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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. Chairperson,

It is my pleasure to introduce the sixth report of the Drafting Committee for the seventy-second session of the International Law Commission, concerning the topic "Succession of States in respect of State responsibility". This report is contained in document A/CN.4/L.954, which reproduces the text of the draft articles provisionally adopted by the Drafting Committee at the present session.

Mr. Chairperson,

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 five meetings on this topic and provisionally adopted three draft articles, namely draft articles 10, 10 *bis* and 11.

You will remember that, at its seventieth session, the Commission referred draft articles 5 through 11, as contained in the Special Rapporteur's second report, to the Drafting Committee. Due to lack of time, the Drafting Committee could not consider draft articles 7 to 11 during that session. The Committee subsequently adopted draft articles 7, 8, and 9 at the seventy-first session, in 2019. Also at the seventy-first session, following the plenary debate 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. At the present session, the Plenary further referred draft articles 7 *bis*, 16, 17, 18, and 19, as proposed by the Special Rapporteur in his fourth report, 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, while draft article 6, which was provisionally adopted by the Committee at the seventieth session, will be likewise revisited 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. Chairperson,

At the outset, I would like to note that the Drafting Committee continued its consideration of the draft articles the Commission referred to it at the seventieth session, beginning with draft

article 10, based on proposals made by the Special Rapporteur in his second report (A/CN.4/719), taking into account the debate in the Plenary and in the Drafting Committee.

Draft article 10 – Uniting of States

Mr. Chairperson,

Draft article 10 on "Uniting of States" is based on the original proposal for draft article 10, paragraph 1, in the Special Rapporteur's second report. The Drafting Committee held an extensive and rich discussion on the different scenarios of succession of States. Following this discussion and the proposal by the Special Rapporteur, the Committee decided to split the Special Rapporteur's original proposal for draft article 10 into separate provisions: Uniting (i.e., merger) of two or more States so as to form one successor State (draft article 10), and incorporation of a State into another State (draft article 10 *bis*). In its earlier work on State succession, the Commission had understood the term "Uniting of States" as covering both merger and incorporation and only drew the distinction between those two scenarios in the commentaries to the relevant draft provisions. Following the most recent example of article 21 of the 1999 draft articles on nationality of natural persons in relation to the succession of States, the Drafting Committee decided to make the distinction more explicit by having separate draft articles covering the two situations.

Considering first the situation of a merger of States, the Drafting Committee held extensive discussions on the responsibility of the successor State. A range of views were expressed in the Drafting Committee. Several members noted that there was no rule of "automatic succession" in such circumstances and expressed a preference for a text which clearly stipulated it. Other members were concerned that such position, which effectively amounted to the 'clean' slate approach, would risk leaving the injured State without remedy. The Drafting Committee sought to find a middle way between those positions. It did so initially on the basis of a revised proposed submitted by the Special Rapporteur, which sought to establish an obligation ("shall") between the successor State and injured State to "endeavour to reach an agreement"; a formulation drawn from draft article 9, paragraph 2, as provisionally adopted by the Drafting Committee. However, the prevailing view in the Drafting Committee was that the formulation in draft article 9 was not

entirely appropriate since it addressed the situation where the predecessor State continued to exist and thus continued to be responsible for its internationally wrongful act. Draft article 10, on the other hand, seeks to cover the scenario in which the predecessor State or States cease to exist.

Some members of the Drafting Committee preferred to recognize such distinction by formulating the obligation to address the injury in stronger terms, and thereby avoiding the impression that the "clean slate" rule applied to the circumstance contemplated in the draft article. In that vein, various drafting suggestions were discussed by the members of the Committee. For example, it was suggested to stipulate that the injured State and the successor State should have an obligation of result, i.e., that they "shall engage in negotiations and other means for solving a dispute in accordance with international law" and "shall reach an agreement". It was also proposed that the provision should put greater emphasis on equity and good faith by stating that they "shall seek a solution in good faith and in the spirit of cooperation and early and equitable settlement for addressing the injury arising from the internationally wrongful act."

