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SUCCESSION OF STATES IN RESPECT OF STATE RESPONSIBILITY

Statement of the Chair of the Drafting Committee

Mr. Ki Gab Park

14 July 2022

Mr. Chairperson,

It is my pleasure to introduce the fourth report of the Drafting Committee for the seventy-third session of the International Law Commission, concerning the topic "Succession of States in respect of State responsibility". The report, which is to be found in document **A/CN.4/L.970**, which contains eleven provisions.

Before proceeding, 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.

Mr. Chairperson,

Permit me to make a few preliminary remarks. First, I wish to recall that at its 3583rd meeting on Tuesday, 17 May 2022, the Commission decided, in principle, that the form of the work of the Commission on this topic would henceforth be draft guidelines, rather than draft articles, in light of the views expressed by several States in the Sixth Committee and by a number of Members of the Commission in plenary. Accordingly, the Drafting Committee proceeded to prepare draft guidelines on the basis of the texts referred to it by the Commission at previous sessions.

The Drafting Committee also understood the instruction of the Plenary to mean that the draft articles previously adopted by the Commission on this topic were, in effect, referred back to the Drafting Committee for purposes of transformation into draft guidelines. I can report that the Drafting Committee did indeed have the opportunity to revisit the previously adopted provisions and made some modifications to them. In addition to replacing the reference to "article(s)" with "guideline(s)", in some cases the shift in form required more substantive adjustments to texts adopted at previous sessions. The Drafting Committee considered the difference between the two forms of outcomes, namely that draft guidelines were intended to provide guidance to States while draft articles were cast as directions to States, often suitable for incorporation in a treaty. Accordingly, the words "shall be" were replaced by "is" in draft guideline 8, reflecting the descriptive nature of the provision. Likewise, in draft guidelines 9, paragraph 2, 10, 10 *bis* and 11, the imperative verb "shall" was replaced by "should", thus reframing the provisions as guidance to States.

Whilst the Drafting Committee was able to conduct this exercise of modifying the previously adopted draft articles into draft guidelines, it did not have time to carry out a sufficiently thorough re-examination of them and accordingly, at this stage, the reformulated provisions remain before the Drafting Committee pending a *toilettage* finale at the conclusion of the work on first

reading. However, for the convenience of the Commission the entire set of draft guidelines provisionally adopted thus far, including the draft guidelines modified from previously adopted draft articles, is reproduced in an annex to this statement.

Mr. Chairperson,

The Drafting Committee devoted 16 meetings at the present session to the examination of the draft guidelines, at its 15th, 26th, 29th, and 36th to 48th meetings, held on 11 May, 19 May, 23 May, from 30 May to 2 June and from 4 to 8 July 2022, respectively. It had before it the remaining provisions the Commission referred to it at the sixty-ninth, seventieth, seventy-first and seventy-second sessions on the basis of proposals made by the Special Rapporteur in his first (A/CN.4/708), second (A/CN.4/719), third (A/CN.4/731) and fourth (A/CN.4/743 and Corr.1) reports.

I will describe the work undertaken at the present session shortly. Permit me, however, to record that while much progress was made, as I have already alluded to, the Drafting Committee ran out of time and was unable to conclude its work on a complete set of draft guidelines to be considered for adoption by the Commission on first reading. What remains is for the Drafting Committee to consider only a revised proposal by the Special Rapporteur for draft guideline 15 *ter*, on reparation. The Drafting Committee was also unable to consider proposals for the division of the draft guidelines into parts.

At this point, I wish to also place on record the fact that the Special Rapporteur decided no longer to pursue certain proposals he had made in his reports in light of the evolution of the draft guidelines. These were draft guidelines 3 and 4, as proposed in his first report, and draft guidelines 2 (f), X and Y as proposed in his third report.

Mr. Chairperson,

Turning to this year's report of the Drafting Committee, first I wish to draw the Commission's attention to the fact that four of the provisions contained therein were actually proposed by the Drafting Committee at previous sessions. I am referring to what are now draft guidelines 6, 10, 10 *bis* and 11. Draft guideline 6 was provisionally adopted by the Drafting

Committee in 2018, on the understanding that its text and placement would be revisited later. This year, the Drafting Committee considered that the provision was no longer subject to further modification. Draft guidelines 10, 10 *bis* and 11 were included in an interim report of the Drafting Committee submitted to the Plenary last year, but the Commission was only able to take note of them at the time, owing to a lack of time for the processing of the corresponding commentaries. As I mentioned earlier, draft guidelines 10, 10 *bis*, paragraph 1, and 11, were among those provisions that were amended as a consequence of the shift to guidelines. The statement of the Chair of the Drafting Committee in 2021, Ms. Patricia Galvão Teles, should thus be read in light of the changes made to those provisions this year.

