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Succession of States in respect of State responsibility

Statement of the Chair of the Drafting Committee

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Mr. Chair,

It is my pleasure to introduce the fifth report of the Drafting Committee for the seventy-first session of the International Law Commission, which is the third report concerning the topic “Succession of States in respect of State responsibility”. This report is contained in document A/CN.4/L.939/Add.1, which reproduces the text of the draft articles provisionally adopted by the Drafting Committee at the present session.

Mr. Chair,

My statement today is presented in the form of an interim report, intended to provide the Commission with information on the progress made in the Drafting Committee during this session. The Drafting Committee held eleven meetings on this topic and provisionally adopted three draft articles, namely draft articles 7, 8, and 9.

You will remember that, at its seventieth session, the Commission referred draft articles 5 through 11 to the Drafting Committee, as contained in the Special Rapporteur’s second report. Due to lack of time, the Drafting Committee could not consider draft articles 7 through 11 during that

session. Therefore, the Committee resumed its consideration of these draft articles at the present session. In addition, following the Plenary debates on the third report of the Special Rapporteur, the Commission referred draft articles 2 paragraph (f), X, Y, 12, 13, 14, and 15, as well as the titles of Part II and Part III to the Drafting Committee. It should also be recalled that draft articles 3 and 4, as proposed by the Special Rapporteur in his first report remain in the Drafting Committee for consideration at a later stage.

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 would also like to 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.

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Mr. Chair,

At the outset, I would like to note that the Drafting Committee continued its consideration of the draft articles the Commission referred to it last year based on proposals made by the Special Rapporteur in his second report, taking into account the debate in the Plenary and in the Drafting Committee.

Let me begin with draft article 7.

Draft article 7 – Acts having a continuing character

Mr. Chair,

Draft article 7 is entitled “Acts having a continuing character”. This provision was originally proposed by the Special Rapporteur in his second report under draft article 6, paragraph 3. Last year, the Drafting Committee determined the first paragraph of draft article 6, as proposed by the Special Rapporteur, would be best suited as an independent article, and thus provisionally adopted draft article 6, entitled “No effect upon attribution”.

The purpose of draft article 7 is to address the question of internationally wrongful acts that have a continuing character in the context of succession of States. The draft article reads as follows:

“When an internationally wrongful act of a successor State is of a continuing character in relation to an internationally wrongful act of a predecessor State, the international responsibility of the successor State extends only to the consequences of its own act after the date of the succession of States. If and to the extent that the successor State acknowledges and adopts the act of the predecessor State as its own, the international responsibility of the successor State also extends to the consequences of such act.”

Draft article 6, paragraph 3, as originally proposed by the Special Rapporteur in his second report was a “without prejudice” clause, which was to be read in conjunction with the previous paragraphs of the same draft article. The consequence of the adoption of draft article 6 as a self-standing provision was that a “without prejudice” clause was no longer necessary. Draft article 7 was therefore adopted on the basis of a new proposal by the Special Rapporteur, accounting for last year’s debate in the Drafting Committee.

The first sentence of draft article 7 sets forth the basic rule that in the case of internationally wrongful acts that continue to occur after succession, the international responsibility of the successor State extends only to the consequences of its own acts after the date of the succession. This is meant to reflect article 14, paragraph 2, of the 2001 articles on the responsibility of States for internationally wrongful acts, which states “[t]he breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation.”

The purpose of the second sentence of draft article 7 is to address exceptional circumstances where the international responsibility of the successor State would also extend to the consequences of the acts of the predecessor State. Such extension would take place only “if and to the extent that the successor State acknowledges and adopts the act of the predecessor State as its own”. This formulation derives from the language of article 11 of the 2001 articles on the responsibility of States for internationally wrongful acts, which states that “[c]onduct which is not attributable to a State ... shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own.”

During the conversation about acts having a continuing character, some Members of the Drafting Committee suggested that a draft article be developed on the related issue of composite acts in the context of succession of States. Reference was made in this regard to article 15 of the 2001 articles on the responsibility of States for internationally wrongful acts, which addresses composite acts. The Special Rapporteur indicated that these two issues were already addressed in paragraphs 63 through 74 of his second report, and, given the complexity of the issue of composite acts, he would address it in more detail and propose a draft article in his fourth report.

