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Report of the International Law Commission on the work of its 72nd session:
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 the Commission made on the topic "**Succession of States in respect of State responsibility**", and appreciates the contribution of the Special Rapporteur Pavel Šturma to this achievement. Today we will focus on three articles with commentaries adopted by the Commission at its recent session.

Draft article 7 deals with acts having a continuing character. It is intended to apply generally to all categories of State succession. It addresses two issues, namely that of successor's responsibility for its own wrongful conduct after the date of State succession and that of successor's eventual responsibility for the consequences of predecessor's conduct prior to the date of succession.

An internationally wrongful act of the predecessor State which is of "continuing character" and an internationally wrongful act of the successor State of "continuing character", even if they are of the same content and were committed sequentially (back-to-back) are two different acts, each of them engaging independently international responsibility of its author.

Indisputably, the successor State is responsible for any wrongdoing of its own, in which it engaged after the date of State succession. This applies irrespective whether such wrongful act is of continuing character or consists of a single act.

We support the main gist of the second sentence of article 7, namely that, in certain circumstances, the successor States shall assume secondary obligations resulting from its predecessor's wrongful conduct before the date of State succession. We however doubt whether such rule could rely on the concept of the "acknowledgement" and "adoption" of predecessor's conduct by the successor State, borrowed from Article 11 of the Articles on Responsibility of States for Internationally Wrongful Acts and significantly altered.

Article 11 of the articles on State responsibility deals solely with the conduct of private actors (subjects), which otherwise would not be attributable to the State under whose jurisdiction these private subjects acted. Through the "acknowledgment and adoption" of their conduct the State grants an official status to otherwise private conduct and therefore assumes also the consequences of such actions as if they were executed on its behalf. Article 11 does not deal with the attribution to a State of the conduct of another State. Such situations are covered by articles 16 – 19 of the Articles on State Responsibility. None of these articles however envisages the possibility of attributing the conduct of a State to a State, which does not even exist at the time when the wrongful act is performed. Thus, it seems that the premise of "acknowledgment" or "adoption" laid down in draft article 7 does not have support in the Articles on Responsibility of States for Internationally Wrongful Acts.

Madam / Mr. Chair,

We would also like to recall what the Commission said in 2001 in its own commentary to article 14 of the Articles on Responsibility of States, concerning the acts of continuing character. I quote:

"[(4) Whether a wrongful act is completed or has a continuing character will depend both on the primary obligation and the circumstances of the given case. [….] (5) Moreover,]

… the distinction between completed and continuing acts is a relative one. [….] Where a continuing wrongful act has ceased, […] the act is considered for the future as no longer having a continuing character, even though certain effects of the act may continue.

[(6) […] The pain and suffering caused by earlier acts of torture or the economic effects of the expropriation of property continue even though the torture has ceased or title to the property has passed. Such consequences are the subject of the secondary obligations of reparation, including restitution, as required by Part Two of the articles.]"

It seems therefore that the issue at stake is not the continuing character of the wrongful act, but rather lasting consequences of predecessor's wrongful act and the ability of the successor State to contribute to the elimination of these consequences (e.g. by the restitution of the status *quo ante*).

This is in particular evident in the scenario, when the internationally wrongful act was committed by a State against the predecessor State. Successor State inherits the burden of damage caused by the wrongful act committed against the predecessor and will have to deal with it irrespective of whether, after the date of State succession, the wrongful conduct against the successor State retained its "continuing character", or eventually stopped.

In this respect we also note that despite seemingly general ambit of draft article 7 (it seems to apply to all categories of State succession), its sole focus are internationally wrongful acts of continuing character committed by the predecessor State and followed by those committed by the successor State. However, the Commission did not analyse a reverse situation, namely that of internationally wrongful acts of continuing character committed by a State against the predecessor State which were followed, after the date of State succession, by the same kind of wrongdoing against the successor State.

In this scenario, *[the wrongdoing State is the same both before and after the date of State succession, however the victims of its continuing wrongful acts are two different States – namely the predecessor State and the successor State. At the same time,]* the real impact of the wrongful conduct, both before and after the date of State succession, may be felt by the same population or may affect the same property, even if they passed from the jurisdiction of the predecessor State under the jurisdiction of the successor State. The successor State should be entitled to reparation of injury which accumulated both in the period after the date of State succession, but also in the period before that date. This would be consistent with what the Commission proposes in the second sentence of draft article 7.

It seems that for this purpose it also is not important whether the wrongful act consisted of a single act or was of continuing character. The focus should be rather on consequences of an international wrongful act committed by the predecessor State or against it from the perspective of lasting adverse effects of such act and their desired elimination, in accordance with requirements of fairness and restoration of justice.

Draft article 8 on attribution of conduct of an insurrectional or other movement restates provisions of paragraphs 2 and 3 of Article 10 of the Articles on Responsibility of States. While we agree with its content, we do not see sufficient reason for such repetition. Should the Commission believe that this draft article is needed, it would be only logical to elaborate also the provision addressing the reverse scenario, namely the reparation for internationally wrongful acts committed against an insurrectional or other movement which succeeds in establishing a new State.

Finally, draft article 9 deals with cases of succession of States when the predecessor State continues to exist. The Czech delegation commented extensively on this draft article in 2019 when it was provisionally adopted by the Drafting Committee. We note with satisfaction that some of our concerns have been addressed in the commentary to this article.

Madam / Mr. Chair,

Let me now turn to the work of the International Law Commission on the topic of "**General principles of law**". We welcome the Second Report of the Special Rapporteur, covering the methodology for their identification. Draft conclusions presented by the Special Rapporteur provide a convenient basis for further discussions and we look forward to their consideration and development by the Commission.

Nevertheless, the Czech Republic would like to reiterate its last year's position that it understands general principles of law as those originating in and derived from the national legal systems, and *not* as those formed primarily within international legal system. We share the concerns of some members of the Commission and Member States that recognition of the latter category could be problematic for several reasons. Firstly, there is insufficient State practice to identify them. Secondly, it would be hard or impossible to distinguish them from customary international law. And thirdly, it could lead to the circumvention of the State's consent. This is apparent from draft conclusion 7 (a) according to which the existence of the general principle of law formed within the international legal system could be determined on the basis of its wide recognition "in treaties and other international instruments". Nevertheless, under such an approach the emerged principle could bind the States that did not accept the relevant rule from which the principle is derived in the first place, leading to the circumvention of State's consent as the principal foundation of international law.

More generally, we would like to reiterate that the principles formed within the international legal system apply only to relations between States or other subjects of international law and this makes them distinct from and independent of the „general principles of law" within the meaning of Article 38 paragraph 1 (c) of the Statute of the International Court of Justice. The term "principles formed within the international legal system", in our view, refers to highly general rules of conduct that are contained in a source of international law, namely in treaties or international custom. Often, these principles take a customary form, since it is the customary process that by its very nature tends to shape general patterns of State conduct. Occasionally, a customary principle will be taken over and confirmed by a treaty instrument, thus reinforcing its importance in inter-State practice.

To conclude, Madam / Mr. Chair, even though, according to Article 38 paragraph 1 (c) of the Statute of Court, the general principles of law formally constitute one of the three sources of international law, in practice they only supplement the main sources - treaties and international custom. Further study and analysis should clarify the position of general principles of law among other sources of international law, namely their relationship to treaties and international custom. Therefore, we are awaiting with interest the next report of the Special Rapporteur and consideration of this topic by the Commission.

Thank you, Madam / Mr. Chair.