Provisional

**For participants only**

10 August 2021

Original: English

# International Law Commission

**Seventy-second session (second part)**

**Provisional summary record of the 3532nd meeting**

Held at the Palais des Nations, Geneva, on Tuesday, 6 July 2021, at 11 a.m.

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***Present***:

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| *Chair:* | Mr. Hmoud |
| *Members:* | Mr. Cissé |
| | Ms. Escobar Hernández |
| | Mr. Forteau |
| | Ms. Galvão Teles |
| | Mr. Hassouna |
| | Mr. Jalloh |
| | Mr. Laraba |
| | Ms. Lehto |
| | Mr. Murase |
| | Mr. Murphy |
| | Mr. Nguyen |
| | Ms. Oral |
| | Mr. Ouazzani Chahdi |
| | Mr. Park |
| | Mr. Petrič |
| | Mr. Rajput |
| | Mr. Reinisch |
| | Mr. Saboia |
| | Mr. Šturma |
| | Mr. Tladi |
| | Mr. Vázquez-Bermúdez |
| | Sir Michael Wood |
| | Mr. Zagaynov |

***Secretariat***:

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| Mr. Llewellyn | Secretary to the Commission |

*The meeting was called to order at 11.05 a.m.*

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

**Mr. Reinisch** said that he wished to thank the Special Rapporteur for his fourth report on succession of States in respect of State responsibility (A/CN.4/743), which focused on the "consequences" of responsibility in the form of reparation, cessation and non-repetition.

Unfortunately, the Special Rapporteur had continued his approach of proposing a new rule of State succession to State responsibility, thereby deviating from established international law. While the Special Rapporteur reiterated, in paragraph 33 of the report, the mantra that the "topic does not envisage the succession of States in respect of State responsibility as a transfer of the responsibility as such, but as a transfer of rights and obligations arising from international responsibility of a predecessor State", the assumptions in the report nevertheless continued to be based on State responsibility obligations that might result for successor States as a consequence of the succession of States.

The main problem was that the difference between a "transfer of the responsibility as such" and a "transfer of rights and obligations arising from international responsibility" was not explained. The Special Rapporteur asserted that Judge *ad hoc* Kreća had reached the same conclusion in his separate opinion in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*. While it was correct that Judge *ad hoc* Kreća had referred to that distinction, the context in which the distinction had been drawn in fact contradicted the conclusions of the Special Rapporteur. On the one hand, Judge Kreća's discussion focused on the argument that "succession to responsibility *in personam* is not a part of the corpus of general international law" and that "[s]uccession to responsibility *in personam* is not *stricto sensu* legally possible". On the other hand, he had emphasized that the "only possible form of succession to responsibility in the circumstances surrounding the case, could be succession to the responsibility of [the Socialist Federal Republic of Yugoslavia] *ex consensu*", which would not constitute a case of succession to responsibility, but of voluntary assumption of the consequences of responsibility.

Additionally, the assertion, in paragraph 33 of the fourth report, that "this is not an automatic succession (as the responsibility generally rests with the predecessor State), but rather a transfer depending on the existence of special circumstances", was insufficient, given the consequences of the responsibility of successor States as suggested in a number of the proposed draft articles. Thus, the distinction drawn between "transfer of the responsibility as such" and a "transfer of rights and obligations arising from international responsibility" seemed largely to be a distinction without a difference.

As the Special Rapporteur had explained in previous reports, there were some special situations, such as the adoption or continuation of wrongful acts, where a successor State might incur responsibility because of its own acts. The Special Rapporteur implicitly recognized that point in paragraph 102, where he stated that the successor State was "under an obligation to cease that act (its own act)" if the act was wrongful, and rightly concluded that "obviously, this is based on general rules on State responsibility, which are fully applicable". In such a situation, however, it seemed very clear that the successor State's responsibility arose not from the fact of a succession of States, but rather from general considerations concerning attribution under the rules of State responsibility.

Regarding what the Special Rapporteur called the "general approach (methodology) of the report", he noted that chapter I (B) highlighted some general considerations, the first of which was the subsidiary nature of the draft articles and, consequently, the priority given to agreements between the States concerned. That first consideration was certainly generally acceptable, but it also demonstrated the degree to which the attempt to codify or progressively develop fallback rules was questionable. Such rules not only would be based on a virtual lack – or, as the Special Rapporteur described it, a "paucity or non-conclusiveness" – of State practice, but would also be subsidiary to agreements, which already appeared to be the default tool chosen by States to regulate such issues.

