Provisional

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International Law Commission
Seventy-second session (second part)

Provisional summary record of the 3531st meeting
Held at the Palais des Nations, Geneva, on Monday, 5 July 2021, at 3 p.m.

Contents

Present:

Chair:	Mr. Hmoud
Members:	Mr. Aurescu
	Mr. Cissé
	Ms. Escobar Hernández
	Mr. Forteau
	Ms. Galvão Teles
	Mr. Grossman Guiloff
	Mr. Hassouna
	Mr. Jalloh
	Mr. Laraba
	Ms. Lehto
	Mr. Murase
	Mr. Nguyen
	Ms. Oral
	Mr. Ouazzani Chahdi
	Mr. Park
	Mr. Petrič
	Mr. Rajput
	Mr. Reinisch
	Mr. Ruda Santolaria
	Mr. Saboia
	Mr. Šturma
	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 3.10 p.m.

Succession of States in respect of State responsibility (agenda item 6) (*continued*) (A/CN.4/743)

Mr. Šturma (Special Rapporteur), introducing his fourth report on succession of States in respect of State responsibility (A/CN.4/743), said that, before addressing the main theme, he wished to recall the general considerations that applied to the entire topic. Those considerations, as summarized in chapter I (B) of the report, were that the draft articles on succession of States in respect of State responsibility were of a subsidiary nature, with agreements between the States concerned taking priority; that the draft articles must be consistent with the Commission's previous work, including, in particular, the articles on responsibility of States for internationally wrongful acts; that the concepts of equity and equitable proportion or distribution of rights and obligations must be given due importance; that cases of succession of States inevitably combined political and legal considerations and were therefore context-specific; that neither the "clean slate" principle nor the automatic succession principle was acceptable as a general rule; and that codification must be combined with the progressive development of international law.

Part two of the report examined the impact of succession of States on forms of responsibility. Reparation of damage was a key issue but not the sole focus. Rather, the report addressed all forms of responsibility and all legal consequences that might apply even in situations of succession, with the aim of maintaining consistency with the articles on responsibility of States for internationally wrongful acts. The report would have been misleading if it had omitted to address some of the legal consequences of wrongful acts simply because they were rarely referred to in practice or in writings in relation to the succession of States.

The report and the proposed draft articles respected the premise that the general rules of State responsibility remained applicable to a predecessor State, except when it was materially impossible for that State to provide a specific form of reparation. They recognized that, in special circumstances, certain forms of reparation by a successor State or States might be warranted, but that only in those circumstances was it possible to speak of a possible and conditional transfer of obligations and rights; in other words, a succession of States *stricto sensu*.

That approach was consistent with the approach taken in previous reports, which covered situations of real, even if possible or conditional, succession of States to rights and obligations arising from State responsibility and situations in which States incurred responsibility for their own acts even in the event of succession. In the latter hypothesis, the usual rules governing the attribution of acts of State organs or other persons or entities, including, for example, an insurgent movement, continued to apply. In other words, the approach taken was fully aligned with the statement of principle contained in draft article 6, according to which succession of States had no effect upon the attribution to a State of an internationally wrongful act committed by that State before the date of succession.

Chapter III (A) of the report examined problems arising in relation to different forms of reparation, beginning with restitution, which was the subject of draft article 16. Setting forth a basic rule that was fully aligned with the articles on responsibility of States for internationally wrongful acts, draft article 16 (1) stated that, where a predecessor State continued to exist, that State was under an obligation to make restitution, provided and to the extent that restitution was not materially impossible or did not involve a burden that was out of all proportion. However, as reflected in draft article 16 (2), there were certain circumstances where only a successor State, or one of the successor States, was in a position to make restitution, or where restitution was not possible without the participation of a successor State. Such situations included, for example, cases where an object that had been illegally removed or a construction that threatened the environment was located in the territory of a successor State. In such circumstances, the injured State could request the successor State to provide or participate in the provision of restitution, and negotiations between the two States would be initiated.

Draft article 16 (3) established that the provisions of paragraphs 1 and 2 were without prejudice to any apportionment or other agreement between the successor and the predecessor State or another successor State. Draft article 16 (4) addressed situations that were the inverse of those referred to in draft article 16 (2), indicating that a successor State could request restitution from a State that had committed a wrongful act against a predecessor State if the injury caused by that act continued to affect the territory or persons having come under the jurisdiction of the successor State.

The second form of reparation examined in the report was compensation, which was the most frequent form, and could arise in situations affected by succession of States. The corresponding draft article 17 was based on an analysis of practice, including decisions of the European Court of Human Rights and the United Nations Compensation Commission, and was structured in the same way as draft article 16. Draft article 17 (1) confirmed the obligation of a predecessor State that continued to exist to provide compensation for damage caused by its internationally wrongful act. Draft article 17 (2) established that an injured State could request compensation from a successor State or one of the successor States, provided that the predecessor State had ceased to exist or the successor State continued to benefit from such act. Such a request would be justified, for example, when there was a direct link between the consequences of a wrongful act and the territory or population of a new State or States, or when the author of a wrongful act was an organ of the predecessor State that subsequently became an organ of the successor State. Draft article 17 (3) addressed apportionment or other agreements between the successor State and the predecessor State or another successor State, and draft article 17 (4) provided that a successor State could request compensation from a State responsible for a wrongful act if, after the date of succession, the successor State continued to suffer the injurious consequences of that act.

