

Chapter VII

Succession of States in respect of State responsibility

A. Introduction

116. At its sixty-ninth session (2017), the Commission decided to include the topic “Succession of States in respect of State responsibility” in its programme of work and appointed Mr. Pavel Šturma as Special Rapporteur.³⁹² The General Assembly subsequently, in its resolution 72/116 of 7 December 2017, took note of the decision of the Commission to include the topic in its programme of work.

117. At the same session, the Commission considered the first report of the Special Rapporteur (A/CN.4/708), which set out the Special Rapporteur’s approach to the scope and outcome of the topic, and provided an overview of general provisions relating to the topic. Following the debate in plenary, the Commission decided to refer draft articles 1 to 4, as contained in the first report of the Special Rapporteur, to the Drafting Committee. The Commission subsequently took note of the interim report of the Chair of the Drafting Committee regarding draft articles 1 and 2, provisionally adopted by the Committee, which was presented to the Commission for information only.³⁹³

118. At its seventieth session (2018), the Commission considered the second report of the Special Rapporteur (A/CN.4/719), which discussed the legality of succession, the general rules on succession of States in respect of State responsibility, and certain special categories of State succession to the obligations arising from responsibility. Following the debate in plenary, the Commission decided to refer draft articles 5 to 11, as contained in the second report of the Special Rapporteur, to the Drafting Committee. The Commission subsequently took note of the interim report of the Chair of the Drafting Committee on draft article 1, paragraph 2, and draft articles 5 and 6, provisionally adopted by the Committee, which was presented to the Commission for information only.³⁹⁴

119. At its seventy-first session (2019), the Commission considered the third report of the Special Rapporteur (A/CN.4/731), which discussed reparation for injury resulting from internationally wrongful acts committed against the predecessor State and against the nationals of the predecessor State. The report also contained technical proposals in relation to the scheme of the draft articles. The Commission also had before it a memorandum by the Secretariat providing information on treaties which may be of relevance to its future work on the topic (A/CN.4/730). Following the debate in plenary, the Commission decided to refer draft articles 2, paragraph (f), X, Y, 12, 13, 14 and 15, and the titles of Part Two and Part Three, as contained in the third report of the Special Rapporteur, to the Drafting Committee. The Commission subsequently considered a first report of the Drafting Committee on the topic³⁹⁵ and provisionally adopted draft article 1, draft article 2, paragraphs (a) to (d), and draft article 5, which had been provisionally adopted by the Drafting Committee at the sixty-ninth and seventieth sessions, with commentaries thereto.³⁹⁶ The Commission also took note of the interim report of the Chair of the Drafting Committee on draft articles 7, 8 and 9, provisionally adopted by the Committee, which was presented to the Commission for information only.³⁹⁷

³⁹² At its 3354th meeting, on 9 May 2017. The topic had been included in the long-term programme of work of the Commission during its sixty-eighth session (2016), on the basis of the proposal contained in annex B to the report of the Commission (*Official Records of the General Assembly, Seventy-first Session, Supplement No. 10 (A/71/10)*).

³⁹³ The interim report of the Chair of the Drafting Committee is available in the analytical guide to the work of the International Law Commission: http://legal.un.org/ilc/guide/3_5.shtml.

³⁹⁴ *Ibid.*

³⁹⁵ See A/CN.4/L.939 and interim report of the Chair of the Drafting Committee, available in the analytical guide to the work of the International Law Commission (see footnote 393 above).

³⁹⁶ See *Official Records of the General Assembly, Seventy-fourth Session, Supplement No. 10 (A/74/10)*.

³⁹⁷ The interim report of the Chair of the Drafting Committee is available in the analytical guide to the work of the International Law Commission (see footnote 393 above).

B. Consideration of the topic at the present session

120. At the present session, the Commission had before it the fourth report of the Special Rapporteur (A/CN.4/743).

121. In his fourth report, composed of three parts, the Special Rapporteur provided an overview of the work on the topic, which included a summary of the debate in the Sixth Committee and an explanation of the methodology of the report (Part One). The Special Rapporteur then addressed questions related to the impact of succession of States on forms of responsibility, in particular different forms of reparation (restitution, compensation and satisfaction), the obligation of cessation and assurances and guarantees of non-repetition (Part Two). Lastly, the Special Rapporteur discussed the future programme of work on the topic (Part Three). Five new draft articles (draft articles 7 *bis*, 16, 17, 18 and 19) were proposed in the fourth report.³⁹⁸

³⁹⁸ The text of draft articles 7 *bis*, 16, 17, 18 and 19, as proposed by the Special Rapporteur in his fourth report, reads as follows:

Draft article 7 *bis*
Composite acts

1. When an internationally wrongful act is of a composite character, the international responsibility of a predecessor State and/or that of a successor State is engaged if a series of actions or omissions defined in aggregate as wrongful occurs. If the action or omission, taken with the other action or omission, is sufficient to constitute the wrongful act of either the predecessor State or the successor State, such State is responsible only for the consequences of its own act.
2. However, if an internationally wrongful act occurs only after the last action or omission by the successor State, the international responsibility of this State extends over the entire period starting with the first of the actions or omissions and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation.
3. Provisions of paragraphs 1 and 2 are without prejudice for any responsibility incurred by the predecessor State or the successor State on the basis of a single act if and to the extent that it constitutes a breach of any international obligation in force for that State.

