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International Law Commission

Seventy-second session (second part)

Provisional summary record of the 3534th meeting

Held at the Palais des Nations, Geneva, on Thursday, 8 July 2021, at 11 a.m.

Contents

Present:

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

Secretariat:

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)

Ms. Lehto, commending the Special Rapporteur on his well-structured and focused fourth report on succession of States in respect of State responsibility (A/CN.4/743), said that the report would have provided a clearer picture of the work done thus far on the topic if, in addition to the new draft articles being proposed, the draft articles that had already been provisionally adopted or were under consideration by the Drafting Committee had been annexed to it.

She generally agreed with the points made in paragraphs 13 to 22 of the report, summarizing the methodology used, including the assessment in paragraph 20 of the specific features of available State practice. As succession of States was, by nature, a rare occurrence in international relations, not all States had had an opportunity or possibility of applying the relevant rules; such a scenario was recognized in the Commission's conclusions on identification of customary international law as a circumstance to be taken into account in assessing whether the requirement of general practice had been met. Comparison might be made with space law, an area in which the scarcity of State practice had not prevented the development of international legal rules; however, that comparison was not intended to imply that it was already possible to identify new customary international law in the complex area of State succession in respect of State responsibility.

She supported the idea expressed in paragraph 22 regarding the priority of specific agreements as a feature of the law of State succession. To the extent that common elements regarding the transfer of rights or obligations related to State responsibility could be discerned from treaty practice, they could be used as a basis for the formulation of general default rules. Since that was true for many treaties addressing different areas, the argument that such treaties were specific to particular historical contexts seemed to be moot. She also concurred with the point made by Mr. Rajput at the Commission's 3532nd meeting that the same argument could be made in relation to lump-sum agreements, which, insofar as there were generalizable common elements, could serve as a basis for new rules.

The main forms of reparation had been spelled out in the Commission's 2001 articles on responsibility of States for internationally wrongful acts, but their applicability might be questioned in situations of State succession or in factual circumstances that might make one or more of them inapplicable. The thorough analysis provided in part two of the report was therefore useful and represented an original contribution to the development of the law of State succession.

Given the frequency of the practice in international relations, including in cases other than of State succession, it was not possible to avoid the general issue of lump-sum agreements, addressed in paragraphs 29 to 32 of the report. While States were free to conclude such agreements, it was nevertheless important to emphasize that their use could not undermine the principle of full reparation as a fundamental principle of the law of State responsibility.

In respect of restitution, she agreed with the Special Rapporteur that the example cited in the commentary to article 35 of the articles on State responsibility, namely loss or destruction of the object of restitution, was not representative of what the concept of material impossibility might entail in situations of State succession. Such situations were often more complex, particularly when the object was located in the territory of a successor State while the predecessor State continued to exist, or when only one successor State was able to provide restitution, as illustrated by the example of the *Gabčikovo-Nagymaros Project (Hungary/Slovakia)* case. The wording of proposed draft article 16 made it clear that restitution might not be possible without the participation of a particular successor State. It was less clear whether restitution would indeed be made, as the proposed draft article provided only that restitution could be requested of such a State. As Mr. Reinisch had pointed out at the Commission's 3532nd meeting, payment of compensation would be an alternative for the responsible State.

The formulation “may request” in proposed draft article 16 (2) was also used in draft articles 12, 13 and 14, which were still being considered by the Drafting Committee. It had also appeared in the 2015 resolution of the Institute of International Law on succession of States in matters of international responsibility, in which it was used in article 5 (1) together with the wording “may invoke the international responsibility” and in article 5 (2) seemingly interchangeably with that wording. As that understanding was not consistent with the idea that “may request” was another way of saying “can ask”, more clarity on the matter would be welcome.

The general discussion of compensation in the report was framed by the citation of a number of relevant established principles: in addition to the principles of full reparation and contribution to the injury, which were addressed in articles 31 and 39, respectively, of the articles on State responsibility, the report contained reflections on causality, equity and the prohibition of unjust enrichment. The Vienna Convention on Succession of States in respect of State Property, Archives and Debts and the 2001 resolution of the Institute of International Law on State succession in matters of property and debts both contained a number of references to equity. Equitable considerations could play a role in the calculation of the amount of compensation and the apportionment of compensation between several States.

The prohibition of unjust enrichment had also been applied to disputes related to the succession of States. Mr. Reinisch had referred to unjust enrichment from the beginning of the Commission’s consideration of the topic in 2017. The concept was of particular relevance in situations in which the predecessor State ceased to exist, given that liability for unjust enrichment did not require a link to responsibility for an internationally wrongful act.

