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Cluster III:
Succession of States in respect of State responsibility
General principles of law

Statement by

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Madam/Mr. Chair,

The Czech delegation welcomes the progress of the work on the topic **"Succession of States in respect of State responsibility"** and appreciates the contribution of the Special Rapporteur, Mr. Pavel Šturma, to the over-all achievement.

We note the Commission's decision to modify the form of the draft provisions from that of "draft articles" to that of "draft guidelines". Because the revision of provisions adopted during previous sessions did not affect their content[1], we refer to our comments made on these provisions in the past. Today we will focus on draft guidelines with commentaries adopted by the Commission at its recent session.

Guideline 6 entitled "No effect upon attribution", clarifies an essential aspect of the topic, namely that the internationally wrongful act committed by the predecessor State prior to the date of succession of States remains attributable solely to that State. We support this guideline. At the same time, the mere fact that the succession of States has no impact on the attribution does not preclude, depending on circumstances, participation of the successor State or States in the wiping of injurious consequences of the predecessor's internationally wrongful act, as it is further clarified in subsequent provisions.

Guideline 7bis deals with Composite acts. Paragraphs 1 and 2 are confirming the obvious, namely that the predecessor State or, as the case may be, the successor State are each responsible for their own international wrongful conduct consisting of a series of composite acts against another State. The fact that the line of these acts straddle the date of succession does not make these situations distinct and in need of being regulated under the current topic. In each of these cases, all elements of the composite act are attributable to a single wrongdoing State (which existed prior to and continues to exist after the date of State succession). Both situations are, therefore, sufficiently covered by the 2001 Articles on Responsibility of States for Internationally Wrongful Acts (2001 ARSIWA).

The only situation not already covered by the said Articles is envisaged in paragraph 3. It is the case when a series of actions by the predecessor State is followed by series of actions by the successor State and, cumulatively, these actions would constitute a "composite act" *sui generis*. The Commission, however, seems not to find any solution to this problem. As admitted in the commentary, "the inconsistency of the available State practice did not allow a firm conclusion to be drawn as to the content of the law" and paragraph 3 is, therefore, formulated as a "without prejudice" clause. Guideline 7bis thus provides only very limited guidance for the solution of the relevant problem which the Commission was able to identify under the theme of "composite acts" and which could arise in the context of succession of States. We therefore doubt whether this guideline is really needed, in its current form.

The common element of guidelines 10, 10bis paragraph 1 and guideline 11, dealing with uniting of States, incorporation of a State into another State and dissolution of a State respectively, is the idea that the injured State and the successor State should agree on how

[1] Draft guidelines 1, 2, 5, 7, 8 and 9.

to address the injury. In our understanding this means that the negotiations (and an agreement resulting thereof) should focus on the modalities of the reparation, namely its forms and eventually (in case of dissolution) its distribution between successor States. However, the very purpose and goal of such negotiations, namely the principle according to which the injurious effects of an internationally wrongful act of the predecessor have to be wiped out, cannot be questioned in such negotiations. In other words, to use those of the commentary, "the provision should not be viewed as an expression of the 'clean slate' principle [...], as that would risk leaving the injured State without a remedy." We still regret that these guidelines themselves, apart from their commentaries, do not provide at least some guidance to the States concerned, which could assist them in their negotiations.

Paragraph 2 of guideline 10bis deals with an aspect which is fully covered by 2001 ARSIWA and, should this question, for sake of clarity, be mentioned at all, the commentary would be sufficient place for doing so.

Guidelines 12, 13, 13bis and 14 deal with situations when prior to the date of succession of States the predecessor State was a victim of an internationally wrongful act the consequences of which have not yet been wiped out.

Guideline 12 deals with those cases where the injured predecessor State continues to exist. Quite understandably, as stated in paragraph 1 of this guideline, such State "continues to be entitled to invoke the responsibility of the [wrongdoing] State even after the date of succession, if the injury to it has not been made good". The guideline focuses on "invocation of responsibility" which entitles the right of the injured State to request compensation in its various forms. Thus, e. g., should the restitution or compensation *in lieu* of the restitution, concern the part of the territory or population, which became the territory or population of the successor State, the right to invoke responsibility may belong also to the successor State. We therefore agree with the content of all 3 paragraphs of this guideline.

Finally, it is our understanding that guideline 12 covers the same cases of succession of States as those listed in guideline 9. It would therefore be desirable to ensure also drafting coherence of these two guidelines, as far as the specification of situations of State succession is concerned.

