Report of the International Law Commission

Agenda item 82

"Report of the International Law Commission on the work of its seventy-second session, Cluster 3"

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Cluster III

Chapter VII - Succession of States in respect of State responsibility

Madam Chair, I would now like to turn to the topic on Succession of States in respect of State responsibility. We have noted the effort made by the Special Rapporteur in his fourth report. We have also taken note of the debate in the Commission and my Government agrees with some of the comments made by the members of the Commission. I would like to address four issues.

The first concerns the form of the present project. As my Government has stated before – and incorrectly reflected in the Special Rapporteur's Fourth report (2020) – the Netherlands is not convinced that this should take the form of draft articles with commentaries, principles or guidelines, and does not support such outcome. In view of the way in which this topic develops, my Government could only support an outcome in the form of a study, a report, or an analysis of the relevant topics. To this might be added a list of issues to be considered in case of State succession. This could be a check-list, or building blocks for succession agreements. The topic of Succession of States in respect of State responsibility is not suitable for an outcome in the form of articles, guidelines or principles.

Second, my Government wishes, in support of members of the Commission, to reiterate its concern with the frequent restatements of the law on State responsibility. As the Commission noted, this may lead to misstatements of the law. We would therefore urge the Commission, and in particular the Special Rapporteur, to refrain from this exercise. Rather, we would recommend that the Special Rapporteur collect relevant State practice, including a comparison of, and reflection on, the various agreements concluded by States in situations of State succession.

Third, and more substantially, my Government has noted the debate in the Commission concerning the general rule of non-succession and that of 'automatic' succession. In this respect, my Government would reiterate its position, as previously expressed, that the point of departure should be the principle that no legal vacuum in terms of State responsibility should emerge. This applies both to situations of dissolution or unification, where the original State has disappeared, and to situations of secession, where the predecessor State remains. Whether rights or obligations be transferred in specific situations should be assessed on a case-by-case basis and be addressed in a

succession agreement. If such agreement cannot be reached, the legal vacuum should be avoided by transferring rights and obligations to the successor State or States.

Fourth and finally, my Government wishes to express its concern with the Special Rapporteur's treatment of reparation in case of State succession and its different forms. The law on State responsibility, as reflected in the Articles on the Responsibility of States for Internationally Wrongful Acts, adequately regulates this topic. The flexibility found in the law on State responsibility regarding the various forms of reparation in turn reflects that every situation involving a wrong to be repaired is different. What is an appropriate, and just, form of reparation must be determined on a case-by-case basis. Satisfaction is a form of reparation *par excellence* that cannot be predefined, and its flexibility has proven very useful in the settling of disputes. There is no reason for a different approach in situations of succession of States. My Government therefore urges the Special Rapporteur to refrain from defining, and redefining, the forms of reparation and to align his work with the work of the Commission on the general law on State responsibility.

Chapter VIII - General Principles of Law

The Netherlands wishes to extend its congratulations to the Special Rapporteur for his second report on general principles of law and to the Commission for the insightful plenary debate as is reflected in the ILC report. As to the identification of general principles of law in the sense of Article 38(1) of the Statute of the ICJ and the proposed six draft conclusions, the Netherlands would like to present the following observations.

The Netherlands would like to reiterate its previously expressed position that it welcomes the two categories of general principles of law as proposed by the Special Rapporteur, namely general principles of law derived from national legal systems, and general principles of law formed within the international legal system. In this respect, the Netherlands welcomes the suggestions for the future programme of work on the topic. The Netherlands looks forward in particular to the next study of the Special Rapporteur, on the relation between general principles of law and other sources of international law. The Netherlands believes it is important to distinguish the identification of general principles of law formed within the international legal system from the identification of other sources of international law. This is in order to clarify whether general principles of law formed within the international legal order

can exist as such, as an individual source of international law, or whether these general principles of law can only be regarded as a source of international law when also found in the corpus of customary international law or treaty law.

Furthermore, the Netherlands believes that general principles of law may usefully serve as a reference framework for the identification or deduction of applicable rules of general international law. In this way, judges in international courts and tribunals may use general principles of law for the settlement of disputes.

The Netherlands would like to refer to one example from the *Arctic Sunrise* Arbitration between the Netherlands and the Russian Federation. In its Award on the Merits of 14 August 2015, the arbitral tribunal held that the right to protest at sea, which derives from human rights standards, such as the freedom of expression and the freedom of assembly, is an internationally lawful use of the sea related to the freedom of navigation. Hence, with the use of the general principle of law of freedom of navigation, the arbitral tribunal had regard to the rules of international human rights law to assist in the interpretation and application a general principle of the law of the sea, namely the freedom of navigation, one of the freedoms of the high seas.

Thank you.