Permanent
Mission
of Austria

to the United Nations
in New York

76th Session of the General Assembly

Sixth Committee

Agenda item 82: Report of the International Law Commission on the work of its seventy-second 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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New York, 2 November 2021

Chairperson,

Allow me to address the topic **"Succession of States in respect of State responsibility"** and to express Austria's appreciation to Special Rapporteur Pavel Šturma for his fourth report, focussing on the "impact" of state succession on forms of responsibility. In this context, the Special Rapporteur proposed four new draft articles (16 – 19) dealing with restitution, compensation, satisfaction as well as assurances and guarantees of non-repetition. In addition, he proposed draft article 7*bis* on composite acts.

Unfortunately, none of these articles were discussed in the drafting committee; they merely formed the basis for the general debate within the Commission in 2021. Instead, the drafting committee discussed and provisionally adopted draft articles 7, 8 and 9 concerning issues debated already in 2018. We will first comment on the fourth report and then consider the draft articles provisionally adopted in this year's session.

As a general matter, Austria does not support the premise underlying the fourth report 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*. The proposition that parallels may be drawn from the transfer of state debts, one of the subjects of the 1983 Vienna Convention on Succession of States in respect of State Property, Archives and Debts, seems inappropriate. As opposed to state debts, the responsibility for wrongful acts is a highly personal liability that is not transferable. A far more apposite comparison would be one to personal treaties that do not automatically pass to any successor state. In our view, a purported rule that responsibility passes from a predecessor state to a successor state would not be a welcome progressive development of law.

As regards draft article 7*bis*, Austria is not convinced that the asserted succession rule in paragraph 2 is supported by state practice. The purported rule that a successor state's responsibility extends beyond its own, unlawful act or omission appears highly speculative and not in line with existing law, as it is reflected in draft article 7*bis* paragraph 1.

In regard to draft articles 16 to 19, Austria notes that they continue to contain the ambiguous wording that, in some situations, states "may request" different forms of reparation from a successor state.

As already mentioned in our 2019 statement, we would have no problem with such wording when understood as permitting states to ask for reparation which the injuring states may grant *ex gratia*, or not. However, we are concerned that such wording is likely to be understood as a rule of automatic succession into the responsibility of the predecessor state by a successor state. In our view, such a rule does not have a legal basis in international law and should not form part of *lex ferenda* either.

Where draft articles 16 to 19 restate the general rule that a state which continues to exist after state succession will remain responsible for its unlawful acts and thus have to afford reparation, Austria does not see any problems. However, we wonder to what extent it is necessary to restate this general rule of state responsibility that is already covered by the Articles on the Responsibility of States for Internationally Wrongful Acts. In this regard, we concur with the views expressed by some members of the Commission as stated in paragraph 142 of the Commission's report.

Let me reiterate that Austria considers matters concerning succession relating to state responsibility, or more specifically the legal consequences stemming from internationally wrongful acts, to be fundamentally different from issues concerning succession to treaties, assets and debts. In the latter field, customary international law differentiates between types of treaties, assets and debts and provides for different succession rules. We do not think that any rule asserting an automatic transfer of rights and obligations to successor states where the predecessor state does not continue to exist can be identified as *lex lata*, nor would we consider it a good candidate for progressive development of law.

We welcome the idea mentioned in paragraph 149 of the report that the format of the outcome of the Commission's work on this topic be reconsidered, as expressed in our earlier statements and by a number of other delegations. We strongly support such reconsideration and deem guidelines, principles or an analytical report more appropriate than the present format of draft articles.

Chairperson, allow me to turn now to the three draft articles provisionally adopted by the Commission during its 2021 session.

Austria agrees with the rules formulated in draft article 7 concerning acts of a "continuing character" which affirm the principles of the law on state responsibility that a state incurs responsibility only for its own acts or for those of third parties that it acknowledged and adopted. The same applies to draft

article 8 restating the traditional rule of attribution of conduct of a successful insurrectional movement to a new state.