The Special Rapporteur's second conclusion, in paragraph 16 of the report, that the topic should "preserve consistency, in terminology and substance, with the previous works

of the Commission", was highly problematic. While it was, of course, very important to maintain such consistency, as broadly as possible, with the 1978 Vienna Convention on Succession of States in respect of Treaties and the 1983 Vienna Convention on Succession of States in respect of State Property, Archives and Debts, he strongly questioned what the Special Rapporteur considered to be one of the "broader ramifications" of such consistency. In paragraphs 17 and 18 of the report, the Special Rapporteur suggested that the rules concerning succession of States in respect of State debts "may be viewed as closely related to those on obligations arising from internationally wrongful acts" and that, as those rules called for the passing of State debts to successor States in an equitable proportion, the concept of equitable proportion might inform the proposed draft articles on succession of States in respect of State responsibility.

The idea of taking the rules on State debts as a source of inspiration for the topic at hand represented one of the core problems of the Special Rapporteur's approach. State responsibility denoted the legal consequences of an internationally wrongful act, whereas State debts were incurred for various reasons, but mostly as a result of lawful activities. A very clear distinction had been made, both in theory and in practice, between the consequences of State debts and those of State responsibility. Any transfer to State responsibility of concepts pertaining to State debts or liabilities appeared to be unwarranted.

That view was further supported by the established practice of distinguishing between "liquidated" and "unliquidated" claims. In effect, indirect succession to State responsibility could take place only where, before the succession occurred, liability for an internationally wrongful act had been accepted by the predecessor State or confirmed by a judicial body, thereby "liquidating" a claim arising out of an alleged unlawful act. In such a situation, the delictual claim had already been transformed into a monetary claim constituting a debt or liability on the part of the State against which the claim had been brought. Only in such a case could it be said that the "consequence" of an internationally wrongful act, for instance in the form of an obligation to pay compensation, was "transferred" to the successor State, in the form of what had been considered, in doctrine and in jurisprudence, a "debt" of the predecessor State. In the *Robert E. Brown (United States) v. Great Britain* arbitration, for example, the United States-Great Britain Arbitral Commission had held that a claim for damages arising out of a denial of justice committed by the South African Republic before its annexation by Great Britain had never passed to the latter because it had been "simply a pending claim for damages … and had never become a liquidated debt of the former State". Similarly, in the *Lighthouses* arbitration, the Permanent Court of Arbitration tribunal had noted, in concluding that no responsibility fell on Greece as successor State to either Crete or Turkey for a violation by the Government of Crete, that the claim had been "neither recognized as well founded by the Ottoman Empire or by Crete nor determined by a competent tribunal nor liquidated or easily liquidable on the basis of the facts giving rise to it". He wished to acknowledge, however, that the distinction between liquidated and unliquidated debts had been criticized in academic writings, in particular by authors who supported the concept of succession to liability arising from wrongful acts.

He also had reservations about the conclusions drawn from what the Special Rapporteur called the "third general point", namely that the acknowledgement of inconsistent, context-specific and non-conclusive State practice should "not be abused". While the Special Rapporteur repeated his mantra of being agnostic in regard to either a rule of non-succession or a rule of automatic succession due to the lack of clear State practice, he still asserted, in paragraph 21 of the report, that "this does not question in any way the applicability of the 'clean slate' principle when the successor State is a newly independent State, unless an agreement between them provides otherwise". One could only wonder where the Special Rapporteur had found consistent and conclusive State practice in that regard. Overall, the Special Rapporteur's suggestion that the less frequent occurrence of State succession "implies, quite obviously, that the requirement of general practice as an element of identification of customary international law cannot be applied too strictly" was quite telling: the goal seemed to be to complete draft articles on the topic at all costs, even if it meant loosening core tenets of customary international law.

Part two of the report, on the content and forms of responsibility in cases of succession of States, purported to follow closely those articles on responsibility of States for

internationally wrongful acts that dealt with the consequences of responsibility, which gave rise to a "new legal relationship which arises upon the commission by a State of an internationally wrongful act". That quotation, from paragraph (1) of part two of the commentary to the articles on State responsibility, showed that the consequences of State responsibility were relevant for the State having committed a wrongful act, not for any successor State.

In paragraph 23 of the report, the Special Rapporteur asserted that the report would "focus on the impact of succession of States on forms of international responsibility". What the Special Rapporteur had probably meant was "on the consequences of responsibility", with a primary focus on the three forms of reparation, namely restitution, compensation and satisfaction, which were elaborated upon in proposed draft articles 16, 17 and 18.

The main problem with those three draft articles lay in their pointlessness. He saw no need for draft articles covering those situations, all of which were, in the general way in which they were formulated in the report, already covered by the general rules of State responsibility law. A discussion of forms of reparation with reference to different categories of State succession, namely when the predecessor State did or did not continue to exist, might have been useful, but, as shown by paragraph 26 of the report, the Special Rapporteur had expressly rejected that approach. Instead, the distinction drawn was between restitution, compensation and satisfaction, on the one hand, and the obligation of cessation and non-repetition, on the other. That distinction was already made clear in the articles on State responsibility and did not add any analytical benefit to the discussion of the topic at hand.