Draft article 16
Restitution

1. In cases of succession of States where a predecessor State continues to exist, that State is under an obligation to make restitution, provided and to the extent that restitution is not materially impossible or does not involve a burden out of all proportion.
2. If, due to the nature of restitution, only a successor State or one of the successor States is in a position to make such restitution or if a restitution is not possible without participation of a successor State, a State injured by an internationally wrongful act of the predecessor State may request such restitution or participation from that successor State.
3. Paragraphs 1 and 2 are without prejudice to any apportionment or other agreement between the successor State and the predecessor State or another successor State, as the case may be.
4. A successor State may request restitution from a State which committed an internationally wrongful act against the predecessor State if the injury caused by this act continues to affect the territory or persons which, after the date of succession of States, are under the jurisdiction of the successor State.

Draft article 17
Compensation

1. In cases of succession of States where a predecessor State continues to exist, that State is under an obligation to make compensation for the damage caused by its internationally wrongful act, insofar as such damage is not made good by restitution.
2. In particular circumstances, a State injured by such internationally wrongful act may request compensation from a successor State or one of the successor States, provided that the predecessor State ceased to exist or, after the date of succession of States, that successor State continued to benefit from such act.
3. Paragraphs 1 and 2 are without prejudice to any apportionment or other agreement between the successor State and the predecessor State or another successor State, as the case may be.

122. At its 3528th meeting, on 21 May 2021, the Commission provisionally adopted draft articles 7, 8 and 9,³⁹⁹ which had been provisionally adopted by the Drafting Committee at the seventy-first session (2019) (see sect. C.1 below).

123. The Commission considered the fourth report of the Special Rapporteur at its 3531st to 3537th meetings, from 5 to 12 July 2021. At its 3537th meeting, on 12 July 2021, the Commission decided to refer draft articles 7 *bis*, 16, 17, 18 and 19, as contained in the fourth report of the Special Rapporteur, to the Drafting Committee, taking into account the views expressed in the plenary debate.

124. At its 3552nd meeting, on 28 July 2021, the Chair of the Drafting Committee presented an interim report on draft articles 10, 10 *bis* and 11, provisionally adopted by the Committee at the present session. The interim report was presented for information only and is available on the website of the Commission.⁴⁰⁰

125. At its 3560th to 3562nd meetings, on 4 and 5 August 2021, the Commission adopted the commentaries to draft articles 7, 8 and 9 provisionally adopted at the present session (see sect. C.2 below).

1. Introduction by the Special Rapporteur of the fourth report

126. The Special Rapporteur first reiterated the following general considerations for the Commission's work on the topic, as outlined in Part One of his fourth report: (a) the subsidiary nature of the draft articles and the priority of agreements entered into between States concerned; (b) the importance of preserving consistency with the previous work of the Commission, in particular its articles on responsibility of States for internationally wrongful acts;⁴⁰¹ (c) the role of the concepts of equity, equitable proportion and distribution of rights and obligations; (d) the specificity of cases of succession of States that inevitably combines political and legal considerations; (e) the fact that neither the "clean slate" rule nor automatic succession were accepted as general rules; and (f) the need to combine codification with progressive development of international law.

4. A successor State may request compensation from a State which committed an internationally wrongful act against the predecessor State, provided that the predecessor State ceased to exist or, after the date of succession of States, the successor State continued to bear injurious consequences of such internationally wrongful act.

Draft article 18
Satisfaction

1. In cases of succession of States where a predecessor State continues to exist, that State is under an obligation to give satisfaction for the injury caused by its internationally wrongful act, insofar as such injury is not made good by restitution or compensation.

2. Paragraph 1 is without prejudice to an appropriate satisfaction, in particular prosecution of crimes under international law, that any successor State may claim or may provide.

Draft article 19
Assurances and guarantees of non-repetition

1. In cases of succession of States where a predecessor State continues to exist, that State is under an obligation to offer appropriate assurances and guarantees of non-repetition, if circumstances so require, even after the date of succession of States.

2. Provided that the obligation breached by an internationally wrongful act remained in force after the date of succession of States between a successor State and another State concerned, and if circumstances so require:

(a) a State injured by an internationally wrongful act of the predecessor State may request appropriate assurances and guarantees of non-repetition from a successor State; and

(b) a successor State of a State injured by an internationally wrongful act of another State may request appropriate assurances and guarantees of non-repetition from this State.

³⁹⁹ As contained in the report of the Drafting Committee (A/CN.4/L.939/Add.1).

⁴⁰⁰ Available in the analytical guide to the work of the Commission (see footnote 393 above).

⁴⁰¹ General Assembly resolution 56/83 of 12 December 2001, annex. The draft articles adopted by the Commission and the commentaries thereto are reproduced in *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, paras. 76–77.

127. The Special Rapporteur then stated that Part Two of the report concerned the impact of succession of States on forms of responsibility. Part Two dealt with forms of responsibility and legal consequences that could be applicable in situations of succession of States, while maintaining consistency with the articles on responsibility of States for internationally wrongful acts. The report and the draft articles proposed therein respected the continuing applicability of general rules of State responsibility with respect to a predecessor State, subject to the material impossibility of that State providing a specific form of reparation. Special circumstances that warranted certain forms of reparation by a successor State or States were also discussed. Additionally, the report contained an analysis of (a) situations of actual succession of States to international rights and obligations arising from State responsibility, and (b) situations when the State incurs responsibility for its own internationally wrongful acts, even in the case of succession of States.

128. With respect to the proposed draft articles, the Special Rapporteur explained that the report addressed the question of composite acts, in response to a request from members of the Drafting Committee at the seventy-first session (2019) of the Commission during the debate on draft article 7 (acts having a continuing character). Draft article 7 *bis* (composite acts) was proposed further to the Special Rapporteur's analysis in the second and fourth reports and was deemed useful in order to clarify the issue of composite acts. The Special Rapporteur considered that composite acts differed from acts having a continuing character. Draft article 7 *bis* did not purport to establish a new rule but rather built upon the application of general rules of responsibility of States in the context of succession of States.

