



**Report of the International Law Commission on the work of its
seventy-second session
(Agenda item 82)
*Statement by Portugal***

Cluster 3

**Chapters: VII (Succession of States in respect of State responsibility)
and VIII (General principles of law)**

**“Succession of States in respect of State responsibility” – Chapter VI of
the ILC Report**

Madam Chair,

This statement by my delegation will be delivered in an abridged version. Our full statement will be submitted to the Secretariat.

Allow me to first address the topic “**Succession of States in respect of State Responsibility**”. Let me begin by commending the Special Rapporteur, Mr. Pavel Šturma, for his fourth report on a topic full of intricacies and complex questions.

Portugal welcomes the five new draft articles introduced in this report, addressing the impact of succession of States on forms of responsibility, including legal remedies.

Madam Chair,

Portugal remains open-minded regarding the format of the outcome of this topic. We follow the Special Rapporteur and other members of the Commission



in the idea that the progressive development of international law concerning the impact of succession of States on forms of responsibility should be consistent with the Articles on Responsibility of States for Internationally Wrongful Acts.

It is of fundamental importance that coherence and consistency be permanent drivers of any effort in progressively developing the public international legal framework.

Madam Chair,

As in the past, Portugal considers that State practice on this matter is diverse, context-specific, and sensitive and that it does not offer enough basis for affirming the existence of a general rule in connection with State succession. Therefore, Portugal reaffirms that the draft articles on succession of States in matters of State responsibility should be of a subsidiary nature and that priority should be given to agreements between the concerned States.

We are thus pleased that paragraph 2 of Draft Article 1 makes clear that, the draft articles are applicable "in the absence of any different solution agreed upon by the States concerned."

Be as it may, Portugal concurs that the commentaries to these draft articles should bring added value by including examples of succession agreements between States, as well as model-clauses to be used as a basis for negotiation of agreements on succession with regards to State responsibility. *This is without prejudice to the need of being cautious in inferring general conclusions and principles from particular instruments and practices.*



Madam Chair,

With respect to Draft Articles 16 to 19, Portugal agrees that the obligations of cessation, assurances and guarantees of non-reparation, and other forms of reparation, are forms of remedies, rather than forms of responsibility. They should, therefore, be treated accordingly.

Furthermore, as *lex specialis*, these draft articles and the legal solutions they envisage should aim to cover as many scenarios of State succession as possible. Otherwise, they run the undesirable risk of becoming mere rewritings of the general law on State responsibility for internationally wrongful acts.

Being commendable that we build upon existing legal framework, it is equally important to ensure that further developments on the law on State responsibility seek to respond to idiosyncratic needs or problems, like the ones that are characteristic of situations of State succession.

Madam Chair,

Portugal further believes that the long-established principle of full reparation does not prevent, as a rule, States from concluding settlement agreements, including lump sum agreements. However, an exception should be in place in situations involving the breach of peremptory norms of general international law and of *erga omnes* obligations.

In these cases, the validity of such agreements depends on them meeting the necessary threshold of full reparation. It is important to note that *jus cogens* and *erga omnes* obligations aim to protect values and interests of the whole international community, and not exclusively those of the States directly involved in the breach.



Therefore, it would be unreasonable if the concerned States alone could settle on the remedy for their breach. Accordingly, Portugal considers that, in situations where interests and values of the international community as a whole are at stake, the principle of full reparation should be fully respected, with no exceptions.

As to whether the prosecution of international crimes could be considered as a form of satisfaction, Portugal would deem helpful that the Special Rapporteur could provide additional evidence of State practice supporting this view. In the absence of specific and sound evidence of State practice, Portugal argues that, in principle, the prosecution of international crimes should not be regarded as a form of satisfaction.

Madam Chair,

Finally, as to whether a State must offer appropriate assurances and guarantees of non-repetition, paragraph 1 in Draft Article 19 makes it dependent on the circumstances of the case requiring it. In this regard, Portugal considers that the expression "if circumstances so require," which implies a case-by-case analysis, fails to provide States enough guidance as to its scope of application.

Therefore, my delegation considers it would be helpful to substantiate, either in the provision itself or in the commentaries, the meaning and extent of application of that expression.

Madam Chair,

Portugal will continue to follow closely the topic on the Succession of States in respect of State responsibility, hoping that it may be completed on first reading at the Commission's Seventy-Third Session.