Concerning draft article 16, on restitution, paragraph 25 of the report contained the rather general assertion that the proposed draft articles would respect the continuing applicability of general rules of State responsibility with regard to a predecessor State, "subject to material impossibility for that State to provide a specific form of reparation". The ensuing discussion revealed that "material impossibility" basically referred to a situation where objects to be returned might no longer be located in or under the control of the continuing State, with the result that restitution might become impossible.

He had been surprised to note that, in paragraph 41 of the report, the Special Rapporteur cited the *Mytilineos Holdings v. The State Union of Serbia and Montenegro/Republic of Serbia* arbitration award on jurisdiction in asserting that "Montenegro (the successor State) was directed to perform an obligation after its separation from the State Union of Serbia and Montenegro". In that award, the arbitral tribunal had expressly noted that "in June 2006, well after the filing of Claimant's Statement of Claim in April 2005, Montenegro, a constituent unit of the State Union of Serbia and Montenegro, declared its independence. While the Tribunal has not been requested to rule on any ensuing State succession issues, it takes note that it appears uncontroversial that the Republic of Serbia will continue the legal identity of the State Union of Serbia and Montenegro on the international level." Nowhere in the *Mytilineos Holdings* arbitration award had the arbitral tribunal, which he himself had chaired, directed Montenegro, as a successor State of the State Union of Serbia and Montenegro, to perform any obligation of that predecessor State.

Draft article 16 (1), which provided that a continuing State continued to be responsible, seemed superfluous. The continuing State was obviously "under an obligation to make restitution"; if restitution was materially impossible, other forms of reparation would be due. However, such a rule could already be found in articles 35 and 36 of the articles on State responsibility, and there was therefore no need for the suggested provision.

Draft article 16 (2) was more interesting. It addressed the situation of a successor State that was in a position to make such restitution, probably because the object in question was now located in its territory or was under its control. The Special Rapporteur suggested a rule according to which an injured State could "request such restitution … from the successor State". While the suggested formulation was rightly very cautious, as it did not call for the successor State to be viewed as being under an obligation, having responsibility or succeeding to the consequences of the predecessor State's responsibility, a simpler and more satisfactory solution might be to apply the principle of unjust enrichment. If any illegally or unjustly removed or appropriated object was found in the successor State, that State was probably under an obligation to return it to the injured State.

As he had remarked in the past, the proposed wording of some of the draft articles might easily be misunderstood, since it indicated that a State injured by an internationally wrongful act of a predecessor State "may request" restitution or compensation from a successor State. If the words "may request" simply meant that an injured State could ask for restitution or compensation but that the successor State had no responsibility or obligation to provide it, those provisions were superfluous, as they merely stated the obvious. If the intention, however, was to suggest that successor States would succeed to the consequences of State responsibility incurred by the predecessor State and would become obliged to provide restitution or compensation, such an assumption could not be justified on the basis of existing custom, or even as a good rule from a policy standpoint.

The Special Rapporteur reasoned that there might be situations where the responsible State was not in a position to make restitution because the property in question was located not in its territory but in the territory of the successor State. There was no reason, however, to impose any obligation on a successor State in such a situation. The general law of State responsibility did not prevent the responsible State from negotiating, with the successor State, the means by which restitution could take place. If such negotiations were not successful, payment of a sum corresponding to the value of the object would obviously be the appropriate consequence for the responsible State, according to the rules of State responsibility.

Turning to draft article 17, on compensation, he said that if a successor State had benefited from the commission of a wrongful act by a predecessor State, as mentioned in draft article 17 (2), there was likewise no need to resort to State succession rules. Rather, such a State would have been unjustly enriched, and the prohibition of unjust enrichment, as the Special Rapporteur rightly noted in paragraph 55, would provide a sufficient basis for the unjustly deprived party to claim compensation from the unjustly enriched one. The provision was thus another example of a proposed rule that covered matters that were already regulated either by secondary law, such as the articles on State responsibility, or by primary law, as in the case of the principle of unjust enrichment.

The rule proposed as the second alternative in draft article 17 (2) would therefore apply in any event and did not provide a rule concerning State succession. In that sense, it shared the fate of some of the other "exceptional" situations in which, according to the Special Rapporteur, consequences of State responsibility could pass to a successor State. As he had already explained, the situation involved not a transfer of State responsibility, but rather a consequence of unjust enrichment, having its origin in the commission of a wrongful act by a predecessor State and existing independently from any State succession.

