



Permanent Mission  
of the Federal Republic of Germany  
to the United Nations  
New York

- Check against delivery -

**Statement by the Federal Republic of Germany on Cluster 3 (Succession of States in respect of State responsibility and General Principles of Law) in the debate of the Sixth Committee of the Report of the International Law Commission, November 2021**

Madam Chair,

Let me extend our sincere gratitude to Special Rapporteur Pavel Šturma for his insightful treatment of the topic “Succession of States in respect of State responsibility” and the Commission for the important work on this subject during the last session. We specifically note that substantive progress on this topic was made despite the difficulties posed by the COVID 19 pandemic and would like to commend the Special Rapporteur and the Commission for their impressive commitment during these difficult times. Germany notes that the project “Succession of States in respect of State responsibility” is advanced and looks forward with interest to the announced fifth report of the Special Rapporteur.

Madam Chair,

as regards this third cluster of ILC topics, Germany would like to focus its comments on the topic “General Principles of Law”. Let me begin by thanking Special Rapporteur Marcelo Vázquez-Bermúdez for his substantive second report. We note with appreciation the extensive analysis presented in the second report which in our view constitutes an excellent basis for a corroboration of the rules on and the methodology for identifying general principles of law. Germany also welcomes the engaged discussions in the Commission on this topic.

We agree with the Special Rapporteur and members of the Commission that a cautious approach is advisable when discussing issues related to such fundamental elements of our international legal system as the rules on the sources of international law. Especially the contentious category of general principles of law formed within the international legal system requires careful consideration.

Germany generally welcomes the provisional adoption of draft conclusions 1, 2, and 4 with commentaries and generally agrees with the proposed methodology for the identification of general principles of law derived from national legal systems as laid out in Part II of the second report.

Germany agrees that the comparative legal analysis underlying the “recognition” element in the determination of general principles of law derived from national legal systems must cover different ‘legal families’ but must also provide for geographical representativeness and diversity. This aspect, in Germany’s view, is of critical importance for the legality and legitimacy of any findings on general principles of law. The formulation suggested that the analysis must be “sufficiently wide and representative” in Germany’s view captures this requirement well.

In this context, Germany also points to the importance of all States making national legal sources available to an international audience as widely as possible, especially if their respective legal system operates in a language that is not widely spoken. This being said, in Germany’s view, the non-availability of information on certain legal systems to other States with regard to a particular issue in principle does not alter or reduce the requirements of the representativeness criterion which is inherent in the notion of commonality of a principle “to the various legal systems of the world”. It cannot absolve those seeking to determine the existence of a general principle from a sufficiently wide and representative comparative analysis and must not lead to premature findings on the existence of such a principle. Germany certainly takes into account that the representativeness criterion does not require the consideration of each and every legal system in the world.

As regards the ascertainment of transposition to the international legal system, the Special Rapporteur *inter alia* concluded that, for a principle common to the principle legal systems of the world to be transposed to the international legal system, it must be compatible with “fundamental principles of international law”. The latter, according to the Special Rapporteur, included the principle of sovereignty, the notion of territorial sovereignty, the basic concept of continental shelf entitlement, and the principles set out in the friendly relations declaration. While we generally agree with the compatibility test, we feel that further analysis might be helpful to identify what kind of “principles” could possibly further qualify as “fundamental” in this context, also given the fact that the Special Rapporteur’s enumeration in the report, which is introduced by the verb “include”, does not appear to be conclusive. A crucial aspect, in Germany’s view, is indeed the differentiation between such “fundamental principles”, which may bar the “influx” of legal principles from the domestic legal sphere in the international legal system, and “simple” principles or characteristics of the international legal system, as well as international norms and general principles of law, which do not have that quality.

Germany supports the inclusion of general principles of law formed within the international legal system in the topic. We are convinced that this is the right setting and context to study and discuss their existence as a source of international law. Germany notes the doubts that some States as well as members of the Commission have voiced in this regard. While Germany does not exclude the possibility that general principles of law derived from the international legal system exist as a source of international law, we underline that the criteria for identifying them must in any case be sufficiently strict, so as to minimize the risk that the rules governing the identification of customary international law are undermined or bypassed in practice. Germany welcomes the general remarks in this regard by the Special Rapporteur in paras. 15 and 120 of his second report.

Nevertheless, Germany shares concerns voiced during discussions within the Commission on whether the proposed methodology to determine the “recognition” of general principles of law formed within the international legal system actually achieves this objective.

Regarding the proposed category of principles widely recognized in treaties and “other international instruments” in draft conclusion 7 (a), Germany believes that it should be further explained by what precise criteria a certain element or notion within a treaty or instrument can be considered to have emancipated itself from its origin in order to acquire a distinct and independent legal status as a general principle of law. Does the simple incorporation of a certain notion into a number of treaties or instruments suffice or do the treaties or instruments in question have to indicate expressly or impliedly that the element or notion in question is generalizable and carries a specific (general) legal authority or potentially overarching relevance? In any case, Germany doubts that binding legal principles formed within the international legal system may be derived from a synopsis of purely non-legally binding instruments – this would be different from cases in which a non-legally binding instrument was referred to in order to corroborate a legal principle recognized in other, legally binding instruments.

Moreover, Germany believes that the requirements for wide recognition in the sense of draft conclusion 7 (a) would also have to be further examined. The question arises whether analogously to the determination of principles derived from the domestic legal order, a comparative analysis of international treaties and other instruments would be necessary and whether such analysis would then have to cover not only as many treaties and instruments as possible but also a variety of treaties or instruments from different areas, sub-areas or regimes of international law.

As regards the second form of recognition governed by draft conclusion 7 (b) as proposed by the Special Rapporteur, Germany feels that the precise methodology underlying the deduction to be performed remains vague and could be further discussed. Moreover, we recognize the difficulty in identifying the content of the basic features and fundamental requirements of the international legal

system from which a general principle may be deduced under the third category of recognition in draft conclusion 7 (c), bearing the risk of somewhat subjective results and legal uncertainty – this is a point which has also been made during the discussions in the Commission and in our view should be addressed further.

We again thank again the Special Rapporteur and the Commission for their important work and will continue to follow this project carefully.

Thank you.