Permanent Mission
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Agenda item 79: Report of the International Law Commission on the work of its seventy-fifth session

Cluster III – Chapters VI (Prevention and repression of piracy and armed robbery at sea), VIII (Non-legally binding international agreements) and IX (Succession of States in respect of State responsibility)

Statement by

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Chairperson,

With regard to the topic "**Prevention and repression of piracy and armed robbery at sea"**, Austria commends Special Rapporteur Yacouba Cissé for presenting his second report, which contains a wealth of material and proposes five draft articles. In view of the current global situation, the issue at hand continues to be of great importance for world trade, 90% of which is carried out by sea.

The basis for the discussion of this topic is the "constitution of the oceans", the United Nations Convention on the Law of the Sea of 1982 which must guide the work on the draft articles, as – rightly so – no change of the Convention is intended.

In general, we believe that the draft articles should, as far as possible, apply the rules on piracy also to armed robbery at sea, although subject to the rights of coastal states in the maritime areas under their jurisdiction.

First of all, we would like to comment on draft article 4, which is based on Article 100 of UNLCOS and was adopted by the Drafting Committee this year. We regret that the text of the draft article is not contained in the report of the Commission. On substance, we do not see the rationale behind the substitution of the term "shall" by "undertake", because "shall" may well be used for all kinds of legal obligations. The reference to "conformity with international law" indicates that pertinent provisions of international law, above all UNCLOS, but also the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation of 1988 including its Protocol, take precedence over the future outcome of the Commission's work. We understand that any such outcome will have a gap-filling or otherwise subsidiary function.

We support the use of the term „take“ instead of “adopt” in draft article 4, paragraph (a), which corresponds to the language used in UNCLOS. With regard to draft article 4, paragraph (b), on “cooperation” we share the view of the Drafting Committee that this obligation should apply to armed robbery at sea as well. As far as piracy is concerned, we believe that a duty to prosecute can already now be derived from the obligation to cooperate for the purpose of combating and suppressing piracy contained in Article 100 UNCLOS by means of a *bona fide* interpretation. This should be reflected in the commentary.

Permit me also to comment on draft articles 6 and 7 as proposed by the Special Rapporteur: Both articles concern the obligation to introduce the criminal offences enumerated in draft article 6 into national law, with draft article 6 containing the definitions of the offences that are to be criminalized and draft article 7 covering the establishment of jurisdiction.

With regard to draft article 6, it should be borne in mind that although piracy is, per definition, an act committed outside the jurisdiction of any state, voluntarily participating in, inciting or intentionally facilitating piracy may also be committed within the jurisdiction of a state.

Draft article 7 raises the question of universal jurisdiction and its applicability to armed robbery at sea. In this respect, draft article 7 must draw a distinction between two scenarios: where armed robbery is committed in the territorial sea or in internal waters and where it is committed on the high seas. Only armed robbery on the high seas may be subject to the principle of universal jurisdiction.

A large number of legal questions in this field remain unresolved, as listed in paragraph 130 of the Commission's report, and we are looking forward to the work of the new Special Rapporteur with great interest.

Chairperson,

I would like to address now the topic of "**Non-legally binding international agreements**". The Austrian delegation congratulates Special Rapporteur Mathias Forteau on his first explorative report. We consider that this preliminary report and the discussion in the Commission provide an interesting starting point, and we have taken note of the Rapporteur's and the Commission's intention to clarify the nature, regime and potential legal effects of legally non-binding instruments. Given that such instruments are a tool frequently resorted to in international relations, Austria welcomes the Special Rapporteur's intention to focus on practical aspects of the topic, particularly the practice and opinio juris of States.

Let me start by reiterating the Austrian position that the terminology currently used by the Commission is not ideal. Austria continues to share the scepticism that was already voiced last year by many delegations that the term "agreement" may be confusing in the context of the current topic. There is no doubt that the English expression "agreement" for most people implies a text of a legally binding nature. In our view, "instruments" would be the more suitable term, to which also the Committee of Legal Advisers on Public International Law of the Council of Europe resorted to in its current work on this issue. In the discussions in the Council of Europe it was made clear that it was in the interest of practitioners to use a clear terminological differentiation between legally binding agreements and legally non-binding texts.

To reply to the concerns raised by the Special Rapporteur, the term "instruments", for the purposes of the present endeavour of the Commission, could be defined as not including resolutions of international organisations.

Austria concurs that the focus of the present topic should be instruments entered into by States and international organizations, but could potentially also cover those entered into by other subjects of international law. However, the Commission's work should not extend to unilateral acts or resolutions of international organisations.

Austria is also content that one of the major goals of the Commission's work should be to develop criteria to distinguish between binding international agreements, treaties in a generic sense as contained in the Vienna Convention on the Law of Treaties, and instruments that are not legally binding.

We consider that work on the regime governing non-binding instruments should be undertaken very carefully. Particularly, the example given in paragraph 261 of the report asserting that non-binding instruments contrary to jus cogens may be void needs further reflection: if a non-binding instrument does not have any legal force, it cannot be legally void because it is not legally binding to start with.

It would appear promising to focus on the possible role of the rules of treaty interpretation, including good faith as well as on the accepted doctrines under international law inspired by good faith, such as acquiescence and estoppel, to study the potential effects on such instruments. In this context, we appreciate the Special Rapporteur's willingness to refer more broadly to implications or consequences instead of legal effects.

Austria also remarks that it does not see any need to cover "inter-institutional agreements or administrative arrangements" on the sub-State level, for example territorial units of a federal State. The practice of States in this respect seems too diverse and incoherent. However, the result of the work of the Commission on non-legally binding international instruments may also have effects on such arrangements.

As regards the final outcome of this topic, we take note that resorting to conclusions would correspond to the work of the Commission on sources of international law. Therefore, we wonder whether conclusions are the appropriate form of outcome for the topic of non-legally binding instruments.

Chairperson,

Allow me now to briefly deal with the topic of "**Succession of States in respect of State responsibility**". Austria has noted with appreciation that the Commission has reconvened a working group on this topic and thanks Mr. August Reinisch for chairing this working group. We are glad to see that work on this topic will be concluded at the next session by a summary report. We consider that the Commission should not deal with this topic in more depth, but rather concentrate its attention on other more pressing issues in international law. Austria congratulates Mr. Bimal Patel for being tasked with the chairing of the working group in the future and wishes him success in preparing a final summary report.