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Seventy-first session (second part)

Provisional summary record of the 3495th meeting

Held at the Palais des Nations, Geneva, on Wednesday, 31 July 2019, at 10 a.m.

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Present:

Chair:	Mr. Šturma
later:	Mr. Hmoud (First Vice-Chair)
later:	Mr. Šturma (Chair)
Members:	Mr. Argüello Gómez
	Mr. Cissé
	Ms. Escobar Hernández
	Ms. Galvão Teles
	Mr. Gómez-Robledo
	Mr. Grossman Guiloff
	Mr. Hassouna
	Mr. Huang
	Mr. Jalloh
	Mr. Laraba
	Ms. Lehto
	Mr. Murase
	Mr. Murphy
	Mr. Nguyen
	Mr. Nolte
	Ms. Oral
	Mr. Ouazzani Chahdi
	Mr. Park
	Mr. Petrič
	Mr. Rajput
	Mr. Reinisch
	Mr. Ruda Santolaria
	Mr. Saboia
	Mr. Tladi
	Mr. Valencia-Ospina
	Mr. Vázquez-Bermúdez
	Sir Michael Wood
	Mr. Zagaynov

Secretariat:

Mr. Llewellyn	Secretary to the Commission

The meeting was called to order at 10.10 a.m.

Succession of States in respect of State responsibility (agenda item 6) (*continued*) (A/CN.4/731)

Report of the Drafting Committee (A/CN.4/L.939/Add.1)

Mr. Hmoud, First Vice-Chair, took the Chair.

The Chair invited the Chair of the Drafting Committee to present the report of the Drafting Committee on the topic "Succession of States in respect of State responsibility", as contained in document A/CN.4/L.939/Add.1.

Mr. Grossman Guiloff (Chair of the Drafting Committee) said that the report, which was the third that the Drafting Committee had produced on the topic "Succession of States in respect of State responsibility", was an interim report aimed at providing the Commission with information on the progress made by the Committee during the session. The Committee had held 11 meetings on the topic and had provisionally adopted three draft articles, namely draft articles 7, 8 and 9.

At its seventieth session, the Commission had referred draft articles 5 to 11, as contained in the Special Rapporteur's second report (A/CN.4/719), to the Drafting Committee. Owing to a lack of time, the Committee had been unable to consider draft articles 7 to 11 during that session, and had therefore resumed its consideration of them at the current session.

In addition, following the plenary debates on the Special Rapporteur's third report (A/CN.4/731), the Commission had referred draft articles 2 (f), X, Y, 12, 13, 14 and 15, and the titles of parts II and III to the Drafting Committee. It should also be recalled that draft articles 3 and 4, as proposed by the Special Rapporteur in his first report (A/CN.4/708), remained in the Drafting Committee for consideration at a later stage.

At the outset, he wished to note that the Drafting Committee had continued its consideration of the draft articles that the Commission had referred to it in 2018 on the basis of proposals made by the Special Rapporteur in his second report, taking into account the debates in plenary and in the Drafting Committee.

Draft article 7, which was entitled "Acts having a continuing character", had originally been proposed by the Special Rapporteur in his second report under draft article 6 (3). In 2018, the Drafting Committee had decided that draft article 6 (1), as proposed by the Special Rapporteur, would be best suited as an independent article, and had thus provisionally adopted draft article 6 under the title "No effect upon attribution".

The purpose of draft article 7 was to address the question of internationally wrongful acts that had a continuing character in the context of succession of States.

Draft article 6 (3), as originally proposed by the Special Rapporteur in his second report, was a "without prejudice" clause, which was to be read in conjunction with the previous paragraphs of the same draft article. The consequence of the adoption of draft article 6 as a self-standing provision was that such a clause was no longer necessary. Draft article 7 had therefore been adopted on the basis of a new proposal by the Special Rapporteur, taking into account the debate held in the Drafting Committee in 2018.

The first sentence of draft article 7 set forth the basic rule that, in the case of internationally wrongful acts that continued to occur after succession, the international responsibility of the successor State extended only to the consequences of its own acts after the date of succession. The sentence was meant to reflect article 14 (2) of the 2001 articles on responsibility of States for internationally wrongful acts, which established that "the 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".