“General principles of law” – Chapter VIII of the ILC Report

Madam Chair,

I will now proceed to the topic of **“General Principles of Law”**, starting with a word of appreciation to the Special Rapporteur, Mr. Marcelo Vázquez-Bermúdez, for his second report, in which he proposed six new draft conclusions.

My delegation thanks the Secretariat for having produced a high-quality memorandum surveying the case law of inter-State arbitral tribunals and international criminal courts and tribunals of a universal character, as well as treaties. That document will certainly be relevant for future work of the Commission on this topic.

Madam Chair,

We take good note of the agreement of members of the Commission with statements by States at the Sixth Committee indicating that the starting point for the work of the Commission on this topic should be Article 38, paragraph 1 (c), of the Statute of the International Court of Justice, in light of State practice, jurisprudence and relevant teachings.

As previously stated before this Committee, Portugal believes that this topic gives the Commission a chance for complementing its existing work on other sources of international law and for providing added guidance on the nature, identification, and application of the general principles of law, as well as on their relationship with other sources of international law.

Hence, Portugal welcomes the discussions at the Commission in this session that have resulted in provisionally adopting Draft Conclusions 1, 2 and 4 and their respective commentaries.



These elements constitute a solid first step for a new outlook on this important source of International Law, showcasing the Commission's fundamental role as an active interpreter and guiding body.

Madam Chair,

Considering past statements by Portugal at the Sixth Committee, my delegation wishes to briefly refer to Draft Conclusion 2 and its commentaries, as provisionally adopted by the Commission.

The term "civilized nations", which dates from almost 100 years ago, is archaic and has no place in contemporary international relations.

We had also encouraged the Commission to further study the role of international organisations in the formation and recognition of general principles of law, underlying that one of the most noteworthy developments in the last century was precisely the role that international organisations had been playing in the formation of international law.

Portugal takes good note that Paragraph 5 in the commentaries to Draft Conclusion 2 declares that (quote) «(...) *international organizations may also contribute to the formation of general principles of law.*» (unquote).

Still, my delegation would have preferred that Draft Conclusion 2 used a term that could undoubtedly encompass international organisations, instead of the wording "community of nations".

In fact, Portugal has, for a number of reasons, difficulties with the term "community of nations" that, today, cannot be understood in a rather simplistic



fashion as referring to States. We thus encourage the Commission to revisit this concept.

Madam Chair,

As for the Draft Conclusions proposed by the Special Rapporteur in his second report, Portugal supports the two-step analysis, contained in Draft Conclusion 4, for the identification of general principles of law derived from national legal systems.

Accordingly, my delegation also sees the methodology for identifying general principles of law derived from national legal systems as resting upon two combined determinations. Firstly, determining the existence of a principle that is common to different legal systems around the world. Secondly, determining the transposition to the international legal system of that principle.

Portugal argues that the comparative analysis mentioned in Draft Conclusion 5 must be sufficiently extensive and representative, in line with the approach followed by the Commission in the Draft Conclusions on Identification of Customary International Law. Elements for determining representativity must, in our opinion, include an analysis on geographical and linguistic diversity, in addition to criteria on legal diversity (different legal systems or legal families).

With respect to both paragraph 3 of Draft Conclusion 5 and to Draft Conclusion 8, Portugal stresses that national courts may rely on sources of law different from those applicable under international law. Furthermore, those different sources of law may be organised according to a hierarchy specific to different legal systems. This should be considered when conducting an analysis of decisions of national courts for determining the existence of a general principle of law.



Finally, and recalling Part Five of the Draft Conclusions on Identification of Customary International Law, my delegation would welcome draft conclusions (and commentaries) on the usefulness or significance of other subsidiary means for the determination of general principles of law. These could cover, for example, resolutions of the United Nations or international expert bodies, and outputs of the International Law Commission.

Madam Chair,

Portugal looks forward to the next report by the Special Rapporteur, focusing on the functions of general principles of law and their relationship with other sources of international law.

On this subject, my delegation reiterates the view that, in that study, establishing a hierarchy between the several sources of international law should be avoided. It should also be taken into account that the General Principles of Law, in addition to setting the ethical-normative scene for other norms, have a supplementary role of filling the gaps, and avoiding rulings of *non liquet*.

Madam Chair,

This concludes the statement of my delegation under Cluster 3 of this agenda item.

Thank you, Madam Chair.