129. Turning to the draft articles on the different forms of reparation, the Special Rapporteur explained that draft articles 16 (restitution) and 17 (compensation) followed similar structures. Both draft articles provided for the obligations of predecessor and successor States in relation to restitution and compensation, as relevant. The two draft articles also addressed apportionment of responsibility or other relevant agreements between the successor State and the predecessor State or another successor State. The Special Rapporteur further explained that draft article 16 was in line with the articles on responsibility of States for internationally wrongful acts and draft article 17 was informed by an analysis of practice, including decisions of the European Court of Human Rights and the United Nations Compensation Commission.

130. Moreover, the Special Rapporteur had examined satisfaction as a form of reparation for non-material injury, as proposed in draft article 18. A distinction had to be made between the traditional perspective and the modern law of State responsibility. Under the former, the nature of moral injury appeared to be linked to the bilateral relations of the States concerned and to their dignity and personality. The latter envisaged the notion of "legal injury", which was mainly related to breaches of obligations that protected essential collective interests of a group of States or the international community of States. That included the protection of human rights or the prevention and punishment of crimes under international law. While the fourth report pointed to the examples contained in the Commission's commentary to article 37 of the articles on responsibility of States for internationally wrongful acts, the report focused on the investigation and punishment of responsible persons as the most appropriate form of satisfaction in cases of serious violations of obligations *erga omnes*. The Special Rapporteur clarified that the report examined the case law regarding crimes under international law committed in the territory of the former Yugoslavia, as they were the most significant examples in modern practice and had been tried at the national and international levels. It was within such context that draft article 18 had been proposed. Paragraph 1 of draft article 18 stipulated that in cases of succession of States where a predecessor State continued to exist, that State was under an obligation to give satisfaction for the injury caused by its internationally wrongful act, insofar as such injury was not made good by restitution or compensation. Paragraph 2 contained a without prejudice clause, which sought to reflect a cautious and flexible approach to appropriate forms of satisfaction, in particular investigation and prosecution of crimes under international law.

131. The report also provided an analysis of the obligation of cessation and assurances and guarantees of non-repetition. It sought to clarify the obligation of cessation, which in his view was only relevant in cases of internationally wrongful acts having a continuing character and applied by virtue of general rules of State responsibility. The Special Rapporteur considered

that assurances and guarantees of non-repetition served a different function from other forms of reparation and, therefore, their inclusion and analysis in the report was needed. He emphasized that assurances and guarantees of non-repetition were future-oriented, in the sense that they would only apply once the internationally wrongful act had been committed. It was also explained that the breached primary obligation must subsist and be in force, making the transfer of any secondary obligation contingent on the succession of the primary obligation. Draft article 19 (assurances and guarantees of non-repetition) was proposed to that effect. Paragraph 1 contained the general rule based on the articles on responsibility of States for internationally wrongful acts: where a predecessor State continues to exist, that State is under an obligation to offer appropriate assurances and guarantees of non-repetition, if circumstances so require, even after the date of succession of States. Paragraph 2, in turn, addressed exceptional situations and contained two conditions in order to be applicable: (a) that the obligation breached by an internationally wrongful act remained in force between a successor State and another State concerned; and (b) that the circumstances so require. If both conditions were present, then an injured State might request appropriate assurances and guarantees of non-repetition from a successor State, and a successor State of a State injured by a wrongful act committed by another State could request appropriate assurances and guarantees of non-repetition from that State.

132. Part Three of the report discussed the future programme of work. The Special Rapporteur indicated that his fifth report would focus on matters related to the plurality of injured successor States, as well as the plurality of responsible States. It would also address miscellaneous and technical issues, including the renumbering of the draft articles and their final structure. It was hoped that the topic could be completed on first reading at the Commission's seventy-third session.

2. Summary of the debate

(a) General comments

133. Members of the Commission expressed their appreciation to the Special Rapporteur for his fourth report.

134. Regarding the general considerations for the work on the topic, members generally agreed with the Special Rapporteur on the subsidiary nature of the draft articles and on the priority to be given to agreements between the States concerned. Some members suggested that the commentaries to the draft articles could provide examples of succession agreements between States, and that a number of model clauses could be drafted to be used as a basis for negotiation of agreements on succession in respect of State responsibility.

135. Differing views were expressed pertaining to the general rule of non-succession, the "clean slate" rule, and that of "automatic" succession. Some members concurred with the Special Rapporteur's assertion that the diverse and context-specific State practice did not support the primacy of either the "clean slate" rule or automatic succession, while some members were of the view that there could be exceptions to the general rule of non-succession. Other members reiterated that the general rule applicable in the topic was the "clean slate" rule and that no such rule of automatic succession existed. While the view was expressed that the proposed draft articles appeared to go in the direction of automatic succession, other members did not share that view. The point was made that the fourth report, while stating that the "transfer of responsibility" of States is different from the "transfer of rights and obligations arising from responsibility" of States, did not sufficiently explain such difference. Some members questioned the methodology of the report and the extent to which the analysis contained therein was made by drawing parallels with succession of States in respect of debts and inspired by the 1983 Vienna Convention on Succession of States in respect of State Property, Archives and Debts.⁴⁰²

136. A number of members emphasized the need to take into account more geographically diverse sources of State practice and recalled that the scarcity of State practice had been

⁴⁰² Vienna Convention on Succession of States in respect of State Property, Archives and Debts (Vienna, 8 April 1983), United Nations, *Juridical Yearbook 1983* (Sales No. E.90.V.1), p. 139.

highlighted during the debate in the Sixth Committee. Other members noted that, although State practice was limited, the Commission should nevertheless ascertain what practice existed on the matter. Caution was expressed against drawing general conclusions on matters of reparation based on lump-sum agreements or on the inconsistent, insufficient and context-specific State practice. In that connection, it was recalled that the mandate of the Commission was not limited to codification, but also included progressive development of international law. A further suggestion was made that the commentary describe the relationship between State practice and each draft article more clearly, thus showing clearly which draft articles were supported by State practice and which constituted progressive development of international law.

