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Succession of States in respect of State responsibility
General principles of law

Statement by

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Mr. Chairman,

Concerning the topic "**Succession of States in respect of State responsibility**", the Czech Republic welcomes the Third Report of the Special Rapporteur, Professor Pavel Šturma, and notes with satisfaction the adoption by the Commission of draft articles 1, 2 and 5 together with commentaries thereto. We also commend the Secretariat for its Memorandum and take note of the interim report of the Drafting committee on draft articles 7, 8 and 9. I will first offer some comments on the articles adopted by the Commission.

Concerning draft article 1, its paragraph 1 captures adequately the material scope of the present topic on general level. Draft articles X and Y, recently proposed by the Special Rapporteur for insertion in Part Two and Part Three, will in our view further contribute to the clarification of the material scope by specifying the temporal aspects of the commission of the international wrongful act by the predecessor State and the reparation.

We note that the Commission decided to maintain paragraph 2 of draft article 1, proposed by the Drafting Committee, despite the doubts about the utility of such provision expressed by several delegations a year ago. Paragraph 2 is a mere restatement of an obvious principle according to which States may derogate by mutual agreements from dispositive rules of international law. In this respect, we note that references to such agreements between States concerned appear also in some other articles proposed for Parts Two and Three. Such duplications seem unnecessary.

Draft article 2 contains definitions of terms, which are identical with those contained in Vienna Conventions of 1978 and 1983. We consider it appropriate and do not see a need for any additional definitions.

We agree with draft article 5 (Cases of succession of States covered by the present draft articles). It is sensible that, consistently with the approach chosen by the Commission in its past work on issues of succession of States, the focus is on effects of succession of States, which occurred in conformity with international law.

I will now turn to the issues addressed in the Interim report of the Drafting Committee, dealing with draft articles 7, 8 and 9 provisionally adopted by the Drafting Committee.

We have a number of comments on draft article 7 (Acts having a continuing character), adopted on the basis of a new proposal by the Special Rapporteur, accounting for last year's debate in the Drafting Committee.

First, let us recall that the only internationally wrongful act, which should be of our interest under this topic, is the illegal act committed by the predecessor State before the date of State succession. Any wrongdoing after this date, whether its author would be the successor State or eventually the predecessor State (in case it continues to exist), is clearly covered by 2001 Articles on Responsibility of States. Consequently, there is no reason to deal with it under the present topic.

Second, for the purpose of this topic it is irrelevant whether the internationally wrongful act of the Predecessor State was a single act or an act having a continuing character. In case that full reparation for injury caused by any of these acts was not made before the date of succession, the problem falls under the present topic. Accordingly, there is no reason for singling out one type of these acts, as draft article 7 does.

Third, even if the breach of an international obligation of the predecessor State would result from its "act having a continuing character" and even if after the date of succession of States the successor State would immediately engage in an illegal conduct of similar nature (i.e. having a continuing character), these would still be two independent acts of two different States. They would not become one continuing wrongful act, as the Interim report of the Drafting committee suggests. Not even through the "acknowledgment" and "adoption", mentioned in the second sentence of draft article 7.

As admitted in the Interim report of the Drafting Committee, notions of "acknowledgment" and "adoption" are borrowed from article 11 of the Articles on responsibility of States. The problem is that article 11 deals with attribution to a State of a conduct of entities, which are not "organs" of a State. In other words, it deals with situations when the State acknowledges and adopts as its own the conduct, which would otherwise be considered as a conduct of a private entity, but not as an act of that State. Neither article 11 nor any other article of the chapter on the attribution of conduct deal with the "adoption" of an act of one State by another State. The questions of responsibility of a State in connection with the act of another State are dealt with in Part I, Chapter IV (articles 16 – 19) of the Articles on responsibility of States. None of these provisions gives grounds for the use of the concept of "acknowledgment" and "adoption" as proposed in draft article 7.

It is also noteworthy, that in the topic under consideration draft article 7 would be placed after draft article 6 entitled "No effect upon attribution", which was adopted by the Drafting Committee last year. According to draft article 6, succession of States has no impact on the attribution of the internationally wrongful act committed before the date of succession of States. At the same time, draft article 7, as we explained, seems to collide with the very rules of articles on responsibility of States governing attribution of conduct.

For these reasons we believe that draft article 7 should be reconsidered.

I now move to draft article 8 (Attribution of conduct of an insurrectional or other movement). Czech delegation does not see reasons for repeating provisions of paragraphs 2 and 3 of article 10 of the Articles on responsibility of States concerning one specific situation of attribution, namely that of the acts of insurrectional movement. Provisions of Articles on responsibility of States are broad enough and directly applicable also in the context of succession of States. Draft article 8 is also superfluous in view of proposed draft article 6.

