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Draft report of the International Law Commission on the work of its seventy-first session

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Chapter VII
Succession of States in respect of State responsibility

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A. Introduction

1. 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.[1] 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.

2. At the same session, the Commission considered the first report of the Special Rapporteur (A/CN.4/708), which sought to set out the Special Rapporteur's approach to the scope and outcome of the topic, as well as to provide 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.[2]

3. At its seventieth session (2018), the Commission considered the second report of the Special Rapporteur (A/CN.4/719), which addressed 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.[3]

B. Consideration of the topic at the present session

4. At the present session, the Commission had before it the third report of the Special Rapporteur (A/CN.4/731). 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).

5. In his third report, which was composed of four parts, the Special Rapporteur first addressed introductory issues, including certain general considerations (Part One). Thereafter, the Special Rapporteur discussed questions of reparation for injury resulting from internationally wrongful acts committed against the predecessor State, considering, in particular, claims for reparation in different categories of State succession, as well as various approaches to reparation for injury arising from internationally wrongful acts committed against the nationals of the predecessor State (Part Two). Further, the Special Rapporteur made technical proposals in relation to the scheme of the draft articles (Part Three). The future programme of work on the topic was then addressed (Part Four). The Special Rapporteur proposed several new draft articles (draft articles 2, paragraph (*f*), X, Y, 12, 13, 14 and 15) and suggested that the draft articles be organized into three parts (Parts I, II and III) with proposed titles for Parts II and III.[4]

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[1] 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)).

[2] 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.

[3] *Ibid*.

[4] The text of draft articles 2, paragraph (*f*), X, Y, 12, 13, 14 and 15, and the titles of Part II and Part III, as proposed by the Special Rapporteur in his third report, reads as follows:

Draft article 2
Use of terms

For the purposes of the present draft articles: …

(*f*) “States concerned” means, in respect of a case of succession of States, a State which before the date of succession of States committed an internationally wrongful act, a State injured by such act and a successor State or States of any of these States; …

Title for Part II – Reparation for injury resulting from internationally acts committed by the predecessor State

Draft article X
Scope of Part II

The provisions of this Part apply to reparation for injury resulting from internationally wrongful acts committed by the predecessor State for which the injured State did not receive full reparation before the date of succession of States.

Title for Part III – Reparation for injury resulting from internationally wrongful acts committed against the predecessor State

Draft article Y
Scope of the present Part

The articles in the present Part apply to reparation for injury resulting from internationally wrongful acts committed against the predecessor State for which this State did not receive full reparation before the date of succession of States.

Draft article 12
Cases of succession of States when the predecessor State continues to exist

1. In the cases of succession of States:

(*a*) when part of the territory of a State, or any territory for the international relations of which a State is responsible, not being part of the territory of that State, becomes part of the territory of another State; or

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

the predecessor State injured by an internationally wrongful act of another State may request from this State reparation even after the date of succession of States.

2. Notwithstanding paragraph 1, the successor State may request from the responsible State reparation in special circumstances where the injury relates to the part of the territory or the nationals of the predecessor State that became the territory or nationals of the successor State.

3. The provisions of paragraphs 1 and 2 are without prejudice to any question of compensation between the predecessor State and successor State.

Draft article 13
Uniting of States

1. When two or more States unite and so form one successor State, the successor State may request reparation from the responsible State.

2. Paragraph 1 applies unless the States concerned otherwise agree.

Draft article 14
Dissolution of States

1. When parts of the territory of the State separate to form two or more States and the predecessor State ceases to exist, one or more successor States may request reparation from the responsible State.

2. Such claims and agreements should take into consideration a nexus between the consequences of an internationally wrongful act and the territory or nationals of the successor State, an equitable proportion and other relevant factors.

3. The provisions of paragraphs 1 and 2 are without prejudice to any question of compensation between the successor States.