137. The view was expressed that the focus of the work of the Commission on the topic should be on clarifying how the rules on State responsibility operate in the specific factual scenario of succession of States. It was suggested that the Commission should further explore the legal consequences of State succession in relation to claims by private persons, which was not covered by the articles on responsibility of States for internationally wrongful acts, although opposition was also expressed to that suggestion.

138. The importance of maintaining consistency, in terminology and substance, with the previous work of the Commission was reiterated. In that regard, a proposal was made to add a provision to the draft articles concerning their temporal application, along the lines of article 7 of the 1978 Vienna Convention on Succession of States in respect of Treaties⁴⁰³ and article 4 of the 1983 Vienna Convention on Succession of States in respect of State Property, Archives and Debts. It was noted that the Commission could benefit from the work of the Institute of International Law on succession of States.

(b) Draft article 7 bis

139. Several members considered draft article 7 *bis* to be a useful complement to draft article 7. It was suggested that the draft article could rely on the definition of composite acts as contained in article 15 of the articles on responsibility of States for internationally wrongful acts. Another view recalled that Member States in the Sixth Committee had expressed reservations about a discussion on composite acts. Some members were of the view that the scope of paragraphs 1 and 2 needed to be clarified, in particular with regard to the responsibility of the predecessor State when it continued to exist. It was also considered that paragraph 1 could benefit from clarification as to whether it excluded the transfer of rights and obligations arising from State responsibility that could occur under circumstances different from those envisaged in paragraph 2. Moreover, it was observed that paragraph 2 related more to the extension in time of the breach of an international obligation, as referred to in article 14 of the articles on responsibility of States for internationally wrongful acts, than to composite acts. Some members considered it necessary to further examine matters related to shared responsibility when a predecessor State continued to exist, and an analysis was called for of how the obligation of cessation applied in the case of a composite act or a continuing act which occurred during the succession process. The view was expressed that there was some degree of confusion between composite acts and continuing acts. Attention was drawn to the work of the Institute of International Law regarding succession and continuing and composite acts. Drafting suggestions were made to streamline the provision, as some of its proposed content was deemed to already be covered by general rules on State responsibility. Other drafting suggestions were made in relation to clarifying the scope of paragraphs 1 and 2.

(c) Draft articles 16 to 19

140. Some members noted that chapter III in Part Two of the fourth report, entitled “Impact of succession of States on forms of responsibility”, actually focused on the consequences of an internationally wrongful act committed by States, particularly in relation to the forms of reparation (restitution, compensation and satisfaction, as envisaged in draft articles 16 to 18). It was recalled that the obligation of cessation, assurances and guarantees of non-repetition,

⁴⁰³ Vienna Convention on Succession of States in respect of Treaties (Vienna, 23 August 1978), United Nations, *Treaty Series*, vol. 1946, No. 33356, p. 3.

and other forms of reparation, were not forms of responsibility, but rather legal consequences of responsibility of States under the articles on responsibility of States for internationally wrongful acts. Concern was expressed regarding the question of transfer of obligations to the successor State in order to provide reparation for acts of the predecessor State that took place before the date of succession, as it appeared that such concept was inconsistent with the requirement of attribution under article 2 of the articles on responsibility of States for internationally wrongful acts.

141. The need to clearly distinguish reparation, on one hand, and cessation and assurances and guarantees of non-repetition, on the other, was emphasized. Doubts were expressed regarding the value of having specific stand-alone draft articles for different forms of reparation. Accordingly, a proposal was made to simplify draft articles 16 to 19, so that they would become only two provisions: one concerning cessation and non-repetition, and the other concerning reparation. Further discussion of the forms of reparation with reference to the different categories of State succession was considered necessary, in particular on the circumstances leading to various solutions. The point was made that the draft articles were without prejudice to any right of reparation that might be owed to individuals subject to the jurisdiction of the injured State and, accordingly, it was suggested to add a draft article in that sense. A further view was expressed that discussing the issue of how to discharge the obligation to make full reparation for the injury caused by an internationally wrongful act committed by or against a predecessor State went beyond the scope of the topic.

142. Several members questioned whether draft articles 16 to 19, as proposed in the fourth report, were necessary, given that the situations governed therein were already covered by general rules of State responsibility. Concern was expressed with restating or rewriting the law on State responsibility, as the draft articles could risk misstating the law. It was noted, however, that the articles on responsibility of States for internationally wrongful acts might not cover all aspects relevant to the topic.

143. Some members were of the view that the recourse to lump-sum agreements should not undermine the rule of full reparation as a fundamental principle of the law of State responsibility. Furthermore, it was observed that lump-sum agreements might not be appropriate to settle disputes involving *erga omnes* obligations.

144. While the view was expressed that the flexible wording of “may request” employed in draft articles 16, 17 and 19 was appropriate, a number of members considered that such wording, and the expression “may claim” in draft article 18, were ambiguous and lacked clarity. Several members requested clarification of whether draft articles 16 to 19 applied to situations where the predecessor State ceased to exist. Clarification was requested that not every predecessor State was bound by an obligation of reparation, but only the predecessor State that was responsible for a wrongful act. Additionally, it was suggested that draft articles 16 to 19 be clarified to apply only to the extent that a successor State was bound to provide reparation for the acts of a predecessor State, in conformity with Part Two of the draft articles.