Although equity was not mentioned in the proposed draft articles, the identification, in proposed draft article 17 (2), of a situation in which the successor State had continued to benefit from an internationally wrongful act as a particular circumstance seemed to be based on the prohibition of unjust enrichment. Furthermore, the identical wording of paragraph 3 of proposed draft articles 16 and 17 seemed to provide for equity without explicitly saying so. If that interpretation was incorrect, the need for such a “without prejudice” clause might be questioned, given that the draft articles as a whole were subsidiary, as confirmed in the wording of draft article 1 (2): “The present draft articles apply in the absence of any different solution agreed upon by the States concerned.”

Compensation might be the most common form of reparation, but there was nevertheless value in also addressing satisfaction, cessation and guarantees of non-repetition. According to article 37 of the articles on State responsibility, satisfaction could consist in “an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality”. When the wrongful acts in question consisted of the most serious international crimes, as had most notably been the case in the former Yugoslavia, investigation of the crimes and prosecution of responsible persons seemed to be a particularly appropriate modality, a possibility that had been foreseen and was briefly mentioned in the commentary to article 37 of the articles on State responsibility. The Special Rapporteur was to be commended for building on that base and for giving an overview, in paragraphs 83 to 96 of his report, of the relevant practice of Croatia, Serbia and Bosnia and Herzegovina. It would be helpful to hear from the Special Rapporteur whether the practice had been regarded as a form of satisfaction by the States concerned. In addition, Mr. Nguyen had raised an interesting point at the Commission’s 3533rd meeting, saying that prosecutions of serious violations of *erga omnes* obligations constituted a specific form of satisfaction for the international community as a whole.

Regarding proposed draft article 18, she supported the distinction established in paragraphs 1 and 2, given that prosecution of crimes under international law could, in principle, be undertaken by any successor State or, indeed, any other State, on the basis of universal jurisdiction.

Cessation and guarantees of non-repetition played an equally important role in all situations, not only those in which restitution was not possible and the injury was not only material. In the scenario envisaged in proposed draft article 19 (1), where the predecessor State continued to exist, assurances and guarantees served an important function as an aspect of the continuation and repair of the legal relationship affected by the breach, as described in

paragraph (11) of the commentary to article 30 of the articles on State responsibility. The fact that assurances and guarantees from a successor State would be appropriate and beneficial to the future relationship between the States concerned would also be worth mentioning.

Proposed draft article 7 *bis* on composite acts was a useful complement to draft article 7 on acts having a continuing character. The comments made by Mr. Park, at the Commission's 3533rd meeting, on the drafting and his proposal that the corresponding provision of the 2015 Institute of International Law resolution should be taken as a model had merit.

She supported the Special Rapporteur's proposals on the future programme of work, including the consideration of situations where there was a plurality of successor States, and was in favour of referring the new draft articles proposed in the report to the Drafting Committee.

Mr. Jalloh said that the Commission's decision, taken at the Special Rapporteur's request, to revert to its traditional methods of work would give States greater predictability and more opportunities to engage substantively with the Commission's work. In the Sixth Committee, feedback on the topic from States had been generally positive; most delegations had rightly stressed that succession agreements took precedence over the Commission's work on the topic, which should be guided by State practice in that area.

Although, like Mr. Hassouna, he believed that the Commission's work on the topic should build on and avoid contradicting its previous work on topics related to succession, a flexible approach would be needed if, as suggested in paragraphs 17 and 18 of the report, the effort to ensure consistency could have methodological and substantive ramifications for the work on the topic at hand. He was not in favour of the wholesale transfer of primary rules from other succession regimes, such as the regime on archives and debts, to the draft articles without thorough analysis.

As the articles on responsibility of States for internationally wrongful acts were so widely accepted that they arguably formed part of customary international law, the Commission should depart from the letter and spirit of those articles only where warranted. As the basic rule of international responsibility set out in articles 1 and 2 of the articles on State responsibility was that such responsibility arose only in cases where internationally wrongful acts were attributable to a State, the primary concern in the context of succession must be the legal consequences of internationally wrongful acts committed by a State before the date of succession. The main exceptions would be the circumstances covered by articles 11 and 15 of the articles on State responsibility, relating to wrongful conduct acknowledged and adopted by the successor State as its own and composite acts, respectively.