Draft article 15
Diplomatic protection

1. The successor State may exercise diplomatic protection in respect of a person who is its national at the date of the official presentation of the claim but was not a national at the date of injury, provided that the person or the corporation had the nationality of a predecessor State or

6. The Commission considered the third report of the Special Rapporteur at its 3475th to 3480th meetings, from 8 to 15 July 2019. At its 3480th meeting, on 15 July 2019, the Commission decided to refer draft articles 2, paragraph (*f*), X, Y, 12, 13, 14 and 15, and the titles of Part II and Part III, as contained in the third report of the Special Rapporteur, to the Drafting Committee, taking into account the views expressed in the plenary debate.

7. At its … meeting, on … July 2019, the Commission considered the report of the Drafting Committee on draft articles 1, 2 and 5,[5] which had been provisionally adopted by the Drafting Committee at the sixty-ninth and seventieth sessions (see section C.1 below).

8. At its … meeting, on … 2019, the Chair of the Drafting Committee presented an interim report on draft articles 7, 8 and 9, provisionally adopted by the Committee at the present session. The report was presented for information only and is available on the website of the Commission.[6]

9. At its … meeting, on … 2019, the Commission adopted the commentaries to draft articles 1, 2 and 5 provisionally adopted at the present session (see section C.2 below).

1. Introduction by the Special Rapporteur of the third report

10. The Special Rapporteur indicated that Part One of his third report recalled the work of the Commission on the topic so far and the summary of the debate in the Sixth Committee of the General Assembly. Reiterating that he was attentive to comments made in the Commission and in the Sixth Committee, the Special Rapporteur stressed that he was open to suggestions regarding his proposals. The report aimed to follow the programme of work, as previously outlined, without undue haste. Apart from one new definition and two provisions on the scheme of the draft articles, only four new substantive draft articles were proposed. Further, the report clarified the Special Rapporteur's approach to the topic, which excluded both the automatic extinction of responsibility and the automatic transfer of responsibility in cases of succession of States. As to the fact that complex situations may occur when a claim for reparation is invoked by the predecessor State and one or more successor States, the Special Rapporteur indicated that this issue will be addressed in his fourth report. He also considered it useful to state expressly that the draft articles only covered situations when injury was not made good by reparation before the date of succession of States and he proposed draft articles X and Y to that effect.

11. Part Two of the report, dealing with reparation for injury resulting from internationally wrongful acts committed against the predecessor State, addressed the so-called "passive" aspect of State responsibility where succession of States occurs in relation to the injured State. Unlike the resolution of the Institute of International Law on succession of States in matters of international responsibility, the Special Rapporteur proposed analysing the possible transfer of rights separately from that of obligations, taking into account that an important difference between the question of succession to the right to reparation, on one hand, and the question of succession to obligations arising from State responsibility, on the other hand, was that the right to reparation was a consequence of the internationally wrongful act of the responsible State which remained unaffected by the territorial changes giving rise to the succession of States.

12. In addition, the Special Rapporteur distinguished between situations when the predecessor State continued to exist after the date of succession and when the predecessor

lost his or her nationality and acquired, for a reason unrelated to the bringing of the claim, the nationality of the former State in a manner not inconsistent with international law.

2. Under the same conditions set in paragraph 1, a claim in exercise of diplomatic protection initiated by the predecessor State may be continued after the date of succession by the successor State.

3. Paragraphs 1 and 2 are without prejudice to application of rules of State responsibility relating to the nationality of claims and rules of diplomatic protection.

[5] The report and the corresponding statement of the Chair of the Drafting Committee are available in the analytical guide to the work of the International Law Commission (see footnote 2 above).

[6] *Ibid.*.

State ceased to exist. When the predecessor State continued to exist, succession would not affect its right to claim reparation from the wrongdoing State for acts committed before the date of succession. Such claim was based on the rules governing the responsibility of States for internationally wrongful acts. However, that did not answer all questions that could arise when the injury primarily or exclusively affected part of the territory which became part of the successor State. In situations such as decolonization, separation or transfer of territory, when the injury affected persons who subsequently became nationals of the successor State, the Special Rapporteur considered it unlikely that the predecessor State could still claim reparation after the date of succession. In contrast, according to the prevailing opinion in doctrine, when the predecessor State ceased to exist, the right to reparation did not devolve from the predecessor State to the successor State. The Special Rapporteur cautioned, however, against the discriminatory treatment of States when continuity was disputed, considering that the distinction made between cases of dissolution and separation of a State was often based on broader political considerations rather than objective criteria. Moreover, the idea of a "personal" right to claim reparation belonging only to the predecessor State seemed to reflect a traditional positivist doctrine, which viewed State responsibility as closely linked to legal personality, and not as a body of secondary rights and obligations.