The Drafting Committee considered a further revised proposal, presented by the Special Rapporteur that "the obligations arising from any internationally wrongful act of the predecessor State pass on to the successor State unless the States concerned otherwise agreed". However, such formulation drew criticism from several members who were concerned that such formulation, and in particular the reference to obligations "passing" to a successor State, effectively amounted to a rule of automatic succession. In their view, succession in respect of responsibility in cases of merger could only take place subject to the consent of the successor State, and they proposed that the provision expressly say so. The view was expressed that the Institute of International Law's decision to provide for the responsibility of the successor State in cases of merger was not based on sufficient State practice, but rather on a policy decision to avoid leaving the internationally wrongful act unrepaired.

Draft article 10, as adopted by the Drafting Committee, sets out by specifying that the provision addresses the situation in which two or more States merge to form one successor State. By forming a new State, the predecessor States cease to exist, which is implied in the phrase "[w]hen two or more States unite and so form one successor State". The Drafting Committee slightly modified the original proposal of the Special Rapporteur to align it with the formulation

used in the previous relevant work of the Commission, namely 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, and the 1999 draft articles on nationality of natural persons in relation to the succession of States. In the middle part of the paragraph, the phrase "and an internationally wrongful act has been committed by any of the predecessor States" links the provision to the specific context of the succession of States in respect of State responsibility.

The last part of draft article 10 is based on a revised proposal of the Special Rapporteur, which takes into account the comments made during the Drafting Committee at the seventy-first session. Some members of the Committee were of the view that the original proposal by the Special Rapporteur (i.e., "the obligations arising from an internationally wrongful act of any predecessor State pass to the successor State") could be understood as providing for an automatic succession rule. They reiterated that there was no rule on automatic succession in respect of State responsibility. However, other members of the Drafting Committee emphasized that draft article 10 should ensure that States cannot evade their international responsibility by forming a new State. Although the phrase "pass to the successor State" mirrored that of article 16 of the 1983 Vienna Convention on Succession of States in respect of State Property, Archives and Debts, it was noted that succession in terms of property, archives and debts had to be distinguished from that in respect of responsibility.

The final wording adopted by the Drafting Committee, "shall agree on how to address the injury", is the result of a compromise between the various divergent positions just described. As a middle ground between these formulations, it does not articulate a "clean slate" rule or an automatic succession rule. Instead, it is intended to encourage States to seek a solution to questions of international responsibility in situations of a merger between States. The formulation of the wording is meant to be sufficiently flexible to give States the freedom to choose the modalities of the agreement. Such flexibility could even result in agreement between the injured State and the successor State that it was not possible to address the injury. The Drafting Committee considered limiting the obligation to agree on how to address the injury as arising only "in particular circumstances", which is a formulation contained in draft article 9, paragraph 2, as provisionally adopted. However, several members of the Drafting Committee opposed such specification as it

could unnecessarily constrain the ability of an injured State to seek redress. To align draft article 10 with draft article 9, paragraph 2, the Drafting Committee decided to replace the expression "consequences of the internationally wrongful act" in the original proposal of the Special Rapporteur with "injury" at the end of the provision.

The title of draft article 10, which is "Uniting of States", follows the example of the previous work of the Commission. As noted above, however, the term "Uniting" is to be understood in the narrow sense as covering only the "merger" of States. The Drafting Committee decided not to follow the approach taken by the Institute of International Law in its resolution, which calls the pertinent draft article 13 "Merger of States". Likewise, the Drafting Committee declined to refer to the "unification of States", which is a phrase more typically employed in the political context.

Draft article 10 *bis* – Incorporation of a State into another State

Mr. Chairperson,

I will now turn to draft article 10 *bis* on "[i]ncorporation of a State into another State". Unlike the situation of merger, a situation of incorporation involves one or more States being incorporated into another State that continues to exist. The Drafting Committee took into account several examples from State practice, and discussed whether "incorporation" could be considered a form of "partial succession" because the incorporated State ceases to exist. The Drafting Committee decided against using the terms "succession", and "predecessor State" and "successor State" in draft article 10 *bis* so as to clearly distinguish it from the situation envisaged in draft article 10.