145. In relation to restitution, as foreseen in draft article 16, while agreement was expressed with the Special Rapporteur’s approach that restitution was the priority form of reparation under international law, some members questioned that approach. It was noted that a definition of restitution was absent from the provision. According to several members, draft article 16 was superfluous because it restated relevant provisions in the articles on responsibility of States for internationally wrongful acts. While appreciation was shown for the Special Rapporteur’s efforts to distinguish “legal” and “material” restitution, such distinction was questioned due to the lack of a basis in State practice. Agreement was expressed with the Special Rapporteur’s assertion that loss or destruction of the object of restitution was not representative of what the concept “material impossibility” could entail in situations of State succession. Regarding paragraph 1 of draft article 16, some members stressed the need to explain why the predecessor State should make restitution, as in some cases the predecessor State might not be responsible and the wrongful act might not be attributable to it. It was noted that the formulation of paragraph 1 could be clearer and less subjective and could benefit from full consistency with article 35 of the articles on responsibility of States for internationally wrongful acts. With respect to paragraph 2 of draft article 16, while some members suggested that the situation envisaged therein could be solved by applying the principle of unjust enrichment, scepticism was expressed on the

application of that principle in the context of international law. Several members observed that, in the context of paragraph 2, the successor State did not have an obligation to make restitution in lieu of the predecessor State. The view was expressed that paragraph 2 seemed to be based on “automatic succession”. Some members deemed it necessary to clarify whether the agreement between the successor State and the predecessor State referred to in paragraph 3 was opposable to injured States. The point was made that paragraph 3 was not in accordance with the rules on State responsibility pertaining to reparation, since agreements envisaged therein, between predecessor and successor States, could not produce legal effects in relation to injured States. The inclusion of a “without prejudice” clause in paragraph 4 to preserve the rights of individuals was proposed. Further, in that light, various drafting proposals were made in relation to draft article 16.

146. Regarding compensation, provided for in draft article 17, agreement was expressed with the Special Rapporteur’s assertion that compensation seemed to be the most common form of reparation in cases where responsibility for internationally wrongful acts was affected by the succession of States. Some members felt that it was necessary to clarify the principles underlying the proposed provision. The 1983 Vienna Convention on Succession of States in respect of State Property, Archives and Debts, as well as the work of the International Law Institute, were referred to as containing a number of references to the principle of equity, which could play a role in the calculation of the amount of compensation and the apportionment of the compensation between several States. It was noted that paragraph 1 did not contain a reference to financially assessable damage, unlike article 36 of the articles on responsibility of States for internationally wrongful acts. It was suggested that the situation foreseen in paragraph 2 could be resolved by applying the principle of the prohibition of unjust enrichment. In particular, that principle was relevant in situations in which the predecessor State ceased to exist. The need to clarify the circumstances that justified transferring obligations to the successor State whenever the predecessor State continued to exist was referred to. The view was expressed that the idea contained in paragraph 2 was already contained in draft article 7. It was suggested that the two conditions envisaged in paragraph 2 should be cumulative instead of alternative. The same suggestion was made concerning the two conditions in paragraph 4. Clarification was requested as to whether the agreement referred to in paragraph 3 was opposable to injured States. In that connection, the view was expressed that paragraph 3 was not in accordance with the rules on State responsibility pertaining to reparation, since agreements envisaged therein, between predecessor and successor States, could not produce legal effects in relation to injured States. Some members noted that the content of paragraph 3 appeared to already be covered in paragraph 2 of draft article 1. Several members considered that draft article 17 did not sufficiently demonstrate causality and requested further elaboration by the Special Rapporteur in that regard. A suggestion was made to include methods used for valuation of compensation in the commentary. Accordingly, various drafting proposals were made regarding the text of draft article 17.

147. Regarding satisfaction, as per draft article 18, support was expressed for the Special Rapporteur’s approach of interpreting, in the work on the topic, satisfaction through the modern concept of responsibility of States, which is based on “objective responsibility” and “legal injury”. It was reiterated that the provision was unclear regarding situations where the predecessor State ceased to exist, as well as when and under what conditions a successor State was entitled to request such form of satisfaction. In relation to paragraph 2, the inclusion of investigation and prosecution of international crimes was commended by some members. In contrast, the view was expressed that there was no evidence suggesting that investigation and prosecution of international crimes constituted a form of satisfaction, and the relevance of investigation and prosecution of such crimes as a form of satisfaction was questioned. Several members considered that it would be beneficial to have examples of State practice indicating that prosecution of international crimes was indeed regarded as a form of satisfaction by successor States, as well as an analysis of whether there was an obligation to claim or provide satisfaction by means of prosecuting crimes under international law. It was suggested that the word “may” did not cover an obligation of the successor State to provide satisfaction through the prosecution of international crimes. Moreover, the prosecution of serious violations of obligations *erga omnes* was referred to as a specific form of satisfaction made in relation to the international community as a whole. Draft article 18 was considered

unclear as to who was entitled to invoke responsibility within the meaning of article 48 of the articles on responsibility of States for internationally wrongful acts in cases of obligations *erga omnes*. Several members were of the view that, in cases of breaches of peremptory norms of general international law (*jus cogens*) and obligations *erga omnes*, all forms of reparation would be relevant, not just satisfaction. It was observed that a distinction had to be drawn between State responsibility and individual criminal responsibility. Several drafting proposals were made to amend draft article 18 with the intention of introducing such distinction.

