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on the Work of its 70th Session

Cluster II - Chapters: VI (Protection of the atmosphere), VII (Provisional application of treaties) and VIII (Peremptory norms of general international law (jus cogens))

Statement by

Ambassador Helmut Tichy

New York, 24 October 2018

Chairperson,

Concerning the topic **"Protection of the atmosphere"**, the Austrian delegation commends Special Rapporteur Murase for his fifth report which deals with general issues of international law regarding the protection of the atmosphere, such as implementation, compliance and the peaceful settlement of disputes in connection with the protection of the atmosphere.

The main gist of the report is reflected in the three new Draft Guidelines 10 to 12 that aim at integrating the substantive Draft Guidelines 1 to 9 into the general system of international law.

As to Draft Guideline 10 (1) on implementation of international obligations, Austria is not convinced of the necessity of this provision. *It is already a fundamental principle of general international law that international obligations have to be implemented by states in their domestic law. It depends on the legal system of the relevant state in which manner the obligations are implemented, provided that the implementation gives full effect to the obligations. However, as Draft Guideline 10 (1) only reflects general international law and has no separate function of its own in the context of the present guidelines, it seems redundant.*

In Austria's view, the second paragraph of Draft Guideline 10 would be sufficient, as it encourages states to give effect to the recommendations contained in the Draft Guidelines. The non-binding nature of guidelines makes such a provision useful, since otherwise the guidelines would lack any indication of the effect to be given to them.

As to Draft Guideline 11 on compliance with obligations under international law, including relevant agreements, my delegation is not convinced of the need for such a provision. Draft Guideline 11 (1) only reiterates rules of general international law and, in particular as far as international agreements are concerned, the general pacta sunt servanda rule according to Article 26 of the 1969 Vienna Convention on the Law of Treaties, a provision which undoubtedly reflects customary international law.

Draft Guideline 11 (2) does not go beyond a mere listing of examples of various forms of compliance mechanisms, the applicability of which is based on the applicability of the relevant agreements. The only purpose of this draft provision is to indicate possible mechanisms that can or should be included in future treaties.

In case Draft Guideline 11 (2) was retained, we would suggest to replace the introductory phrase, which reads "in accordance with the relevant agreements", by the words "if provided for in the relevant agreements", since it is rather a matter for the agreements themselves than for general international law whether, for instance, individual "rights and privileges under the relevant agreements" can be terminated. Moreover, in subparagraph (b) of Draft Guideline 11 (2) the reference to "other forms of

enforcement measures" should be qualified to read "other forms of lawful enforcement measures" in order to exclude measures in breach of international law.

Draft Guideline 12 (1) on dispute settlement states the obvious, namely that disputes have to be settled by peaceful means, including disputes relating to the protection of the atmosphere from atmospheric pollution and atmospheric degradation. As to Draft Guideline 12 (2), the reference to the "fact-intensive character" of a dispute is misleading, since large disputes, even other than those relating to the protection of the atmosphere, are very likely to involve a huge quantity of facts that the judges and not "technical and scientific experts" have to deal with. The involvement of technical and scientific expertise in the assessment of a case may be necessary if the facts of a case are of a special and complex nature. Accordingly, it is the specialty and complexity of the facts and not their fact-intensity that requires the assistance of experts.

Chairperson,

The Austrian delegation commends Special Rapporteur Gómez Robledo for his fifth report and congratulates the Commission on the adoption of the Draft Guidelines on **"Provisional application of treaties"** on first reading. The Draft Guidelines will provide a valuable tool for states and international organisations in their treaty making practice. We also want to express our appreciation of the extensive study of practice in regard to provisional application of treaties prepared by the Secretariat.

The Austrian delegation notes, however, that the present formulation of the Draft Guidelines resembles very closely the text of the Draft Guidelines provisionally adopted last year and that suggestions made by delegations during the past 6th Committee meetings have not or only very cautiously been taken up.

With regard to the possibility to make reservations when agreeing to the provisional application of treaties, as provided for in Draft Guideline 7 on reservations, the Austrian delegation concurs with the underlying idea that such modification of legal effects between parties should be made possible. However, we would appreciate further explanation of the legal effect of such reservations, which has not been sufficiently dealt with in the 2011 Guide to Practice on Reservations to Treaties.

Concerning Draft Guideline 9 on termination and suspension of provisional application, my delegation notes that the current wording restates the provisions of the two Vienna Conventions on the Law of Treaties regarding termination of provisional application as a result of a treaty's entry into force as well as of a state's or international organisation's notification that it no longer intends to become a party to the treaty. While we appreciate adherence to the rules of the Vienna Conventions, we would have welcomed an additional provision on other forms of termination and/or

suspension, going beyond the present content of Article 25 of the Vienna Conventions. We note that the Commission seems to have contemplated such other forms, including unilateral termination of provisional application, but decided against introducing respective language. Since states and international organisations may have to terminate or suspend the provisional application of treaties as a result of internal democratic decision-making procedures or other legal or political reasons, without necessarily expressing their will not to become a party at all in the future, it would seem useful to include some additional language in the Draft Guidelines to that effect.