Draft article 10 *bis* contains two paragraphs, which are based on the Special Rapporteur's amended proposal for draft article 10, paragraphs 2 and 3. After adopting the text of the paragraphs, the Drafting Committee decided to reverse their order, as originally proposed by the Special Rapporteur. As explained below, paragraph 1 covers a situation which is more comparable to that in draft article 10 whereas paragraph 2 reiterates the general applicability of the rules on State responsibility.

Paragraph 1

Mr. Chairperson,

The first part of paragraph 1 reflects the scope of the provision. It covers the situation in which "an internationally wrongful act has been committed by a State prior to its incorporation into another State". The incorporating State "continues to exist" while the State that committed the internationally wrongful act ceases to exist. Although this situation is different from that of a uniting of States into a new State, the common denominator between draft article 10 and draft article 10 *bis*, paragraph 1, is that the new State (under draft article 10) and the incorporating State (under draft article 10 *bis*, paragraph 1) did not commit the internationally wrongful act. However, as the State or States that committed the internationally wrongful act ceased to exist after the date of succession or incorporation, respectively, there is a need to address the injury that was caused by the internationally wrongful act. Bearing in mind the compromise found regarding draft article 10, the Drafting Committee adopted the same formulation used in that provision, namely the phrase "shall agree on how to address the injury". Under the terms of draft article 10 *bis*, paragraph 1, the obligation to agree is incumbent on "the injured State and the incorporating State". The Drafting Committee considered referring to "continuing State" but found "incorporating State" more appropriate.

Notwithstanding this compromise formulation, I should note that the differing views that existed regarding draft article 10 also informed the debate on draft article 10 *bis*, paragraph 1. Accordingly, the Drafting Committee also considered including the phrase "in particular circumstances" in paragraph 1. In the alternative, it was suggested to add "as appropriate". As in the case of draft article 10, those formulations were proposed to make clear that the obligations arising from the internationally wrongful act do not pass automatically to the incorporating State. Moreover, it was reiterated that it would be better to state that the injured State and the incorporating State "shall [or undertake to] pursue negotiations in good faith". While some members of the Drafting Committee emphasized the need for the Commission to consider claims by private individuals (for example, under human rights law), others pointed out that such claims were beyond the scope of the draft articles, which only concerned injuries to States. The phrase

"shall agree on how to address the injury" was adopted on the understanding that the commentaries will reflect those positions.

Paragraph 2

Mr. Chairperson,

Paragraph 2 follows the same structure as paragraph 1. The first part of the paragraph makes clear that it applies to the situation where "an internationally wrongful act has been committed by a State prior to incorporating another State". In other words, while paragraph 1 deals with the situation where an internationally wrongful act was committed by a State that no longer exists, owing to its incorporation into another State, paragraph 2 covers the scenario where the wrongful act was committed by the incorporating State. The question that arises is whether such wrongfulness is affected by the fact of its incorporation of another State. The latter part of the provision confirms that "the responsibility of the State that committed the wrongful act is not affected by such incorporation." The Special Rapporteur had suggested several alternative formulations, including that "an injured State is entitled to invoke the responsibility of the successor State" and also that "the responsibility of the State that committed the internationally wrongful act continues after the date of succession".

I wish to place on record that there was a view in the Drafting Committee that, strictly speaking, paragraph 2 was not required since the situation addressed therein was already covered by the application of the articles on responsibility of States for internationally wrongful acts, adopted in 2001. Nonetheless, the Drafting Committee decided, on balance, to retain the provision as a useful clarification, especially since the 2001 articles made no reference to the scenario being contemplated in paragraph 2. Nonetheless, the Drafting Committee sought to align the formulation with that of the 2001 State responsibility articles, by including the phrase "is not affected by", which the Committee considered to be sufficiently neutral. In doing so, it also sought to signal that

paragraph 2 was not intended to regulate situations sufficiently addressed by the 2001 State responsibility articles.

Draft article 10 *bis* has the title "Incorporation of a State into another State", which a slightly modified and more succinct version of the Special Rapporteur's proposal that read "Incorporation of a State in another existing State".

