

72nd Session

of the General Assembly

Sixth Committee

Agenda Item 81

Report of the International Law Commission

on the Work of its 69th Session

Cluster 3: Chapters VIII-X (Peremptory norms of general international law (jus cogens); Succession of States in respect of State Responsibility; Protection of the environment in relation to armed conflicts)

New York, 31 October 2017

In the interest of time I will deliver a shortened statement today. The full version will be on record on the Papersmart Platform.

Mr. Chairman,

The Austrian delegation commends Special Rapporteur Dire Tladi for his informative second report on the topic of "**Peremptory norms of general international law (jus cogens)**". My delegation considers the issue of jus cogens to be of central importance and does not see a need to change the title of the topic from "Jus cogens" to "Peremptory norms of general international law (jus cogens)". Jus cogens is a well-established concept that does not need further precision. If considered necessary, "jus cogens in international law" would appear to be sufficient. At the same time the currently proposed title of "Peremptory norms of general international law (jus cogens)" is not objectionable.

On a technical matter, my delegation notes that the Commission's report only reproduces, in a footnote, the draft conclusions 4 to 9 as proposed by the Special Rapporteur in his second report while it does not contain the draft conclusions 1 to 7 provisionally adopted by the Drafting Committee. To the latter, only a reference is made directing the reader to the Commission's homepage. It would have been preferable to have also the text of the provisionally adopted conclusions in the report itself and to receive clear guidance on which set of draft conclusions states are invited to comment.

My delegation wishes to reiterate that an illustrative list of jus cogens norms would be one of the crucial benefits of the Commission's work on this topic. Therefore, we are satisfied to read in the Commission's report that in this year's session most members favoured the preparation of such a list in the context of the current study. While other members were of the opinion that this would take a disproportionately large amount of time to prepare, we believe that this time would be well invested.

As regards the draft conclusions provisionally adopted by the Drafting Committee, the Austrian delegation wishes to add the following remarks:

Concerning draft conclusion 2 on the "General nature of peremptory norms of general international law (jus cogens)", my delegation concurs with the view that the hierarchical superiority of jus cogens norms is rather a consequence than a characteristic or precondition for the qualification of jus cogens norms as such. This view now seems to be adequately reflected in draft conclusion 2. This conclusion also refers to the universal applicability of jus cogens norms; in this context, we suggest that the Commission also considers the relationship between universal applicability and the possibility of persistent objectors.

With respect to draft conclusions 3 and 4, it appears that draft conclusion 4, which contains "Criteria for identification" of a jus cogens norm, largely overlaps with the criteria used to define a jus cogens norm in draft conclusion 3. My delegation shares the view expressed during the Commission's discussion as referred to in the report that the existing overlap could be avoided through a better stream-lining or even merger of these provisions.

Regarding draft conclusion 5 on "Bases for peremptory norms", the Austrian delegation supports the view expressed in para. 1 that "the most common basis for the formation of jus cogens" would be customary international law. Concerning para. 2, it seems doubtful whether also treaty provisions, including some that are not universally applied or even contained in multilateral treaties, might "serve as bases" for jus cogens norms. My delegation would therefore prefer the text of the draft conclusion as proposed by the Special Rapporteur, according to which "a treaty rule may reflect a norm of general international law capable of rising to the level of a jus cogens norm of general international law".

My delegation would appreciate if the Special Rapporteur, who in his extensive analysis of cases has exclusively discussed customary international law, could identify examples of jus cogens norms deriving from general principles of law and treaty rules as well.

The newly added para. 1 of draft conclusion 6 does not seem necessary. Furthermore, the wording of this paragraph is not very clear as it could be asked whether the "acceptance and recognition as a norm of general international law" should rather read "acceptance and recognition of a norm as one of general international law". Finally, one could ask whether the reference to "acceptance and recognition" can be applied to general principles of law.

With regard to para. 2 of draft conclusion 6 Austria is of the view that this provision is redundant in light of draft conclusion 4(b), since it only duplicates the wording of the latter.

With regard to the debate that obviously took place within the Commission as to the exact meaning of the notion "international community of states as a whole" in draft conclusion 7, we share the view that although that notion may not require participation of "all states", it certainly requires a "very large majority" of or virtually all states. Such language has been usefully added to the current wording of draft conclusion 7(2).

Mr. Chairman,

The Austrian delegation wishes to congratulate Mr. Pavel Šturma on his appointment as Special Rapporteur for the topic "**Succession of states in respect of state responsibility**" and commends him for offering already a very substantive first report shortly after his appointment. Still, Austria needs to reiterate its hesitation in regard to the topic chosen as already expressed in its statement last year.

In our opinion this highly controversial topic was wisely excluded from previous work of the ILC. Recent discussions of this topic by the International Law Association as well as the Institut de Droit International have shown that state practice is extremely scarce. It is questionable whether some of the few cases discussed by the Special Rapporteur in his first report provide enough substance for asserting any exceptions to the firmly established rule of "non-succession" into the responsibility for internationally wrongful acts.

My delegation has noted that even the Special Rapporteur himself has been careful to state that it is unclear whether any general rules providing for succession into responsibility exist. Still, the title chosen by the Commission suggests that there may be situations in which a successor state automatically succeeds into the responsibility incurred by a predecessor state in regard to that other state's wrongful act. This implicit suggestion is unfortunate and it

would have been more apt to speak of the topic of “**State responsibility problems in cases of succession of states**”. In fact, the examples provided by the Special Rapporteur in his first report mostly relate to situations where successor states become responsible because they continue the unlawful acts of their predecessors or endorse them or even voluntarily assume secondary obligations arising from internationally wrongful acts committed by the predecessor states.

It is the conviction of the Austrian delegation that what the Special Rapporteur has termed the “traditional view” that a successor state does not succeed into the responsibility for internationally wrongful acts of a predecessor state reflects the existing state of international law. With that in mind it is hoped that the Commission’s work on this new topic will lead to a clarification of the concept of state responsibility and the effects of instances of state succession.

Mr. Chairman,

Finally, on the topic of “**Protection of the environment in relation to armed conflicts**”, we welcome the appointment of Marja Lehto as Special Rapporteur and wish her success for her work on this important but at the same time difficult subject. We trust that her efforts will lead to a clarification of the relationship between environmental law and international humanitarian law.

As far as international humanitarian law is concerned, the main issue at the moment is not the establishment of new rules and standards, but an improvement of the compliance with its existing rules. Austria, together with many other states, supports the efforts of Switzerland and the International Committee of the Red Cross to reform the international humanitarian law compliance mechanisms and to increase their efficiency.

As current chairmanship-in-office of the Organization for Security and Cooperation in Europe, Austria was able to contribute to the first activation of the good offices of the International Humanitarian Fact Finding Commission under Article 90 of the First Additional Protocol to the Geneva Conventions in connection with an incident on 23 April 2017 in Eastern Ukraine involving the death of an OSCE team member, injuries of two OSCE team members and the destruction of an OSCE vehicle. The Fact Finding Commission was able to render essential assistance to the OSCE Secretary General in the selection of the members of the independent team of experts tasked to conduct a forensic post-blast investigation of that incident and to submit a report to the OSCE.

In concluding, therefore, as compliance depends on a clear understanding of the existing norms, we support the examination of the topic “Protection of the environment in relation to armed conflicts” by the Commission and are waiting with interest to receive the first report of the new Special Rapporteur.