Permanent Mission
of Austria to the
United Nations in New York

78th Session of the General Assembly

Sixth Committee

Agenda item 79: Report of the International Law Commission on the work of its seventy-third and seventy-fourth session

Cluster I - Chps: I, II, III, IV (General principles of law), VIII (Sea-level rise in relation to international law) and X (Other Decisions and Conclusions)

Statement by

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New York, 23 October 2023

Chairperson,

Austria congratulates the Commission, and in particular Special Rapporteur Marcelo Vázquez-Bermúdez, on the adoption of the draft conclusions on **"General principles of international law**" on first reading. Austria welcomes the inclusion of this topic in the work of the ILC, as this category of sources of international law is subject to highly divergent interpretations and, therefore, urgently requires clarification.

From the very beginning, Austria has been sceptical regarding general principles formed within the *international* legal system, referred to as a category distinct from principles derived from national legal systems in **draft conclusion 3 on categories of general principles of law.** In practice, it seems very difficult to distinguish between general principles formed within the international legal system and rules of customary international law.

Draft conclusion 7 on the identification of general principles of law formed within the international legal system contains a more detailed definition with examples in the commentary, which, in our view, are not very convincing. For instance, the nature of the *uti possidetis* principle is controversial: while the Commission suggests that it is a principle formed within the international legal system, it definitely has also roots in national legal systems and is considered by many as part of customary international law. Also, the freedom of maritime communication is often considered as too vague to have received normative force. Moreover, the different understanding of the term "principles of international law" can also be seen in the title of the 1970 "Friendly Relations Declaration" of the General Assembly entitled "Principles of *International* Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations".

As the International Court of Justice has confirmed, the principles listed in this resolution belong to customary international law. Austria would be interested to be provided with other examples that might demonstrate the independent normative character of general principles of law formed within the international legal system.

The wording of **draft conclusion 2 on recognition** leaves it open as what exactly general principles of law must be recognized. We therefore propose to add that they must be recognized "as such" by the international community. Austria wonders, if such a recognition can take place instantly or would have to evolve over a certain time. Furthermore, we prefer the term "international community" to "community of nations" since the term "nation" has different meanings and is disputed and politically sensitive. In addition, the term "community of nations" would exclude international organizations and other subjects of international law.

With regard to **draft conclusion 4 on the identification of general principles of law derived from national legal systems**, we support the view that the transposition of such principles to the international legal system does not require a "formal or express act", as stated in paragraph 5 of the commentary. As far as the drafting of subparagraph (a) is concerned, we would prefer to speak about "various *national* legal systems of the world" as in the title of this draft conclusion. The provision would otherwise also include international law.

In the same vein, the title of **draft conclusion 5** should refer **to the determination of the existence of a principle common to the various *national* legal systems of the world**. As far as the substance of draft conclusion 5 is concerned, we appreciate that the commentary on this conclusion gives detailed examples of this category of general principles.

Draft conclusion 6 on the determination of transposition to the international legal system raises many questions. In particular, the meaning of the phrase "may be transposed" contains many elements of uncertainty. The compatibility with the international legal system pursuant to draft conclusion 6 seems to be a condition for the recognition as general principle of law as addressed in draft conclusion 2. Since both draft conclusions are closely connected, we suggest to integrate the compatibility test in draft conclusion 2.

With regard to **draft conclusion 8 on decisions of courts and tribunals** we suggest to use the term "jurisprudence" instead of "decisions", since the word "decision" in general refers to binding acts of courts and tribunals as can be seen inter alia in Article 59 of the Statute of the International Court of Justice. We support that advisory opinions should be covered by that draft conclusion, which is also the intention of the Commission. In the present drafting, however, this is not sufficiently reflected and can only be deduced from the commentary. Furthermore, we suggest that the Commission considers whether bodies other than courts and tribunals empowered to decide disputes, interpret the law authoritatively or render advisory opinions, should also be covered by this draft conclusion.

With regard to **draft conclusion 10 on functions of general principles of law**, Austria notes that paragraph 1 is phrased as a statement of fact and not as a rule. We are aware of the explanation given in paragraph 3 of the commentary, but question the usefulness of statements of fact in draft conclusions and would rather prefer this conclusion to be drafted in a normative way.

We appreciate the examples given in paragraph 14 of the commentary to draft conclusion 10, however we are not sure to what extent all of these examples amount to general principles of law. Some, like the principle that no one can be judge in his or her own cause or the right to be heard, directly stem from the rule

of law and could be regarded as general principles of law. Other examples, however, appear to be dependent on either the context or the applicable procedural rules. In any case, we do not accept *trial in absentia* as a general principle of law*,* as it is in conflict with the *ordre public* of a number of states.

