

## Chapter IX

### SUCCESSION OF STATES IN RESPECT OF STATE RESPONSIBILITY

#### A. Introduction

211. At its 3354th meeting, on 9 May 2017, the Commission decided to include the topic “Succession of States in respect of State responsibility” in its programme of work and appointed Mr. Pavel Šturma as Special Rapporteur.<sup>791</sup>

#### B. Consideration of the topic at the present session

212. At the present session, the Commission had before it the first report of the Special Rapporteur (A/CN.4/708), which sought to set out the Special Rapporteur’s approach to the scope and outcome of the topic, and to provide an overview of general provisions relating to the topic.

213. The Commission considered the first report at its 3374th to 3381st meetings, from 13 to 25 July 2017.

214. At its 3381st meeting, on 25 July 2017, the Commission decided to refer draft articles 1 to 4, as contained in the Special Rapporteur’s first report, to the Drafting Committee, taking into account the views expressed in the plenary debate and on the understanding that draft articles 3 and 4 would be left pending in the Drafting Committee.

215. At its 3383rd meeting, on 31 July 2017, the Chairperson of the Drafting Committee presented an interim oral report on draft articles 1 and 2, provisionally adopted by the Drafting Committee. The report was presented for information only and is available from the website of the Commission.<sup>792</sup>

#### 1. INTRODUCTION BY THE SPECIAL RAPPORTEUR OF THE FIRST REPORT

216. The Special Rapporteur indicated that his first report focused on general provisions that would underpin the future examination of the topic. The report first provided an overview of views received from delegations during the debate of the Sixth Committee at the seventy-first session of the General Assembly, in 2016, in which several delegations had expressed support for the inclusion of the topic in the Commission’s long-term programme of work, with a particular focus on its potential to fill gaps within international law. A few delegations had questioned the contemporary relevance of the topic, and had expressed some doubt as to the possibility of States finding consensus on the controversial topic.

<sup>791</sup> The topic had been included in the long-term programme of work of the Commission during its sixty-eighth session (2016), on the basis of the proposal contained in annex II to the report of the Commission on the work of that session (*Yearbook ... 2016*, vol. II (Part Two), para. 36 and p. 23.

<sup>792</sup> <http://legal.un.org/ilc>.

217. Regarding the scope and outcome of the topic, a question inextricably linked to the previous work of the Commission, the Special Rapporteur reiterated that the topic dealt with two areas of international law that were already the object of codification and progressive development by the Commission: namely, succession of States and State responsibility. The Special Rapporteur drew attention to the previous work of the Commission that had left gaps for examination at a later point,<sup>793</sup> as well as the work concluded on the topic by the Institute of International Law.<sup>794</sup> The Special Rapporteur emphasized that the aim of examining the topic was to shed more light on the question of whether there were rules of international law governing both the transfer of obligations and the transfer of rights arising from the international responsibility of States for internationally wrongful acts in situations of succession of States. With a focus on the secondary rules of international responsibility, the scope of the topic would not extend to any issues of international liability for injurious consequences arising out of acts not prohibited by international law. The Special Rapporteur indicated that the work on the topic should also follow the main principles of succession of States concerning the differentiation of transfer of a part of a territory, secession, dissolution, unification and creation of a new independent State.

218. Noting the relevant precedents of the articles on responsibility of States for internationally wrongful acts and those articles that became the Vienna Convention on Succession of States in Respect of Treaties (hereinafter “1978 Vienna Convention”) and the Vienna Convention on Succession of States in Respect of State Property, Archives and Debts (hereinafter “1983 Vienna Convention”), as well as the articles on nationality of natural persons in relation to the succession of States, the Special Rapporteur indicated that the appropriate form for the topic appeared to be draft articles with commentaries thereto.