The Special Rapporteur's fourth report had perhaps not sufficiently reflected the distinction between the primary rules relating to succession or categories of succession and the secondary rules of responsibility that would generally apply to succession in international law. He had doubts regarding the decision, described in paragraph 26 of the report, not to distinguish between categories of succession or between cases where the predecessor State continued to exist and those where it did not and to instead focus on general forms of legal consequences of internationally wrongful acts. He would argue that whether the predecessor State did or did not continue to exist had some significant legal and practical consequences in terms of the rights and obligations relating to reparation, cessation and assurances of non-repetition. Moreover, the category of the succession – for example, whether it involved unification, dissolution or transfer of territory – would generally have a bearing on a State's succession to international responsibility, since different primary rules of customary international law might apply to different situations. He agreed with Mr. Reinisch that the draft articles proposed in the report would be more useful if they took account of the different categories of succession. He hoped that the Special Rapporteur would put forward updated versions of the proposed draft articles, as the issue was too significant to be addressed only in the commentaries.

In his view, the three forms of reparation addressed in the report – restitution, compensation and satisfaction – were well established in State practice and warranted the Commission's consideration. While some members of the Commission had questioned the need for the related draft articles, given that the general rules on State responsibility would

continue to apply, he wondered what the utility of the Commission's work on the topic would be if it did not formulate draft articles addressing the legal consequences of responsibility in the specific context of succession, especially since the articles on State responsibility had expressly set aside the issue of succession.

He agreed with the Special Rapporteur that restitution was the primary remedy in international law, that the wording of article 35 of the articles on State responsibility indicated that a flexible approach was called for and that material and legal restitution could be virtually impossible in some succession contexts. He also agreed with the Special Rapporteur's analyses in paragraphs 42 and 43 of the report, regarding agreements addressing the rights of individuals in succession contexts and cases where only the successor State was in a position to make restitution.

As had already been noted at the current and previous sessions, the examples cited by the Special Rapporteur were not as global as they could be. A comprehensive examination of State practice in all regions of the world would improve the quality and increase the legitimacy of the Commission's work. The Special Rapporteur could, for example, have referred to *The Minister of Defence v. Mwandinghi*, where the Namibian Supreme Court had addressed the issue of whether Namibia, as a successor State, was responsible for internationally wrongful acts committed by South Africa in the context of apartheid. The agreements between the Sudan and South Sudan that were referred to in the memorandum by the Secretariat on treaties of potential relevance to the Commission's work on the topic (A/CN.4/730) would have been another useful example. In addition, there were many more examples of decided cases involving African States such as the Democratic Republic of the Congo, Algeria and Ghana, and several General Assembly resolutions addressing the question of succession in relation to Namibia.

Regarding chapter III (A) of the Special Rapporteur's report, he agreed that injured States had a choice among the different forms of reparation, as stated in article 43 of the articles on State responsibility. In proposed draft article 16, he supported the flexible wording "may request restitution". He also supported proposed draft article 17. He agreed with the Special Rapporteur that compensation, while not the priority form of reparation, was prevalent in State practice and seemed to be the most common form of reparation in succession contexts. He also generally supported the Special Rapporteur's analysis regarding full reparation. The principle of full reparation arising from *Factory at Chorzow, Jurisdiction, Judgment No. 8*, had been applied in numerous rulings involving different areas of international law by bodies such as the International Court of Justice, the United Nations Commission on International Trade Law and the Inter-American Court of Human Rights. The Commission itself had included the principle of full reparation in draft principle 9 of its draft principles on protection of the environment in relation to armed conflicts.

Concerning draft article 18, he agreed with the Special Rapporteur that satisfaction could be an appropriate remedy in cases involving breaches of obligations of an *erga omnes* nature, such as the obligations relating to the prohibition of genocide, crimes against humanity and torture and the right to self-determination. He supported the Special Rapporteur's analysis of article 37 of the articles on State responsibility with respect to the concept of injury, the forms of satisfaction and proportionality and, in particular, the analysis of the appropriate form of satisfaction. It would have been helpful if, in the discussion of wrongful conduct by individuals, the Special Rapporteur had clarified the connection between State responsibility and individual criminal responsibility, which could be concurrent. While not convinced that the investigation and prosecution of international crimes was relevant as a form of satisfaction, he supported the wording of draft article 18 on the whole, since it prescribed no specific form of satisfaction and merely presented satisfaction as a possible remedy where an injury was not made good by either restitution or compensation.