Mr. Chairperson,

Let us now consider the draft guidelines that were provisionally adopted at the present session. These are draft guidelines 7 *bis*, 12, 13, 13 *bis*, 14, 15 and 15 *bis*, which I will introduce in turn.

Draft guideline 7 *bis* – "Composite acts"

Mr. Chairperson,

Draft guideline 7 *bis* on "Composite acts" is based on a proposal made by the Special Rapporteur in his fourth report and on further proposals made in light of the debate in plenary and in the Drafting Committee. It may be recalled that the Special Rapporteur proposed the provision in response to the discussion in the Drafting Committee in 2019 on draft article 7 ("Acts having a continuing character"). Like their analogues, articles 14 and 15 of the 2001 articles on responsibility of States for internationally wrongful acts, articles 7 and 7 *bis* appear next to each other in the present draft guidelines. In light of the complexity of the subject matter and the need to maintain consistency with the prior work of the Commission, the Drafting Committee emphasized the importance of tracking the text of article 15 of the 2001 articles as closely as

possible, by focusing on the question of when the breach by a composite act occurs in various succession contexts.

The draft guideline is structured in three paragraphs. The first two relate to composite acts performed entirely by a predecessor State and by a successor State, respectively. The third relates to a composite act begun by a predecessor state, and continued and completed by its successor State after the date of succession. All three paragraphs focus on composite acts that begin before the date of succession of States and end after such date.

Paragraph 1 relates to composite acts that straddle the date of succession performed by entirely a predecessor State. The paragraph makes clear that a predecessor State is responsible for internationally wrongful composite acts comprising actions or omissions attributable to the predecessor State that were performed both before and after the date of succession. In other words, the incidence of a State succession has no impact on the responsibility of a predecessor State for a composite act whose parts are entirely attributable to it. In this respect, some Members of the Drafting Committee questioned whether it was necessary to restate in the present draft guidelines such a proposition that had little to do with State succession *per se*. However, the Drafting Committee ultimately decided that the paragraph was a useful baseline rule to include in the guideline. Furthermore, the paragraph does not address composite acts of the predecessor State that occur entirely before or entirely after the date of succession.

The opening words of the paragraph, “When a predecessor State continues to exist”, make explicit that the paragraph only applies to situations when the predecessor State exists after the date of succession, for example, where part of a State becomes independent, leaving the rest of the predecessor State to continue the same legal personality. The alternative wording “if it continues to exist” or “that continues to exist” was considered, but the present wording was chosen as it was most clear. The Drafting Committee also discussed whether a specific reference to attribution was necessary in the text, to make clear that the actions or omissions constituting the composite act

must all be attributable to the predecessor State. To address this point, the word "its" was included before "other actions and omissions" and should be understood to refer the element of attribution.

It was proposed to structure the paragraph in two sentences, borrowing from an earlier proposal of the Special Rapporteur for what is now paragraph 3 of the provision. The first sentence would have clarified that the paragraph addressed a composite act of the predecessor State that straddles the date of succession. The second sentence would have explained that the breach occurs when the final action or omission is performed by the predecessor State, after the date of succession. Such proposal was not taken up, as the Drafting Committee considered a simpler structure that better aligned with article 15 to be preferable. Indeed, this structure was not retained for the further paragraphs of draft guideline 7 *bis*.

Paragraph 2 mirrors paragraph 1 with respect to a successor State. The paragraph makes clear that a successor State is responsible for internationally wrongful composite acts comprising actions or omissions attributable to the successor State that were performed both before and after the date of succession. It was recalled that a State that incorporates all or part of the territory of another State is the successor State with respect to that territory, even though the State existed before the date of succession. Composite acts performed by a successor State entirely after the date of succession are also within the scope of the paragraph's terms. As with paragraph 1, the need for paragraph 2 was questioned. The paragraph was retained because it also reflects a scenario that could occur in practice and because it establishes a baseline for paragraph 3.