<sup>793</sup> With respect to international responsibility, this includes the 2001 draft articles on responsibility of States for internationally wrongful acts, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, paras. 76–77 (see also General Assembly resolution 56/83 of 12 December 2001, annex); and the 2011 draft articles on the responsibility of international organizations, *Yearbook ... 2011*, vol. II (Part Two), paras. 87–88 (see also General Assembly resolution 66/100 of 9 December 2011, annex). With respect to succession of States, this includes the 1978 Vienna Convention on Succession of States in Respect of Treaties; the 1983 Vienna Convention on Succession of States in Respect of State Property, Archives and Debts, not yet in force; and the 1999 draft articles on nationality of natural persons in relation to the succession of States, *Yearbook ... 1999*, vol. II (Part Two), paras. 47–48 (see also General Assembly resolution 55/153 of 12 December 2000, annex). Issues of succession also appear in the context of the Commission’s work on the draft articles on diplomatic protection, *Yearbook ... 2006*, vol. II (Part Two), paras. 49–50 (see also General Assembly resolution 62/67 of 6 December 2007, annex).

<sup>794</sup> Institute of International Law, resolution on succession of States in matters of international responsibility, *Annuaire de l’Institut de droit international*, vol. 76 (Tallinn session, 2015) (available from the Institute’s website: [www.idi-iil.org](http://www.idi-iil.org)).

219. Concerning the general provisions that would form the foundation for further examination of the topic, the Special Rapporteur noted that, historically, the doctrine of State succession had generally denied the possibility of the transfer of responsibility to a successor State—the theory of non-succession.

220. While acknowledging that the body of scholarship and theory had supported that position, the Special Rapporteur highlighted that some scholars had questioned the existence of a general rule on State succession applicable in all circumstances. The Special Rapporteur introduced a preliminary survey of State practice in the report, including some judicial decisions, relating to international responsibility in different cases of State succession. He underlined his provisional conclusion that modern international law did not support the general thesis of non-succession in respect of State responsibility. The Special Rapporteur also examined the relevance to the present topic of the two Vienna Conventions on succession. The Special Rapporteur emphasized that, in order to ensure a systemic integration approach, it would be important to utilize the same terms and definitions in a uniform manner for succession in respect of treaties, State property, debts and archives, nationality of natural persons, and State responsibility.

221. The Special Rapporteur noted that there was no universal regime concerning succession of States, but rather several areas of legal relations to which succession of States applies. Therefore, rules on succession of States in one area, e.g. in respect of treaties, may differ from the rules in another area, e.g. in respect of State property, debts and archives. He underlined that different areas of succession were independent and governed by special rules.

222. The Special Rapporteur also drew the Commission's attention to the complicated question of whether obligations arising from wrongful acts are "debts" subject to the 1983 Vienna Convention or are otherwise to be examined under the current topic. The Special Rapporteur drew attention to his preliminary conclusion that it would be a debt for the purposes of rules on succession in respect of State debts, if such an interest in assets of a fixed or determinable value was acknowledged by the State or so adjudicated by an international court or arbitral tribunal at the date of succession. However, if an internationally wrongful act occurred before the date of the succession, but the legal consequences arising therefrom had not already been specified (e.g. a specific amount of compensation was not awarded by an arbitral tribunal), then any possible transfer of obligations or rights should be governed by rules on succession of States in respect of State responsibility.

223. According to the Special Rapporteur, from his analysis, there appeared to be support for two preliminary conclusions, namely that the traditional thesis of non-succession had been questioned in modern practice; and that the transfer or not of obligations or rights arising from State responsibility in specific kinds of succession needed to be proved on a case-by-case basis. Drawing on the Commission's experience with respect to its work on succession of States, as well as the rarity and highly political nature of the subject matter, the Special Rapporteur

highlighted that the rules to be codified should be of a subsidiary nature. As such, they could serve two purposes. First, they could present a useful model that could be utilized and also modified by the States concerned. Second, in cases of lack of agreement, they could present a default rule to be applied in case of dispute.

224. Noting that, in principle, an agreement between the States concerned should have priority over subsidiary general rules on succession to be proposed in the work under the present topic, the Special Rapporteur elaborated on the analysis in his report of the relevance of such agreements, in view of the *pacta tertiis* rule set out in articles 34 to 36 of the Vienna Convention on the Law of Treaties. Classifying the relevant agreements into the categories of devolution agreements, claims agreements and other agreements, the Special Rapporteur drew on an examination of a variety of relevant agreements between predecessor and successor States to suggest that a nuanced approach be taken, with a focus on the content of and the parties to such agreements, to determine the applicable rule.