The Special Rapporteur's discussion of proposed draft article 17, which largely mirrored draft article 16 but focused on "compensation", showed even more clearly that such a provision was probably unnecessary. As the Special Rapporteur recognized in paragraph 57 of the report, "in contrast to restitution, where a shift of obligation from a predecessor State to a successor State was justified by a material impossibility, compensation does not involve the same problem". Indeed, the rule must be that the predecessor State continued to be responsible for its internationally wrongful act and was under an obligation to provide compensation. That idea, as set out in proposed draft article 17 (1), was self-evident and did not need to be repeated in the text.

Draft article 17 (2) provided that "in particular circumstances, a State injured by an internationally wrongful act may request compensation from a successor State … provided that the predecessor State ceased to exist or, after the date of succession of States, the successor State continued to benefit from such act". That departure from existing customary international law was already set out in draft article 7, which the Commission had discussed in 2018. Draft article 17 (2) was merely a repetition and added nothing new. The lack of any clarification of the "particular circumstances" referred to did not appear to be a solid choice from a drafting perspective. The commentary would not, in his view, be a suitable place for such an explanation. As noted in paragraph 57 of the report, the circumstances in question probably involved a direct link between the consequences of the wrongful act and the territory of the successor State or the fact that the author of the wrongful act had been an organ of the predecessor State that had later become an organ of the successor State.

Lastly, the proposed draft article 18, on satisfaction, also did not seem very satisfactory. Paragraph 1 simply stated the obvious, namely that the continuing State remained under an obligation to provide satisfaction for an internationally wrongful act, while paragraph 2 did not appear to reflect the gist of what was discussed in the report.

The report contained a lengthy discussion of the practice of a number of successor States of the former Socialist Federal Republic of Yugoslavia, in particular Croatia, Serbia and Bosnia and Herzegovina, in prosecuting international crimes. Although the Special Rapporteur acknowledged that most of the prosecutions concerned crimes that had been committed after the date of succession and were therefore not directly relevant, he suggested that the prosecution of crimes committed before the date of succession could be viewed as a form of satisfaction afforded by successor States. However, no examples of State practice were provided to show that those prosecutions had indeed been regarded as a form of satisfaction by the successor States.

In draft article 18 (2), the Special Rapporteur suggested a rather weak and broad provision according to which successor States could either claim or provide "appropriate satisfaction, in particular prosecution of crimes under international law". While the report dealt only with cases where such purported satisfaction was provided by successor States and did not give any examples of cases where it was claimed by successor States, the added value of such a proposed "without prejudice" clause was questionable. It was plain that States were free to claim or provide satisfaction, though the question of whether they were obligated to do so was an interesting one in the current context. However, the Special Rapporteur himself was clearly unconvinced of the existence of such an obligation, as he stated merely that "successor States are able to prosecute" and made no attempt to deduce such an obligation from State practice. With respect to the prosecution of international crimes, the question of whether successor States were under an obligation to prosecute war crimes seemed to depend entirely on the applicable primary norms, such as the Geneva Conventions of 12 August 1949, and on the applicable rules of treaty succession in respect of those primary norms.

In any event, if draft article 18 (2) was maintained, it should not single out "prosecution of crimes under international law", since the Special Rapporteur acknowledged that State practice in that regard was not conclusive. Additionally, if the need for such a draft article was accepted, "appropriate satisfaction" could equally play a role in other fields of international law. He wished to propose the deletion of paragraph 2 of draft article 18 or, at a minimum, the deletion of the phrase "in particular prosecution of crimes under international law".

On the issue of cessation, the Special Rapporteur rightly pointed out that a successor State had to "bear all the consequences of its own act after the date of succession of States" and was "under an obligation to cease that act (its own act) if it is continuing". The Special Rapporteur further explained that those assertions were "based on general rules on State responsibility", and rightly concluded that "the existing rules of State responsibility are sufficient".

He was, unfortunately, unable to agree with the reasoning for the inclusion of draft article 19, on assurances and guarantees of non-repetition. While paragraph 1, concerning the obligation of a predecessor State, was uncontroversial, paragraph 2, concerning successor States, followed the same troubling logic as draft articles 16 (2) and 17 (2). Draft article 19 (2) was also phrased very cautiously and flexibly, using the words "may request", but its inclusion was particularly problematic insofar as it related to a guarantee of non-repetition. Given that the successor State had not committed the predecessor State's wrongful act, a guarantee of non-repetition would be, strictly speaking, inappropriate. Only if the successor State had committed a wrongful act after the date of succession would a guarantee of non-repetition become one of the available remedies.