Paragraph 3, in turn, concerns the scenario where the composite act is started by the predecessor State before the date of succession of States and continued and completed by the successor State afterwards. The Drafting Committee held a thorough discussion of the substantive question whether the successor State could be responsible for such a composite act. One potential example discussed was that of a creeping expropriation begun by the predecessor State and completed by the successor State. However, it was noted also that other theories could explain the obligation of the successor State to compensate such an expropriation. For example, it could be considered that the continued application by the successor State of the relevant measures adopted by the predecessor State was an action attributable directly to the successor State. It was recalled that in several cases concerning the successors to the former Yugoslavia, for example *Zaklan v.*

Croatia, the European Court of Human Rights had determined that the successor State was responsible in contexts relating to succession based on its own actions after the date of succession. It was also noted that, in the *Gabčíkovo-Nagymaros* case, the International Court of Justice considered that a successor State could be responsible for the conduct of the predecessor State when, by its conduct, the successor assumed the actions of the predecessor as its own. It was also suggested that a failure of a successor State to compensate a creeping expropriation would be a case of unjust enrichment rather than one of succession to responsibility. Other examples raised concerned the possibility that a predecessor State might begin a series of actions that only amounts to genocide or a crime against humanity when continued by its successor State after the date of succession.

The discussion led to the conclusion that the available State practice, in light of its inconsistency, did not allow the Drafting Committee to draw a firm conclusion as to the content of the law. Accordingly, the Drafting Committee decided to present the paragraph in the form of a without prejudice clause. As such, it leaves open the question of whether the responsibility of a successor State for a such a composite act is possible under international law.

As for the drafting of paragraph 3, the Drafting Committee proceeded on the basis of a revised version, presented by the Special Rapporteur in the Drafting Committee, that provided that a breach of an international obligation, "may occur through a series of actions or omissions that commences with a predecessor State and continues with the successor State". The intention was to reflect the idea that the responsibility of the successor State for such an act was not automatic, but rather a possibility. In its extensive discussions on the paragraph, the Drafting Committee thoroughly explored how best to phrase such a proposition, but ultimately settled on the formulation currently before you. The notion that the composite act is a single series of actions or omissions that occurs across the date of succession of States is reflected in the wording "commences with the predecessor State and continues with the successor State". It was proposed but considered unnecessary to use a more detailed formulation along the lines of "commences with the action or omission of a predecessor State".

Before I move to the title of draft guideline 7 *bis*, allow me to briefly mention a fourth paragraph not adopted by the Drafting Committee. As first proposed by the Special Rapporteur in

his fourth report, the third paragraph would have been a without prejudice clause referring to any responsibility incurred by a predecessor State or a successor State on the basis of a single internationally wrongful act. The Drafting Committee decided to omit such a paragraph, as being unnecessary.

The title of draft guideline 7 *bis* is "[c]omposite acts", as proposed by the Special Rapporteur in his fourth report. The Drafting Committee discussed aligning the title with that of article 15 of the articles on State responsibility, which is "[b]reach consisting of a composite act". Mimicking the title of draft guideline 7, which is "[a]cts having a continuing character" was also suggested. Nonetheless, the Drafting Committee decided to maintain the present title in light of its simplicity.

Mr. Chairperson,

After adopting draft guideline 7 *bis*, the Drafting Committee turned its attention to draft guidelines 12 to 15, which relate to reparation for injury for internationally wrongful acts committed against the predecessor State. Draft guidelines 12, 13, 14 and 15 are based on proposals made by the Special Rapporteur in his third report and referred to the Drafting Committee in 2019, as well as on further proposals made in light of the debate in plenary and in the Drafting Committee. The proposal for Draft Guideline 13 *bis* emerged during the discussion in the Drafting Committee, as I shall explain in due course.

Draft guideline 12 – "Cases of succession of States when the predecessor State continues to exist"

Draft guideline 12 concerns cases of succession when the predecessor State continues to exist. These comprise cases where a part of a State secedes to form a new State, including cases of newly independent States, and cases where a part of a State is ceded to another, pre-existing State. In this respect, it is analogous to draft guideline 9, which covers the same scenarios of succession with respect to the responsibility for the internationally wrongful act performed by a predecessor State prior to the date of succession. It was decided that the structure of draft guideline 12 should

be aligned with that of draft guideline 9, and the Drafting Committee discussed the provision on the basis of a revised proposal of the Special Rapporteur to that effect.

The provision has three paragraphs. The first concerns the situation of an injured predecessor State that continues to exist after the date of the Succession. The second concerns the situation of a successor State to such a predecessor State. The third is a without prejudice clause with respect to apportionments or other agreements between the predecessor and successor States.

In paragraph 1, the phrase "continues to be entitled to invoke" mirrors draft guideline 9 and confirms that the position of the predecessor State is not affected by the succession of States. Different formulations that would have taken a less definitive normative stance, including "may invoke" or "may continue to be entitled to invoke" were also discussed, but not adopted. An earlier proposal of the Special Rapporteur referred to requesting reparation from the responsible State. After a discussion, the Drafting Committee decided that reference to the entitlement to invoke responsibility was preferable because it was broader, encompassing the full content of State responsibility. Such reference also avoided the question of apportionment between the predecessor State and any relevant successor States, which is dealt with by paragraph 3.

