Permanent Mission
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Agenda item 77: Report of the International Law Commission on the work of its seventy-third session

Cluster I - Chps: I, II, III, IV (Peremptory norms of general international law (jus cogens)), V (Protection of the environment in relation to armed conflicts) and X (Other Decisions)

Statement by

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New York, 25 October 2022

Chairperson,

On the topic "**Peremptory norms of general international law (jus cogens)**", Austria expresses its appreciation for the work of Special Rapporteur Tladi and for his fifth report. We welcome the finalisation of the second reading of the draft conclusions, which provide the legal regime for one of the most debated issues concerning the structure of international law. The topic is of utmost importance, especially now as we are confronted with a serious breach of a peremptory norm, the prohibition of the use of force, in the context of the aggression against Ukraine. Although this topic is no longer in the hands of the Commission and we, in general, concur with the draft conclusions, we would like to offer some comments to clarify Austria's position regarding these draft conclusions.

With respect to draft conclusion 7, paragraph 2, on the international community of States as a whole we regret that the clarification of the word "representative" in paragraph 8 of the commentary is not very helpful. The commentary tries to clarify the term "representative" with a reference to "regions, legal systems and culture". However, it is unclear whether these criteria have to be satisfied cumulatively or alternatively or what is meant by the term "culture".

As to draft conclusion 8 on evidence of acceptance and recognition, Austria supports the newly included reference to "other conduct of States" in paragraph 2, which removes the exhaustive character of the enumerated forms of evidence.

In draft conclusion 9, paragraph 1, on subsidiary means for the determination of the peremptory character of norms of general international law, an additional reference to decisions of national courts has been inserted. According to paragraph 5 of the commentary, these acts "should be resorted to with caution". We would have preferred a more precise explanation and concrete criteria for this restriction.

Regarding draft conclusion 11 on separability of treaty provisions conflicting with a peremptory norm, we believe that the new formulation in paragraph 1 on the voidness of the treaty in question is very helpful. However, as to the condition in paragraph 2, sub-paragraph c, that "continued performance of the remainder of the treaty would not be unjust", Austria reiterates its view that a search for a more specific expression would have been desirable. *The vague term "unjust" belongs to legal philosophy rather than the terminology of positive law. An alternative could have been that continued performance "would not be against the common interest of the parties".*

As to draft conclusion 13 on the absence of effect of reservations to treaties on peremptory norms, Austria maintains its position that a different wording would have expressed the legal consequences more clearly. In our view, the wording could have been improved by stating: "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".

By drawing up a list of peremptory norms, even if such list is only indicative, the Commission made an important step towards clarifying basic notions of international law. However, Austria would have preferred that the non-exhaustive list refer to the prohibition of the use of force as a peremptory norm rather than to the prohibition of aggression as defined by GA Resolution A/RES/3314 (XXIX) of 1974. The prohibition of the use of force as referred to in Article 2 (4) of the UN Charter is a broader concept as it comprises also the threat of the use of force. "Prohibition of the use of force" would have brought the text closer to the wording of the UN Charter. Furthermore, we regard the reference to "basic rules of international humanitarian law" as peremptory as not sufficiently precise. The references in the commentary to the ILC Commentary to the Articles on State Responsibility and to the Study on Fragmentation of international law, which mention the "prohibition of hostilities directed at civilian population" as an example for basic rules of international humanitarian law, are not sufficient.

It is, for instance, not clear whether these "basic rules" comprise the "Martens Clause" and the principles and rules of distinction, proportionality, military necessity and precaution in attack as well as the protection of persons hors de combat, or if they even go beyond these rules.

Chairperson,

With respect to the topic "**Protection of the environment in relation to armed conflicts**", Austria aligns itself with the statement made on behalf of the European Union and commends Special Rapporteur Lehto and the Commission on the conclusion of the second reading of the draft principles, which present a full picture of the regime relating to this important area of international law. Unfortunately, we are confronted with the need for such guidance on a daily basis in view of the numerous armed conflicts around the world, including, but not only, the war resulting from the aggression against Ukraine.

Austria concurs with most of the draft principles, but would like to offer a few additional remarks, starting with two general comments: First, we welcome that the draft principles apply to both kinds of armed conflict, international and non-international. However, we would prefer this to be expressed not only in the preamble and commentary, but also in the substantive part of the draft principles.

Secondly, Austria regrets that a definition of the term "environment" was not included, as this term has received the most divergent interpretations in international practice. The commentary does not offer much guidance in this respect. It only states that the change from "natural environment" to "environment" was made in accordance with the "established terminology of international environmental law". We understand this term in the sense of the ILC Principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, according to which "environment" includes "natural resources, both abiotic and biotic, such as air, water, soil, fauna and flora and the interaction between the same factors, and the characteristic aspects of the landscape".