225. The Special Rapporteur also addressed the question of the relevance of unilateral acts in the context of the present topic. He highlighted the work in his report, which had first analysed certain examples of unilateral acts and then the relevant rules on State responsibility and unilateral acts of States adopted thus far by the Commission. The Special Rapporteur highlighted that, after examination of those examples, a distinct approach to the question of unilateral acts in the context of international responsibility, as opposed to the strict approach adopted under the 1978 Vienna Convention, should be proposed.

226. The Special Rapporteur proposed four draft articles. The first dealt with the scope of the entire set of draft articles;<sup>795</sup> the second presented a series of definitions of specific terms, drawing on the definitions included in the two Vienna Conventions on succession and the draft articles on responsibility of States for internationally wrongful acts;<sup>796</sup> the third set out a framework to analyse the relevance of the agreements to succession of States in

<sup>795</sup> The text of draft article 1 proposed by the Special Rapporteur in his first report reads as follows:

"Scope

"The present draft articles apply to the effect of a succession of States in respect of responsibility of States for internationally wrongful acts."

<sup>796</sup> The text of draft article 2 proposed by the Special Rapporteur in his first report reads as follows:

"Use of terms

"For the purposes of the present draft articles:

"(a) 'succession of States' means the replacement of one State by another in the responsibility for the international relations of territory;

"(b) 'predecessor State' means the State which has been replaced by another State on the occurrence of a succession of States;

"(c) 'successor State' means the State which has replaced another State on the occurrence of a succession of States;

"(d) 'date of the succession of States' means the date upon which the successor State replaced the predecessor State in the responsibility for the international relations of territory to which the succession of States relates;

"(e) 'international responsibility' means the relations which arise under international law from the internationally wrongful act of a State;

"[...]"

respect of responsibility,<sup>797</sup> and the fourth provided for a framework with respect to unilateral declarations made by a successor State.<sup>798</sup>

227. As regarded the future work programme, the Special Rapporteur envisaged that the Commission would consider: the issues of transfer of the obligations arising from the internationally wrongful act of the predecessor State, in 2018; the transfer of the rights or claims of an injured predecessor State to the successor State, in 2019; and any remaining procedural and miscellaneous issues, including the plurality of successor States, or a possible application of rules on succession of States in respect of State responsibility to injured international organizations or to injured individuals, in 2020. The Special Rapporteur indicated that, depending on the progress of the debate, the entire set of draft articles could be adopted on first reading in 2020 or 2021.

## 2. SUMMARY OF THE DEBATE

### (a) General comments

228. Members welcomed the first report of the Special Rapporteur, and supported the need for harmony between the present topic and the previous work of the Commission

<sup>797</sup> The text of draft article 3 proposed by the Special Rapporteur in his first report reads as follows:

*“Relevance of the agreements to succession of States in respect of responsibility*

“1. The obligations of a predecessor State arising from an internationally wrongful act committed by it against another State or another subject of international law before the date of succession of States do not become the obligations of the successor State towards the injured State or subject only by reason of the fact that the predecessor State and the successor State have concluded an agreement providing that such obligations shall devolve upon the successor State.

“2. The rights of a predecessor State arising from an internationally wrongful act owed to it by another State before the date of succession of States do not become the rights of the successor States towards the responsible State only by reason of the fact that the predecessor State and the successor State have concluded an agreement providing that such rights shall devolve upon the successor State.

“3. An agreement other than a devolution agreement produces full effects on the transfer of obligations or rights arising from State responsibility. Any agreement is binding upon the parties to it and must be performed by them in good faith.

“4. The preceding paragraphs are without prejudice to the applicable rules of the law of treaties, in particular the *pacta tertiis* rule, as reflected in articles 34 to 36 of the Vienna Convention on the Law of Treaties.”

<sup>798</sup> The text of draft article 4 proposed by the Special Rapporteur in his first report reads as follows:

*“Unilateral declaration by a successor State*

“1. The rights of a predecessor State arising from an internationally wrongful act committed against it by another State or another subject of international law before the date of succession of States do not become the rights of the successor State by reason only of the fact that the successor State has made a unilateral declaration providing for its assumption of all rights and obligations of the predecessor State.