Draft conclusion 11 on the relationship between general principles of law and treaties and customary international law denies the existence of a hierarchy between the general principles of law and the other sources of international law. However, draft conclusion 10 paragraph 1 creates a different picture as it states that general principles of law are mainly resorted to when other rules of international law do not resolve a particular issue.

This concept seems to exclude the existence of a general principle not in conformity with treaties and customary international law, so that, at least to that extent, some sort of hierarchy seems to exist. On the other hand, the 2006 Report of the Study Group on Fragmentation in International Law stated that "[t]he rules and principles of international law are not in a hierarchical relationship to each other. Nor are the different sources (treaty, custom, general principles of law) ranked in any general order of priority." It would be helpful if the Commission could further look into this issue.

Chairperson,

Turning now to the topic of **"Sea-level rise in relation to international law"**, Austria is grateful for the work of the Study Group presented by Professor Bogdan Aurescu and Professor Nilüfer Oral. Although Austria is a land-locked country and therefore not directly affected by sea-level rise, we attach utmost importance to this most urgent topic, which is of great practical relevance for all states either directly or indirectly.

This year's report deals with a number of fundamental questions of international law relating to legal stability, in particular the question of the immutability of boundaries, fundamental change of circumstances, historical titles and rights, equity and permanent sovereignty over natural resources, to name only some of them. We welcome that the Study Group will continue its work next year, focusing on the subtopics of statehood and the protection of persons affected by sea-level rise. Progress on the topic of sea-level rise is very much needed and urgent in view of the increasing effects of the man-made climate crisis.

The effects of climate change on borders are not just an issue for coastal and island states, but also for landlocked countries. For instance, Austria witnesses massive melting of its glaciers, which may lead to questions in cases where a treaty establishes the watershed as the boundary when the watershed was covered by glaciers, but now becomes visible and obviously differs from the boundaries legally fixed by bilateral border commissions based on the watershed when it was still covered. In such cases, Austria has accepted the stability of boundaries fixed by the bilateral commissions.

As to the *uti possidetis* principle, the report of the Commission shows an inconsistency: Whereas the discussion of the Commission on general principles of law includes *uti possidetis* as a general principle formed within the international legal system, under the topic of sea-level rise, it is also regarded by the ILC as a rule of customary international law. In any case, we share the opinion that *uti possidetis* only applies in cases of state succession and would not contribute to a solution of the issue of sea-level rise.

Austria agrees with the view expressed in the report that historic considerations do not create legal rights per se, but have primarily evidentiary value, as stated in by the International Court of Justice in the case concerning the Territorial and Maritime Dispute between Nicaragua and Colombia.

Austria shares the view that any future outcome of the discussion on sea-level rise should not lead to a change of UNCLOS. We are open to achieving legal stability, certainty and predictability through an interpretation of the Convention.

Chairperson,

With respect to **chapter III of the report on "Specific issues on which comments would be of particular interest to the Commission"**, Austria has already submitted written observations on the topic of piracy and armed robbery at sea in May of this year.

Austria also intends to submit written comments on the **"Draft articles on immunity of State officials from foreign criminal jurisdiction"** by 1 December of this year, in particular on **draft article 7** on crimes under international law in respect of which immunity *ratione materiae* shall not apply. While we support article 7 as a central provision of the draft articles and as a contribution to the fight against impunity, we reiterate Austria's position that the list of exceptions to functional immunity in draft article 7 is incomplete and should also contain a reference to the crime of aggression.

According to Austrian practice and *opinio iuris* no functional immunity exists for international crimes, including the crime of aggression. We therefore call on the Commission and the newly appointed Special Rapporteur Claudio Grossman Guiloff, whom we thank for taking over this very important topic, to revisit this matter and amend draft article 7 accordingly.

In this context, we would like to express our support for the balanced approach of the draft articles containing important procedural safeguards, which should make the whole project acceptable to the international community. We encourage the Special Rapporteur to pursue work on the finalisation of the draft articles in this spirit.

Finally, concerning **chapter X of the report**, Austria welcomes the decision of the Commission to address the issue of non-legally binding international instruments. We propose, however, not to refer to "non-legally binding international *agreements*" as the title of the topic currently reads, but to "non-legally binding international *instruments*" as the term "agreement" should be reserved exclusively for legally binding documents. A similar decision to change the title from "agreements" to "instruments" has been taken by the Committee of Legal Advisers on Public International Law (CAHDI) of the Council of Europe.

Regarding the **future work** of the Commission and its long-term program of work, we reiterate our view, recently expressed in a joint statement of the Slavkov group, that is the Czech Republic, Slovakia and Austria, in the Sixth Committee that the Commission should speedily embark on the topic of **universal jurisdiction**. We believe that the Commission could make a substantive legal contribution to the ongoing discussion on this topic.