The phrase at the end of the paragraph, "if the injury to it has not been made good" arose from an extensive discussion about how the injury in question related to the continued entitlement of the predecessor State to invoke responsibility. It was proposed that there were circumstances in which a predecessor State would lose its entitlement to invoke responsibility upon the succession of States because the injury was linked to the successor State, particularly when the successor State was a newly independent State. The Committee did not take up that idea but did have an extensive discussion of whether to include some reference to either the predecessor State as an "injured State" or to the continued existence of the injury after the date of succession. Paragraph 1 relates to the position of an injured predecessor State and is not concerned with the possibility of the invocation of responsibility by a State other than an injured State in the sense of article 48 of the 2001 articles. Drawing on the 2001 articles, the Drafting Committee settled on the phrasing "has not been made

good", which reflects the idea that the predecessor State is not entitled to invoke responsibility in relation to an injury for which full reparation has already been made.

In an earlier proposal of the Special Rapporteur, the paragraph contained three sub-paragraphs (a), (b) and (c) that reflected the factual scenarios covered by the paragraph and were identical to their counterparts in draft guideline 9. The Committee held an extensive discussion of whether the sub-paragraphs were necessary, but ultimately decided to omit them.

Paragraph 2 relates to the position of a successor State of the injured predecessor State and was the product of further extensive discussion in the Drafting Committee. The idea behind the paragraph is that there are circumstances where a successor State is able to invoke the responsibility of a third State for an internationally wrongful act against the predecessor State that occurred before the date of succession. The paragraph begins with the phrase "[i]n addition to paragraph 1" to clarify its relationship with the previous paragraph. Consistent with this, it was noted that an entitlement of both the predecessor State and the successor State to invoke the responsibility of the wrongdoing State did not entail an obligation of the wrongdoing State to make more than full reparation.

The phrase "in particular circumstances" mirrors draft guideline 9, paragraph 2. An earlier proposal of the Special Rapporteur had made specific reference to a connection between the injury to the predecessor State before the date of succession and either the territory or the nationals that became those of successor State upon the succession. The Drafting Committee decided that such specificity was not necessary in the provision, and that the meaning of "particular circumstances" would be explained further in the commentary.

The Drafting Committee decided to use the phrase "entitled to invoke" to parallel paragraph 1, and the word "may" reflects the conditionality of the entitlement on the existence of the particular circumstances. Such wording was chosen after a thorough discussion of how best to phrase the paragraph in which several other options were considered. Among these were "may, in particular circumstances, invoke"; "is, in particular circumstances, entitled to invoke"; and "may request reparation". I should note that one Member opposed the text of the paragraph based on the

view that the provision effectively provided for automatic succession of the right to invoke responsibility.

Paragraph 3 is a without prejudice clause. It accommodates the scenario implied by paragraphs 1 and 2 where both the predecessor and successor States are entitled to invoke responsibility. It is analogous to paragraph 3 of draft guideline 9 and gives priority to agreements between the States concerned. It was noted that such agreements could involve, *inter alia*, the apportionment of compensation already paid to the predecessor State before the date of succession or a decision that the successor State should pursue the entire claim. The words "when implementing paragraphs 1 and 2", which appear in draft guideline 9, were omitted. It was recalled that they had been included in draft guideline 9 in response to the concerns that the predecessor State and the successor State might agree not to provide reparation to an injured third State, which would be to the detriment of that State's rights. Such a limitation was not considered necessary in the context of draft guideline 13 because the responsible State in the present context is not affected by the succession of States.

The title of draft guideline 12 is "[c]ases of succession of States when the predecessor State continues to exist".

Draft guideline 13 – "Uniting of States"

Mr. Chairperson,

I now come to draft guideline 13, which is entitled "Uniting of States". Before I address its text, allow me to briefly discuss its relationship to draft guideline 13 *bis*. You may recall that, in the statement of the Chairperson of the Drafting Committee on this topic at last year's session it was explained that the Committee had decided to treat the scenario of a uniting (i.e., merger) of States separately from the scenario of the incorporation of a State into another State whose personality continues after the date of succession. For this reason, the Drafting Committee adopted draft article 10 *bis* in addition to the draft article 10 originally proposed by the Special Rapporteur.

