

74th Session of the General Assembly

Sixth Committee

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,

Permit me now to address the topic "**General principles of law**". The Austrian delegation commends Special Rapporteur Marcelo Vázquez-Bermúdez for his first report that addresses the scope of the topic and the main issues to be dealt with by the Commission. We welcome the way the Special Rapporteur has set the scene for a thorough discussion of the topic. However, contrary to the view expressed by the Special Rapporteur, we believe that a non-exhaustive list of general principles of law would be a valuable contribution to the ILC's work. In the following, we would like to comment on draft conclusion 1 as provisionally adopted by the drafting committee as well as on some further issues presented by the Special Rapporteur.

As to draft conclusion 1 on the scope of the draft conclusions, Austria is well aware of the difficulties concerning the term "source" of international law. Different views have been offered on the meaning of this term, suggesting that the will or consent of the rule-makers, mostly states, could also be seen as a source of international law. In order to avoid this discussion in this context, my delegation would favour a draft conclusion that does not refer to the term "source" and would rather go along with a wording such as "The present draft conclusions concern general principles of law as norms of international law." The commentary should then explain that the scope encompasses the creation and evidence of general principles of law.

Although the term "principle" could also give rise to different interpretations as discussed in the report of the Special Rapporteur, Austria would suggest retaining this expression in view of the reference to it in Article 38 of the Statute of the International Court of Justice.

Concerning the methodology of identifying general principles of law, we agree that such principles are primarily to be derived from national legal systems. 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.

² Study Group of the International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, International Law Commission OR, 58th Sess, UN Doc A/CN.4/L.682 (2006) para 324.