13. Further, the report provided an analysis of claims for reparation in different categories of succession of States based on State practice, mainly agreements and decisions of international courts and tribunals, which was narrow in scope due to the limited number of cases of succession of States. Draft articles 12 to 14 were informed by the above considerations, and based on the distinction between situations when the predecessor State continued to exist and when the predecessor State ceased to exist. The Special Rapporteur underlined that the expression "may request" used in those draft articles would rebut any allegation of automatic succession and simply reflected the idea that a successor State is able to present a claim or request for reparation. Such an approach was in accordance with the priority generally given to agreements followed by the Commission in this topic. Further, draft article 14, paragraph 2, recalled that any claims and agreements should take into consideration a nexus between the consequences of an internationally wrongful act and the territory or nationals of the successor State, an equitable proportion and other relevant factors, which could include the principle of unjust enrichment.

14. The report also addressed the possible succession to the right to reparation in cases where an internationally wrongful act was committed against nationals of the predecessor State, on the basis of an analysis of more extensive State practice, including agreements and the practice of international courts and tribunals and of the United Nations Compensation Commission. It revealed that a claim for reparation by the successor State was not purely theoretical or rare, nor did it concern only inter-State relations. Instead, there were important practical consequences for the effective exercise of diplomatic protection by States in cases of injury suffered before the date of succession by individuals who subsequently became their nationals. The Special Rapporteur further observed that, in modern practice and doctrine, a change of nationality resulting from succession of States was largely accepted as an exception to the traditional rule of continuous nationality. Draft article 15 was therefore proposed to that effect. The Special Rapporteur noted that this proposal was consistent with the articles on diplomatic protection in particular.[7] Draft article 15, paragraph 1, recognized that the successor State may exercise diplomatic protection under special circumstances, while paragraph 2 provided that, under the same conditions, a claim in exercise of diplomatic protection initiated by the predecessor State may be continued after the date of succession by the successor State. Draft article 15, paragraph 3, clarified that paragraphs 1 and 2 were without prejudice to the application of the rules of State responsibility relating to the nationality of claims and the rules of diplomatic protection.

[7] General Assembly resolution 62/67 of 6 December 2007, annex. The draft articles adopted by the Commission and the commentaries thereto are reproduced in *Yearbook … 2006*, vol. II (Part Two), paras. 49–50.

15. Part Three of the report focused on the scheme of the draft articles presented so far. The Special Rapporteur considered it useful to organize them into three parts and to include two draft articles to address the respective scopes of Parts II and III, namely draft articles X and Y. In relation to draft article 2 on "Use of terms", a new paragraph (*f*) was proposed to define the term "States concerned", which was often referred to in the draft articles and had a special meaning in the context of succession of States.

16. Regarding the future programme of work, the Special Rapporteur indicated that his fourth report would focus on forms and invocation of responsibility in the context of succession of States and also address procedural and miscellaneous issues, including problems arising in situations where there are several successor States and the issue of shared responsibility. It was hoped that the topic could be completed on first reading in 2020 or 2021.

2. Summary of the debate

(a) General comments

17. Members of the Commission generally welcomed the third report of the Special Rapporteur and expressed appreciation for the memorandum prepared by the Secretariat.

18. Regarding the methodology of the report, several members commended the Special Rapporteur's survey of relevant State practice, jurisprudence and doctrine, while others called for a closer analysis of such sources. Caution was expressed against over-reliance on academic literature and the work of the Institute of International Law. Members agreed with the Special Rapporteur's assessment that State practice was diverse, context-specific, and sensitive. Some members also recalled that the scarcity of State practice had been highlighted during the debate in the Sixth Committee, and emphasized the need to take into account more geographically diverse sources of State practice. A number of members also observed that special agreements or *ex gratia* payments by States were often a result of political or other non-legal considerations. Most of these cases did not evidence an *opinio juris* regarding a general rule in connection with State succession, but constituted context-specific arrangements.

