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SUCCESSION OF STATES IN RESPECT OF STATE RESPONSIBILITY

Statement of the Chairperson of the Drafting Committee

Mr. Charles Chernor Jalloh

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Mr. Chair,

It is my pleasure, today, to introduce the eight and last report of the Drafting Committee for the seventieth session of the International Law Commission, which concerns the topic “Succession of States in respect of State responsibility”. This interim report is contained in document ILC(LXX)/DC/SOSR/CRP.2, which reproduces the text of the draft articles provisionally adopted by the Drafting Committee, at the present session. The full rolling text, provisionally adopted both this and last year, is annexed to this report.

Mr. Chair,

Following the referral to the Drafting Committee of draft articles 5 to 11, the Drafting Committee held 3 meetings on the topic, from 24 to 26 July 2018. It should be recalled that, at the sixty-ninth session, the Drafting Committee had provisionally adopted draft articles 1 and 2. In addition, draft articles 3 and 4 remained in the Drafting Committee for consideration at a later stage. In the present session, where the held over draft articles would ordinarily receive consideration, the Drafting Committee did not take up those provisions based on the request of the Special Rapporteur. He had explained in his second report (i.e. A/CN.4/719), and the Drafting

Committee agreed with this position, that it would be more appropriate to return to them at a later stage and certainly after addressing the draft articles proposed in the second report. With that in mind, and at the outset, I should note that my statement today is an interim oral report. It is intended to provide the Commission with information on the progress made by the Drafting Committee on this topic during the current (i.e. 70th) session.

Before addressing the details of the report, allow me to pay tribute to the Special Rapporteur, Mr. Pavel Šturma, whose mastery of the subject, guidance and cooperation greatly facilitated the work of the Drafting Committee. I also thank the other members of the Committee for their active participation and significant contributions. Furthermore, I wish to thank the Secretariat for its invaluable assistance. As always, and on behalf of the Drafting Committee, I am pleased to extend my appreciation to the interpreters.

Draft article 1, paragraph 2

Mr. Chair,

As I mentioned, last year the Drafting Committee provisionally adopted draft article 1, which was composed of a single paragraph and dealt with the scope of the draft articles being developed by the Commission. At the present session, during the plenary debate, several members discussed the subsidiary nature of the draft articles and proposed that a provision be added making such subsidiarity explicit. Drafting Committee members considered that a provision to that effect should be adopted at the present session. On this basis, the Special Rapporteur suggested the addition of a second paragraph to draft article 1.

The Drafting Committee consequently adopted a new paragraph 2 of draft article 1, which reads as follows: “The present draft articles apply in the absence of any different solution agreed upon by the States concerned”.

Its purpose is to clarify the subsidiary nature of the draft articles, which would only apply in cases where the States concerned have not arrived at a different solution among themselves. The words “any different solution” are intended to capture the vast array of possible solutions that the parties may adopt in a situation of succession of States. Such solutions may be expressed in a variety of forms, which could include for example, international agreements, unilateral declarations, or a combination thereof. In this regard, the words “agreed upon” are to be understood in a broad sense, and do not refer only to the consent to be bound by a treaty. The term “States concerned” may refer to the predecessor State or States, the successor State or States, as well as any State injured by an internationally wrongful act occurred before the date of succession.

Draft article 5

Mr. Chair,

Let me now turn to draft article 5, which is entitled “Cases of succession of States covered by the present draft articles”, as proposed by the Special Rapporteur. This provision reads: “The present draft articles apply only to the effects of a succession of States occurring in conformity with international law and, in particular, the principles of international law embodied in the Charter of the United Nations”.