148. While support was expressed for the text of draft article 19, regarding assurances and guarantees of non-repetition, some members suggested revising it to make it clearer and more precise. Clarification was requested as to why draft article 19 did not include the obligation of cessation. In particular, it was noted that if, indeed, no draft article on cessation was included, the commentary ought to explain what constituted continuing harm. Cessation and guarantees and assurances of non-repetition were considered by some members as playing an equal role in situations in which restitution was not possible and where the injury was not only material. The use of the word “appropriate” in the draft article was questioned because it did not offer enough guidance to States. While support was expressed for paragraph 1, concerns were raised regarding paragraph 2, which seemed to suggest that only if the successor State committed a wrongful act after the date of succession would guarantees and assurances of non-repetition become one of the available remedies. Some members reiterated comments made in relation to paragraphs 2 of draft articles 16, 17 and 18. The question was raised as to whether paragraph 2 applied in situations where the predecessor State ceased to exist. It was noted that any purported rule of succession to the international obligations arising from the responsibility of a predecessor State would contradict draft article 7, paragraph 1, relating to acts having a continuing character. It was proposed that the commentary explain which “circumstances” were covered in paragraph 2, as well as that a list of examples of “appropriate assurances” and an overview in table form of the different situations of succession be provided. The need was mentioned for further analysis of the practice of the African Commission on Human and Peoples’ Rights on elements that formed part of assurances and guarantees of non-repetition. Drafting proposals were also made regarding draft article 19.

(d) Final form

149. Several members questioned whether draft articles were the most appropriate outcome for the topic, taking into account the comments by some States, which demonstrated a preference for draft guidelines, principles, conclusions, model clauses, or an analytical report as alternatives. A number of members suggested that the Commission could reconsider the format of its work on the topic at its seventy-third session, while others did not deem it necessary to do so. It was also suggested that the final decision on the outcome for the topic could be taken once the Commission had concluded most of its substantive work.

(e) Future programme of work

150. Several members agreed with the future programme of work proposed by the Special Rapporteur, while others cautioned that the Commission should not be hasty in its consideration of the topic. Some members expressed doubts as to whether the first reading could be concluded at the seventy-third session.

3. Concluding remarks of the Special Rapporteur

151. In his summary of the debate, the Special Rapporteur expressed his satisfaction with the substantive discussions of the fourth report. The debate in plenary had been rich and interesting and, in his view, demonstrated the intricacies and complex nature of the topic. He also noted that the various comments made by members were at times incompatible, but he was ready to engage with members to bridge gaps and adopt a flexible approach.

152. With respect to the need to ensure that geographically diverse State practice was taken into account, the Special Rapporteur affirmed his readiness to do so and welcomed any examples members had in that regard.

153. Concerning lump-sum agreements, the Special Rapporteur clarified that the fourth report took a cautious and qualified approach. While the Special Rapporteur was unable to confirm their status as customary international law, he still considered lump-sum agreements to be an important element for the topic because they reflected State practice. Furthermore, States were free to enter into agreements that provided less than full reparation, in particular in light of the pronouncements of the International Court of Justice in its judgment on *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*,⁴⁰⁴ and national case law of Czechoslovak and Czech courts regarding the impact of certain lump-sum agreements concluded after the Second World War.

154. Regarding the principle of unjust enrichment, the Special Rapporteur again stated that such principle was relevant as one of the special elements or circumstances that supported the exceptional transfer of obligations arising from State responsibility to a successor State or States. However, he clarified that he had deliberately not expressly mentioned the principle in the proposed draft articles, as he did not accept it as the only ground for the responsibility of successor States for several reasons. The principle was considered to be ambiguous and imprecise, and was often linked to the concept of “acquired rights”, which was considered outdated and not in conformity with modern international law. He indicated his willingness to address the matter in the commentaries.

155. The Special Rapporteur stressed that the text of the proposed draft articles did not imply automatic succession. He agreed with the view expressed that State practice did not support the primacy of either the “clean slate” rule or the automatic succession rule. In the law of State succession, as developed between the 1960s and 1980s, the “clean slate” rule was the rule applicable with respect to newly independent States. However, he did not agree that the doctrine of “clean slate” should be elevated to a general rule applicable to all categories of succession.

156. While the Special Rapporteur understood the questions raised pertaining to the usefulness or necessity of the draft articles, he reiterated that the articles on responsibility of States for internationally wrongful acts did not cover all aspects relevant to the topic. Accordingly, the draft articles could be viewed as complementing existing rules. The work on the topic aimed to fill the gaps in the codification of rules of State responsibility and rules on the succession of States.

157. With respect to comments on the structure of the proposed draft articles, their applicability when the predecessor State continued or ceased to exist, and the different categories of succession, the Special Rapporteur explained that the draft articles proposed in the fourth report should be read in conjunction with those proposed in previous reports. The fourth report was focused on the content and forms of legal consequences of internationally wrongful acts. He nevertheless agreed that the proposed draft articles could be streamlined to avoid unnecessary repetition. The Special Rapporteur also agreed with members that it was more appropriate to refer to the content of the draft articles as legal consequences in general and to the forms of reparation in particular. With respect to the consequences of violations of obligations *erga omnes*, the Special Rapporteur stated that they were not limited to satisfaction and proposed to discuss the matter in the commentaries or in another draft article. In that regard, the Special Rapporteur proposed new draft articles and revisions to the proposed draft articles to clarify and resolve the different issues raised. He also proposed an overall reorganization of the draft articles on reparation, following suggestions made by members. In relation to comments made that an analysis of State succession in respect of responsibility in relation to private persons should be done, the Special Rapporteur considered that the issue would be better addressed under other topics that the Commission might include in its programme of work but agreed to draft a without prejudice clause.

158. The Special Rapporteur generally welcomed suggestions and proposals regarding draft article 7 *bis*. He indicated that he would propose changes in the order and numbering of the draft articles to take into account comments made by members.

⁴⁰⁴ *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, I.C.J. Reports 2012, p. 99.