The purpose of the second sentence of the draft article was to address exceptional circumstances in which the international responsibility of the successor State would extend also to the consequences of the acts of the predecessor State. That would occur only "if and

to the extent that the successor State acknowledges and adopts the act of the predecessor State as its own". The formulation derived from the language of article 11 of the 2001 articles, according to which "conduct 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".

During the conversation about acts having a continuing character, some members of the Drafting Committee had suggested that a draft article should be developed on the related issue of composite acts in the context of succession of States. Reference had been made, in that regard, to article 15 of the 2001 articles, which addressed composite acts. The Special Rapporteur had indicated that the two issues had already been addressed in paragraphs 63 to 74 of his second report, and that, given the complexity of the issue of composite acts, he would address it in more detail and propose a related draft article in his fourth report.

The purpose of draft article 8, which was entitled "Attribution of conduct of an insurrectional or other movement", was to address the specific situation of the conduct of insurrectional or other movements, which had originally been addressed in two draft articles proposed by the Special Rapporteur in his second report, namely draft articles 7 (4) and 8 (3). Following the debates in plenary in 2018, the Special Rapporteur had suggested, and the Drafting Committee had subsequently agreed, that the issue should be addressed in a self-standing provision.

Draft article 8 comprised two paragraphs. Paragraph 1 reaffirmed a rule of attribution of the conduct of an insurrectional or other movement that succeeded in establishing a new State, as contained in article 10 (2) of the 2001 articles. The text of the paragraph followed closely the text of article 10 (2), except that it contained a reference to a "predecessor" State rather than to a "pre-existing" State. The change had been made so that the rule applied specifically to the context of succession of States.

In some cases, a State could be in a position to adopt measures of vigilance, prevention or punishment in response to a movement's conduct, but improperly fail to do so. That type of situation was captured by article 10 (3) of the 2001 articles, which took the form of a "without prejudice" clause to preserve the possibility of attributing any conduct to a State, regardless of how it was related to the conduct of the concerned movement, if such conduct was to be considered an act of that State under the rules of attribution set forth in other provisions of the 2001 articles.

The text of draft article 8 (2) had the same purpose and was modelled on article 10 (3) of the 2001 articles. In order to make the provision applicable to the succession of States, paragraph 2 contained a reference to a "predecessor State". The mention of "the rules on responsibility of States for internationally wrongful acts" was to be understood as a reference to the rules of international law regarding attribution, which were set out in articles 4 to 9 of the 2001 articles.

The purpose of draft article 9, which was entitled "Cases of succession of States when the predecessor State continues to exist", was to address the possibility of transfer of obligations from the predecessor State to the successor State following the commission of an internationally wrongful act by the predecessor State when the predecessor State continued to exist.

That matter, in cases of the separation of parts of a State, the establishment of a newly independent State or the transfer of part of the territory of a State, had originally been addressed in the Special Rapporteur's second report under three separate provisions, namely draft articles 7, 8 and 9. The draft articles shared a similar structure: they expressed the general rule that obligations arising from an internationally wrongful act of the predecessor State did not pass to the successor State, and then established exceptions that applied in particular circumstances. Taking into account the views expressed by some members of the Commission during the plenary debate in 2018, the Special Rapporteur had concluded that draft articles 7, 8 and 9, as proposed in his second report, could be combined to avoid unnecessary repetition. The Drafting Committee had consequently worked on the basis of a new proposal by the Special Rapporteur to that effect.

Draft article 9 comprised three paragraphs. Paragraph 1 established the general rule for when an internationally wrongful act had been committed by a predecessor State before the date of succession and the predecessor State continued to exist. The paragraph addressed three different cases of succession, in subparagraphs (a), (b) and (c). Those cases had previously been addressed in the second report in draft articles 9, 7 and 8, respectively. In such cases, an injured State was still entitled to invoke the responsibility of the predecessor State even after the date of succession.