19. Members 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. It was suggested that the important role of agreements should be addressed in greater detail. Further, according to some members, the relationship between a lump sum agreement concluded before the date of succession of States and the principle of full reparation should be discussed. In this regard, the view was expressed that the existence of a lump sum agreement did not necessarily indicate full reparation, since there were examples of decisions by national courts allowing claims for reparation despite the existence of a previous lump sum agreement.

20. Several members emphasized the general rule of non-succession, leading to the automatic extinction of responsibility in cases of succession of States, with some exceptions. While some members supported the flexible and realistic approach of the Special Rapporteur, others underlined the need to clarify whether such an approach would deviate from the general rule of non-succession. It was suggested that the Commission could acknowledge the limited State practice in this area at the outset of its commentary or approach the project as an effort to develop a new convention, which would be subject to support from States. It was proposed that the Commission expressly indicate that it was engaging in progressive development of international law when proposing draft articles, taking best practices into account, taking into account that *lex ferenda* should be based on solid grounds and not on policy preferences. Moreover, the view was expressed that the work of the Commission was not adjudicatory in nature and should not seek to resolve pending disputes between States, and thus the proposed rules should apply to general situations.

21. The importance of maintaining consistency, in terminology and substance, with the previous work of the Commission was reiterated. It was recalled that different views had been expressed in the Sixth Committee regarding the extent to which provisions in the 1978

Vienna Convention on Succession of States in Respect of Treaties[8] and the 1983 Vienna Convention on Succession of States in Respect of State Property, Archives and Debts,[9] such as those concerning newly independent States, should be replicated. It was also stressed that the proposed draft articles should be compatible with the articles on responsibility of States for internationally wrongful acts[10] and the articles on diplomatic protection.

22. Several members suggested changing the title of the topic to "State responsibility problems/aspects in cases of succession of States", as suggested in the Sixth Committee, or to "Succession of States in matters of international responsibility", as used by the Institute of International Law. An alternative title proposed was "Reparation for injury arising from internationally wrongful acts in State succession". Several other members indicated their preference for retaining the current title of the topic.

(b) Scheme of the draft articles

23. Support was voiced for the Special Rapporteur's proposal to organize the draft articles in parts, as well as to include draft articles X and Y indicating the scope of each part. Another proposal was made to organize the draft articles according to specific categories of succession of States and to address the possible transfer of rights and obligations together in the same draft articles. In this regard, members debated whether issues concerning rights and claims arising from an internationally wrongful act could be treated separately from issues concerning obligations arising from such act. While several members reiterated concerns that it might lead to unnecessary duplication of work, the view was expressed that the right to reparation was an "acquired right" transferable from a predecessor State to a successor State, while the concept of "acquired obligations" was not recognized in legal doctrine.

24. Some members also agreed with the Special Rapporteur on the broad distinction between situations where the predecessor State continued to exist and where it ceased to exist, although it was questioned whether this distinction should be more nuanced. Concerning the specific categories of succession of States, some members supported the formulation of draft article 12 in which three categories of succession of States were merged, whereas others expressed doubts in this regard. A proposal was made to define such categories of succession in draft article 2 on "Use of terms".

(c) Draft article 2 (*f*)

25. Some members questioned whether it was necessary to define the term "States concerned", which might lead to confusion, and suggested that it would be sufficient to explain it in the commentary instead.

(d) Draft articles 12 to 14

26. While the overall approach to reparation in draft articles 12 to 14 was supported by some members, a number of other members considered that the expression "may request" was ambiguous. In this regard, various drafting proposals were made to distinguish the legal right to reparation from the procedural possibility of claiming reparation. Nonetheless, some members questioned the usefulness of recognizing procedural possibilities without identifying substantive rights and obligations. Different views were expressed as to whether the terms "reparation" or "compensation" should be used in those draft articles and whether the reference to "injury" was appropriate, in the light of the articles on responsibility of States for internationally wrongful acts.