159. Regarding draft articles 16 and 17, the Special Rapporteur stated that he was open to considering the drafting suggestions made by members. He pointed out that the purpose of draft article 16 was to confirm that obligations based on the general rules of State responsibility applied even in situations of State succession. In his view, paragraphs 3 of both draft articles 16 and 17 were not superfluous, as they addressed the special case of apportionment agreements between the successor State and the predecessor State. For example, an injured State could decide to address its claim to the predecessor State, which was no longer in a position to reconstitute an object because the object was in the territory of the successor State, and the successor State benefited from the outcome of the wrongful act. However, if the predecessor State paid compensation instead of restitution to the injured State, the apportionment agreement between successor and predecessor State could be concluded as a set off. Apportionment agreements, according to the Special Rapporteur, while allowing injured States to present their claims, were intended to settle claims between the predecessor State and the successor State. With regard to comments made by members on the expression “may request” in draft articles 16 and 17, the Special Rapporteur underlined that the provisions should stress an exceptional and conditional character of such obligations, possibly with the indication of progressive development, where appropriate. He welcomed most drafting proposals concerning the draft articles.

160. The Special Rapporteur stated that draft article 18 on satisfaction could perhaps be streamlined and be included in a draft article with the other forms of reparation, in light of his proposal to reorganize the draft articles. In respect of the possible inclusion of a reference in paragraph 2 to investigation and prosecution of crimes under international law, he drew attention to pleadings by the parties in the case *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*⁴⁰⁵ before the International Court of Justice, which showed that prosecution of international crimes could be considered as a form of satisfaction. He noted that the establishment of the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Court could be understood in a way that indicated that investigation and prosecution of crimes, committed in violation of obligations *erga omnes*, were in the interest of the international community as a whole.

161. Concerning draft article 19, the Special Rapporteur said that he was willing to include in the commentary a list of examples of appropriate assurances, as had been suggested by some members. Regarding the lack of a proposal for a draft article on the obligation of cessation, the Special Rapporteur acknowledged that a new provision on that aspect would be a valuable addition and welcomed drafting proposals to that end.

162. With respect to the outcome of the topic, the Special Rapporteur agreed with the view that the Commission could decide on the most suitable option at a later stage. While indicating his willingness to discuss alternative forms, the Special Rapporteur stated that he did not wish to change the format of the Commission’s work on the topic. The Special Rapporteur also indicated that informal consultations could be held on the various issues.

163. In relation to the future programme of work, the Special Rapporteur acknowledged that, owing to the current COVID-19 pandemic and the modified working arrangements for the Commission, the Commission might not be in a position to conclude its work on first reading by the end of the quinquennium.

C. Text of the draft articles on succession of States in respect of State responsibility provisionally adopted so far by the Commission

1. Text of the draft articles

164. The text of the draft articles provisionally adopted so far by the Commission is reproduced below.

⁴⁰⁵ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, I.C.J. Reports 2005, p. 168.

Succession of States in respect of State responsibility

Article 1

Scope

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

Article 2

Use of terms

For the purposes of the present draft articles:

- (a) “succession of States” means the replacement of one State by another in the responsibility for the international relations of territory;
- (b) “predecessor State” means the State which has been replaced by another State on the occurrence of a succession of States;
- (c) “successor State” means the State which has replaced another State on the occurrence of a succession of States;
- (d) “date of the succession of States” means the date upon which the successor State replaced the predecessor State in the responsibility for the international relations of the territory to which the succession of States relates;

...

Article 5

Cases of succession of States covered by the present draft articles

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

...

Article 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.

Article 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 shall be 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.

Article 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 shall 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.

2. Text of the draft articles and commentaries thereto provisionally adopted by the Commission at its seventy-second session

165. The text of the draft articles and commentaries thereto provisionally adopted by the Commission at its seventy-second session is reproduced below.

Article 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.

Commentary

(1) Draft article 7 seeks to address the question of succession of State responsibility in respect of those acts having a continuing character that are commenced by a predecessor State before the date of succession and that continue thereafter by the successor State. In such circumstances, identifying and defining the scope of State responsibility in respect of predecessor and successor States was considered essential.

(2) Draft article 7, which should be understood within the context of the articles on responsibility of States for internationally wrongful acts,⁴⁰⁶ addresses acts having a continuing character.⁴⁰⁷

(3) The first sentence of draft article 7 sets forth the basic rule that, in the case of an internationally wrongful act of a continuing character that would continue to occur after a succession of States, the international responsibility of the successor State extends only to the consequences of its own act after the date of the succession of States.⁴⁰⁸ This means that the successor State is held responsible only where an internationally wrongful act can be attributed to that State, and not to the predecessor State. This conclusion is in conformity

⁴⁰⁶ General Assembly resolution 56/83 of 12 December 2001, annex. The draft articles adopted by the Commission and the commentaries thereto are reproduced in *Yearbook of the International Law Commission 2001*, vol. II (Part Two) and corrigendum, paras. 76–77.

⁴⁰⁷ Article 14, *ibid.*, at p. 59; see also para. (5) of the commentary to article 14 of the articles on State responsibility, *ibid.*, at p. 60.

⁴⁰⁸ *Affaire des biens britanniques au Maroc espagnol (Espagne contre Royaume-Uni) [Spanish Zone in Morocco Claims]* (1925), UNRIIAA, vol. II, pp. 615–742, at pp. 648–649 (available in French only).

with the articles on responsibility of States for internationally wrongful acts, wherein article 14, paragraph 2, concluded that “[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.”

