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Chapter VII

Succession of States in respect of State responsibility

Addendum

Contents

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



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

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

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- (b) “predecessor State” means the State which has been replaced by another State on the occurrence of a succession of States;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 draft articles and commentaries thereto provisionally adopted by the Commission at its seventy-second session

2. 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 State responsibility in respect of those acts having a continuing character. This needed to be addressed because acts having a continuing character would continue to occur after State succession. Thus, identifying and defining the scope of State responsibility in respect of predecessor and successor States was essential. Following the provisional adoption of draft article 6 by the Drafting Committee, the Commission chose to address this question in a separate article.

(2) The Commission agreed on the text of draft article 7 within the context of the 2001 articles on the responsibility of States for internationally wrongful acts,¹ which addresses acts having a continuing character.²

(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

¹ 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.

² Para. (5) of the commentary to article 14 of the articles on State responsibility, *ibid.*, at p. 60.

State succession, the international responsibility of the successor State extends only to the consequences of its own act after the date of the succession of States.³ 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. This conclusion is in conformity with the 2001 articles on the responsibility of States for internationally wrongful acts, wherein this Commission, in 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) This being the general rule in the case of succession, the second sentence of draft article 7 addresses exceptional circumstances. It states that the international responsibility of the predecessor State extends to the successor States only if and to the extent that the successor State acknowledges and adopts the act of the predecessor State. This conclusion derives from and builds upon the 2001 articles, 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.”⁴

(5) Additionally, this second sentence in draft article 7 reaffirms principles of conduct that is not attributable to a State, but adopted by that State on a later date.⁵ This is also in conformity with draft article 6 (as provisionally adopted by the Drafting Committee) that sets forth that succession of States has no impact on attribution.

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 insurrectional or other movements.

(2) Paragraph 1 reaffirms the rule of attribution of the conduct of an insurrectional or other movement which succeeds in establishing a new State, as contained in article 10, paragraph 2, of the 2001 articles on responsibility of States for internationally wrongful acts.⁶ The text of paragraph 1 of draft article 8 mimics the text of article 10, paragraph 2, of the 2001 articles, except that it refers to a “predecessor” State instead of a “pre-existing” State. The effect of this change is that it places these rules firmly within the context of succession of States.

(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 improperly failed to do so. That paragraph is modelled closely on article 10, paragraph 3, of the 2001 articles, making a deliberate choice to refer to a “predecessor State” in order to contextualize the provision in terms of the context of succession of States. The reference to “the rules on responsibility of States for internationally

³ *Affaire des biens britanniques au Maroc espagnol (Espagne contre Royaume-Uni)* [Spanish Zone in Morocco Claims] (1925), UNRIAA, vol. II, pp. 615–742, at pp. 648–649 (available in French only).

⁴ 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.

⁵ Para. (6) of the commentary to article 10 of the articles on State responsibility, *ibid.*, at pp. 50–51.

⁶ *Ibid.*, at pp. 50–51; A/CN.4/719 (second report of the Special Rapporteur), paras. 107–121.

wrongful acts” is to be understood as a reference to the rules of international law regarding attribution, which are comprised generally in articles 4 to 9 of the 2001 articles on responsibility of States for internationally wrongful acts.⁷

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 question of a possible transfer of obligations from the predecessor State to the successor State further to the commission of an internationally wrongful act by the predecessor State, when the predecessor State continues to exist. These would 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 general 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. Additionally, it indicates a temporal element. This means that the entitlement of the injured State to invoke the responsibility of a predecessor State is not affected after the date of a succession of States as the entitlement remains thereafter.⁸ This is reflected in the choice of the terms “continues to” and “even after the date of succession”.

(3) The Commission also re-emphasizes the applicability of the 2001 articles on the responsibility of States for internationally wrongful acts by using the formulation “invoke the responsibility”. This formulation is broader than liability, or an entitlement to reparations, as it encompasses all rules on the responsibility of States for internationally wrongful acts. This also means that the predecessor State may continue to rely on circumstances precluding the wrongfulness of internationally wrongful acts.⁹

⁷ 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.

⁸ 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.

⁹ Cf. 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. This 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.¹⁰

(5) The phrase “in particular circumstances” covers diverse situations where a successor State may be addressing the injury. In addition to the three circumstances that are provided for in paragraph 1, the successor State may also be required to address responsibility where there is a link between the territory of the successor State and the internationally wrongful act.¹¹ That is to say that the internationally wrongful act was committed on the territory of the successor State. For example, foreign nationals or officials unlawfully detained are placed on that territory. Additionally, a circumstance where the successor State would unjustly enrich itself as result of an internationally wrongful act committed before the date of succession would require the successor State to be held responsible. 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 as 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.

¹⁰ A/CN.4/719 (second report of the Special Rapporteur), paras. 98–103.

¹¹ 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.