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Agenda Item 79

Report of the International Law Commission

on the work of its 71st Session

Cluster III: Chapters: VII (Succession of States in respect of State responsibility) and IX (General principles of law)

Statement by

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New York, 5 November 2019
Chairperson,

Allow me to turn now to the topic “Succession of States in respect of State responsibility” and to express my delegation’s appreciation to Special Rapporteur Pavel Šturma for his third report and to the Secretariat for its memorandum on this topic. The third report focussed on the issue of state succession occurring on the side of a state injured by internationally wrongful acts and offered a number of draft articles under the title “Reparation for injury resulting from internationally wrongful acts committed against the predecessor State”.

The Austrian delegation notes with regret that these suggested draft articles were not discussed in the drafting committee and only received general comments by the members of the Commission in the plenary session. We also note that the Special Rapporteur again pursues the course of automatic succession in cases where the predecessor state does not continue to exist.

My delegation has read with interest the summary of the ILC’s debate on draft articles 12, 13 and 14 proposed by the Special Rapporteur and notes their ambiguity resulting from the wording that successor states “may request reparation”. Indeed, when understood as permitting successor states to ask for reparation which may be granted by the injuring states _ex gratia_, my delegation would have no problem and would only question the added value of such a provision. However, seen in the context of the other rules, it is likely to be understood as a veritable rule of automatic succession into the claims of the predecessor state by the successor state. In our view, such a rule does not find a basis in international law and should also not be included among the _de lege ferenda_ provisions.

Should these draft articles be adopted, the following would occur: In spite of the Special Rapporteur’s disclaimer in paragraph 16 of his second report that “[h]e does not suggest replacing one highly general theory of non-succession by another similar theory in favour of succession”¹ the Special Rapporteur would in fact replace the principle of non-succession by a principle of succession.

Let me reiterate that my delegation considers matters concerning succession relating to state responsibility, or more specifically the legal consequences stemming from internationally wrongful acts, to be fundamentally different from issues concerning succession to treaties, assets and debts. In the latter field, customary international law differentiates between types of treaties, assets and debts and provides for different succession rules. We do not think that any rule claiming that there is an automatic transfer of rights and obligations to successor states where the predecessor state does not continue to exist can be identified as _lex lata_, nor do we consider that it would be a good candidate for progressive development of law. If embarking on this issue at all, the Commission should have focused on analysing specific problems arising in practice regarding the non-implementation of obligations stemming from treaties and judgments relating to a predecessor state.

¹ Special Rapporteur Pavel Šturma, Second Report on succession of States in respect of State responsibility, para. 16.
Finally, as regards draft article 15 as proposed by the Special Rapporteur, my delegation believes that diplomatic protection should not form part of these articles, since the ILC, also in its previous work, had considered the topics of state responsibility and diplomatic protection separately.

Chairperson,

Permítanme ahora abordar el tema “General principles of law”. La delegación austriaca agradece al Relator Especial Marcelo Vázquez-Bermúdez por su primer informe que aborda el alcance del tema y los principales temas a tratar por la Comisión. Nos abrimos a la manera en que el Relator Especial ha configurado el escenario para un debate exhaustivo del tema. Sin embargo, en contraste con la visión expresada por el Relator Especial, consideramos que una lista no-exhaustiva de principios generales de derecho sería una contribución valiosa a la labor de la ILC. En lo siguiente, nos gustaría comentar el borrador de conclusión 1 como provisionalmente adoptado por la comisión redactora, así como en algunos otros temas presentados por el Relator Especial.

En cuanto a la conclusión 1 sobre el alcance de las conclusiones, Austria está bien consciente de las dificultades relacionadas con el término “fuente” del derecho internacional. Se han ofrecido diferentes opiniones sobre el significado de este término, sugiriendo que la voluntad o consentimiento de los legisladores, principalmente los Estados, también podrían considerarse una fuente de derecho internacional. Para evitar este debate en este contexto, mi delegación favorecería una conclusión que no hace referencia al término “fuente” y que se mantenga con un enfoque como “las conclusiones presentes contemplan principios generales de derecho como normas de derecho internacional”. Los comentarios deberían explicar que el alcance incluye la creación y evidencia de principios generales de derecho.

Aunque el término “principio” podría dar lugar a diferentes interpretaciones como se discutió en el informe del Relator Especial, Austria sugeriría mantener este término en vista de la referencia a él en el artículo 38 del Estatuto del Tribunal Internacional de Justicia.

En cuanto a la metodología para identificar principios generales de derecho, estamos de acuerdo de que tales principios son principalmente derivados de los sistemas legales nacionales. Under certain circumstances, there may be also “general principles of law formed within the international legal system”, as referred to in draft conclusion 3 proposed by the Special Rapporteur. However, it would be problematic to derive “instant” general principles of law merely from acts of international organisations, such as resolutions of the UN General Assembly, even if adopted by consensus. General principles of law formed within the international legal system come only into existence if they are specifically accepted as general principles of law by the international community.

In this regard, the report of the Special Rapporteur also frequently mentions “principles of international law” or “general principles of international law”. However, this wording is confusing. It is our understanding that the norms of international law addressed by the present topic have a different meaning from the principles of international law as, for instance, addressed in General Assembly resolution 2625 (XX) entitled “Principles of
International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations”. As the ICJ has already confirmed, these principles belong to customary international law. Therefore, they have to be clearly separated from the general principles of law pursuant to Article 38 (1)(c) of the ICJ Statute. Accordingly, it would be necessary to draw a clear terminological distinction in the draft conclusions and the commentary between “principles of international law” belonging to customary international law and “general principles of law” formed within the international legal system.

Concerning the so-called gap-filling character of general principles of law briefly mentioned by the Special Rapporteur in his report, Austria would like to emphasise that we share the Commission’s previous findings in the 2006 Report of the Study Group on Fragmentation in International Law, which had 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.”\(^2\) Thus, it would not be correct to state that general principles of law are only supplementary or even subsidiary to other sources of international law.

I thank you, Chairperson.

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