“2. The obligations of a predecessor State in respect of an internationally wrongful act committed by it against another State or another subject of international law before the date of succession of States do not become the obligations of the successor State towards the injured State or subject only by reason of the fact that the successor State has accepted that such obligations shall devolve upon it, unless its unilateral declaration is stated in clear and specific terms.

“3. Any unilateral declarations by a successor State and their effects are governed by rules of international law applicable to unilateral acts of States.”

on related topics of responsibility and succession. A number of members underlined that the present topic would fill gaps previously left by the Commission during the examination of those related topics, although the view was also expressed that the first report of the Special Rapporteur had provided insufficient examination of the relationship of the present topic with the Commission's articles on responsibility of States for internationally wrongful acts. Some concern was expressed regarding the speed and manner of the selection of the topic to be included on the Commission's agenda at the start of a new quinquennium, which might have resulted in a lack of discussion over the purpose and outcome of the topic; some members encouraged the Commission to examine how it selected topics on which to work.

229. While some members suggested that the topic was a highly relevant one, which it was right to take up at the current time and with support and practice from States now present, other members questioned its current significance. The rarity of succession, as well as the different political and historical contexts in which it occurred, was raised as an obstacle to identifying any unified or clear trend in practice. Some members raised the concern that a very limited number of States had shown interest in the topic in the Sixth Committee. Several members supported the Commission's consideration of the work of private bodies on the topic, including the Institute of International Law<sup>799</sup> and the International Law Association,<sup>800</sup> but underlined that the Commission should proceed independently in its examination of the topic. The need for the Special Rapporteur to provide the Commission with a more systematic account of the relevant materials, especially with respect to State practice and case law, as well as the direction and purpose of the topic, was pointed out.

230. Regarding the general rule on succession of States in respect of State responsibility, several members emphasized that it would be necessary to examine the general substantive rules relating to succession of States relating to State responsibility before examining the potential exceptions or saving clauses that had been set out in draft articles 3 and 4; however, it was also stated that those established ways to transfer responsibility were not dependent on the general rule.

231. A number of members underlined that the “traditional” rule of non-succession that the Special Rapporteur had outlined remained the prevailing position at the present time, with the possibility of automatic succession being limited to succession to State debts, and the potential for a limited range of clearly established possible exceptions to non-succession being available. Other members expressed doubt that the traditional rule of non-succession had changed, although the report of the Special Rapporteur suggested he saw it otherwise, and suggested that any shift from the traditional rule must be supported by clear and unambiguous evidence of State practice and decisions of courts and tribunals.

<sup>799</sup> See footnote 794 above.

<sup>800</sup> International Law Association, *Report of the Seventy-third Conference, held in Rio de Janeiro, Brazil, 17–21 August 2008* (London, 2008), pp. 250 *et seq.*

232. Several members also highlighted that the examples of State practice and jurisprudence, both national and international, that the Special Rapporteur had cited to support his position for evolution in the traditional rule did not in fact support that finding, while other members suggested that, at a minimum, the jurisprudence presented by the Special Rapporteur did suggest that any general rule was not absolute. It was also stated that the doctrine presented by the Special Rapporteur did not support an evolving trend either. In particular, the judgment of the International Court of Justice in the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*<sup>801</sup> case had been limited to the explicit agreement of succession of responsibility between Hungary and Slovakia, and the Court had not given any indication as to the wider question of succession to State responsibility. In turn, the Court had not taken a position either way in the *Genocide* case between Croatia and Serbia<sup>802</sup> on the question of succession regarding State responsibility. It was underlined that agreements between States or unilateral declarations on matters of succession could not depend on a sense of obligation arising from general international law and might support the traditional rule as opposed to any new trend. Alternatively, it was also suggested that the “trend” identified by the Special Rapporteur of moving away from the traditional rule of non-succession could be limited to specific forms of succession, and therefore how the Commission analysed those situations would affect the final outcome.

233. In examining the question of a general rule on succession, some members emphasized a desire for greater attention to State practice, as well as to practice from all regions. Concern was expressed that there was a lack of clarity as to the extent that examination of the topic was to be an exercise of codification or of progressive development. Some members stated that given the prevailing traditional default position of non-succession, examination of the topic would necessarily be an exercise of progressive development and that, given the Commission’s history on topics relating to succession, wide acceptance by States of a final set of articles on the topic would be difficult to achieve.