The Drafting Committee decided to take the same approach when coming to draft guideline 13, treating uniting of States separately from the incorporation of a State, for issues relating to the

reparation of injury for internationally wrongful acts committed against a predecessor State. Accordingly, draft guideline 13 covers the unification scenario while draft guideline 13 *bis* covers the incorporation of a State into another State.

Let me now turn to draft guideline 13 itself. The provision comprises a single paragraph. A number of drafting points were discussed by the Committee. The first was whether to make it explicit in the text that the provision referred to an internationally wrongful act that occurred before the date of succession of States. This was considered unnecessary, because in a situation of unification, the predecessor States cease to exist on the date of succession. Therefore, an injury to a predecessor State could only refer to one that occurred before that date. A discussion was also held whether to use the phrase "may invoke" or to follow draft guideline 12, paragraph 2, using "may be entitled to invoke". The former was chosen since, in the context of unification where there is only one successor State, the challenge of determining which State might be entitled to invoke responsibility did not arise. It was also noted that in draft guideline 12, the notion of "entitled to invoke" was linked to the idea of continuation in paragraph 1 and to the idea of "particular circumstances" in paragraph 2., neither of which were relevant to draft guideline 13.

The Drafting Committee considered a proposal by the Special Rapporteur for a second paragraph, which would have clarified that the previous paragraph applied unless the States concerned agreed otherwise. It was decided that such a clarification could be omitted in draft guideline 13 as such proposition was sufficiently captured by draft guideline 1, paragraph 2.

The title of draft guideline 13 is "Uniting of States", as was proposed by the Special Rapporteur.

Draft guideline 13 *bis* – "Incorporation of a State into another State"

Mr. Chairperson,

I now turn to draft guideline 13 *bis*, which concerns the scenario where an injured predecessor State becomes part of another, whose legal personality continues. Like its analogue in Part Two, draft guideline 10 *bis*, the provision has two paragraphs. The Drafting Committee proceeded on the basis of a revised proposal by the Special Rapporteur which had the order of the

paragraphs reversed. The Committee, however, preferred the current order so as to align with that in draft guideline 10 *bis*.

As originally proposed, draft guideline 13 *bis* made more extensive use of the terms "predecessor State" and "successor State". There was a discussion in the Drafting Committee of whether this might create a risk of confusion. It was noted that, as per the definitions provisionally adopted in draft guideline 2, the incorporated State was the predecessor State and the incorporating State the successor State with respect to the territory incorporated. However, it was considered clearer and more intuitive to use phrasing such as "injured State" and "incorporated State" in the present context.

While in both cases the successor, i.e., incorporating, State may invoke the responsibility of the wrongdoing State, the Drafting Committee consciously used two different verbs in the two paragraphs to reflect the specificities of each scenario. In paragraph 1, where the ability of the incorporating State to invoke the responsibility of the wrongdoing State only begins on the date of succession, the wording "may invoke" is used. As in draft guideline 13, this reflects the fact that there is no confusion as to which of the States might invoke responsibility after the date of succession because the predecessor State has ceased to exist. In paragraph 2, where the entitlement of the incorporating State to invoke responsibility begins when it is injured prior to the date of succession, the word "continues" is used. This reflects the notion I mentioned earlier in my report on draft guideline 12 that the pre-existing entitlement is not affected by the succession. It was also proposed to capture the idea of continuation by including the word "thereafter", but the Drafting Committee considered that the context made paragraph 2 sufficiently clear without it.

The term "wrongdoing State", used at the end of both paragraphs, as well as in draft guideline 14, is borrowed from the commentary to the 2001 articles. The Drafting Committee considered whether to avoid the term, however, as it did not figure in the text of the corresponding article. It was decided, however, that the phrase would be useful for the present draft guidelines as it was an elegant way of capturing the idea of the State that was responsible for the internationally wrongful act without repeating so many words. This will be explained further in the commentary.

The title of draft guideline 13 *bis* is "[i]ncorporation of a State into another State", which mirrors the title of draft guideline 11 *bis*.

Draft guideline 14 – "Dissolution of a State"

Mr. Chairperson,

Allow me to now turn to draft guideline 14, which concerns the dissolution of a State. Like its analogue in Part Two, draft guideline 11, the provision defines the dissolution of a State in the terms used by article 18 of the 1983 Vienna Convention on Succession of States in respect of State Property, Archives and Debts: that is, "[w]hen a State … dissolves and ceases to exist and the parts of the territory of the predecessor State form two or more successor States". The same definition was also used in the Commission's work on nationality in relation to the succession of States and the work of the *Institut de droit international*. The only change from the formula of the Vienna Convention is the addition of the words "that has been injured by an internationally wrongful act" between "a State" and "dissolves". This does not change the definition of a dissolution but rather serves to indicate the scenario to which the draft guideline applies.