The Drafting Committee provisionally adopted the draft article with no changes to the formulation proposed by the Special Rapporteur. Its purpose is to limit the present draft articles to succession of States in conformity with international law. The text of this provision is modelled on article 6 of the Vienna Convention on Succession of States in Respect of Treaties of 1978 and article 3 of the Vienna Convention on Succession of States in Respect of State Property, Archives and Debts of 1983. A proposal to delete the term “only” from the above treaty language generated significant discussion amongst members on the potentially confusing signal that would be sent to States. The Drafting Committee considered that any deviation from the wording included in these instruments could have been misinterpreted as signaling an intention by the Commission to address the issue of legality of succession in a different manner in relation to this topic than in relation to succession in respect of treaties or State property, archives and debts.

In this regard, a debate took place as to whether the rationale underlying the corresponding articles in the two Vienna Conventions on succession also applied in the context of this topic. Draft article 5 should not provide an advantage to unlawful successor States in relation to succession to responsibility. It was understood by members of the Drafting Committee that the commentary would indicate that issues of State responsibility may indeed arise in complex situations where the legality of a succession is contested, and that in such situations, the general rules of international law on State responsibility would apply to unlawful successor States.

Draft article 6

Mr. Chair,

Let me now turn to draft article 6, entitled “No effect upon attribution”. Draft article 6 reads as follows: “A succession of States has no effect upon the attribution to a State of an internationally wrongful act committed by that State before the date of succession”.

This provision, which is composed of one paragraph, arose from the extensive debate that took place in the Drafting Committee in relation to paragraph 1 of draft article 6 as proposed by the Special Rapporteur in his second report. Members of the Drafting Committee considered that, as it was originally proposed, paragraph 1 of draft article 6 did not set forth a general rule applicable to the succession of States in respect of State responsibility, but rather addressed the question of attribution, which several members of the Drafting Committee considered to be conceptually distinct from the general rule of non-succession. The Special Rapporteur stated that it was preferable to consider a stand-alone provision concerning attribution before setting out the general rule of non-succession in a subsequent provision, and made a proposal to that effect.

Against this backdrop, the purpose of draft article 6 is to indicate that rules of State responsibility do not cease to apply in situations of succession of States. It clarifies that an internationally wrongful act occurring before the date of succession remains attributable to the State that committed it.

An extensive debate took place on whether such a draft article was needed in the context of this topic. According to a number of members of the Drafting Committee, the draft article was unrelated to the present topic and unnecessarily reiterated a rule that was obvious or self-evident. To the Special Rapporteur and a relatively small number of other members, on the other hand, maintaining such a provision was important, because it constituted the logical premise of a number of subsequent proposed draft articles concerning aspects of State responsibility which were relevant in the context of State succession. Such provisions, for example, concerned the responsibility for breaches of international law having a continuing character and the question of the attribution of conduct of insurrectional or other movements.

It was also stressed by several members of the Committee that the concept of attribution in this draft article might be conflated with the question of attribution of conduct addressed in article 2, paragraph (a) and in Chapter II of the articles on the responsibility of States for internationally wrongful acts, adopted by the Commission in 2001, which was only one of the two constitutive elements of an internationally wrongful act (the other element being a breach of an international obligation). In this regard, the Drafting Committee opted for the formulation “attribution ... of an internationally wrongful act” precisely to emphasize that, in this draft article, the term “attribution” must be understood in a broad sense, relating to the internationally wrongful act as a whole.

An alternative term for attribution (that is, “imputation”) was also discussed based on a concern of some members that the use of the term “attribution” could be confusing if not associated with the term “conduct” or if misread to mean something narrower than was intended by the Drafting Committee. For some of the members, rather than use the term “attribution” which had another meaning in the context of state responsibility, it might have been clearer to instead provide that the obligations and rights arising from an internationally wrongful act committed before the date of the succession of States, remain, in principle, with the predecessor State that is the author of the wrongful act since that was the crux of the matter.

