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on the Work of its 68th Session

Cluster 1: Chapters I-VI & XIII (Protection of persons in the event of disasters; Identification of customary international law; Subsequent agreements and subsequent practice in relation to the interpretation of treaties; Other decisions and conclusions of the Commission)

Statement by

Professor August Reinisch

New York, 25 October 2016

Mr. Chairman,

Let me now address the topic **"Identification of customary international law"**. Austria expresses its continued support for the Commission's plan to clarify important aspects of this source of public international law by formulating conclusions with commentaries. We commend Sir Michael Wood for his most efficient work as Special Rapporteur on this topic. The 16 draft conclusions adopted on first reading provide an excellent starting point, also for non-insiders, to appreciate the intricate difficulties of the subject.

However, Austria would like to draw the Commission's attention to a few points that may require adaptation.

We have noted that draft conclusion 13 proposes to introduce an important differentiation between decisions of international and national courts and tribunals. Paragraph 1 considers decisions of international courts and tribunals "to be" subsidiary means for the determination of customary international law, whereas, pursuant to paragraph 2, one may only "have regard to, as appropriate," decisions of national courts for the purpose of evidencing customary international law as subsidiary means. As the commentary explains, this may be due to a lack of international law expertise and other reasons.

However, the Austrian delegation is not convinced that such a principled distinction should be made. Article 38 of the Statute of the International Court of Justice does not make such a distinction, and it would also not pay sufficient regard to the importance of decisions of national courts which, as draft conclusion 6 confirms, are a form of state practice relevant for the formation of customary international law.

The Austrian delegation is of the view that possible differences between decisions – whether of international or national courts and tribunals – result only from their different persuasive force with which they serve as evidence of customary international law. We fully concur with the concluding remarks in the Secretariat memorandum on the "role of decisions of national courts in the case law of international courts and tribunals of a universal character for the purpose of the determination of customary international law" that "the authority of a statement made in a decision of a national court as a subsidiary means for the determination of a rule of law resides essentially in the quality of the reasoning and its relevance to international law." In the view of the Austrian delegation, this statement also applies to decisions of international courts and tribunals.

Maintaining the strict distinction between international and national courts and tribunals in draft conclusion 13 is difficult in practical terms. This is illustrated by regional international courts, like the European Court of Human Rights and the Court of Justice of the European Union, which exercise functions both as international courts and, at the same time, as quasi-national, even constitutional courts.

My delegation also wishes to address the fact that, in addition to international and national courts and tribunals, there is a wide range of judicial institutions which combine international with national elements. The commentary to draft conclusion 13 suggests that the term "national courts" also applies to courts with an international composition operating within one or more domestic legal systems, such as hybrid courts and tribunals involving a mixed national

and international composition and jurisdiction. Examples for such judicial institutions are various criminal tribunals, such as those relating to crimes committed in Cambodia, Lebanon and Sierra Leone. Also the jurisprudence of these tribunals is highly relevant as subsidiary means for the determination of rules of customary international law. Thus, an express reference to them in the text of the conclusions would be preferable to a simple mentioning in the commentary.

Already last year, we welcomed the elaboration of draft conclusion 15 relating to "persistent objectors" and advised that the conclusion should also be interpreted to mean that a single state is not in a position to prevent the creation of a rule of customary international law. We thus welcome the formulation now found in paragraph 2 of the commentary to draft conclusion 15, distinguishing individual persistent objections from "a situation where the objection of a substantial number of States to the formation of a new rule of customary international prevents its crystallization altogether."

The Austrian delegation appreciates that the commentary to draft conclusion 16 on "particular" customary international law stresses that the expression "whether regional, local or other" was chosen in order to acknowledge that "particular" customary international law may also develop among states "linked by a common cause, interest or activity". We suggest to include a few relevant examples in the commentary, such as the development towards an understanding that the death penalty and the use of nuclear weapons are already prohibited by particular customary law. As far as the death penalty is concerned, the emerging customary nature of this prohibition has been referred to in a statement made by New Zealand in the UN Human Rights Council on 16 September 2016 on behalf of a group of states, including Austria, recognising and welcoming "the emerging customary norm that considers the death penalty as per se running afoul of the prohibition of torture and cruel, inhuman or degrading treatment or punishment", consistent with the spirit of Article 6 paragraph 6 of the International Covenant on Civil and Political Rights.