

Statement of Portugal

at the 77th Session of Sixth Committee of the General Assembly

Agenda Item 77

Report of the ILC on the work of its 73rd session (cluster III)

Check against delivery

General principles of law (Chapter VIII)
and
Succession of States in respect of State responsibility
(Chapter VII)

Mr. Chairman,

In the interest of time, my delegation will deliver an abbreviated version of its statement. The full statement will be made available for publishing on the website of the Committee.

In today's statement I will address the topics "Succession of States in Respect of State Responsibility" and "General Principles of Law".

Succession of States in respect of State responsibility (Chapter VII)

Mr. Chairman,

Concerning the topic "Succession of States in respect of State Responsibility" we would to begin by thanking Mr. Pavel Šturma, the Special Rapporteur, for his fifth report, which is devoted to both general issues regarding succession of States and international responsibility for wrongful acts, including the issue relating to the plurality of States in the context of succession.

Mr. Chairman,

Portugal is aware that the lack of a coherent and consistent international practice on the issue of the succession of States in respect of State responsibility complicates any exercise of codification of international law. In this context, Portugal welcomes the decision of turning the draft articles into draft guidelines. Such output can still contribute significantly to greater clarity and understanding on this issue.

We also take good note of the assurances given by the Special Rapporteur that it is not his intention to question or rewrite the general rules on State responsibility. *Although the 2001 Draft Articles on Responsibility of States for Internationally Wrongful Acts have not yet been adopted as an international convention, many international tribunals, including in the context of investor-State disputes, have relied on them in their decisions. The draft articles have proven to be a useful international tool. Portugal therefore believes that they should be used as one of the starting points for analyzing international responsibility in the context of state succession. Therefore, any attempt to revise or rewrite them should be avoided.*

Mr. Chairman,

Portugal agrees with the principle, reiterated several times by the Special Rapporteur in his report, that the final product should be considered as subsidiary in nature and that agreements on succession issues between the States concerned take precedence.

However, it should be noted that the phenomenon of State succession may be the result of idiosyncratic and complex dynamics, whether historical, social, economic, ideological. In some cases, succession is simply the only solution to address deeper and even more complex problems. This conclusion is not without implications for the question of state responsibility in the case of state succession. Indeed, it justifies the concern that any agreement on the apportionment of international responsibility in such circumstances should be placed in its particular context. This means that it is of utmost importance to ensure that such an agreement actually expresses the free and noncoerced will of the parties.

Portugal is aware that this concern is essentially related to the issue of invalidity of treaties, which is dealt with in the Vienna Convention on the Law of Treaties. However, we consider that the rule that agreements concluded by the States concerned take precedence over a possible practice of State succession can only retain its relevance if the aforementioned concern is taken into account at all times.

With regard to the importance of the concept of equity in the division of responsibilities among successor States, Portugal joins those who consider it an indispensable mechanism. However, we also consider important to examine more closely how the concept has been used in the various historical examples of State succession, given the underlying uncertainty of the concept. *This may be of particular importance when a decision is to be made on how to proceed with the division of responsibility if the States concerned have not done so at the time of the succession.*

Mr. Chairman,

I would like now to address more specific questions regarding Draft Guidelines 11 and 14, as well as Draft Guidelines 12(2) and 13.

Given the scope of Draft Guidelines 11 and 14, there does not appear to be a defensible reason for using different methodologies and terminology in the two Draft Guidelines.

Furthermore, in both draft guidelines, the only relevant element for the formation of two or more successor States is the parts of the territory of the predecessor State. It is well known that, in addition to the qualification of a "defined territory," States must usually have a permanent population. Therefore, the question arises whether an existing sovereign state that incorporates the population of the predecessor state is covered by Draft Guideline 10bis, paragraph 1, and Draft Guideline 13bis, paragraph 1. Finally, it is not clear what "particular circumstances" may justify one or more successor states being entitled to invoke the responsibility of the wrongdoing state under Draft Guideline 14. Therefore, we would welcome additional clarification in this regard.

Mr. Chairman,

In what concerns Draft Guideline 12, it is not entirely clear whether the reference to "a successor State" includes the same situation addressed in draft Guideline 13. However, it seems unlikely that this is the case. Therefore, Portugal would welcome further clarification on the exact scope of these two provisions and their interaction.

Mr. Chairman,

Portugal has been following closely the discussions by the Commission on this topic. We are looking forward to its conclusion on first reading.

General principles of law (Chapter VIII)

Mr. Chairman,

Let me now turn to Chapter VIII of the Report of the International Law Commission, devoted to the topic of "General Principles of Law". We would like to begin by thanking the Special Rapporteur, Mr. Marcelo Vázquez-Bermúdez, for his third report, which addressed the issues of transposition of general principles of law formed within the international legal system and of the functions of general principles of law and their relationship with other sources of international law. Furthermore, it proposed five draft conclusions.

At the end of its discussion during this year's session, the Commission provisionally adopted draft conclusions 3, 5 and 7 and their respective commentaries and also took note of draft conclusions 6, 8, 9, 10 and 11.

Mr. Chairman,

Portugal would like to recall that it believes that this topic gives the Commission a chance for complementing its existing work on other sources of international law and for providing added guidance on the nature, identification, and application of the

general principles of law, as well as on their relationship with other sources of international law.

Being a topic of such great relevance, we welcome the fact that the Commission seems to be moving at a steadfast pace in its discussion. Nevertheless, we are aware of the complexity of this topic and we feel that the Report shows that there are some issues that merit further debate in the.

The Commission has a fundamental role as an active interpreter and guiding body. Therefore, it is important that the Commission presents clear solutions relating to this source of International Law.

Mr. Chairman,

Regarding paragraph 3 of Draft Conclusion 5, my delegation would like to underline once more that national courts may rely on sources of law different from those applicable under international law. Furthermore, those different sources of law may be organised according to a hierarchy specific to different legal systems. This should be considered when conducting an analysis of decisions of national courts for determining the existence of a general principle of law.

As we have mentioned before, we would welcome draft conclusions on the usefulness or significance of other subsidiary means for the determination of general principles of law, which could address, for example, resolutions of the United Nations or international expert bodies, and outputs of the International Law Commission.

We would also like to make a very brief reference to the question of the identification of general principles of law formed within the international legal system, which is dealt in Draft Conclusion 7. We feel that its paragraph 2, along with the commentary thereto, is not sufficiently clear, namely when it comes to the distinction between general principles of law and international customary law.

Mr. Chairman,

In previous years, Portugal expressed its understanding that, while studying this topic, the Commission should avoid establishing a hierarchy between the several sources of international law. In this sense, we welcome Draft Conclusion 11, paragraph 1, as adopted by the Commission, which affirms the absence of a hierarchy. *Accordingly, we cannot support the opinion expressed by some members of the Commission that Article 38 of the Statute of the International Court of Justice sets an informal hierarchy between sources of international law.*

Mr. Chairman,

To finalize our statement on this topic, allow me a brief comment on the functions of General Principles of Law.

We agree with the view that was expressed by some members of the Commission that the gap-filling function was performed to avoid situations of non liquet and that general principles of law perform other important functions in the international legal system.

In our view, the General Principles of Law set the ethical-normative scene for other norms and have a supplementary function of filling the gaps and avoiding rulings of *non liquet*.

In this sense, we believe this question requires further analysis by the Commission.

Mr. Chairman,

Portugal will continue following attentively the work of the Commission on the topic of General Principles of Law and it hopes that the Commission can bring clear guidance to this very complex and important subject-matter.

Thank you, Mr. Chairman.