After a thorough discussion, the Drafting Committee provisionally adopted draft article 6 with the understanding that, taking into account the views expressed in the Drafting Committee,

its text and perhaps placement would be revisited at a later stage. Later stage was considered to be before or during the completion of the first reading. This understanding is reflected in a footnote to the draft article. It was also agreed by the Drafting Committee and the Special Rapporteur that he would clearly explain the various concerns regarding the provisionally adopted Draft Article 6 in the commentary.

On a more personal note before I conclude, Mr. Chair, allow me to note that this will be my last report to the plenary in my capacity as Chairperson of the Drafting Committee of the Commission during this 70th session. The successful completion of the work that the plenary entrusted to the Drafting Committee when it referred the draft texts proposed by the Special Rapporteurs on the seven topics debated and subsequently referred during this session deserves some final reflections. First, I must say that I was deeply honoured to have had the privilege of serving the Commission in this role in this important anniversary year. In this regard, to my colleagues from the African Group who expressed great confidence in me by nominating me for the post, and the Commission as a whole which elected me to it by acclamation, I am much indebted.

Second, I am pleased that building on the work of its predecessors, including from the previous quinquennium, the Drafting Committee was able to deliver some substantial outputs for the Commission during this historic session. We completed two second reading topics, namely, identification of customary international law, and subsequent agreements and subsequent practice in relation to the interpretation of treaties. We also, as colleagues would recall, completed two first readings on the topics protection of the atmosphere and provisional application of treaties. We further worked on provisions concerning peremptory norms of general international law (*jus cogens*), including completing remaining work from last year's session during the New York segment, as well as successfully completing consideration of all the new draft principles presented for the topic protection of the environment in relation to armed conflicts. Last but not least, and as just reported, we began to make progress on succession of states in respect of state responsibility. Throughout all the discussions on all these topics, irrespective of their stage, we debated and

resolved many points of drafting and many points of substance. I am pleased to note, in this regard, that we provisionally adopted the texts concerning each of the topics on the basis of consensus. This despite the complexities of some of the issues, and the strong views initially expressed by some members.

Finally, Mr. Chair, under your capable leadership that has successfully steered our ILC ship at the present session with great skill, we did all this work while fitting in commemoration activities in Geneva and in New York. Not to mention the numerous side events that became part of our routine. So, as we wrap up this last part of the work of the Drafting Committee for the present session, I want to recognize and pay tribute to each member of each drafting committee for your hard work, spirit of collegiality and warm cooperation. Progress in accomplishing our lofty goals was only possible because of your deep commitment and great flexibility. Of course, without the special rapporteurs whose reports and contributions provided the foundation for our plenary debates and subsequent work, there would have simply been no drafting committees. I am therefore grateful to each of the special rapporteurs, as well as to our first class Secretariat, for their crucial contributions. Allow me to also express my gratitude to the four excellent research fellows from the College of Law at Florida International University in Miami, USA, whose assistance was helpful to my work throughout the session.

Mr. Chair,

This concludes my introduction of the final report of the Drafting Committee for the seventieth session. I wish to confirm that the Commission is not, at this stage, being requested to act on the draft articles concerning this particular topic, as this interim report has been presented for information purposes only. A complete rolling text of the draft articles provisionally adopted thus far is annexed to this statement, for information purposes only, and will be posted on the Commission's website with the text of this oral interim report.

Thank you.

Annex

Article 1

Scope

1. The present draft articles apply to the effects of a succession of States in respect of the responsibility of States for internationally wrongful acts.
2. The present draft articles apply in the absence of any different solution agreed upon by the States concerned.

Article 2

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 the territory to which the succession of States relates;

[...]

Article 5

Cases of succession of States covered by the present draft articles

The present draft articles apply only to the effects of a succession of States occurring in conformity with international law and, in particular, the principles of international law embodied in the Charter of the United Nations.

Article 6¹

No effect upon attribution

A succession of States has no effect upon the attribution to a State of an internationally wrongful act committed by that State before the date of succession.

¹ Taking into account the views expressed in the Drafting Committee, the present text will be revisited at a later stage.