In general, any purported rule of succession to the obligations arising from the responsibility of a predecessor State would squarely contradict draft article 7 (1), on acts having a continuing character, which had been provisionally adopted by the Commission in 2019. Draft article 7 (1) clearly stated that "the international responsibility of the successor State extends only to the consequences of its own act after the date of the succession of States". In other words, State responsibility did not imply that a successor State became

responsible for the acts of the predecessor State even in the case of a wrongful act of a continuing character. It would not be logical to assume that a successor State bore such responsibility with regard to an internationally wrongful act that did not have a continuing character and had been completed by the predecessor State before the succession of States.

In conclusion, he wished to commend the Special Rapporteur on the fourth report, which discussed many pertinent issues of State responsibility law and of law that might be relevant under the concept of unjust enrichment. However, he was unfortunately unable to recommend that the five proposed draft articles should be referred to the Drafting Committee.

**Mr. Rajput**, thanking the Special Rapporteur for the fourth report on succession of States in respect of State responsibility, said that, regrettably, as in the case of the previous reports, he had been unable to find any areas in which he could offer his support. He agreed with many of the points just made by Mr. Reinisch.

The report was unnecessarily complicated and often contradictory, and promoted the Special Rapporteur's own views even though they had been opposed within the Commission, by the Member States in the Sixth Committee and in almost all the relevant literature. For instance, in introducing the report, the Special Rapporteur had reiterated his opposition to the "clean slate" rule, despite the fact that, in the Sixth Committee, many States had repeatedly noted that it was a generally accepted rule. While the Special Rapporteur had previously indicated that he did not wish to replace one theory with another – implying thereby that the "clean slate" rule was in fact a theory – the effect of the proposals made in the fourth and previous reports was to advocate automatic succession as a rule in place of non-succession.

Some of the conclusions drawn in the fourth report appeared not to have an adequate basis, a concern that had also been raised by some Member States in the Sixth Committee with respect to the third report. Furthermore, the report seemed to proceed from the assumption that the Commission had already accepted the thesis of automatic succession, whereby the predecessor State, if it still existed, or the successor State would be responsible and the consequences of succession in the form of reparation would follow.

In terms of methodology, the Special Rapporteur might usefully have paid more attention to footnotes; for instance, the discussion of States' comments in chapter I (A) of the report included footnote references to only two of the nine States mentioned in paragraph 10, and extensive quotations from just one of them, a clear supporter of the Special Rapporteur's favoured approach of automatic succession. Furthermore, in the Sixth Committee in 2019, many States had expressed support for the continuation of the general rule of non-succession, while a number of others had expressed strong reservations about the Special Rapporteur's approach; none of those objections were referred to in the report.

In chapter I (B), the Special Rapporteur discussed three methodological approaches. The first took inspiration from the Vienna Convention on Succession of States in respect of State Property, Archives and Debts, although, except for a general statement in paragraph 18 of the report that "the concept of equity, equitable proportion or distribution of rights and obligations seems to be important", no light was shed on how the provisions of the Convention informed the Special Rapporteur's thinking.

The second methodological approach, that the work must be consistent with the articles on responsibility of States for internationally wrongful acts, was the correct one, but the report contradicted most of the rules on State responsibility.

With respect to the third approach, related to the role that treaty practice could play in connection with the topic, the Special Rapporteur argued in paragraph 20 of the report, as he had in paragraph 19 of the third report (A/CN.4/731), that State practice was inconsistent and context-specific. The Special Rapporteur nevertheless endeavoured to draw general conclusions, regardless of the specificity of the treaties and the political considerations that had dictated them and contradicting the views expressed by many States in the Sixth Committee that no such general conclusions could be drawn, going so far, in paragraph 22 of the fourth report, as to discredit treaties and customary law.

While the Special Rapporteur gave a spirited defence of his position in paragraphs 20 and 22, drawing general conclusions from diverse and context-specific State practice, he did the opposite in paragraph 31 in respect of lump-sum agreements on matters of reparation,

asserting that such treaties were context-specific and that no general conclusions could be drawn from them. When the same treaties suited his thesis, he defended their use, as in paragraph 21, and when they did not, he declared them to be driven by non-legal considerations and thus irrelevant, as in paragraph 32. In paragraph 55, the same treaties were once again considered relevant.

The core of the fourth report concerned the consequences of State responsibility, as discussed in chapter III. However, the title of the chapter, "Impact of succession of States on forms of responsibility", showed that the Special Rapporteur's approach was fundamentally wrong: contrary to his assertion in paragraph 34, cessation, non-repetition and other forms of reparation were not different forms, but legal consequences, of responsibility under the articles on State responsibility. By transforming "consequences of responsibility" into "forms of responsibility", the Special Rapporteur seemed to be embedding responsibility into the legal consequences, in furtherance of his thesis that someone must be found responsible.