The focus of paragraph 1 was on the "injured State", a term that was used for the sake of consistency with parts two and three of the 2001 articles. Following an extensive debate, the Drafting Committee had considered that a proposal indicating that the injured State "may request" reparation was not appropriate, since the expression was not sufficiently normative. Thus, it had been considered that paragraph 1 should preferably be referred to as an entitlement of the injured State "to invoke the responsibility of the predecessor State". That language was also consistent with the formula used in the 2001 articles. The Committee had considered that referring to an entitlement to invoke the responsibility of the predecessor State was more appropriate than referring to an entitlement to "reparation", since the responsibility of the predecessor State was comprehensive before the succession of States. Furthermore, the formulation suggested by the Committee encompassed all the rules on the responsibility of States for internationally wrongful acts, which might include, for example, the rules on circumstances precluding wrongfulness. It had been understood within the Drafting Committee that such a scenario would be explained in the commentary.

The main element of paragraph 1 was temporal. Its aim was to indicate that the entitlement of the injured State to invoke the responsibility of a predecessor State was not affected after the date of succession of States if the predecessor State still existed. That was reflected in the choice of the words "continues to" and "even after the date of succession".

The purpose of paragraph 2 was to address exceptional situations in which there was a direct link between the act or its consequences and the territory of the successor State or States. In such circumstances, the predecessor State might not be in a position to address the injury alone, and might need the cooperation of the successor State. The term "in particular circumstances" covered diverse situations in which a successor State might be addressing the injury. Those situations would be described in the commentary.

The purpose of paragraph 2 was not to create obligations entailing the automatic transfer of obligations to the successor State, but to signal the possibility for the successor State to reach an agreement with the injured State for the purpose of addressing the injury. That could take a variety of forms depending on the factual situation, the nature of the internationally wrongful act and the link between its consequences and the successor State. The purpose of paragraph 2 was also to signal that the consequences of the internationally wrongful act did not disappear simply because of the succession of States. It had been understood within the Drafting Committee that the commentary would provide clarification as to how the injury could be addressed and how the injured State and the successor State could endeavour to reach an agreement.

While paragraph 1 concerned the entitlement of the injured State with regard to the predecessor State, and paragraph 2 addressed the relationship between the injured State and the successor State, paragraph 3 dealt with possible agreements between the predecessor and successor States to address the injury. The paragraph set out, in the specific context covered by draft article 9, the general rule enshrined in draft article 1 (2), according to which "the present draft articles apply in the absence of any different solution agreed upon by the States concerned".

Paragraph 3 was drafted as a "without prejudice" clause to clarify that the two situations covered under paragraphs 1 and 2 did not preclude any other solution reached through an agreement between the predecessor and successor States, and might actually be affected by such an agreement. For instance, an agreement between the predecessor State and the successor State could take the form of an apportionment in cases of compensation, and the existence of such situations was recognized in the draft article through the inclusion of the "without prejudice" clause. Paragraph 3 also covered arrangements that took

different forms owing to the nature of the injury and the type of reparation sought by the injured State.

To conclude, he wished to confirm that the Commission was not, at that stage, being requested to act on the draft articles, as the report had been presented for information purposes only.

The Chair said he took it that the Commission wished to take note of the interim report contained in document A/CN.4/L.939/Add.1.

It was so decided.

Mr. Šturma, Chair, resumed the Chair.

Mr. Park asked whether the Commission would consider the text of the draft articles paragraph by paragraph. He had a minor proposal regarding draft article 8.

The Chair said that the report of the Drafting Committee was an interim report for information purposes. In his capacity as Special Rapporteur for the topic, he would prepare draft commentaries to be presented at the seventy-second session. The draft articles provisionally adopted by the Drafting Committee at that stage would then be referred to the plenary for adoption, together with their commentaries. There was therefore still time for members to propose minor adjustments.

Mr. Murphy said that Mr. Park was right that at some point the Commission had to adopt the draft articles in the plenary. The Special Rapporteur would then be expected to prepare draft commentaries based on what had been approved in the plenary. Of course, the Special Rapporteur could begin working immediately on draft commentaries that he thought were appropriate, but he would not know exactly what the draft articles were until such a time as they had been adopted by the plenary.