Draft article 8 - “Attribution of conduct of an insurrectional or other movement”

Mr. Chair,

Let me now turn to draft article 8 entitled “Attribution of conduct of an insurrectional or other movement”.

The purpose of this draft article is to address the specific situation of the conduct of insurrectional or other movements. This situation was originally addressed within various draft articles proposed by the Special Rapporteur in his second report, namely draft article 7, paragraph 4 and draft article 8, paragraph 3. Following last year’s debate, the Special Rapporteur suggested addressing this issue in a self-standing provision and the Drafting Committee concurred with this approach. Draft article 8 comprises of the following two paragraphs.

Paragraph 1 reads as follows:

“The conduct of a movement, insurrectional or other, which succeeds in establishing a new State in part of the territory of a predecessor State or in a territory under its administration shall be considered an act of the new State under international law.”

This paragraph reaffirms a rule of attribution of the conduct of an insurrectional or other movement, that succeeds in establishing a new State, as contained in article 10, paragraph 2 of the 2001 articles on responsibility of States for internationally wrongful acts. The text of paragraph 1 of draft article 8 closely follows the text of article 10, paragraph 2 of the 2001 articles, except that it refers to a “predecessor” State instead of a “pre-existing” State. This change was made so that this rule applies specifically to the context of succession of States.

According to paragraph 2 of draft article 8:

“Paragraph 1 is without prejudice to the attribution to the predecessor State of any conduct, however related to that of the movement concerned, which is to be considered an act of that State by virtue of the rules on responsibility of States for internationally wrongful acts”.

In some cases, a State can be in a position to adopt measures of vigilance, prevention, or punishment in response to a movement’s conduct but improperly failed to do so. This type of situation was captured by article 10, paragraph 3 of the 2001 articles on responsibility of States for internationally wrongful acts. Article 10, paragraph 3 takes the form of a “without prejudice” clause to preserve the possibility of attributing any conduct to a State, regardless of how it is related to the conduct of the concerned movement, if such conduct is to be considered an act of that State under rules of attribution set forth in other provisions of the 2001 articles.

The text of paragraph 2 of draft article 8 has the same purpose and is modelled after article 10, paragraph 3 of the 2001 articles on responsibility of States for internationally wrongful acts.

In order to make this situation applicable to the succession of States, paragraph 2 refers to a “predecessor State”. The reference to “the rules on responsibility of States for internationally wrongful acts” is to be understood as a reference to the rules of international law regarding attribution, which are comprised in articles 4 through 9 of the 2001 articles on responsibility of States for internationally wrongful acts.

Draft article 9 – “Cases of succession of States when the predecessor State continues to exist”

Mr. Chair,

Let me turn to draft article 9, which is entitled “Cases of succession of States when the predecessor State continues to exist”. The purpose of this draft article is to address the possibility of transfer of obligations from the predecessor State to the successor State following the commission of an internationally wrongful act by the predecessor State when the predecessor State continues to exist.

This question, in cases of the separation of parts of a State, the establishment of a newly independent State, or the transfer of part of the territory of a State, was originally addressed within the Special Rapporteur’s second report under three separate provisions, namely draft articles 7, 8, and 9. These draft articles shared a similar structure: they expressed the general rule that obligations arising from an internationally wrongful act of the predecessor State did not pass to the successor State, and then identified exceptions that applied in particular circumstances. Accounting for the views expressed by some members during the Plenary debate at the seventieth session, the Special Rapporteur concluded that draft articles 7, 8, and 9, as proposed in his second report, could be combined to avoid unnecessary repetitions. The Drafting Committee consequently worked on the basis of a new proposal by the Special Rapporteur to that effect.

Draft article 9 comprises three paragraphs that I will address in turn.

Paragraph 1 reads as follows:

“When an internationally wrongful act has been committed by a predecessor State before the date of succession of States, and the predecessor State continues to exist, an injured State continues to be entitled to invoke the responsibility of the predecessor State even after the date of succession:

(a) when part of the territory of the predecessor State, or any territory for the international relations of which the predecessor State is responsible, becomes part of the territory of another State;

(b) when a part or parts of the territory of the predecessor State separate to form one or more States; or

(c) when a successor State is a newly independent State the territory of which immediately before the date of the succession of States was a dependent territory for the international relations of which the predecessor State was responsible.”