In paragraphs 35 and 36, the Special Rapporteur argued, on the basis of one article in the literature, that, in its articles on State responsibility, the Commission had given priority to restitution over other forms of reparation. However, that had never been the case. In paragraph (2) of the commentary to article 34 of the articles on State responsibility, the Commission had noted that the consequences of a wrongful act might require some or all forms of reparation to be provided, depending on the type and extent of the injury that had been caused. Furthermore, as noted in paragraph (4) of the same commentary, the form of reparation was subject to the conditions laid down in the respective provisions of subsequent articles.

In paragraph 45 of the report, the Special Rapporteur stated that the injured State could choose the form of reparation. Paragraph (4) of the commentary to article 34 of the articles on State responsibility specified that such a choice must be a "valid election" and that the validity depended on whether the conditions laid down in subsequent articles were satisfied, but the Special Rapporteur did not seem to have taken that into account. The choice of one form of reparation over another would be made on the basis of several factors, such as the need to achieve compliance or settle disputes, as had been pointed out in the literature, although no writings on that point were mentioned in the current report.

Relying again on one author, the Special Rapporteur made a distinction between legal and material restitution, but that author was simply describing factual situations rather than making any legal distinction. The statement, in paragraph 44, that a State should be asked to revoke judicial decisions as a part of restitution was particularly disturbing. Countries that strongly believed in the independence of the judiciary would never tolerate the suggestion that a judicial decision could be revoked.

By promoting restitution as the supreme remedy, which was certainly not the case, the Special Rapporteur was suggesting that legislation could be withdrawn as a part of restitution. Restitution was not an appropriate mode of reparation in all situations: although it was used as a remedy in the context of the World Trade Organization (WTO), where States could be asked to withdraw measures that were inconsistent with the WTO agreements, it was not used at all by investment tribunals. The only case of restitution in which a State had been asked to withdraw its legislation was that of *Texaco Overseas Petroleum Company v. Government of the Libyan Arab Republic*, where the sole arbitrator had asked Libya to withdraw its laws as part of the order for restitution. That award was still cited as a relic of the colonial mentality of international arbitrators at that time, and it was unfortunate to see such suggestions resurface through the fourth report.

The report did not establish which State – the predecessor or the successor – should take such measures and why. There was a sudden declaration in draft article 16 (1) that the predecessor State should provide restitution, without any explanation as to why, if it was not responsible. Draft article 16 (2) went further, turning the entire law of State responsibility on its head by presuming that responsibility should be decided on the basis of the form of reparation. That paragraph provided that, if restitution was not possible without the participation of the successor State, then that State might be joined, whether or not it had committed the internationally wrongful act or the act was attributable to it. It was unclear how a successor State could withdraw legislation passed by the predecessor State.

On compensation as a form of reparation, the Special Rapporteur argued in paragraph 55, without any supporting sources, that the role of equity in determining compensation needed to be underlined. Lump-sum agreements were then mentioned as a precedent, without any reference to a particular agreement or clause. It was curious that lump-sum agreements seemed to be considered relevant in paragraph 22, despite having political undertones; were described as being dictated by political objectives and hence irrelevant in paragraph 31; and were seen as relevant once again in paragraph 55.

In paragraph 64, the Special Rapporteur made a strong case for relying on equity as an element in granting compensation, although, once again, no references were provided for that argument. It was presumably inspired by the Vienna Convention on Succession of States in respect of State Property, Archives and Debts, referred to in paragraph 17 of the report, which also mentioned equity. Close examination of the Commission's work on succession of States in respect of matters other than treaties was needed in order to understand the context in which equity was involved. Chapter II of the Commission's report on the work of its thirty-third session (A/36/10), paragraph 76, specified that equity was relevant to the passing of State property, archives and debts from the predecessor State to the successor State. However, it had nothing to do with compensation; the Special Rapporteur had taken the principle of equity out of context.

In paragraph 63 of the report, there was an attempt to rewrite the very fundamental norm of causality, which was used to determine whether and to what extent the loss caused was an outcome of State responsibility. The Special Rapporteur reduced the rigours of causality by asserting that it should be applied *mutatis mutandis*. Departure from causality was exceptional and the situations under consideration were certainly not covered by that concept.

The discussion of satisfaction as a form of reparation conflated different ideas, arguing that satisfaction was a kind of obligation *erga omnes*. Satisfaction was addressed in part two, chapter II, of the articles on State responsibility, which codified existing international law, while serious breaches of obligations under peremptory norms of general international law were addressed in part two, chapter III, which represented progressive development. There was no special place for satisfaction, which, in itself, was certainly not an obligation *erga omnes*. In the event of a serious breach of an obligation under a peremptory norm, all forms of reparation, not just satisfaction, would be relevant. The Special Rapporteur also seemed to assume that, in every case of succession, international crimes would have been committed and prosecution was the only or the most appropriate form of satisfaction.

