

 Permanent Mission
of Austria to the
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Sixth Committee

**Agenda item 77: Report of the International Law Commission on the work of
its seventy-third session**

**Cluster III – Chps: VII (Succession of States in respect of State responsibility) and VIII
(General principles of law)**

Statement by

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Chairperson,

To begin with, let me express Austria's appreciation to Special Rapporteur Šturma for his fifth report on the topic "**Succession of States in respect of State responsibility**" and his work on this topic over the last years.

Austria has been following the development of the topic with great attention. While we have repeatedly emphasised that a clarification of existing practice may be valuable, we consider the rights and obligations triggered by an internationally wrongful act to concern only the state that has committed it. We do not think that such rights and obligations are transferable as a result of state succession. As affirmed in our statement last year, Austria does not support the premise underlying much of the present and previous reports of the Special Rapporteur that there may be situations where the responsibility or the "rights and obligations arising from responsibility" may be transferred from a predecessor state to a successor state as a matter of *lex lata*. Our delegation has thus voiced scepticism towards an attempt of drafting articles that purport to codify rules, which in our view do not exist.

Therefore, Austria welcomes the decision of the Commission during its 73rd session to change course and to prepare "guidelines". We recognise the potential of such non-binding guidelines to take into account policy aspects that have been repeatedly stressed by the Special Rapporteur, in particular the idea that the disappearance of a state which has committed a wrongful act should not lead to a situation where such wrongful act remains un-remedied.

We took note of the fact that the Commission has not been able to complete its work on this topic during its 2022 session. With the Special Rapporteur leaving the Commission, this implies that the Commission will have to consider how to proceed with the topic in the future. In this context, Austria has also noted that there have been discussions within the Commission to finalise this topic by drawing up a report that would be annexed to the Commission's report. Given the complexity of the topic as well as the paucity of practice, this would indeed be a preferred final format for the topic.

In the following my delegation will limit itself to a few short comments on the text of the draft guidelines and commentaries provisionally adopted by the Commission as laid out in paragraph 89 of the Commission's report.

Draft guideline 6 entitled “No effect upon attribution” indeed provides the core of the entire topic, stating that a succession of states does not have any effect on attribution and therefore, in Austria’s view, on the consequences of an internationally wrongful act committed by a predecessor state.

Austria welcomes the attempt to find a soft formulation for draft guideline 10 on uniting of states pursuant to which in such a case an injured state and the successor state to the state which committed an internationally wrongful act “should agree on how to address the injury.”

In our view, the non-attributability of the wrongful act committed by the predecessor state to a successor state implies that the successor state does not have any obligation stemming from the wrongful act. Where it has benefited from it, principles like unjust enrichment may be used in order to address the injury or the successor state may voluntarily consider doing so.

Against this background we are sceptical whether a formulation pursuant to which a successor state and an injured state “should agree on how to address the injury” is indeed excluding a rule of automatic succession or the clean slate principle, as commentary 3 to draft guideline 10 suggests.

The need to “address the injury” arises from the commission of a wrongful act under the principles of state responsibility. Thus, to suggest that a successor state should address these issues presupposes that a wrongful act committed by its predecessors somehow imposes obligations on it by way of succession.

Similar considerations would be pertinent to other situations of state succession, but we recognise that this forum is not the appropriate one to address all the details.

Let me therefore reiterate Austria’s view that it might be most appropriate to assess the various problems addressed by the topic of succession of states in respect of state responsibility in a report instead of trying to squeeze incompatible legal views in vague compromise formulations.

Chairperson,

I am now turning to the topic of “**General principles of law**”. Austria commends Special Rapporteur Vázquez-Bermúdez for his third report that focuses on the transposition of general principles of law, on general principles of law formed within the international legal order and on the functions of general principles of law.

Austria aligns itself with the statement made on this topic on behalf of the European Union. In the following, we will comment on draft conclusions 3, 5 and 7 as provisionally adopted by the drafting committee.

Concerning draft conclusion 3 on categories of general principles of law, i.e. those that are derived from national legal systems and those that may be formed within the international legal system, Austria reiterates its strong support for the traditional and established category of general principles derived from national legal systems. We have continued doubts, however, whether the second category, i.e. principles formed within the international legal system, can actually be ascertained and we will return to this issue in the discussion of draft conclusion 7.

Regarding draft conclusion 5 on the determination of the existence of a principle common to the various legal systems of the world, Austria welcomes the formulation provisionally adopted. We agree that a comparative analysis on a wide and representative basis must take place in order to determine the existence of a general principle of law. We specifically agree with paragraph 3, emphasising that such a comparative analysis should not be limited to the law in the books, but would have to take into account decisions of national courts.

Let me finally turn to the most difficult aspect of the draft conclusions discussed and provisionally adopted so far, i.e. draft conclusion 7 on the identification of general principles of law formed within the international legal system.

We note that this question has been controversially discussed within the Commission and we would like to recall that we and other delegations had expressed doubts in the Sixth Committee already last year. Against this background, Austria wishes to express its disappointment that the commentary to draft conclusion 7 merely notes that there would be examples in judicial practice which appear to support the existence of general principles of law formed within the international legal system without elaborating on these examples in more detail. We note that some examples, generally referred to in footnote 1202 of the report, are devoid of any closer analysis, which would be crucial in order to support the existence of this category of general principles of law. The fact that neither the text of Article 38, paragraph 1 (c) of the Statute of the International Court of Justice nor its *travaux préparatoires* exclude the category of general principles of law formed within the international legal system seems to be an insufficiently cogent reason to prove the existence of this category.

Therefore, we would encourage that both the Special Rapporteur and the Commission embark on a deeper study to provide examples for general principles of law formed within the international legal system.

Concerning the actual formulation of draft conclusion 7, it is unclear to us what the term “intrinsic” is meant to signify. We note that also the commentary to draft conclusion 7 just reiterates this requirement without explaining it in more detail, which would be helpful for understanding the underlying concept.

I thank you.