[8] Vienna Convention on Succession of States in Respect of Treaties (Vienna, 23 August 1978), United Nations, Treaty Series, vol. 1946, No. 33356, p. 3.

[9] 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.

[10] 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.

27. Several members considered that the principle of unjust enrichment could form the foundation for progressive development of international law in draft articles 12 to 14, although others questioned whether that would be appropriate or sufficient in the context of this topic. It was also noted that the concept of unjust enrichment fell outside the rules of State responsibility.

28. In relation to draft article 12, some members highlighted the need to clarify the meaning of "special circumstances" in paragraph 2. In this regard, the work of the Institute of International Law referred to "special circumstances" only in the specific context of a potential sharing of responsibility by both the predecessor and successor States as an exceptional solution. It was also suggested that reference be made to agreements between States in paragraph 2. Further, consistency was required with the phrase "particular circumstances" as previously proposed in draft articles 7 to 9. The wording of draft article 12, paragraph 2, seemed to be broader than the requirement of a "direct link" between the internationally wrongful act or its consequences and the territory or nationals of the successor State in draft articles 7 to 9. In contrast, draft article 14, paragraph 2, required a "nexus" between the consequences of an internationally wrongful act and the territory or nationals of the successor State. Moreover, it was noted that the term "nationals" might be too restrictive and could be replaced with "persons under the jurisdiction of the successor State". At the same time, the question was raised whether a State newly independent further to the exercise of the right to self-determination could be considered as a successor injured State with direct rights. It was suggested that the commentary distinguish between the right of a successor State to claim reparation and the potential right of individuals to claim reparation without intervention by the State.

29. Some drafting proposals were also made regarding draft article 13. In this connection, reference was made to article 13 of the resolution adopted the Institute of International Law. It was suggested that cases of merger of States and cases of incorporation of a State into another existing State should be treated in separate draft articles. While draft article 13, paragraph 2, received support for reflecting the priority of any agreement between the States concerned, the view was expressed that it could be deleted.

30. As to draft article 14, it was proposed that paragraph 1 be redrafted to focus on the dissolution of a State without referring to separation of part of the State. The reference to agreements in draft article 14, paragraph 2, needed to be explained. It was opined that agreements between successor States should be considered as a priority over the other factors in paragraph 2. It was suggested that the term "nexus" in paragraph 2 should be clarified, and that the phrase "other relevant factors" raised similar questions in relation to equitable considerations such as unjust enrichment. A number of drafting suggestions regarding paragraph 3 were also made.

(e) Draft article 15

31. Several members concurred with the Special Rapporteur's approach of allowing an exception to the principle of continuous nationality in cases of succession of States to avoid situations in which an individual lacked protection. In this regard, reference was made to the preamble of the articles on nationality of natural persons in relation to the succession of States,[11] stating that due account should be taken both of the legitimate interests of States and those of individuals. Some other members cautioned that the doctrine and practice in this area were not uniform. Some doubts were expressed as to whether issues of diplomatic protection should be addressed in this topic. The need to consider the comments of States in the Sixth Committee concerning the articles on diplomatic protection was stressed.

32. Some members observed that draft article 15 was consistent with article 5, paragraph 2, of the articles on diplomatic protection, as well as article 10, paragraph 1, of the resolution of the Institute of International Law. Nonetheless, it was underlined that the draft articles proposed by the Special Rapporteur should not conflict with the articles on

[11] General Assembly resolution 55/153 of 12 December 2000, annex. The draft articles and the commentaries thereto are reproduced in *Yearbook … 1999*, vol. II (Part Two), paras. 47–48.

diplomatic protection. Further analysis of their interaction was called for. It was proposed that draft article 15, or its commentary, should include the safeguards stated in article 5, paragraphs 3 and 4, of the articles on diplomatic protection, which were intended to avoid abuses and prevent "nationality shopping" if the rule of continuous nationality was lifted.

