Statement on behalf of S3 (Austria, Czech Republic, Slovakia)

by

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Chairperson,

I am honored to speak on behalf of the three states belonging to the Slavkov format: Austria, Czechia and my own country, Slovakia.

We would like to use this opportunity to make a few general remarks, before commenting on the topics covered in Cluster I. The Slavkov states were very surprised and dismayed by the reduction of the ILC's annual session this year due to the liquidity crisis the UN is facing. The extreme shortening of the meeting time for the Commission hinders the effective work of the Commission. We commend the members of the Commission for having been able to produce, in spite of this lack of time, an important outcome. However, the Commission will no longer be able to adhere to its work plan, and topics that were due to be completed during this quinquennium will have to be carried over into the next one, to be considered by presumably a large number of new Commission members. We very much deplore this effect, which impacts the Commissions' efficiency. In our view it is absolutely necessary to provide for a session length that enables the Commission to return to its practice of dividing the session into two parts, thereby allowing the ILC Members and the Secretariat preparations and work in between to ensure an efficient consideration of the topics on the ILC's agenda.

Chairperson,

Let me now start with our comments on the first substantial topic of this Cluster, "**Sea-level rise in relation to international law**".

The Slavkov states have already expressed their interest in the ILC's initiative on this issue in previous statements and we are grateful to the two Co-Chairs, Ms. Galvão Teles and Mr. Ruda Santolaria, for elaborating the final consolidated report. The discussions over the years have revealed the extensive difficulties and the potential for conflicts resulting from sea-level rise. The conclusions of the Study Group are based on the integrity of the UN Convention on the Law of the

Sea, principles such as equity and justice, international cooperation and in particular the right to self-determination as the cornerstones of possible solutions. The conclusions reflected in the final report illustrate the manifold challenges posed by this phenomenon. One of these challenges is the fragmented and overly general international legal framework potentially applicable to the protection of persons affected by sea-level rise.

The importance of this issue is corroborated by the fact that it has already been addressed by several international institutions, including the UN Security Council and the International Court of Justice in its recent Advisory Opinion on the Obligations of States in respect of Climate Change. Although the work of the ILC on this topic has come to an end, its final report should be seen as a starting point for further discussions in other bodies and fora. The conclusions of the final report already contribute to the objectives of legal stability, legal certainty and predictability in the interest of the states and individuals concerned. We are convinced that these conclusions offer a solid basis for future work that needs to be taken up. The response to this threat must be comprehensive. International law is part of this response, bearing in mind that this response as a whole should reflect the evolving scientific understanding of the phenomenon and its consequences.

Chairperson,

Before commenting on the substance of the work of the Commission on the topic of "**General principles of law**", the Slavkov states want to express their disappointment that the Commission did not have the necessary time to adopt the draft conclusions on second reading due to the reduction of the ILC's session. This implied that there was no time for preparing and considering the commentaries to the draft conclusions. It also made work for states difficult as they have to compare the explanations contained in the report with the text of the draft conclusions adopted by the drafting committee contained in a separate document. As a matter of practicality, we would appreciate if the Commission

could find a way of integrating also the text of draft conclusions so far adopted only by the drafting committee into the report, e.g. by way of footnotes. This would make the report and its content much easier accessible.

The Slavkov states commend the Special Rapporteur, Mr. Marcelo Vázquez-Bermúdez, for his tireless efforts to steer the topic to a successful end. Allow me, Chairperson, to turn now to the substance of the draft conclusions.

We note that in regard to draft conclusion 2, the notion of "community of nations" has been maintained. While appreciating the choice of this terminology as definitely preferable to the outdated reference to "civilized nations" contained in Article 38, paragraph 1, subparagraph c, of the Statute of the International Court of Justice, we would like to point out that there are discrepancies in the different language versions of the text. We recommend that the Commission align the language versions in a way that captures the intention of the Commission not to exclude that, in addition to states, other actors, in particular international organizations, may participate in the recognition of general principles of law.

In regard to draft conclusion 6, we realize that the text has been maintained and we note that the Commission's discussion continued whether the title of this conclusion should refer to "transposability" rather than "transposition". We do not wish to reopen this debate. However, let me just add that the reason given for the choice of terminology in the statement of the chair of the drafting committee is slightly confusing. Therein, Mr. Olayzabal states, and I quote, that "the term transposition was retained to avoid giving the impression that a formal act by States was necessary before applying a principle in the international legal system". He continues by saying that "whether a principle determined in accordance with draft conclusion 5 may be transposed to the international system depends on whether it is capable of serving a regulatory function in the latter." It appears that given this reasoning the phrase "possibility of transposition" would in fact far better indicate that there is no formal act by states necessary for transposing a

principle from national legal systems to the international system, which should be clarified expressly in the commentary. Finally, the current title of draft conclusion 6 is misleading with regard to its content: Not stating whether or not a principle is transposed, it speaks about the possibility of being transposed and applicability of a principle in the international legal system. In this regard we align ourselves with the concern expressed in paragraph 233 of the report.