Our position in regard to draft article 9 is less positive. While we do not disagree that the responsibility of a predecessor state continues for its own acts after part of its territory becomes part of another state, we are seriously concerned about draft article 9 paragraph 2, stating that "[i]n particular circumstances, the injured State and the successor State shall endeavour to reach an agreement for addressing the injury." Quite apart from the fact that the purported rule seems to be based on the erroneous assumption of a transfer of responsibility between the predecessor and the successor state, the rule is vague and imprecise and fails to indicate elements that may help ascertain such particular circumstances. The examples of such particular circumstances given in paragraph 5 of the commentary, such as when an expropriated factory is situated in the territory of a successor state or when a successor state would be unjustly enriched, demonstrate that the resulting "exceptional situation" is not at all a transfer of responsibility from the predecessor to the successor state. Rather, it may be a justified consequence of the rule calling for the avoidance of unjust enrichment.

This leads us to the final consideration and our proposal that the Special Rapporteur should study in more depth the potential of unjust enrichment and similar doctrines. They may in fact better explain why in specific circumstances international law may require successor states to remedy acts committed by predecessor states.

Chairperson,

Permit me now to turn to the topic of "**General principles of law**". Austria commends Special Rapporteur Marcelo Vázquez-Bermúdez for his second report that focuses on the methodology of identifying general principles of law. In the following, we will comment on draft conclusions 2 and 4 as provisionally adopted by the drafting committee as well as on some further issues presented by the Special Rapporteur in his second report.

In regard to draft conclusion 2 on recognition of general principles of law, Austria has taken note of the interesting debate among the members of the ILC on the second report of the Special Rapporteur. Austria shares the view that the term "civilized nations" has become obsolete and should be replaced by a different wording. In this regard we prefer the idea to use "international community"

instead of “community of nations” since the term “nation” has different meanings. As we can read in the prestigious Max Planck Encyclopedia of International Law, “the notion of nation is decidedly unclear, disputed, and politically sensitive.”

Usage of the terminology “international community” would have the further advantage of including other subjects of international law, such as international organisations, that may also develop legal systems, similar to national legal systems, that apply internally and sometimes even to the member states and their citizens. Austria also shares and supports the position not to exclude the legal practice of international organisations as acknowledged in commentary 5 to draft conclusion 2. Hence, it would only be more unequivocal and consistent to use the wording “international community” in draft conclusion 2.

In regard to draft conclusion 4, Austria agrees with the proposed methodology for identifying general principles of law derived from national law.

The more controversial issues are addressed in the Special Rapporteur’s second report. Austria is aware of the debate concerning the preconditions for or “ascertainment of transposition” to the international legal system, currently reflected in draft conclusion 6 proposed by the Special Rapporteur. Austria agrees that the two conditions – compatibility with fundamental principles of international law and suitability for adequate application in the international legal system – may be difficult to assess in specific cases. Nevertheless, we concur with the Special Rapporteur that they are useful requirements which should be specifically laid down in the conclusions and analysed in more detail in the commentary. In that context, it might be advisable to consider adding “compatible with fundamental rules and principles of international law” which would make it clear that this includes also *ius cogens*. Furthermore, we encourage the Commission to further consider the process of “transposition” as indicated in paragraph 209 of the report.

Concerning draft conclusion 7, which addresses the question of general principles of law formed within the international legal system, Austria does not generally reject such notion. However, it is doubtful whether such principles could be identified as easily as the draft text proposed by the Special Rapporteur currently seems to suggest. We would be hesitant to ascertain general principles of law on the basis of wide recognition in treaties or other instruments, of underlying general rules of treaty or customary international law, or of being inherent in the basic features and fundamental requirements of the international legal system.

Finally, we would like to point out that confusion could occur in relation to the difference between “fundamental principles of international law” of draft conclusion 6 and “general principles of law formed within the international legal system” of draft conclusion 7. An analysis of this issue in the commentary would be useful.

I thank you.