



## UNITED STATES MISSION TO THE UNITED NATIONS

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**Statement of the United States of America  
76th Session of the General Assembly Sixth Committee  
Agenda Item 82: Report of the International Law Commission  
on the Work of its Seventy-Second Session  
Cluster Three  
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Thank you, Madam Chair.

I will start our comments today on the succession of States in respect of State responsibility. We thank Mr. Pavel Šturma, the Special Rapporteur, and Ms. Patrícia Galvão Teles, the Chair of the Drafting Committee, for their thoughtful contributions on this topic.

The United States continues to believe that draft guidelines or principles may be the more appropriate form for this topic. The substance of the initial draft articles continues to support this conclusion. For example, paragraph 2 of proposed draft article 16 notes that an injured state “may request” restitution from a successor state in certain circumstances. This permissive language may be appropriate in this area, as State practice is, at best, uneven, and determinations by predecessor or successor states to deny or accept liability are likely driven more by diplomatic and political considerations than by legal ones. To this end, we appreciate that the Special Rapporteur, in his third report, acknowledged that the proposed draft articles constitute the progressive development of international law.

Language provisionally adopted with respect to draft articles 10, 10 *bis* para. 1, and 11 raises a similar concern. The language that two or more states “shall agree” on how to address an injury appears to be binding, but it is unclear what that legal obligation entails in practice. What is the legal consequence of a breach of this obligation? If one party proposes a means to address an injury to which the other party does not agree, does the failure to agree constitute an internationally wrongful act? Despite the inclusion of seemingly binding language, these draft articles appear to be exhortations to cooperate that seem more appropriately located in guidelines.

We appreciate the efforts of the Special Rapporteur to address composite acts, as compared to continuing acts, in draft article 7 *bis*. The United States has not formed a position on this draft article but notes that the inclusion of examples or a hypothetical in the commentaries will be helpful for States, courts and tribunals attempting to parse this complex subject in their work.

Finally, the United States agrees with the concerns raised by certain members of the ILC that the draft articles would be improved by avoiding controversial positions or unsettled areas of law that do not need to be addressed in the context of State succession in respect of State responsibility. For example, the fourth report includes language that highlights the ability of an injured state to elect the form of reparation to invoke, and points to the Draft Articles on State Responsibility for Internationally Wrongful Acts and the related commentary to support this election. To the extent this suggests that such an invocation creates an obligation for a responsible state to provide that particular form of reparation, we do not believe this to be supported by the cited draft articles on State responsibility, the related commentary, the cases cited in the commentary, or the discussions of the ILC when the relevant language was initially drafted. We understand that others may have different views on this point or, for example, may have views that do not align with the primacy of restitution. These are complex subjects about which reasonable people may differ. However, these differences do not need to be resolved in the context of State succession in respect of State responsibility and may obscure the important work of the Commission on this topic. We encourage the Special Rapporteur and the Drafting Committee to consider revisions that minimize the need to address these unrelated issues.

The United States looks forward to the future work of the Commission on this topic.

I turn now to the topic “General Principles of Law.” We have read with great interest the second report produced by Marcelo Vazquez-Bermudez, the special rapporteur for this topic. We join others in thanking him for his clear exposition of the topic and thoughtful, well-researched work in the report. We offer here some reactions and comments for the consideration of the ILC as it continues to make progress on this important topic.

First, the United States would like to reiterate its view that the element of “recognition” is essential to the identification of general principles of law and that the relevant analysis is whether a legal principle is recognized by States, as evidenced by their practice. We share the concerns raised by some members of the Commission about the potential ambiguity introduced by the proposed language “recognized by [the community of nations]” in draft conclusion 2 and believe “recognized by States” would provide better clarity for States, courts, and tribunals as they apply the concept in practice.

In this vein, we encourage the Commission to continue focusing on the need for recognition by States as the core consideration when drawing conclusions about the identification of general principles of law and, indeed, in assessing whether there is sufficient information available from which to draw such conclusions. For example, focusing on state practice in the drafting of commentaries and subsequent conclusions could further elucidate when and how a general principle of law is transposed to the international legal system. It could also provide greater clarity with respect to if, when, and to what extent, the activities of supranational or international organizations contribute evidence of the existence of a general

principle of law.

With respect to draft conclusion 7, the United States remains concerned that there is insufficient State practice in the international legal system to determine whether a particular principle “formed within the international legal system” may be considered a general principle of law. We acknowledge and appreciate the admirable efforts of the Special Rapporteur to identify such practice. However, the second report does not alleviate our concerns about the availability and quality of evidence of relevant practice. The report also raises concerns about the lack of objective standards to guide the identification process. Without objective standards, we fear that it will be impossible to achieve the goal -- that we share with the Special Rapporteur -- of ensuring “that the criteria for determining the existence of a general principle of law . . . be strict and the criteria . . . not be used as an easy shortcut to identifying norms of international law general principles.” The lack of objective standards also opens the door for general principles to be used a means to assert claims about international law that are not properly established.

Relatedly, we share concerns expressed by certain members of the ILC about the extent of the reliance on decisions of international criminal courts and tribunals in the second report. International criminal law is often *sui generis*, and caution must be taken when extrapolating from it to other areas of international law or international law generally. To the extent that there is evidence of State practice that is available from other areas of international law, inclusion from a more representative sampling of international law would greatly enhance the effectiveness of commentaries for the relevant draft conclusions. If such evidence is limited, we encourage the Commission to consider whether there is a sufficient basis for a conclusion concerning existing law and, if not, to clearly identify any resulting conclusion as progressive development of law.

The second report also raises questions related to distinguishing between general principles of law and other sources of international law that merit additional careful consideration. We believe that these questions will be better addressed following a review of the next report of the special rapporteur on the relationship between the sources of international law. We look forward to the future work of the Special Rapporteur and the Commission on this topic.

Thank you, Madam Chair.