Chapter III (A) (3) of the report concerned satisfaction as a form of reparation for non-material injury. From a traditional perspective, moral injury would appear by nature to be closely linked to the bilateral relations of the States concerned and to their dignity and personality. Thus, in situations of succession of States that involved a change of sovereignty, satisfaction could hardly be claimed against or by a successor State. However, the modern law of State responsibility also encompassed the notion of legal injury. That concept related mainly to breaches of obligations that were not bilateral but safeguarded essential collective interests of a group of States or the international community of States, examples of which were the obligation to protect human rights and the obligation to prevent and punish crimes under international law. Because such obligations, which had effect *erga omnes*, were of an objective character, their breach entailed legal consequences that extended beyond mere reparation for moral damage to the honour and dignity of a single State. In such situations, no State, including any successor State, should be excluded from the possibility of claiming satisfaction in an appropriate form.

Having established that satisfaction was a possible form of reparation, the report then considered appropriate forms of satisfaction. In cases of serious violations of *erga omnes* obligations, including, specifically, crimes under international law, the investigation and punishment of the persons responsible was identified as the most appropriate form. Accordingly, the report focused on the prosecution of the crimes under international law that had taken place in the territory of the former Yugoslavia before and after 27 April 1992, the date on which the process of dissolution of Yugoslavia was generally deemed to have been completed. The decision to analyse the Yugoslav succession was a logical one, because that case was one of the most significant examples of succession of States in modern practice. Moreover, it involved numerous crimes under international law that had been investigated and tried at both the international and national levels.

The proposed draft article 18 was based on that analysis. Draft article 18 (1) confirmed that, in cases of succession of States where a predecessor State continued to exist, that State was under an obligation to give satisfaction for the injury caused by its internationally wrongful act, insofar as such injury was not made good by restitution or compensation. Reflecting a cautious and flexible approach, draft article 18 (2) stated that the provisions of paragraph 1 were without prejudice to any appropriate satisfaction, including, in particular, the prosecution of crimes under international law, that a successor State might claim or provide.

Chapter III (B) of the report dealt with cessation and non-repetition, both of which reflected the contemporary view that State responsibility went beyond the mere reparation of injury. The report's treatment of those concepts reflected the comprehensive approach to rules of State responsibility that might be affected by a situation of succession of States. The report noted, on the one hand, that the obligation of cessation could arise only in respect of wrongful acts having a continuing character and that it applied by virtue of the general rules of State responsibility. In principle, therefore, the existing rules were sufficient and there was no need to formulate new draft articles in addition to draft article 7, which had been provisionally adopted by the Commission during the first part of its seventy-second session (A/CN.4/SR.3528). On the other hand, the report recognized that assurances and guarantees of non-repetition of a wrongful act should be addressed in relation to the topic at hand, as they served a function distinct from that of other forms of reparation: they related to the future and to wrongful acts that consisted of a single, completed act, not a continuing act. In addition, the primary obligation that had been breached must remain extant and in force, making any transfer of the secondary obligation contingent on succession with respect to the primary obligation.

The proposed draft article 19, on assurances and guarantees of non-repetition, had two paragraphs. Draft article 19 (1) confirmed the general rule – based on the articles on responsibility of States for internationally wrongful acts – that, in cases where a predecessor State continued to exist, that State was under an obligation to offer appropriate assurances and guarantees of non-repetition, if circumstances so required, even after the date of succession. Draft article 19 (2) addressed the more exceptional situations where, subject to two preconditions – firstly, that the obligation breached by an internationally wrongful act remained in force between a successor State and another State concerned, and, secondly, that circumstances so required – an injured State could request appropriate assurances and guarantees of non-repetition from a successor State or, conversely, a successor State of a State injured by a wrongful act of another State could request appropriate assurances and guarantees of non-repetition from that State.

The report also included a section on composite acts, prepared in response to a request made by members of the Drafting Committee in 2019 in connection with the debate on draft article 7, which addressed acts having a continuing character. The issue of composite acts had already been analysed partially in paragraphs 63 to 74 of the second report on the topic (A/CN.4/719) but no draft article on the subject had been proposed. The fourth report continued that analysis, and the proposed draft article 7 *bis* was based on the analysis contained in both reports. It was a counterpart to draft article 7 that was based on the premise that composite acts differed fundamentally from acts having a continuing character and were a concept of relevance even in situations of succession of States. Draft article 7 *bis* did not purport to establish a new rule, but dealt with the application of general rules of State responsibility in the context of succession of States. It also dealt with the attribution of acts to either a predecessor or a successor State rather than with the succession itself, specifically the transfer of obligations or rights. It was nevertheless useful in that it could shed more light on the issue.

Part three of the report concerned the future programme of work. The fifth report on the topic would focus on the legal problems arising when there was a plurality of injured successor States and a plurality of responsible States. However, it would introduce few, if any, new draft articles. It would also cover miscellaneous and technical issues, such as the renumbering and final structure of the draft articles, with a view to the completion of the topic in the near future. Depending on how the debate progressed, the Commission might be in a position to adopt the entire set of draft articles on first reading in 2022.

The meeting rose at 3.30 p.m.