The draft guideline comprises two paragraphs. Paragraph 1 concerns whether one or more of the successor States is entitled to invoke the responsibility of the wrongdoing State for an act against the predecessor State, while paragraph 2 emphasizes the importance of agreement between the wrongdoing State and the relevant successor State or States in the context of a dissolution.

I begin with paragraph 1. The use of the phrase "may, in particular circumstances, be entitled to invoke", is similar to that in draft guideline 12, paragraph 2. The Drafting Committee chose this language, instead of an earlier proposal "may invoke", because the phrase reflected the idea that, while not all successor States will be entitled to invoke responsibility, one or more will. The phrase "in particular circumstances" serves to confirm that the identification of the successor State or States that are entitled to invoke responsibility in respect of the injury to the predecessor may depend on a number of factors and that it will not necessarily be all successor States who are so entitled. This will be explained further in the accompanying commentary.

Nevertheless, some members of the Drafting Committee considered that the question of an agreement was closely linked to the subject matter of the draft guideline. This connection was emphasized in particular with respect to the identification of which successor State or States is entitled to invoke responsibility. Paragraph 2 speaks to this concern, emphasizing the role of agreements in the complex situation of a dissolution of a State to avoid overlapping claims, notwithstanding the entitlement specified in paragraph 1.

The text of paragraph 2 is inspired by that of draft guideline 11. As in draft guideline 11, the use of the word "relevant" in relation to "successor State or States" reflects the possibility that there may be successor States that do not have an interest in addressing the injury and therefore should not necessarily be involved in negotiations being envisaged. This will be explained in the commentary. The final sentence is identical to its analogue in draft guideline 11 and provides criteria for the determination of which successor States are relevant and have a more justified claim in relation to the injury. The same criteria also point to the meaning of the phrase "particular circumstances" in paragraph 1. The emphasis on agreement is consistent with the overall orientation of the draft guidelines, reflected in draft guideline 1, paragraph 2: that agreements between the State concerned have priority.

The Drafting Committee considered a proposal for a third paragraph in draft guideline 14 that would have served as a without prejudice clause with respect to any question of apportionment between the successor States *inter se*. Although some consideration was given to the drafting of such a paragraph, the Drafting Committee decided that a without prejudice clause was unnecessary because the issue of agreements between the successor States was covered by paragraph 2.

The title of draft guideline 14 is "[d]issolution of a State". The title of the provision as proposed by the Special Rapporteur in his third report was "Dissolution of States". This was changed to the singular to align the title with those used in the prior work of the Commission, including in draft guideline 11.

Draft guideline 15 – "Diplomatic protection"

Mr. Chairperson,

I now turn to draft guideline 15 on diplomatic protection. The Drafting Committee took note of the fact that the Commission had in its prior work, particularly in relation to article 5, paragraph 2, of the draft articles on diplomatic protection of 2006, clarified that an exception to the general requirement of continuous nationality applied to persons whose nationality had been changed by a succession of States. The Drafting Committee attempted to draft a detailed provision covering the matter but was unable to agree on a text. As such, it settled for a saving clause to confirm its intention not to depart from the Commission's prior work, including as regards both the draft articles on diplomatic protection, of 2006, and the articles on nationality of natural persons in relation to the succession of States, of 1999. This point will be further explained in the commentary. The Drafting Committee initially considered a specific reference to the rules regarding the nationality of claims, but decided that such rules were adequately covered by the phrase "rules of diplomatic protection".

The Drafting Committee held a discussion as to whether draft guideline 15 would be better located as a third paragraph to draft guideline 1, as it also serves to define the substantive scope of the draft guidelines. It was decided that this question would be best considered at the stage of *toilettage* at the end of the first reading.

The title of draft guideline 15 is "[d]iplomatic protection", as proposed in the third report of the Special Rapporteur. There was a discussion in the Drafting Committee as to whether a more precise title would better reflect the fact that the provision was a savings clause. In the end, this was considered unnecessary.

Draft guideline 15 *bis* – "Cessation and non-repetition"

Mr. Chairperson,

Allow me to turn to draft guideline 15 *bis*. The Special Rapporteur introduced revised proposals for draft guidelines 15 *bis* and 15 *ter*, based on the debate in the Plenary at the previous session, with a view to streamlining his original proposal for four draft articles on reparation, contained in his fourth report. Together, the provisions were proposed as a separate part of the draft guidelines, which would be entitled "[f]orms of obligations arising from States responsibility in the context of succession of States".