Finally, the Austrian delegation notes with regret that the Commission did not have sufficient time to discuss and formulate in detail the draft model clauses proposed by the Special Rapporteur*, as contained in footnote 996 to the present report*. Such model clauses seem to be of particular value, and it is hoped that the Commission will revert to a more detailed discussion of them in the future.

Chairperson,

With regard to the topic **"Peremptory norms of general international law (*jus cogens*)"**, the Austrian delegation commends Special Rapporteur Tladi for his extensive third report containing thirteen Draft Conclusions.

Austria notes with a certain apprehension that the length of the report and the lack of time to discuss it sufficiently may have contributed to the situation that the Commission could only deal with a small part of the proposed Conclusions in its Drafting Committee. The following remarks will thus focus on the Draft Conclusions as contained in the third report of the Special Rapporteur and discussed by the Commission.

My delegation welcomes the initial proposed Draft Conclusions 10 to 12 which largely reflect the current state of the law as laid down in the 1969 Vienna Convention and corresponding customary international law.

Only in regard to Draft Conclusion 11 on separability of treaty provisions in conflict with *jus cogens*, we wonder whether the strict adherence to the non-separability regime for treaties contrary to *jus cogens* existing at the time of the treaty's conclusion is still the optimal approach. Appreciating the "deterrence" effect of Article 44 (5) of the 1969 Vienna Convention and restated in Draft Conclusion 11 (1), it would still appear that a more nuanced approach might be more adequate to "sanction" treaty provisions that violate *jus cogens* without leading to the invalidity of the entire treaty, which would be in line with the *favor contractus* principle.

Draft Conclusion 13 (2) according to which "[a] reservation cannot exclude or modify the legal effect of a treaty in a manner contrary to a peremptory norm of general international law (jus cogens)", corresponds to Point 4.4.3.2 of the ILC Guide to Practice on Reservations to Treaties. The Austrian delegation concurs with the underlying idea that has played a particularly prominent role in the context of human rights treaties. However, we would have preferred the wording proposed by the Special Rapporteur in paragraph 76 (b) of his third report, which reads: "A reservation that seeks to exclude or modify the legal effects of a treaty in a manner contrary to a peremptory norm of general international law (jus cogens) is invalid". This wording expresses more clearly the consequences of such a reservation for the applicability of the treaty to the reserving party.

The following observations relate to some of the Draft Conclusions contained in the third report of the Special Rapporteur, but not yet discussed by the Drafting Committee:

My delegation has noted that the specific reference to UN Security Council resolutions in Draft Conclusion 17 has engendered a debate and criticism within the Commission. We are of the opinion that the first part of the wording in Draft Conclusions 17 (1) and (2) proposed by the Special Rapporteur, which speaks of "[b]inding resolutions of international organizations", refers to international organisations in general. This is sufficiently broad to apply to all international organisations and their organs, including the Security Council of the United Nations, without an explicit reference to any of them. As a strong supporter of the rule of law also in the context of the United Nations, my delegation concurs with the underlying idea of Draft Conclusion 17, because Security Council resolutions might in some cases lead to a potential conflict with *jus cogens*. In this context I would also like to point out that in the final report of the Austrian initiative from 2004 to 2008 on "The UN Security Council and the Rule of Law" *(A/63/69 – S/2008/270, paras. 29, 37 and 49)* it was concluded that the Security Council does not operate free of legal constraint, which means that the Council's powers are subject to the UN Charter and norms of *jus cogens*.

My delegation welcomes the proposed Draft Conclusions 20 and 21, concerning a duty of cooperation to end jus cogens violations and of their non-recognition. They are obviously inspired by Articles 40 and 41 of the Articles on State Responsibility. In the final drafting of Conclusions 20 and 21, the Commission will have to decide whether consequences will attach to all breaches of jus cogens or only to serious breaches, as it is now envisaged in Draft Conclusion 20 (1).

Draft Conclusions 22 and 23 are more controversial. While a state has a duty to exercise jurisdiction over crimes prohibited by *jus cogens* that were committed by its nationals or on its territory, as provided for in Draft Conclusion 22 (1), paragraph 2 of that Draft Conclusion might be misleading. It provides that paragraph 1 does not

preclude the establishment of jurisdiction on any other ground as permitted under the state's national law. Thus, it appears to permit the exercise of universal jurisdiction to prosecute crimes prohibited by peremptory norms of international law solely on the basis of national law. We believe that any exercise of universal jurisdiction must be within the framework of international law, which should be reflected in the wording of the guidelines. However, we trust that this issue will be addressed more closely by the Commission in the framework of its examination of the topic "universal criminal jurisdiction.

Turning to Draft Conclusion 23 (2) providing for the non-applicability of immunity *ratione materiae* for offences prohibited by *jus cogens*, we would consider any inclusion of such a provision problematic, in particular because the issue is currently examined by the Commission under the topic "Immunity of State officials from foreign criminal jurisdiction". As long as this debate is ongoing, we would prefer the Commission to abstain from addressing this issue in the context of the topic of *jus cogens* in order to avoid any potential inconsistency and duplication.

Let me reiterate my delegation's appreciation of the Commission's work on this topic. Finally, we would like to encourage once again the Special Rapporteur to try to establish an illustrative list of *jus cogens* norms, which would be one of the crucial benefits of the Commission's work on this topic.