The Chair, speaking in his capacity as Special Rapporteur for the topic, said that he planned to begin working on the draft commentaries earlier than usual because of time constraints. It was of course the case that draft commentaries were officially prepared only after the adoption of draft articles by the Commission.

Mr. Ouazzani Chahdi said that there was an issue with the French translation of the draft articles, specifically the translation of the term "internationally wrongful acts", which in the French version had been rendered as "*fait internationalement illicite*". The words "*fait*" and "*acte*" were not interchangeable. The translation should be carefully reviewed before the adoption of the draft articles.

The Chair said that Mr. Ouazzani Chahdi's concern had been duly noted. The translations of the draft articles would be double-checked before their adoption to ensure consistency in the use of terminology in all languages. As had been explained by the Chair of the Drafting Committee in his statement, the terminology used in the draft articles was intended to be consistent with the terminology used in the articles on responsibility of States for internationally wrongful acts.

Other business (agenda item 11) (*continued*)

Provisional application of treaties

Mr. Gómez-Robledo (Special Rapporteur) said that he was grateful for the opportunity to provide a brief report on the informal consultations that had been held at the current session on the draft model clauses on the provisional application of treaties.

As members would recall, the Commission had concluded its first reading of the draft Guide to Provisional Application of Treaties at its seventieth session in 2018. In addition, the Commission had taken note of the Drafting Committee's recommendation that a reference should be made in the commentaries to the possibility of including, during the second reading, a set of draft model clauses based on a revised proposal that the Special Rapporteur would make at an appropriate time, taking into account the comments and suggestions made both during the plenary debate and in the Drafting Committee.

Such reference has subsequently been included in paragraph (7) of the general commentary to the Guide, in which it was explained that in preparing a set of draft model clauses, to be annexed to the Guide, the Commission would seek to reflect best practice with regard to the provisional application of both bilateral and multilateral treaties. It was also clarified that in no way would the draft model clauses be intended to limit the flexible and voluntary nature of provisional application of treaties; nor would they attempt to address the whole range of situations that might arise.

The Commission had further indicated, in its report on the seventieth session, its intention to resume the consideration of the draft model clauses at the current session, "to allow States and international organizations to assess the annex containing such draft model clauses before the second reading of the draft guidelines took place during the seventy-second session".

Following the discussions held in 2018, he had prepared an informal paper containing, *inter alia*, a revised set of five draft model clauses for the consideration of the Commission in the context of informal consultations. Two meetings of informal consultations on the informal paper had been held on 10 and 18 July 2019. The consultations had been open to all members and had been announced in advance. At the second meeting, he had circulated a revised version of the informal paper, which took into account some of the comments made at the first meeting. Copies of that revised informal paper had been made available to all members.

He was grateful to the Bureau for having allocated time for the informal consultations and wished to thank those members who had participated in the consultations for their contributions. The purpose of the current statement was to provide the plenary with a report of the discussions held in the informal consultations, and to make a recommendation on how to proceed.

However, before doing so, he wished to recall the context in which the draft model clauses were being considered. First, he wished to recall that 41 delegations, including the European Union, which had spoken on behalf of its 28 member States and other States, had expressed views in the debate on the topic in the Sixth Committee, during the seventy-third session of the United Nations General Assembly.

Many delegations had acknowledged with appreciation his proposal to include draft model clauses as an annex to the Guide; several delegations had observed that draft model clauses would provide practical assistance and guidance to States in the drafting and negotiation of the provisions of treaties. At the same time, some delegations had regretted that the Commission had not been able to complete its consideration of the draft model clauses during the first reading and had expressed the hope that States and international organizations could be in a position to consider the draft model clauses before the second reading took place.

Turning to his revised proposal for the draft model clauses, he said that he wished to recall the understandings that underpinned his revised proposal namely that: (a) the draft model clauses should be aimed at addressing the most common issues faced by States and international organizations that were willing to resort to provisional application; (b) the draft model clauses should not seek to address the whole range of situations that might arise; (c) special care should be taken so as to prevent the draft model clauses from overlapping with the guidelines contained in the Guide to Provisional Application of Treaties; and (d) the draft model clauses should be accompanied, for reference purposes, with examples of clauses contained in existing treaties.