This paragraph establishes the general rule for when an internationally wrongful act has been committed by a predecessor State before the date of succession of States and the predecessor State continues to exist, separating within one article three different cases of succession of States under sub-paragraphs (a), (b), and (c). These three different cases of succession were previously addressed respectively in the second report in draft articles 9, 7, and 8. In such cases, an injured State is still entitled to invoke the responsibility of the predecessor State even after the date of succession.

The focus of paragraph 1 is on the “injured State”, a term which is used for the sake of consistency with Parts Two and Three of the 2001 articles on responsibility of States for internationally wrongful acts. Following an extensive debate, the Drafting Committee considered that a proposal indicating that the injured State “may request” reparation was not appropriate since this expression was not sufficiently normative. Thus, it was considered that paragraph 1 should preferably be referred to as an entitlement of the injured State “to invoke the responsibility of the predecessor State.” Such language was also consistent with the formula used in the 2001 articles on responsibility of States for internationally wrongful acts. The Drafting Committee considered that referring to an entitlement to “invoke the responsibility of the predecessor State” was more appropriate than referring to an entitlement to “reparation”, since the responsibility of the

predecessor State was comprehensive before the succession of States. Further, the formulation suggested by the Drafting Committee encompasses all rules on the responsibility of States for internationally wrongful acts, which may include, for example, the rules on circumstances precluding the wrongfulness. It was understood in the Drafting Committee that this scenario would be explained in the commentary.

The main element of paragraph 1 is temporal. It aims at indicating that the entitlement of the injured State to invoke the responsibility of a predecessor State is not affected after the date of a succession of States if the predecessor State still remains. This is reflected in the choice of the terms “continues to” and “even after the date of succession”.

Let me now turn to paragraph 2, which reads as follows:

“In particular circumstances, the injured State and the successor State shall endeavour to reach an agreement for addressing the injury.”

The purpose of paragraph 2 is to address exceptional situations where there is a direct link between the act or its consequences and the territory of the successor State or States. In such circumstances, the predecessor State may not be in a position to address the injury alone and may need the cooperation with the successor State to do so. The term “in particular circumstances” covers diverse situations where a successor State may be addressing the injury, which will be described in the commentary.

The purpose of paragraph 2 is not to create obligations entailing the automatic transfer of obligations to the successor State, but instead is to signal the possibility for the successor State to reach an agreement with the injured State for addressing the injury. This could take a variety of forms depending on the factual situation, the nature of the internationally wrongful act, and the link between its consequences and the successor State. The purpose of paragraph 2 is also to signal that the consequences of the internationally wrongful act do not disappear simply because of the succession of States. It was understood that the commentary would clarify how the injury could

be addressed and how the injured State and the successor State could endeavour to reach an agreement.

Let me now turn to paragraph 3, which reads as follows:

“Paragraphs 1 and 2 are without prejudice to any apportionment or other agreement between the predecessor State and the successor State when implementing paragraphs 1 and 2.”

While paragraph 1 concerns the entitlement of the injured State towards the predecessor State and paragraph 2 addresses the relationship between the injured State and the successor State, paragraph 3 deals with possible agreements between the predecessor and the successor States to address the injury. This paragraph reiterates, in the specific context covered by draft article 9, the general rule set forth under draft article 1, paragraph 2, according to which “[t]he present draft articles apply in the absence of any different solution agreed upon by the States concerned”.

Paragraph 3 is drafted as a without prejudice clause to clarify that the two situations covered under paragraphs 1 and 2 do not preclude any other solution reached through an agreement between the predecessor and the successor States and may actually be affected by such agreement. For instance, an agreement between the predecessor State and the successor State could take the form of an apportionment in cases of compensation, and the existence of such situations is recognized in the draft article through the inclusion of the without prejudice clause. Paragraph 3 also covers arrangements having different forms due to the nature of the injury and the type of reparation sought by the injured State.

Mr. Chair,

This concludes my introduction of the fifth report of the Drafting Committee for the seventy-first 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 report has been presented for information purposes only.

Thank you.