The Drafting Committee held a preliminary discussion on whether or not to include the additional part within the draft guidelines. It was noted in the Committee that the *Institut de droit international* had not addressed obligations arising from responsibility in its 2015 resolution. It was also suggested that the draft guidelines could simply provide that the 2001 articles apply *mutatis mutandis* in cases of succession of States or could include a without prejudice clause to similar effect.

Ultimately, the Drafting Committee decided to proceed with consideration of the revised proposals of the Special Rapporteur and was able only to conclude its consideration of, and adopt, draft guideline 15 *bis*, owing to a lack of time. As I mentioned at the beginning of my statement, the Special Rapporteurs proposal for draft guideline 15 *ter*, on reparation, has been left over to next year. Before proceeding with draft guideline 15 *bis*, I wish to record that there was also a proposal in the Drafting Committee to include a further provision, dealing with the continued duty of performance. However, some Members considered such a provision unnecessary on basis that, in their view, the continued duty of performance was a consequence of the underlying primary obligation, rather than a secondary obligation that existed by virtue of the law of State responsibility.

I turn now to draft guideline 15 *bis*, which is comprised of two paragraphs whose structures parallel the text of article 30 of the 2001 articles.

Paragraph 1 concerns the situation of a predecessor State that is responsible for an internationally wrongful act that occurred before the date of succession. The phrase “and that continues to exist after the date of succession” was included to highlight the point that it could only apply to predecessor States that were not extinguished upon the succession of States without necessarily implying that the act in question needs to be continuing in nature in order to fall within the scope of the paragraph.

Paragraph 2 covers two main scenarios. As originally proposed, paragraph 2 related only to the position of a successor State that was responsible for an internationally wrongful act. However, its scope was broadened to include also the case of a predecessor State that is responsible for a composite act that it committed prior to the date of succession of States and then completed

after that date. This is reflected both in the opening of the paragraph, which refers generically to "a State", as well as in the cross-reference to draft guideline 7 *bis*, paragraph 1, which, as I mentioned earlier, covers this scenario. The Committee preferred this solution to the alternative of having a separate paragraph for each scenario for the sake of concision.

The Drafting Committee held a thorough discussion of how best to word the *chapeau* of paragraph 2, resulting in a decision to mirror that of paragraph 1 to the extent possible. Several possibilities were put forward. One was to refer generally to "[a] State that is responsible for an internationally wrongful act", which was rejected as overly broad given the scope of the draft guidelines. Another was to refer to "continuing and composite acts". To link the paragraph to the topic of succession in a clear and concise way, the Committee decided to use cross-references to both draft guidelines 7 and 7 *bis*, paragraphs 1 and 2.

Sub-paragraphs (a) and (b) of each paragraph are identical to their counterparts in article 30 of the 2001 articles. The sub-paragraphs provide, respectively, for the obligation of a State to cease an internationally wrongful act, if the act has a continuing character, and to offer appropriate assurances and guarantees of non-repetition, if circumstances so require, in the situations described in the *chapeaux* of paragraphs 1 and 2. In its discussion, the Drafting Committee also considered that the term "act" should be understood to refer to both actions and omissions.

The title of draft guideline 15 *bis* is "[c]essation and non-repetition", drawing on the title of article 30 of the 2001 articles.

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Mr. Chairperson,

This concludes my introduction of the fourth report of the Drafting Committee at the seventy-third session, devoted to the topic "Succession of States in respect of State responsibility". I recommend that the Commission provisionally adopt draft guidelines 6, 7 *bis*, 10, 10 *bis*, 11, 12,

13, 13 *bis*, 14, 15 and 15 *bis* as contained in the report of the Drafting Committee. The Special Rapporteur has submitted commentaries for these draft guidelines, which will be considered by the Commission at the current session. The Commission is requested to take note of revised draft guidelines 1, 2, 5, 7, 8 and 9, as reflected in the annex to this statement. I understand that the Special Rapporteur has also provided commentaries for these draft guidelines to assist the Commission in its future work on this topic. I would like to thank Mr. Sturma for this and to thank him for his outstanding work on this topic over the past several years. As I mentioned, the entire set of draft guidelines worked out thusfar by the Commission is annexed to this statement, which will be posted on the website of the Commission.

I thank you for your kind attention.

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Annex

Titles and texts of the draft guidelines on the succession of States in respect of State responsibility worked out by the Drafting Committee thus far

Draft guideline 1

Scope

1. The present draft guidelines concern the effects of a succession of States in respect of the responsibility of States for internationally wrongful acts.