(4) The first sentence being the rule in the case of succession, the second sentence of draft article 7 addresses exceptional circumstances. It states that the international responsibility of the successor State also extends to the act of the predecessor States only if and to the extent that the successor State acknowledges and adopts the act of the predecessor State as its own. This conclusion derives from and builds upon the articles on responsibility of States for internationally wrongful acts, specifically article 11, 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.”⁴⁰⁹ For example, in the *Lighthouses* arbitration, a tribunal held Greece liable for breach of a concession agreement initiated by Crete at a period when the latter was an autonomous territory of the Ottoman Empire, partly on the basis that the breach had been endorsed and eventually continued by Greece, even after the acquisition of territorial sovereignty over the island. Even if the claim was originally based on a breach of a concession agreement, if the successor State, faced with a continuing breach on its territory, endorses and continues that situation, the inference may be drawn that it has assumed responsibility for it.⁴¹⁰

Article 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 shall be 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.

Commentary

(1) The purpose of this draft article is to address the specific situation of the conduct of an insurrectional or other movement.

(2) Paragraph 1 reaffirms the rule of attribution of the conduct of an insurrectional or other movement which prevails in establishing a new State, as contained in article 10, paragraph 2, of the articles on responsibility of States for internationally wrongful acts.⁴¹¹ The text of paragraph 1 of draft article 8 closely follows the text of article 10, paragraph 2, of those articles, except that it refers to a “predecessor” State instead of a “pre-existing” State.

(3) Paragraph 2 is a without prejudice clause, to account for a circumstance where a State was in a position to adopt measures of vigilance, prevention or punishment in respect of the movement’s conduct but failed to do so. This paragraph is modelled closely on article 10, paragraph 3, of the articles on responsibility of States for internationally wrongful acts, but with reference to a “predecessor State” in order to contextualize the provision in terms of succession of States. 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

⁴⁰⁹ See para. (1) of the commentary to article 11 of the articles on State responsibility, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, para. 77, at p. 52.

⁴¹⁰ *Affaire relative à la concession des phares de l’Empire ottoman*, UNRIAA, vol. XII (1956), p. 155, at pp. 197–198; see also para. (3) of the commentary to article 11 of the articles on State responsibility, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, para. 77, at p. 52.

⁴¹¹ *Ibid.*, at pp. 50–51; A/CN.4/719 (second report of the Special Rapporteur), paras. 107–121.

attribution, which are comprised generally in articles 4 to 11 of the articles on responsibility of States for internationally wrongful acts.⁴¹²

Article 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 shall 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.

Commentary

(1) Draft article 9 addresses the retention of obligations by the predecessor State arising from the commission of an internationally wrongful act by the predecessor State, when the predecessor State continues to exist after the date of the succession of States, as well as the possibility of an agreement between the successor State and the injured State. Such succession could occur in cases of separation of a part or parts of a State, establishment of a newly independent State, or transfer of part of the territory of a State.

(2) Paragraph 1 establishes the rule that, 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 in the three specific cases listed thereunder, an injured State continues to be entitled to invoke the responsibility of the predecessor State even after the date of succession. As such, 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.⁴¹³ This is reflected in the choice of the terms “continues to” and “even after the date of succession”.

(3) The text draws upon the articles on responsibility of States for internationally wrongful acts by using the formulation “invoke the responsibility”. This formulation encompasses all rules on the responsibility of States for internationally wrongful acts. Further, the predecessor State may continue to rely on circumstances precluding the wrongfulness of internationally wrongful acts.⁴¹⁴

⁴¹² See para. (1) of the commentary to chapter II of the articles on State responsibility, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, para. 77, at p. 38.

⁴¹³ See W. Czapliński, “La continuité, l’identité et la succession d’États – évaluation de cas récents”, *Revue belge de droit international*, vol. 26 (1993), pp. 375–392, at p. 388; M. Koskenniemi, Report of the Director of the English-speaking Section of the Centre, *State Succession: Codification Tested against the Facts*, pp. 71 and 119 ff.; P. Pazartzis, *La succession d’États aux traités multilatéraux : à la lumière des mutations territoriales récentes* (Paris, Pedone, 2002), pp. 55–56.

⁴¹⁴ See articles 20 to 27 of the articles on State responsibility and commentaries thereto, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, para. 77, at pp. 72–86. Cf. also Institute of International Law, *Yearbook*, vol. 76, Session of Tallinn (2015), “State succession in matters of international responsibility”, Fourteenth Commission, Rapporteur: Marcelo Kohen, resolution, p. 711, at p. 714.

(4) Paragraph 2 addresses 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 cooperation with the successor State may be necessary. Paragraph 2 does not entail an automatic transfer of obligations to the successor State, but merely specifies that an agreement may be reached by the States depending on the factual situation and the form of reparation that is most appropriate.⁴¹⁵

(5) The phrase “in particular circumstances” covers diverse situations where a successor State may be relevant for addressing the injury. For example, the successor State may be relevant in a situation where restitution of property is appropriate in order to address responsibility or there is a link between the territory or an organ of the successor State and the internationally wrongful act.⁴¹⁶ Additionally, the successor State may be relevant for addressing the injury in a circumstance where the successor State would be unjustly enriched as a result of an internationally wrongful act committed before the date of succession. This may include, for example, cases where an expropriated factory belonging to foreign investors or an object of art belonging to another State is retained on the territory of the successor State.

(6) Paragraph 3 deals with the concept of shared responsibility and apportionment of responsibility between the predecessor State and the successor State by way of agreement. It is drafted without prejudice to the contents of paragraphs 1 and 2, and reaffirms the rule contained in 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 does not limit itself to questions of financial apportionment in case of compensation, recognizing that the form of reparation necessary under different factual circumstances may be distinct, leaving it open for the predecessor and the successor State to discuss the form of reparation in the agreement.

⁴¹⁵ A/CN.4/719 (second report of the Special Rapporteur), paras. 98–103.

⁴¹⁶ P. Dumberry, “Is a new State responsible for obligations arising from internationally wrongful acts before its independence in the context of secession?”, *Canadian Yearbook of International Law*, vol. 43 (2005), pp. 419–454, at pp. 429–430.