Guidelines 13, 13bis and 14, are built-upon an idea of the entitlement of the successor State to invoke responsibility of a State which committed an internationally wrongful act against the predecessor State which ceased to exist. They apply, respectively, in situations of uniting of States, incorporation of a State into another State and dissolution of a State, Understandably, in case of dissolution of a State, and in view of the plurality of successor States, this right has to be exercised depending on particular circumstances of the situation. We note with interest that paragraph 2 of guideline 14 contains an indicative list of elements to be taken into consideration by the States concerned in course of their negotiations aimed at reaching the agreement addressing the injury caused by the wrongful acts.

We agree with guideline 15 which excludes from the scope of the present project questions of diplomatic protection that could arise in the context of succession of States.

Conversely, guideline 15bis concerning cessation and guaranties of non-repetition is rather superfluous. Its inclusion, it is our concern, could only undermine the authority and integrity of 2001 ARSIWA, which undoubtedly apply to any internationally wrongful act, simple or lasting, irrespective of its history, including succession of States.

To conclude on this topic, Madam/Mr. Chair, and notwithstanding some critical remarks, we consider the topic "Succession of States in respect of State responsibility" as an important one and wish to once more extend our appreciation to the outgoing member of the Commission, Mr. Pavel Šturma, for the work and progress achieved so far. We are convinced that it would be worthwhile to continue along this path and we hope that appropriate attention will be given to this project also by the Commission in its renewed composition.

Madam/Mr. Chair,

Turning to the topic **"General principles of law"**, the Czech delegation notes the consideration by the Commission of the third report of the Special Rapporteur Mr. Marcelo Vázquez- Bermúdez, whom we commend for his efforts. We also note the provisional adoption of the draft conclusions 3, 5 and 7 with commentaries on which we wish to offer some comments.

Conclusion 3 – Categories of general principles of law. We agree with the content of subparagraph a), namely that general principles of law are derived from national legal systems. We however disagree with the inclusion of subparagraph b) which assumes the existence of a parallel category of general principles "that may be formed within the international legal system". Such dichotomy contradicts to the notion of general principles of law, which are general not only in the sense of highly abstract level of their content, but also in the sense that they are common to the various legal systems.

Subparagraph b) of draft conclusion 3 together with draft conclusion 7 dealing with Identification of general principles of law formed within the international legal system threaten the integrity of the notion of general principles of law by opening the door to its fragmentation.

In support of the purported existence of an autonomous category of general principles of law formed within the international legal system the commentary to draft conclusion 3 (b) refers to some examples in practice and views expressed in the literature. These examples, however, are questionable. They can also be interpreted as examples of formation of general principles of international law, but not of the law in its sense as used in article 38, para 1 (c) of the ICJ Statute. We do not believe that these examples are sufficient for the formulation of far reaching provisions as those proposed in draft conclusion 3 (b) and draft conclusion 7. It is not appropriate for the Commission to give such a weight to views which do not have general support in the doctrine and solid basis in international practice.

For the sake of clarity, we wish to underline, that many general principles of law which are common to national legal orders are now inherent also to international legal system. It is due to the fact that they are intrinsic to every legal system, whether national or international.

Despite significant increase of the volume of the international law, since times when famous formula of article 38, paragraph 1 (c) of the ICJ Statute was drafted, the national legal orders remain the most reliable basis for the identification of general principles of law. The determination of the existence of a principle common to the various legal systems of the world is addressed in conclusion 5. According to paragraphs 1 to 3, such determination requires "a comparative analysis of national legal systems [which] must be wide and representative, include different regions of the world [as well as] an assessment of national laws and decisions of national courts, and other relevant materials." This threshold seems to be too high. We are unaware of any practice which would justify similar requirements. The analogy which is made here with the identification of the rules of customary international law is inappropriate. Most of the general principles of law are legal postulates of notorious knowledge and are generally accepted as incontestable postulates, such as *"pacta sunt servanda", "bona fides", "ne bis in idem", "nemo iudex in re sua", "res transit cum onere suo", "ius ex iniuria non oritur",* etc. Their identification is a result of a long process, not of an *ad hoc* exercise as draft conclusion 5 seems to suggest. No State, international organization, or international judicial instance can reasonably be expected to follow the steps spelled out in paragraphs 1 to 3. We therefore believe that this conclusion should be reconsidered.

Concerning draft conclusions 6, 8, 9, 10 and 11 which were adopted by the Drafting Committee, and of which the Commission took note, we reserve our comments to the stage when they are provisionally adopted by the Commission together with commentaries.

I thank you, Madam/Mr. Chair.