Concerning draft article 9 (Cases of succession of States when the predecessor State continues to exist) we welcome the merger of three original draft articles dealing with this type of succession. However, the formulation used in paragraph 1 according to which "an injured State continues to be entitled to invoke the responsibility of the predecessor State even after the date of succession" leaves ambiguity as far as the range of situations covered by this

article is concerned. In our view, by shifting the focus from the question of reparation of injury (proposed by the Special Rapporteur) to that of invocation of responsibility, this provision does not capture satisfactorily the fact that this article applies also to situations when the injured State invoked responsibility of the predecessor State already before the date of succession of States, but the predecessor State did not make full reparation for the injury before that date (i. e. made no reparation at all or made only a partial reparation). These situations may be, in fact, the most frequent in practice.

Accordingly, further precision in the chapeau of this draft article is needed, because the formulation used will impact not only on the understanding of paragraph 1, but also of paragraphs 2 and 3. Preferably, the Drafting Committee could still revisit this issue. In any event an elaborated explanation of this aspect has to be included in the commentary.

It is our understanding that paragraph 2 envisages situations when making full reparation after the date of succession of States would eventually require the involvement of the successor State. For example, when the restitution would require the repair or reconstruction of a facility which was illegally disabled or removed by the predecessor State and which is now located in the territory of the successor State. In this respect, the solution proposed in paragraph 2, according to which "[i]n particular circumstances, the injured State and the successor State shall endeavor to reach an agreement for addressing the injury" is insufficient.

The injured State, let us not forget, is a victim of an internationally wrongful act of the predecessor State. The Successor State, even if having international legal personality distinct from that of the predecessor State, is not entirely "out of the hook" as far as the material consequences of the said internationally wrongful act are concerned. Behind a legal fiction of State's legal personality, there is a material content of the statehood, which in some cases – as presumably those envisaged in paragraph 2 – may be essential for making the reparation. If, for example, the legal remedies against an internationally wrongful act of the predecessor State are, after the date of succession, available only in the courts of the successor State, then the call of the injured State for such remedy is meaningful only if addressed to the successor State. In addition, the successor State cannot pretend that the problem is somehow "res inter alios acta". It would be wrong to suggest, that, in similar situation, the talks between the injured State and the successor State start around a "tabula rasa" or from a "clean slate". Suggesting that both of these States have an equal obligation to simply [and I quote] "endeavor to reach an agreement for addressing the injury" gives precisely this impression. The proposed paragraph 2 is disappointing and should be revisited. The position of the injured State must be strengthened and guaranteed much better.

Concerning paragraph 3 of draft article 9, we fully support its content. It is an indispensable saving clause, in view of many particularities that various arrangements between States concerned may involve.

Mr. Chairman,

Turning now to the topic of "**General principles of law**", we would like to thank and congratulate Special Rapporteur, Mr. Marcelo Vázquez-Bermúdez, on submission of his first report on that topic. As we stated last year, we expect the Commission to provide states with practical and concrete conclusions, commentaries and clarification of terms based on analysis of State practice, jurisprudence and views of scholars concerning this topic. In this regard, we appreciate that the Commission requested the Secretariat to prepare a memorandum surveying the practice of States and case law of international courts and tribunals relevant for this topic.

Let me now comment on some issues contained in the first report as well as issues which arose during Commission's debate. Firstly, some members of the Commission suggested that an illustrative list of general principles of law be prepared and provided as an annex to the future draft conclusions. We agree with the Special Rapporteur that this might be incomplete and would divert attention away from the central aspects of the topic. On the other hand, we are of the opinion that examples of general principles of law with relevant references should be included in the commentaries to pertinent draft conclusions.

We are also doubtful about the possibility of addressing "regional" and "bilateral" general principles of law. We are particularly doubtful as to the existence of such principles or at least of their relevance for the purposes of the present topic. Since the topic concerns general principles of law, we believe that the discussion has to be limited to such principles, which find place in all or most of national systems of law. In this respect the notion of "bilateral general principle" is an antilogy - *contradictio in adjecto*.

Concerning the question whether general principles of law can be derived only from national legal systems, or whether there is also a category of general principles of law formed within the international legal system, we consider the latter hypothesis doubtful. In accordance with the prevailing opinion in the doctrine, we understand general principles of law as principles commonly applied in national legal systems (*in foro domestico*), insofar as they can be transposed to and applied in relations among States. On the other hand, rules formed and recognized by states in international relations are part of customary international law as a distinct source of international law with specific requirements for its establishment.

Finally, we agree with the majority of members of the Commission that general principles of law are supplementary source of international law. Although article 38(1)(c) of the Statute of the International Court of Justice lists general principles of law as separate source of law of the same importance as international conventions and international custom, in practice they can only be applied upon the basis of inability of customary and treaty law to provide required solution. Yet applying general principles of law may give rise to evolution of new international custom or concluding a new treaty. This is another reason why we consider the topic in question relevant and we are looking forward to the second report of the Special Rapporteur.

Thank you, Mr. Chairman.