Draft article 11 – Dissolution of a State

Mr. Chairperson,

Draft article 11 concerns the dissolution of a State. It is based on a revised proposal of the Special Rapporteur, taking into account comments made in the plenary and Drafting Committee and wording adopted in previous provisions. Here, we are dealing with yet another scenario where, as in the cases of draft articles 10 and 10 *bis*, paragraph 1, a predecessor State that committed an internationally wrongful act has ceased to exist, in the present scenario owing to its dissolution. Hence, the first part of the first sentence reflects the scope of the provision, i.e. a situation in which "a State that has committed an internationally wrongful act dissolves and ceases to exist and the parts of the territory of the predecessor State form two or more successor States". Such formulation is taken from articles 18, 31 and 41 of the 1983 Vienna Convention on Succession of States in respect of State Property, Archives and Debts and met with general agreement in the Drafting Committee.

The central question confronting the Drafting Committee was how to frame the consequences of the succession, if any at all, for the successor States. A similar alignment of views as in the debate on draft article 10, also arose in the context of draft article 11. The focus of the work, therefore, became how to best draw a balance in the text between the clean slate doctrine and an automatic succession position. Once again, the Drafting Committee settled on establishing an obligation among the concerned States to seek to agree on how to address the injury. This is reflected in the phrase "the injured State and the relevant successor State or States shall agree on how to address the injury arising from the internationally wrongful act", which the Drafting Committee spent considerable time discussing. The phrase "shall agree on how to address the injury" is to be understood in the same way as in draft articles 10 and 10 *bis*. The Drafting

Committee added "arising from the internationally wrongful act" to establish a *renvoi* to the first part of the sentence. The consistency between draft articles 10, 10 *bis* and 11 was appreciated, but it was also observed that divergence from the formulation in draft article 9, paragraph 2 should be revisited in light of the question whether the legal personality of the predecessor State continued in the form of the successor or incorporating State.

Regarding the scope *ratione personae* of the provision, it was noted that the dissolution of a State might give rise to different kinds of legal relations: the *inter se* relations between the successor States, and the relations between the successor State or States and the injured State and the successor State or States. Draft article 11 only covers the latter kind of legal relations. Nonetheless, it must be born in mind that the obligation to agree how to address the injury might not be relevant to all successor States to an equal extent. Some successor States might have a closer connection with the injury than others. The Drafting Committee sought to reflect such relative connection in the text of the provision itself. Proposals included referring to "the successor State or States benefitting from the internationally wrongful act committed by the predecessor State", and adding the phrase "as appropriate" as a qualification to the obligation to agree. It was also suggested stating that the injured State and the "relevant", "appropriate" or "concerned" successor State shall agree on how to address the injury. After considering those different adjectives, the Drafting Committee settled on the phrase "relevant successor State or States" as being the most accurate depiction of the legal situation.

The function of the second sentence, which was based on a proposal by the Special Rapporteur, is to provide the relevant States seeking to reach agreement with a set of factors that they might wish to take into account in determining how best to address the injury arising from the internationally wrongful act committed by the predecessor State. In doing so, the factors listed therein also serve as a guide to the determination of which successor State or States are to be considered "relevant" for purposes of draft article 11. The sentence stipulates that "[t]hey should take into account any territorial link, any benefit derived, any equitable apportionment, and all other relevant circumstances." The pronoun "they" refers to "the injured State and the relevant successor State or States", thus connecting the first and the second sentence. While express reference is made to "any territorial link, any benefit derived, any equitable apportionment", the list is not exhaustive. This is indicated by the phrase "all other relevant circumstances", which –

like the verb “take into account” – is based on article 31, paragraph 2, of the 1983 Vienna Convention on Succession of States in respect of State Property, Archives and Debts. The commentaries will explain that relevant circumstances include those that establish a link between the successor State or States and the internationally wrongful act, such as the continuity of organs (i.e., a personal link) or unjust enrichment.

Draft article 11 is entitled “Dissolution of a State”, which follows article 31 of the 1983 Vienna Convention on Succession of States in respect of State Property, Archives and Debts.

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Mr. Chairperson,

This concludes my introduction of the sixth report of the Drafting Committee for the seventy-second session. I wish to confirm that the Commission is not, at this stage, being requested to take action on the draft articles concerning this particular topic, as this report has been presented for information purposes only. As such, I recommend that the Commission take note of the report.

Thank you.