Chairperson, allow me now to move to the most controversial part of the topic of general principles of law, i.e. the question of "general principles of law formed within the international legal system". As already mentioned on previous occasions, we remain hesitant and are still not convinced as to the existence of this type of general principles. Concerning draft conclusion 7, we fear that the remaining criterion for the identification of general principles of law formed within the international legal system, i.e. the recognition of a principle as "intrinsic to the international legal system" may be too vague in order to fully explain how and which principles may fall under this category. We note that many general principles of law which are common to national legal orders are now inherent also to international legal system, since they are intrinsic to every legal system. The Commission should offer convincing and plausible examples of general principles formed within the international legal system, which we consider crucial for justifying this type of general principles of law and to corroborate their existence. Otherwise, it would appear that such principles are rather general rules contained mostly in customary international law and treaties, or only non-legal policy or guiding principles *de lege ferenda*.

Regarding draft conclusion 8, we believe that further reflection is necessary concerning the distinction made between decisions of international courts and tribunals and those of national courts. The current formulation suggests that only the former "are" a subsidiary means, whereas the latter only "may be taken into account". We suggest that the Commission further examine the text of the draft

conclusion in light of the specific role of national courts in the formation of general principles of law and consider combining paragraphs 1 and 2 into one paragraph, taking also into account the consistency with previous and current work of the ILC on similar topics.

Concerning the role of teachings as expressed in draft conclusion 9, we note the discussion that took place in the Commission concerning the difficulty of aligning the text with that currently under consideration in regard to the Commission's topic "subsidiary means for the determination of international law". In our view it is key that the ILC keep consistency with its previous and related current work in mind as far as suitable. With this specific difficulty in mind, we are of the view that the text referring to "the coinciding views of persons with competence in international law from the various legal systems and regions of the world" is a satisfactory solution. However, we would prefer to return to the previous wording of "may serve as a subsidiary means". Additionally, the commentary to draft conclusion 9 should underline that the "quality of the reasoning" is the most important criterion with regard to teachings as a means to determinate a general principle of law.

In regard to draft conclusion 10, describing the functions of general principles of law, we welcome the reversal of the order of subparagraphs 1 and 2. In our view it is justified to emphasize the contribution of general principles of law to the coherence of the international legal system as well as the fact that they may themselves, in principle, provide a basis for substantive rights and obligations. In this context we also welcome the replacement of "primary" (rights and obligations) by the adjective "substantive" in draft conclusion 10, subparagraph 1 (a). We still acknowledge that the gap filling function of general principles may, in practice, often be the primary one, since they are resorted to only occasionally or exceptionally, when other sources, namely treaties or customary international law, are not applicable.

In regard to the newly proposed draft conclusion 12, the Slavkov states invite the Commission to provide more information on relevant practice and examples in the commentary.

Chairperson, **to conclude my statement**, let me briefly express our support for the new topic included in the long-term programme of work of the Commission on "**Identification and Legal Consequences of Obligations *Erga Omnes* in International Law**". We would welcome the Commission taking up work on this topic, however, only when its current programme of work so allows.

An obligation *erga omnes* is one that is owed to the international community as a whole, giving all States an interest in its protection, and which generates the right, on the part of all States, to invoke the responsibility of a State that is in breach of this obligation.

Recently, this category of international obligations has received increased attention. States are in their actions more than ever relying on the particular legal effects of such obligations in order to protect universally shared values. Although the ICJ confirmed the existence of this special kind of obligations some time ago, it only had to deal with it in depth in recent years. In the climate change opinions of both the ITLOS and the ICJ, the impact of the *erga omnes* commitments was clearly apparent. If the ILC decides to include this topic in its programme of work, it should deal with the norms that give rise to these obligations, to explain their special nature, their relationship with *ius cogens*, and with their treaty counterparts, obligations *erga omnes partes*. Of special interest would also be their place in general international law, in particular in the system of state responsibility. However, the Slavkov States assume that this discussion will primarily deal with the formation and identification of and secondary norms relating to *erga omnes* obligations and will not attempt to establish an exhaustive list of such obligations, since it will be difficult if not even impossible to achieve such a list.

Thank you.