33. Clarification was sought regarding the reference to "the corporation" in draft article 15, paragraph 1. In this connection, reference was made to article 10, paragraph 1, of the articles on diplomatic protection. It was also noted that draft article 15, paragraph 2, did not follow the approach of distinguishing between whether the predecessor State continued to exist or not. The view was expressed that draft article 15, paragraphs 1 and 2, should reflect the conditions for the exercise of diplomatic protection by predecessor and successor States. In addition, it was suggested that draft article 15, paragraph 3, or the commentary thereto, should explain that diplomatic protection was not the only recourse for the vindication of rights by individuals, who could not be deprived of the right to reparation due to territorial changes in all circumstances. Moreover, it was proposed that draft article 15 address the case of diplomatic protection on behalf of a person with dual nationality, one of the predecessor State and one of the successor State, in the light of the articles on diplomatic protection, which covered cases of multiple nationality. A proposal was made to expressly state that a successor State shall not use force for diplomatic protection, or at least to restate, in draft article 2 (use of terms), the definition of diplomatic protection as contained in article 1 of the articles on diplomatic protection.

(f) Final form

34. A number of members questioned whether draft articles were the most appropriate outcome for the topic, taking into account the comments by some States that preferred draft guidelines, principles, conclusions, model clauses, or an analytical report as alternatives. It was suggested that the Special Rapporteur consider making a recommendation on this issue in his next report.

(g) Future programme of work

35. Members generally agreed with the future programme of work proposed by the Special Rapporteur, while some cautioned that the Commission should not be hasty in its consideration of the topic. The Special Rapporteur was asked to clarify whether he would discuss specific forms of reparation in his fourth report. Suggestions were also made that the Special Rapporteur consider addressing the relationship between succession of States and State responsibility in relation to damage caused by crimes under international law, and the possible relevance of the topic of general principles of law, including principles of fairness.

3. Concluding remarks of the Special Rapporteur

36. The Special Rapporteur welcomed the prevailing sense of the debate, which focused on how to approach the topic in order to achieve a balanced and generally acceptable outcome.

37. Concerning the need to ensure consistency with the previous work of the Commission, the Special Rapporteur affirmed his readiness to resolve issues of terminology and substance in the Drafting Committee. The articles on responsibility of States for internationally wrongful acts continued to be the basis for the work on the topic, which aimed to clarify the legal consequences of an internationally wrongful act for a predecessor State or a successor State after the date of succession of States. In particular, the use of the terms "injury" and "injured State" in the proposed draft articles were intended to be consistent with Parts Two and Three of the articles on responsibility of States for internationally wrongful acts.

38. The Special Rapporteur agreed with members who expressed the view that the topic could and should include elements of progressive development of international law. This could be stated at the outset of the general commentary to the draft articles and, where necessary, in relation to specific provisions. Further, the work on the topic could proceed based on a cautious analysis of State practice, which would be explained in the

commentary. While the Special Rapporteur had tried to include relevant State practice from more diverse sources, he would welcome further examples from members of the Commission and from States. He also agreed with some members that the topic could draw on general principles of law, including those concerning acquired rights, unjust enrichment, fairness and reasonableness. However, cautious consideration of the role of general principles of law was required. For example, some principles existing in international investment law might not apply to other areas of international law. Nevertheless, general principles of law could still be relevant, along with State practice, case law and agreements, and could evolve into custom over time or inform the negotiation of agreements between States.

39. While the Special Rapporteur acknowledged that it was difficult to affirm the existence of a general rule, he did not agree with the view that the inconclusiveness of State practice would point towards a "clean slate" rule. In particular, the "clean slate" rule in the 1978 Vienna Convention on Succession of States in Respect of Treaties concerned newly independent States and did not apply to other categories of succession of States, whereas the 1983 Vienna Convention on Succession of States in Respect of State Property, Archives and Debts contained only specific rules for different categories of succession of States in relation to the different areas of State property, archives and debts. Since the previous work of the Commission confirmed several specific rules rather than a general rule, the "clean slate" rule should not be elevated as a general rule in this topic, particularly in situations where the predecessor State continued to exist. Moreover, even if obligations arising from an internationally wrongful act did not transfer to a newly independent successor State, the position was different with respect to invocation of rights, especially in circumstances where the consequences of such act affected the territory or population of the newly independent State. This also justified the separate treatment of obligations and rights in the draft articles. In addition, although the Special Rapporteur's approach to the topic was based on the rules relating to succession of States and the responsibility of States for internationally wrongful acts, the doctrine of acquired rights could support such an approach.