234. Support was expressed by several members for the Special Rapporteur’s indication in his first report that he would focus on differing forms of succession in examining the topic. Some members underscored that a necessary component of examining differing forms of succession was a clear and detailed explanation of the factual differences in such circumstances.

#### (b) *Specific comments*

##### (i) *Draft article 1. Scope*

235. The suggestion was made by several members to amend the scope as proposed by the Special Rapporteur to include “in respect of rights and obligations arising out of an internationally wrongful act”, thereby ensuring greater clarity and focus in the scope of the topic, as opposed

to a general focus on State responsibility. While some members suggested that the topic required examination of primary rules of obligation, other members supported the view that the topic should focus exclusively on general secondary rules of responsibility. While a number of members agreed with the Special Rapporteur on excluding questions concerning responsibility to international organizations from the topic, other members suggested that the Special Rapporteur examine the rights of international organizations as an injured party in his future work. Members expressed opposing viewpoints over the decision to exclude “liability” from examination, and issues concerning the terms “responsibility” and “liability” in certain languages were raised by some members.

236. Several members opposed a suggestion to request the Special Rapporteur to include an examination of the succession of governments in his work, while some members supported the suggestion to also include examination of whether the succession itself had been lawful or unlawful under international law.

##### (ii) *Draft article 2. Use of terms*

237. A number of members supported the elaboration of the use of terms set out in subparagraphs (a)–(d) of draft article 2, with members concurring with the Special Rapporteur’s utilization of previous work of the Commission. Some concern that the use of the word “replaced” in subparagraphs (b)–(d) could be misleading was raised, given the instances of succession where the predecessor State did not cease to exist or had not been replaced entirely. Additionally, a concern was raised over subparagraph (a), given that the definition did not refer to the additional test of “legality” found in the 1978 Vienna Convention, and thus it was suggested that its final form for the topic remain open for discussion.

238. With respect to subparagraph (e) on defining “international responsibility”, the view was expressed that a definition of the term “internationally wrongful act” would be necessary, while several members felt the entire subparagraph was unnecessary to the examination of the topic and should be deleted. It was also suggested that the words “consequences”, “legal consequences” or “covers international relations”, in terms of the rights and obligations arising from internationally wrongful acts, would be more appropriate than “relations” in subparagraph (e).

239. A number of members suggested additional terms that should be defined in this draft article, including “devolution agreement”, “unilateral declaration”, “another subject of international law”, “compensation agreement”, as well as further definitions of the types of succession that the Special Rapporteur had indicated he would examine across the topic.

##### (iii) *Draft article 3. Relevance of the agreements to succession of States in respect of responsibility*

240. Several members raised the possibility of deleting or simplifying paragraphs 3 and 4, as they might be redundant, merely restating that those agreements were subject to treaty law principles, and addressing the content in the commentary. It was suggested that the “without

<sup>801</sup> *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, I.C.J. Reports 1997, p. 7.

<sup>802</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment, I.C.J. Reports 2015, p. 3.

prejudice” clause of paragraph 4 relating to the *pacta tertiis* rule made the distinctions in the forms of agreement set out in paragraphs 1 to 3 redundant. Some members sought greater specification as to the meaning of “an agreement other than” in paragraph 3.

241. Further suggestions from members to the Special Rapporteur included considering developments in the *pacta tertiis* rule in terms of devolution agreements, and the need to delve deeper into the different forms of succession before examining agreements.

(iv) *Draft article 4. Unilateral declaration by a successor State*

242. Some members noted that the phrase “stated in clear and specific terms” included in the Special Rapporteur’s proposed draft article 4, paragraph 2, did not include all of the criteria for a unilateral act to be binding that had been included in the Commission’s previous work on unilateral declarations,<sup>803</sup> and suggested that draft article 4 be amended to include a general reference to all these requirements. The need for the Special Rapporteur to focus on further situations of the assumption of responsibility by a State, outside the confines of unilateral declarations, was emphasized. Finally, it was suggested that the order of the elements of draft article 3 should be reproduced in draft article 4 for consistency.

