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Agenda item 79:
Report of the International Law Commission on
the work of its seventy-first session

Cluster III

Succession of States in respect of State responsibility (Chap VII)
General principles of law (Chap IX)

Statement by Norway on behalf of the Nordic countries

Mr./Mme. Chair,

The Nordic countries would like to thank the Special Rapporteur Pavel Šturma for his interesting and well-researched third report on Succession of States in respect of State responsibility. We note that in addition to four new substantive draft articles, the Special Rapporteur has proposed one new definition and two new provisions on the scope of the draft articles.

The Nordic countries are pleased to note that the Special Rapporteur has reverted to some general aspects that had been subject to comments in both the Commission and the Sixth Committee. We find particularly useful the articulation of the methodological starting points of the Special Rapporteur in paragraphs 17-23. We agree with the seven points.

So far, the Commission has provisionally adopted draft articles 1, 2 and 5. We were pleased to note that in addition to those draft articles, their commentaries were also made available for our scrutiny at this stage. The Nordic countries favor a transparent and inclusive cooperation between the Commission and the Sixth Committee. We feel that

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the early availability of provisionally adopted articles and commentaries are instrumental in facilitating that cooperation.

The commentaries define “succession of States” as “referring exclusively to the fact of the replacement of one State by another in the responsibility for the international relations of territory, leaving aside any connotation of inheritance of rights or obligations on the occurrence of that event”. In addition to the commentaries, paragraphs 26 to 35 in the introductory part of the report usefully complement and clarify the meaning of State succession in the context of State responsibility. Importantly, the term “succession of States” is not seen as implying automatic transfer or automatic extinction of responsibility.

Mr./Mme. Chair,

With regard to the new proposals, I should mention the Special Rapporteur’s proposal to organize the draft articles in parts and indicate in draft articles X and Y the scope of each part. These additions appear sensible to us. We welcome the clarification that only internationally wrongful acts for which the predecessor State (or other injured State if it was the predecessor State that committed the wrongful act) did not receive full reparation before the date of succession of States fall within the ambit of the draft articles.

The substantive part of this report has a perspective different from the earlier reports, as it is concerned with the so called “passive” aspect of State responsibility. In other words, this report discusses reparations for injury resulting from internationally wrongful acts committed *against* the predecessor State. Here, the succession of States occurs on the side of the injured State or States, and does not, as such, affect the question of international responsibility.

We see merit in the Special Rapporteur’s approach to analyze the possible transfer of rights separately from that of obligations. For us it also seems to make sense that the different categories of succession are divided into two, depending on whether the predecessor State continues to exist after the date of the succession of States.

Mr./Mme. Chair,

We note the discussion in the Commission regarding the formulation “may request reparation”, common to the new draft articles 12, 13 and 14. We understand the questions of some members about the usefulness of recognizing procedural possibilities without identifying substantive rights and obligations. However, considering the general approach of the Special Rapporteur, this formulation seems logical to us. The Special Rapporteur states (in paragraph 34) that he does not propose any automatic succession to rights and obligations arising from internationally wrongful acts, but rather “the

possibility for a successor State to raise the issue of reparation of injury caused to the predecessor State, which is now affecting the successor State, with the wrongdoing State.” The Nordic countries may have more to say on this point and the rest of the new proposals once they have matured in the work of the Commission.

For us those provisions that were provisionally adopted by the Drafting Committee during the 71st session, that is, draft articles 7, 8 and 9 seem to be firmly rooted in the relevant provisions of the articles on State responsibility. With regard to draft article 7 we note that the Special Rapporteur intends to address the issue of composite acts in more detail in his fourth report. Regarding draft article 9 it seems to make sense to us that the original proposals for three draft articles are combined in a single draft article for cases of succession of States when the predecessor State continues to exist. With regard to draft article 9 we note the discussion in the Commission regarding the “may request reparation” formulation, which was proposed by the Special Rapporteur for this draft article that deals with the rights on the injured State. The Drafting Committee ended up with an entitlement of the injured State to “to invoke the responsibility of the predecessor State”. The Nordic countries might wish to comment on this formulation once the Commission has advanced with its work on proposals for draft articles 12, 13 and 14.

Finally, as has been said before, State succession is a rare occurrence and the availability of State practice is limited. Therefore, we encourage the Commission to continue to follow a prudent approach. The Nordic countries are looking forward to the continuing collaboration with the Commission on this topic.

Mr./Mme. Chair,

Turning now to the topic of general principles of law, the Nordic countries would like to thank the Special Rapporteur Mr. Marcelo Vázquez-Bermúdez for his first report on this matter. His well-researched and well-structured work provides a solid foundation for this interesting topic, that complements the Commission’s earlier work on the principal sources of international law. As the work on this topic has just started, the Nordic countries would like to present just a few preliminary observations.

The Nordic countries agree with the Special Rapporteur in that “...by adopting a cautious and rigorous approach, the Commission could provide guidance to States, international organizations, courts and tribunals and all those called upon to use general principles of law as a source of international law”.

This task is not without challenges.

In our view, the Commission’s work on this topic can be particularly useful in terms of providing guidance to courts on how to identify and apply general principles of law.

However, given the applicable sensitivities, especially regarding how general principles of law pertain to other sources of international law, we agree that a cautious approach is advisable. This is especially so when it comes to general principles of law in relation to the applicable substantive law. Most of the very few instances where the ICJ has referred to general principles it has been on issues of procedure rather than substantive law obligations.

While article 38(1)c of the Statute of the International Court of Justice provides an obvious starting point, it does contain the unfortunate reference to recognition by “civilized nations”, which the Special Rapporteur explains is there for historic reasons. The Special Rapporteur has proposed replacing “civilized nations” by “States” and we note the alternative formulations suggested in the Commission’s debates. Whether statements and resolutions of intergovernmental organizations could have a place in identifying general principles of law and ascertaining their recognition by the States that are members of that organization is a question to be explored further.

Mr./Mme. Chair,

We note that the Special Rapporteur suggests that general principles of law can have their origin both in national and international legal systems. The Commission is reported to have “unanimously accepted” that general principles of law can be derived from national legal systems, but having been less convinced about such principles originating from international legal systems. The Nordic countries agree with the Special Rapporteur in that article 38(1)c does not exclude the possibility of general principles of law emanating from other sources than national legal systems. The Martens clause, for instance, is an example of a principle that has its origin in the international legal system.

One of the most difficult questions will probably be the delineation of general principles of law from customary international law. “Recognition” as a requirement for general principles of law, is not the same as “acceptance as law” as an element of customary international law. We note the discussion in the Commission about the two-step analysis proposed by the Special Rapporteur regarding recognition with respect to general principles of law derived from national legal systems. Dealing with the requirement of recognition in relation to general principles of law will need to be assessed further as part of the future work on the topic.

The Commission has requested States to provide information on their practice relating to general principles of law, in the sense of Article 38(1)c of the Statute of the International Court of Justice. The Nordic countries feel that the significance of such information for this topic cannot be overemphasized.

There are many academic works on this topic. However, practice, whether State practice or practice of international courts, is not that plentiful. Also the practice of the International Court of Justice is perhaps not that helpful, as the Court seems to have preferred to use the composite term “general international law” without specifying whether the source of obligation was customary law or general principle of law.

Finally, we recall that this important topic requires a cautious approach and we look forward to the continued collaboration with the Commission.

Thank you, Mr./Mme. Chair.