2. The present draft guidelines apply in the absence of any different solution agreed upon by the States concerned.

Draft guideline 2

Use of terms

For the purposes of the present draft guidelines:

(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;

Draft guideline 5

Cases of succession of States covered by the present draft guidelines

The present draft guidelines concern only 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.

Draft guideline 6

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.

Draft guideline 7

Acts having a continuing character

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 guideline 7 *bis*

Composite acts

1. When a predecessor State continues to exist, the breach of an international obligation by that State through a series of actions or omissions defined in aggregate as wrongful occurs when an action or omission of the predecessor State occurs after the date of succession which, taken with its other actions or omissions, is sufficient to constitute the wrongful act.

2. The breach of an international obligation by a successor State through a series of actions or omissions defined in aggregate as wrongful occurs when an action or omission of the successor State occurs after the date of succession which, taken with its other actions or omissions, is sufficient to constitute the wrongful act.

3. The provisions of paragraphs 1 and 2 are without prejudice to whether the breach of an international obligation by a successor State may occur through a series of actions or omissions defined in aggregate as wrongful that commences with the predecessor State and continues with the successor State.

Draft guideline 8

Attribution of conduct of an insurrectional or other movement

1. 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 is considered an act of the new State under international law.

2. 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.

Draft guideline 9

Cases of succession of States when the predecessor State continues to exist

1. 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.

2. In particular circumstances, the injured State and the successor State should endeavour to reach an agreement for addressing the injury.

3. 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.

Draft guideline 10

Uniting of States

When two or more States unite and so form one successor State, and an internationally wrongful act has been committed by any of the predecessor States, the injured State and the successor State should agree on how to address the injury.

Draft guideline 10 *bis*

Incorporation of a State into another State

1. When an internationally wrongful act has been committed by a State prior to its incorporation into another State, the injured State and the incorporating State should agree on how to address the injury.

2. When an internationally wrongful act has been committed by a State prior to incorporating another State, the responsibility of the State that committed the wrongful act is not affected by such incorporation.

Draft guideline 11

Dissolution of a State

When 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, the injured State and the relevant successor State or States should agree on how to address the injury arising from the internationally wrongful act. They should take into account any territorial link, any benefit derived, any equitable apportionment, and all other relevant circumstances.

Draft guideline 12

Cases of succession of States when the predecessor State continues to exist

1. When an internationally wrongful act has been committed against a predecessor State by another State before the date of succession of States, and the predecessor State continues to exist, the predecessor State continues to be entitled to invoke the responsibility of the other State even after the date of succession, if the injury to it has not been made good.

2. In addition to paragraph 1, a successor State may, in particular circumstances, be entitled to invoke the responsibility of the State that committed the internationally wrongful act.

3. Paragraphs 1 and 2 are without prejudice to any apportionment or other agreement between the predecessor State and the successor State.

Draft guideline 13
Uniting of States

When two or more States unite and so form one successor State, and any of the predecessor States was injured by an internationally wrongful act of another State, the successor State may invoke the responsibility of that other State.

Draft guideline 13 *bis*
Incorporation of a State into another State

1. When an internationally wrongful act has been committed against a State prior to its incorporation into another State, the incorporating State may invoke the responsibility of the wrongdoing State.

2. When an internationally wrongful act has been committed against a State prior to incorporating another State, the injured State continues to be entitled to invoke the responsibility of the wrongdoing State.

Draft guideline 14
Dissolution of a State

1. When a State that has been injured by 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, one or more of the successor States may, in particular circumstances, be entitled to invoke the responsibility of the wrongdoing State.

2. The wrongdoing State and the relevant successor State or States should endeavour to reach agreement for addressing the injury. They should take into account any territorial link, any loss or benefit derived for nationals of the successor State, any equitable proportion and all other relevant circumstances.

Draft guideline 15

Diplomatic protection

The present draft guidelines do not address the application of the rules of diplomatic protection in situations of the succession of States.

Draft guideline 15 *bis*

Cessation and non-repetition

1. A predecessor State that is responsible for an internationally wrongful act that occurred before the date of succession of States, and that continues to exist after the date of succession, remains under an obligation:

(a) to cease that act, if it is continuing;

(b) to offer appropriate assurances and guarantees of non-repetition, if circumstances so require.

2. A State that is responsible for an internationally wrongful act in accordance with draft guideline 7 or with draft guideline 7 *bis*, paragraph 1 or paragraph 2, is under an obligation:

(a) to cease that act, if it is continuing;

(b) to offer appropriate assurances and guarantees of non-repetition, if circumstances so require.