243. While some members supported sending all four draft articles to the Drafting Committee, other members supported the sending of only draft articles 1 and 2, suggesting that articles 3 and 4 be held back for further discussion or at least kept within the Drafting Committee until further reports of the Special Rapporteur had been examined. The view was also expressed that further discussion on all draft articles should occur before they were sent to the Drafting Committee.

(c) *Final form*

244. In terms of the final form that the project should take, support was expressed for draft articles, as proposed by the Special Rapporteur, given the Commission’s use of articles in its previous work on issues of succession. Some members suggested that decision on the final form should occur at a later stage, and indicated the potential advantages of draft guidelines. Members supported the Special Rapporteur’s emphasis on any final product being subsidiary in character to agreements between States.

(d) *Future programme of work*

245. A number of members expressed their support for the future programme of work suggested by the Special Rapporteur, while several members suggested that the Special Rapporteur focus his next report on the general rules applicable to all situations of State succession in respect of State responsibility. A suggestion was also made that the Special Rapporteur should address the procedure

of determination of claims in succession before turning to the transfer of claims, and highlighted the need to focus on the rights or claims of the successor State.

3. CONCLUDING REMARKS OF THE SPECIAL RAPPORTEUR

246. In response to the debate, the Special Rapporteur indicated that the topic would include both the progressive development and codification of international law, while he acknowledged that State practice and case law were not equally developed in various areas and types of succession of States.

247. Concerning the State practice and case law cited in his first report, the Special Rapporteur agreed that more in-depth research on State practice would be needed and would be included in future reports, and greater attention would be given to cases from regions outside Europe. The Special Rapporteur acknowledged that State practice was not clear and that cases on such matters could be interpreted in different ways. He emphasized his strong disagreement only with what he called the old doctrine or fiction of the highly personal nature of State responsibility that appeared to exclude, *a priori*, any possible transfer of rights and obligations arising from internationally wrongful acts. The Special Rapporteur underlined that new developments should also be analysed and reflected.

248. With respect to aspects of the scope of the topic, the Special Rapporteur confirmed his preference for leaving out questions on succession of States in respect of consequences of lawful acts at the present stage of the work, with a study potentially to be included at a later stage. He affirmed that, while he would put aside succession in respect of responsibility to international organizations as such, future work on the topic might include issues of succession in respect of responsibility of States for wrongs caused to other actors, namely international organizations, and responsibility of member States in connection with acts of the organization. The Special Rapporteur indicated he would not examine the question of succession of governments.

249. Turning to specific comments on the draft articles, the Special Rapporteur indicated that he was amenable to suggestions to reflect in draft article 1 some reference to “rights and obligations arising out of an internationally wrongful act”. He found the suggestion not to include a definition in draft article 2 for “international responsibility” logical, as it could be addressed in the commentary. The Special Rapporteur indicated that additional definitions would be included as the work progressed. He further indicated that draft article 2, subparagraph (a), had not taken a position on the question of the legality of succession, an issue that would be addressed in his next report.

250. Regarding the need to examine and set out a general rule on succession prior to setting out draft articles 3 and 4 on agreements and unilateral declarations, respectively, the Special Rapporteur noted that those draft articles were not just “without prejudice” clauses, as they referred to both form and substance, underlining the subsidiary nature of the draft articles. The Special Rapporteur maintained that having those draft articles at the commencement of the work was useful and would avoid

<sup>803</sup> Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, and commentaries thereto, adopted by the Commission at its fifty-eighth session, *Yearbook ... 2006*, vol. II (Part Two), paras. 176–177.

the need to repeat references to agreements and unilateral declarations in each of the draft articles that would follow. He indicated that his subsequent reports would propose a set of rules for different categories of succession, and not replace a general rule on non-succession with a general rule on succession.

251. Furthermore, the Special Rapporteur expressed his support for the proposals to include an explicit draft article on the subsidiary nature of the articles and to ensure that the Commission's previous work relating to the Guiding Principles applicable to unilateral declarations of States

capable of creating legal obligations was fully captured in draft article 4.

252. With respect to the final form that the work on the topic should take, the Special Rapporteur reaffirmed his preference for draft articles, noting that the topic would include codification and the development of new norms. He noted that experience with the 1978 and 1983 Vienna Conventions showed that States could use the principles embodied in conventions for their succession even when they were not in force. The subsidiary nature of the rules would allow sufficient flexibility for different situations.