40. Regarding the structure of the draft articles, the Special Rapporteur concurred with the proposal that different categories of succession of States where the predecessor State continued to exist could be merged into a single draft article to avoid unnecessary repetitions, whereas those categories of succession of States where the predecessor State ceased to exist could be addressed in separate draft articles. The Special Rapporteur indicated that it would be useful to continue addressing the category of newly independent States in the draft articles, as illustrated by the pronouncements of the International Court of Justice in its Advisory Opinion on *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*.[12]

41. The Special Rapporteur welcomed most drafting proposals concerning draft articles 12, 13, 14 and 15. Concerning the expression "may request reparation" in draft articles 12, 13 and 14, he indicated that it was intended to be flexible enough to reflect both *lex lata* and *lex ferenda* without a sharp distinction, since some *lex ferenda* rules might evolve into *lex lata* rules over time. This approach was also in accordance with the subsidiary nature of the draft articles. Based on the Special Rapporteur's analysis of agreements between States, such a flexible formulation presented advantages from the perspective of enabling States to reach agreement, such as on the restitution of objects or compensation, without any reference to responsibility for an internationally wrongful act. Further, the Special Rapporteur agreed to clarify the reference to "special" or "particular" circumstances in the draft articles, and to consider replacing the term "nationals" with "population" in draft article 12, paragraph 2. He also acknowledged the need to replace the term "compensation" in draft article 12, paragraph 3, and draft article 14, paragraph 3, since those provisions did not address reparation from the responsible State to the injured State but rather some kind of settlement, set-off, arrangement or repayment as between the predecessor and successor States or between two successor States.

[12] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, 25 February 2019, General List No. 169.

42. While the Special Rapporteur was sympathetic to the view that the draft articles should address the potential right of individuals to claim reparation independent of intervention by a State, he noted that it might have broader ramifications for this topic, the scope of which was set out in draft article 1. In that connection, the main focus of draft article 15 was on diplomatic protection. He indicated that draft article 15 was intended to be consistent with the articles on diplomatic protection and the work of the Institute of International Law. Regarding the safeguards provided in draft article 5, paragraphs 3 and 4, of the articles on diplomatic protection, he considered it sufficient to include a without prejudice clause referring to other rules of diplomatic protection and to explain the need for safeguards in the commentary. In this regard, he observed that the risk of nationality shopping might be less significant in cases of succession of States that involve involuntary change of nationality.

43. The Special Rapporteur indicated his preference for retaining the current title of the topic for consistency with the previous work of the Commission. In particular, he did not find words such as “aspects”, “problems” and “issues” to be suitable for the title of a Commission’s topic. While other proposals merited consideration, he suggested to return to the question of the title at a later stage after the provisional adoption of all the draft articles.

44. Regarding the outcome of the topic, the Special Rapporteur agreed with those members who stated that the Commission should decide on the most suitable option at a later stage. He reiterated that the preparation of draft articles was a standard method of work by the Commission, which did not prejudge the final outcome. While he did not wish to change the form of the draft articles to draft conclusions, guidelines, principles, or to an analytical report, he was open to the proposal of drafting model clauses or compiling an annex of clauses based on existing agreements, which would be compatible with a set of draft articles.

45. In relation to the future programme of work, the Special Rapporteur agreed with comments that the Commission should have sufficient time and could still aim to complete its work on first reading by the end of the quinquennium. He indicated that his next report would focus on the forms of responsibility (in particular, restitution, compensation and guarantees of non-repetition) and could also address procedural and miscellaneous issues, including those arising in situations of several successor States.