In addition, he wished to reiterate that the draft model clauses should, at least, provide for the following situations: (a) the provisional application of a treaty or part of a treaty in the treaty itself or in a separate agreement; (b) the most common situations of termination of the provisional application of a treaty or part of a treaty; (c) the possibility of opting for the provisional application of a treaty or part of a treaty, or of opting not to have the treaty or part of a treaty provisionally applied for that State or international organization, particularly whenever the decision to resort to provisional application was made by (i) a resolution adopted by an international organization or at an intergovernmental conference with which the State or international organization concerned was not in agreement with

such resolution; or (ii) a declaration by a State or international organization that was not a negotiating party to the treaty; and (d) limitations deriving from the internal law of States or the rules of international organizations.

It was with those considerations in mind that he had prepared the revised set of draft model clauses. Furthermore, as had been explained in his fifth report (A/CN.4/718), the draft model clauses were intended only to draw attention to some of the most common situations that arose in the event of an agreement to apply a treaty provisionally. They therefore contained elements that reflected the most clearly established practice of States and international organizations, while avoiding other elements that were not reflected in practice or were unclear or legally imprecise. While none of the proposed wording had been taken verbatim from any existing treaty, the draft model clauses included footnotes that provided examples of provisional application clauses found in treaties that referred to the same issue covered in the draft model clause in question, although such examples were by no means exhaustive.

During the informal consultations, members had been generally supportive of the proposal to include a set of draft model clauses, as an annex to the Guide to Provisional Application of Treaties, to be adopted on second reading in 2020. No drafting exercises had taken place during the informal consultations. A number of suggestions had been made concerning the approach to be taken to the model clauses, and some views had been shared with regard to aspects relating to drafting. For example, it had been stated that the Commission should carefully explain that the draft model clauses were not definitive texts, but drafts that were intended merely to provide a basis for States to negotiate such clauses in their treaties. It had also been suggested that a clearer distinction should be drawn, in the text of the draft model clauses, between bilateral and multilateral treaties. Support had also been expressed for the inclusion of draft model clauses 4 and 5, which dealt with the question of opting out of provisional application arising from a resolution of an international organization, and limitations deriving from internal law of States or rules of international organizations, respectively.

The concern had also been expressed that the inclusion of a set of draft model clauses in the Guide could be interpreted as the Commission’s encouraging States to resort to provisional application. In his view, such concern had existed from the very beginning of the Commission’s work on the topic. The very act of clarifying applicable rules could be understood as facilitating the provisional application of treaties. However, that was not the case. There already existed a significant body of practice of States resorting to provisional application from even before the 1969 Vienna Convention on the Law of Treaties and especially so since the adoption of article 25 of that Convention. The Commission had decided to undertake the topic in order to provide a service to Member States by seeking to clarify the necessary procedures for provisional application, as well some of the legal consequences arising therefrom. At all times, the optional and voluntary nature of provisional application had been emphasized. The draft model clauses would simply be provided to facilitate drafting in those situations where negotiating parties decided to resort to the mechanism of provisional application.

With regard to the question of how to proceed, several members had expressed a preference for the referral of the model draft clauses to the Drafting Committee. However, that would not be possible at the current session owing to time constraints. Nonetheless, he wished to propose that the substance of his oral report should be recorded in the Commission’s report to the General Assembly on the work of its current session, specifically the chapter on other decisions and conclusions of the Commission, and that the draft model clauses should be annexed to that report. That could be accompanied by a request, in chapter III of the report, for Member States to submit comments on those draft model clauses. It would be on the basis of the views of members of the Commission, expressed during the informal consultations, together with the comments received from Governments, made either in writing or in the Sixth Committee, that he would prepare a further revised version of the draft model clauses for inclusion in his final report, to be submitted in 2020. If the plenary agreed, those proposals would be referred to the Drafting Committee at the seventy-second session, for its consideration.

He hoped that the Commission would be in position to take note of his oral report and to proceed on the basis of his recommendation.

The Chair said that he took that it that the Commission wished to take note of Mr. Gómez-Robledo's oral report and to proceed on the basis of his recommendation.

It was so decided.

The meeting rose at 11 a.m.