Especially in the light of the present critical situation in Ukraine, and in relation to draft principles 4 and 18 on protected zones, Austria is convinced that states shall designate protected zones around nuclear power plants and that these zones shall be respected by all states, as it is provided – in a different context – by Article 260 of the United Nations Convention on the Law of the Sea with regard to artificial maritime installations. The necessity and urgency of such safety zones is demonstrated by the current situation of the Zaporizhzhia nuclear power plant, whose particular vulnerability with a risk of universal damage has been confirmed by the International Atomic Energy Agency. Although Article 56 of Additional Protocol I to the Geneva Conventions already prohibits attacks against works and installations containing dangerous forces even where these objects are military objectives, it would nevertheless be desirable to keep nuclear power plants entirely away from any military action so that they would never become a military objective.

In addition, we would like to draw the attention of the Commission to a discrepancy between draft principles 4 and 18. Draft principle 18 should have been aligned with draft principle 4 according to which protected zones can be designated not only by agreement, but also otherwise.

As to draft principle 9 on state responsibility, we wonder to what extent existing regimes of state liability, i.e. regimes not relating to wrongful acts, regarding the protection of the environment would be applicable in situations of armed conflict.

As to draft principles 13 on general protection of the environment during armed conflict and draft principle 14 on the application of the law of armed conflict to the environment, we would have preferred an express confirmation that international environmental law continues to apply during armed conflicts. In this context, reference could have been made to the ILC Articles on the effects of armed conflicts on treaties. These Articles explicitly hold that treaties relating to the international protection of the environment belong to those treaties the subject-matter of which involves an implication that they continue in operation, in whole or in part, during armed conflict.

As we stated already at earlier occasions, Austria welcomes that draft principles 19 to 21 relating to situations of occupation, apply to all forms of "occupation" in the sense of international humanitarian law. According to Article 2 of the Fourth Geneva Convention of 1949, an occupation exists, "even if the said occupation meets with no armed resistance". This understanding is in line with the advisory opinion of the International Court of Justice on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory. The present situation in Ukraine proves the need and the urgency of such rules. Draft principle 19 on general environmental obligations of an occupying power should include a strong recommendation for cooperation with international institutions, such as the International Committee of the Red Cross and the International Atomic Energy Agency, in order to prevent or minimise environmental damage. In this sense, paragraph 3 of this draft principle should emphasise that the international rules on the protection of the environment continue to apply in the territory under occupation. In the same vein and in the light of present contrary practice, Austria underscores draft principle 21 on prevention of transboundary harm, which prohibits the excessive use of natural resources by the occupying power since these resources must be used in the interest of the population of the occupied territory.

Chairperson,

Let me briefly address a few aspects concerning the Commission's new topics.

Austria welcomes the inclusion of three new topics to the Commission's programme of work. Given that the second reading of two topics has been achieved during its 2022 session, the time is right to commence its consideration and analyses of new areas.

Austria specifically welcomes that the topic "**Settlement of international disputes to which international organizations are parties**" has been added to the Commission's work programme. For a host country to many international organisations this is a topic of immense practical importance.

Because of the implications that private law disputes with international organisations often have for host countries, Austria welcomes the idea to also take such disputes into account as suggested in paragraph 238 of the report. We are also very glad that the Austrian member of the Commission, August Reinisch, was appointed as the Special Rapporteur for this topic.

Austria is equally in favour of the new topic "**Prevention and repression of piracy and armed robbery at sea**". In particular, in the light of the importance of regulating criminal jurisdiction, even as a landlocked country Austria has followed recent developments in this field and trusts that the Commission's work will provide valuable insight.

Finally, Austria welcomes the Commission's decision to work on the topic "**Subsidiary means for the determination of rules of international law**". Although we would have preferred that the Commission study the topic of "Universal jurisdiction" which has led to protracted discussions in the Sixth Committee and would have benefitted from the expertise of the Commission, Austria considers that, in practice, subsidiary means play an important role, the exact status of which needs to be ascertained at a methodological level.

With this in mind the Austrian delegation wishes the three new Special Rapporteurs success for their future work.

We also welcome the inclusion of the topic "**Non-legally binding international agreements**" in the long-term programme of work of the Commission. For the practical work of legal advisers this is a very important topic. However, to avoid confusion, we would strongly advocate to reserve the word "agreement" for legally binding texts and to change the title of the topic by referring to non-legally binding texts as "arrangements".

Thank you for your attention.