He saw no need to discuss composite acts in relation to the topic at hand. In cases involving composite acts, the normal rules of attribution would apply and the successor State would be responsible for any acts that it committed after it came into existence.

The Special Rapporteur did not seem to have taken adequate account of the views expressed by States in the Sixth Committee. For example, China had gone so far as to propose that the Commission should reconsider whether any further work should be done on the project. The United Kingdom had called on the Special Rapporteur to avoid undue reliance on academic writings, especially as a basis for the development of draft articles representing "new law" or progressive development of the law. It had also referred to the undesirability of draft articles based primarily on practical and policy considerations, rather than existing practice or law, and had stated that the Special Rapporteur's third report had confirmed rather than alleviated many of its concerns. Other State responses had been more measured but still sceptical. The fourth report might be seen as aggravating the situation still further.

The question of who the ultimate beneficiaries of the draft articles would be, if the work continued along the lines envisaged by the Special Rapporteur, was an important one. The prospect of a treaty was far from realistic: the Vienna Convention on Succession of States in respect of Treaties had only just come into force with 15 ratifications and the Vienna Convention on Succession of States in respect of State Property, Archives and Debts had not yet come into force and had attracted only 7 of the 30 ratifications required. Given the resistance shown by Member States in the Sixth Committee and the constant efforts of the Special Rapporteur to revert to his own preferences, the draft articles seemed unlikely to garner support, especially as they reflected policy preferences rather than State practice. If

State successions occurred in the future, the States concerned were likely to enter into treaties based on their own preferences, as had always been the case.

The one group whose interests would be served by the draft articles was foreign investors seeking protection under investment treaties and State contracts, though that might not have been the Special Rapporteur's intention. There were references in the literature to the rights of foreign investors as "acquired rights" and to the idea that the predecessor State, where it existed, or the successor State was responsible for any breach of contractual rights or rights emanating from investment treaties. Already, 46 arbitration cases involving an issue of succession of responsibility were pending. The reports of the Special Rapporteur were official United Nations documents already in the public domain; most arbitrators in investment arbitration cases came from a commercial arbitration background, not an international law background, and would undoubtedly seize on such reports as reflecting international law. It was possible that the fourth and previous reports had already done considerable damage. Far from assisting States in dealing with the complex issues of responsibility that could arise after a succession of States, the Commission might be creating more problems for them.

If the Commission intended to produce something useful for States, rather than exposing them to the possibility of paying heavy monetary compensation or even restitution, as the Special Rapporteur suggested, it must seriously reconsider its working method on the topic. The situation resulted only from the consequences of the suggestions in the report and had nothing to do with the competence of the Special Rapporteur. In 2019, three States – China and Poland, as well as the Russian Federation, which was mentioned in the fourth report – had said that the Commission should instead prepare a report that would inform States of the different alternatives for apportioning responsibility in the context of succession of States. Many States had proposed that the outcome should instead consist of guidelines. Other States had also suggested, albeit less directly, that the Commission was on the wrong path. Therefore, in order to protect its reputation, the Commission should discuss and change its working method on the topic, possibly by forming a study group to produce a focused report on the different ways in which States could address issues of responsibility.

**Mr. Hassouna** said that the Special Rapporteur's approach in dealing with the topic of succession of States in respect of State responsibility deserved the support of the Commission. In the Sixth Committee, most States had expressed agreement with the Special Rapporteur's premise that the draft articles were subsidiary in nature and that priority should be given to agreements between the States concerned, which were a significant element of State practice in relation to the topic. The commentary to the draft articles should include examples of succession agreements, demonstrating their variety, and the Commission should consider drafting model clauses in respect of State responsibility that States could use as a basis for negotiating such agreements. The Commission's work on the topic should generally not contradict its previous work, but should build on it to fill legal gaps in the field of State succession.

As noted during the debate in the Sixth Committee, State practice in the area was scarce. However, the Commission's role included the progressive development of international law as well as its codification. The memorandum by the Secretariat on treaties which might be of relevance to the Commission's future work on the topic of succession of States in respect of State responsibility (A/CN.4/730) provided an overview of relevant legal documents that were primary evidence of State practice, which would enable the Special Rapporteur to incorporate such practice into his analyses.

As noted in paragraph 11 of the Special Rapporteur's fourth report, States had expressed a variety of views on the form that the final outcome of the work on the topic should take. The Commission should postpone a final decision in that regard until most of the substantive work had been completed, at its seventy-third session. He was in favour of retaining draft article 15, on diplomatic protection, which could be supplemented with the provisions regarding multiple nationality contained in the Commission's articles on diplomatic protection.

