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Report of the International Law Commission

Agenda item 79

"ILC Cluster 3"

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Cluster III

Chapter VII - Succession of States in respect of State responsibility

With respect to the topic of Succession of States in respect of State responsibility, we thank the Special Rapporteur for his third report and the Commission for its efforts to provide guidance and clarifications on this topic. We also express our appreciation to the Secretariat for preparing a Memorandum providing information on treaties which may be of relevance for work on the topic.

Like others, we would like to underline the challenges for the Special Rapporteur and the Commission in their work on this topic. The limited State practice and its diverse and context-specific character make it difficult to draw up clear-cut rules. The recognition of the subsidiary nature of the draft articles and the priority given to agreements between the States concerned, which has now been expressly reflected in the draft articles, is also indicative of the fact that we may find ourselves more within the ambit of the progressive development of the law rather than its codification.

We are of the opinion, like the Commission, that any work on this topic must preserve the integrity of and be consistent with existing arrangements related to the topic of State succession and State responsibility, particularly the Articles on the Responsibility of States for Internationally Wrongful Acts and the Draft Articles on Diplomatic Protection. We therefore appreciate the willingness expressed by the Special Rapporteur to resolve issues of terminology and substance in the Drafting Committee. This will be the yardstick by which we will evaluate the outcome of the work of the ILC. At the same time, we note with concern that the report provides an attempt to describe both areas of laws in a way that is not fully consistent with the work of the ILC on these topics. An example is the definition of diplomatic protection cited in paragraph 86 of the report of the Special Rapporteur which deviates from the definition used in the Draft Articles on Diplomatic Protection.

We understand that the Special Rapporteur has favoured an approach to the topic that excludes both the automatic extinction of responsibility and the automatic transfer of responsibility in case of succession of States. We agree that this appears to be the most logical approach, since any subsidiary rules must be flexible enough to allow for tailor-made solutions in specific situations, precisely because existing practice takes the form of context-specific agreements and often involve non-legal considerations as well, as rightly emphasised by a number of members of the Commission.

At the same time, the Netherlands aligns itself with the caution expressed in the Commission with respect to the methodology applied by the Special Rapporteur. It seems the vast majority of the rapport, and the ensuing conclusions, is based on academic literature, in other words doctrine. Academic literature that qualifies as doctrine, that is as “teachings of the most highly qualified publicists of the various nations” is a subsidiary means for the determination of international law. It should therefore not be put at a more important level than sources that reflect customary international law, such as the Articles on State Responsibility and the Draft Articles on Diplomatic Protection. The Netherlands would urge the Special Rapporteur, and the Commission, to conduct a more thorough investigation into existing State practice and *opinio juris*, instead of the reliance on doctrine.

With respect to specific sections of the report, the Netherlands would observe the following. In draft article 12, paragraph 2, the Special Rapporteur proposes the term ‘special circumstances’ as a condition for a successor State to request reparation from the responsible State in the situations mentioned in that article. By contrast, draft article 14, dealing with the dissolution of States refers to a ‘nexus’ between the consequences of an internationally wrongful act and the territory or nationals of the successor State. Although we recognize the relevance of a link in such situations, we share the

opinion expressed by members of the Commission that it would be necessary to further clarify the meaning of terms used.

With respect to the application of the rules on diplomatic protection to situations of State succession, the Netherlands is concerned with the way in which the report seems to urge a rethinking of the law on diplomatic protection. We would disagree with the position expressed by the Special Rapporteur that the law on State responsibility and the law on diplomatic protection as developed by the ILC 'raises serious issues' in relation to succession of States. In the view of the Netherlands, draft article 5(1) of the Draft Articles on Diplomatic Protection provides for the situation of State succession. It allows a successor State to take up the claim of a person who acquired that State's nationality upon succession of statehood. The Netherlands would urge the Commission not to revisit this provision through a draft under the present topic. The Netherlands therefore would not support draft article 15 as it contains an attempt at redefining the law applicable to State succession and diplomatic protection.

Chapter IX - General Principles of Law

The Netherlands wishes to extend its congratulations to the Special Rapporteur for his first report on general principles of law and to the Commission for the insightful plenary debate as is reflected in the ILC report. As to the scope of this study, the Netherlands would like to present the following observations. Like the Commission, the Netherlands welcomes the proposed list of issues to be considered under this topic, as identified by the Special Rapporteur.

As to the proposed list of issues to be considered, the Netherlands would note that general principles are included in Article 38(1) of the Statute of the ICJ as the sources of international law to be applied by the ICJ for the settlement of disputes. The Netherlands is of the opinion that general principles of law are not to be considered as a subsidiary source of international law but rather have a supplementary function. This would suggest that States can be responsible for an internationally wrongful act when acting contrary to an obligation arising from a general principle. However, a further inquiry would be appreciated into the question whether general principles of law can be violated. We are of the opinion that a general principle of law may be violated if, due to its wide recognition in State practice and case law of international courts, it serves as a source of rights and obligations for states. If this question is to be answered affirmatively in line with our position, it should nevertheless be made clear whether this depends on the qualification of the violated principle as both a general principle of law and customary international law and/or a rule contained in a treaty.

As a final comment, the Netherlands welcomes the formulation of two categories of general principles of law as reflected in draft conclusion three, that is: general principles of law derived from national legal systems, and general principles of law formed within the international legal system. The Netherlands notes the reluctance of some members of the Commission as regards the second category. The main reasons provided by these members of the Commission are the lack of State practice, the problems with delineating this category, and the potential risk of undermining the requirements for the formation of customary international law. Nonetheless, the Netherlands is of the view that general principles of law which find their origins within the international legal system do exist, and that this is supported by State practice and case law of international courts and tribunals. The Netherlands would like to mention one example of such a general principle of international law with a Dutch origin, that is the freedom of the high seas. This recognized general

principle of international law was introduced in 1609 by the Dutch international jurist Hugo Grotius in his book *Mare Liberum* and has been referred to since in many written and non-written sources of international law.

Thank you.