He welcomed the inclusion of a diverse set of examples of State practice in the fourth report, although many parts of the report still relied on European sources only. A

comprehensive review of State practice in relation to succession of States was needed in order for the Commission's work on the topic to be applicable to situations of succession worldwide. Additional examples relating to the topic should be solicited from States, organizations, academic institutions and other sources. There had been cases, for example, where, following decisions of domestic courts of predecessor States or the assumption by a predecessor State of its obligations, newly independent African States, including the Democratic Republic of the Congo, Algeria and Kenya, had not succeeded to obligations arising from internationally wrongful acts committed by the predecessor States in question.

He fully agreed with the general considerations outlined in chapter I (B) of the report. The commentary to the draft articles should describe the relationship between each draft article and State practice so as to clearly distinguish between the draft articles that were supported by State practice and those that represented the progressive development of international law. He also agreed that the proposed draft articles could provide useful guidance in the negotiation by States of succession agreements or the adjudication of responsibility claims in contexts of succession.

Turning to the provisions regarding forms of reparation, he said that the formulation "a burden out of all proportion" in draft article 16 (1) was unclear and subjective and should perhaps be replaced with either "a burden disproportionate to the harm caused" or "a burden which does not correspond to the restitution claimed". In draft article 16 (2), it was unclear whether a successor State that received a "request" for restitution or participation in restitution would be under an obligation to provide it or whether such restitution or participation would be voluntary. If the intention was to create an obligation, it would be advisable to use the language of draft article 16 (1) and article 35 of the articles on responsibility of States for internationally wrongful acts and state that "the successor State is under an obligation to make or participate in such restitution, as the case may be". It would also be advisable to replace "A successor State may request restitution" with "A successor State is entitled to restitution" in draft article 16 (4) to make clear that the successor State had a right to restitution, although it still had discretion as to whether or not to request restitution.

The wording used in draft article 17 was supported by the fact that it was based on prior cases and State practice. As in draft article 16, he would suggest that the phrase "may request" should be replaced with "is entitled to" in draft article 17 (2) and (4). He was unsure whether draft article 17 fully reflected the requirement, referred to in paragraph 53 of the fourth report, of a clear direct link, in claims for compensation, between loss or damage and the acts of organs or a territory or nationals that became the organs, the territory or the nationals of the successor State. It seemed that such a link could exist only if the successor State continued to benefit from the act or to bear the injurious consequences of it.

Draft article 18 (1) placed an obligation on predecessor States to provide satisfaction in cases where those States continued to exist, but remained silent as to cases where predecessor States ceased to exist, even though there might still be a need for satisfaction in such cases. For instance, in cases where acts of genocide or war crimes had occurred before the dissolution of a State, the successor State should be under an obligation to provide satisfaction by prosecuting the perpetrators, especially if they were still present in its territory. Draft article 18 (2), which referred merely to satisfaction that successor States "may" provide, laid down no such obligation. Furthermore, although that paragraph stated that successor States "may claim" such satisfaction, it did not indicate when or under what conditions successor States would be entitled to make such requests.

In draft article 7 *bis*, the Commission could rely on article 15 of the articles on State responsibility for a definition of "composite acts" rather than redefining the term in the first sentence of paragraph 1, as the focus of the draft articles was succession *per se*. It should be made clear that the second sentence of draft article 7 *bis* (1) was intended to deal with elements of composite acts of both the predecessor and the successor States and that the acts of both States constituted the composite act. In his view, draft article 7 *bis* (2) related more to the extension in time of the breach of an international obligation, addressed in article 14 of the articles on State responsibility, than to composite acts. While he agreed that there should be a separate draft article on composite acts, an additional draft article on continuing acts was unnecessary.

In draft article 19, “may request” should be replaced with “is entitled to” for the reasons he had given in connection with draft article 16. The formulation “appropriate assurances and guarantees of non-repetition” appeared to have been borrowed from article 30 of the articles on State responsibility, where the phrasing had been intended to provide flexibility. In the context of draft article 19, however, more precise wording was needed, as the word “appropriate” offered little guidance to States. The commentary to the draft article should include examples of assurances that could be regarded as adequate and sufficient.

Regarding the future programme of work, he supported the Special Rapporteur’s proposal to address situations involving a plurality of injured successor States and a plurality of responsible successor States in the fifth report. He looked forward to that analysis, which would concern the question of which successor State would bear the burden of restitution in cases where a predecessor State, after having committed a wrongful act, was broken up into two or more new successor States.

He supported the referral of all the draft articles to the Drafting Committee.

*The meeting rose at 12.55 p.m.*