With respect to chapter III (B) of the report, he agreed with the Special Rapporteur that it was important to distinguish between single acts and aggregations of single acts that could constitute composite acts, and endorsed draft article 7 *bis*. The draft articles should be in full conformity with article 15 of the articles on State responsibility. He also supported the proposed text of draft article 19, on assurances and guarantees of non-repetition, which could be applicable in some succession contexts, especially those involving gross violations of

human rights and humanitarian law, and agreed with the Special Rapporteur that flexible language should be used. The Special Rapporteur should consider citing, in the commentaries to draft article 19, examples of case law from regional human rights bodies such as the Inter-American Court of Human Rights, the European Court of Human Rights and the African Commission on Human and Peoples' Rights. It would also be useful to take into account the definitions of restitution, compensation, satisfaction and guarantees of non-repetition contained in the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.

In the light of the concerns raised by Mr. Rajput as to the potential misuse of the Commission's work on the topic in the context of investment arbitration, he urged the Special Rapporteur and the Drafting Committee to be particularly careful with the textual outcomes and commentaries that they put before the Commission for adoption. He supported the referral of all the proposed draft articles to the Drafting Committee.

Mr. Forteau said that he wished to thank the Special Rapporteur for his fourth report, not least because of the challenging nature of the topic, the intricacies of which went some way towards explaining the criticisms that had thus far been levelled at the report. While he supported some of those criticisms, he would endeavour to make constructive proposals that would assist the Commission in making effective progress on the topic.

As had been mentioned several times, the main challenge with regard to the topic was the lack of State practice. Moreover, the old rule of non-succession to State responsibility now seemed unfair in some cases. For that reason, and on the ground of equity, he, together with other authors, had advocated the development of the law towards a principle of succession to State responsibility, at least in certain situations such as where the predecessor State ceased to exist. He therefore supported the Special Rapporteur's conclusions on that point. However, it was necessary to identify State practice to support such a rule. As he had already stated, there was little practice in that area, and the related case law, not least that of the International Court of Justice in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)* and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, did not give rise to clear and precise conclusions on the matter.

Given that the old customary rule had been questioned in some quarters and that no new customary rule had emerged uncontested, the codification or even the progressive development of international law in that area was particularly difficult. Accordingly, the Commission should perhaps re-evaluate its intentions with regard to the topic. In addition, where practice did exist, it was not always easy to interpret. As Mr. Rajput had noted, the analysis of treaty practice in the Special Rapporteur's report was not always coherent: in some cases, it implied that even politically motivated agreements should be taken into account in identifying law, whereas in other cases the opposite conclusion was reached. Such uncertainty was exacerbated by the fact that, as indicated in paragraph 10 of the report, States appeared divided on the matter in the Sixth Committee.

Unlike the Special Rapporteur and the other Commission members who had made statements thus far, he was unconvinced that the 2001 articles on responsibility of States for internationally wrongful acts were relevant to all aspects of the current topic. Part two of those articles, on the content of the international responsibility of a State, was concerned solely with inter-State responsibility. Pursuant to article 33 (2), part two was "without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State". Yet a significant proportion of existing practice or questions regarding the succession of States in respect of State responsibility concerned claims by private individuals rather than States. Several of the judicial and arbitral precedents cited by the Special Rapporteur related to mixed arbitral practice, international human rights litigation or foreign investment litigation, rather than inter-State litigation.

Similarly, the treaty practice presented in the March 2019 memorandum by the Secretariat (A/CN.4/730) essentially concerned private rather than inter-State claims, or claims under domestic rather than international law. Only 2 of the approximately 50 examples

in that study concerned inter-State responsibility *per se*, and they referred merely to *ex gratia* recognition of responsibility and did not throw any particular light on the legal regime applicable to State responsibility in cases of succession.

The fact that, in many cases, the relevant practice involved claims brought by private individuals gave rise to legal consequences that, in his view, were not sufficiently explored in the fourth report and even contradicted some of the Special Rapporteur's conclusions. For example, according to paragraph (5) of the commentary to draft article 1 adopted by the Commission in 2019, the draft articles covered all forms of State responsibility, including with respect to private individuals. On the other hand, the Special Rapporteur's proposals in the fourth report addressed only inter-State reparation; those in the third report addressed harm caused to private individuals only from the perspective of diplomatic protection. Conversely, in the 2016 syllabus for the topic, the right to reparation in cases of succession of States was envisaged only in terms of "the right to reparation on behalf of individuals" rather than for the benefit of the injured State itself. There was, therefore, a degree of contradiction between the syllabus and the Special Rapporteur's approach.

The fact that the draft articles were intended to cover all forms of responsibility, including with regard to private individuals, again posed the difficult question of the relationship between succession in respect of international responsibility and succession in respect of State debts. When the topic had been discussed some years earlier by the Working Group on the long-term programme of work, he had stressed the need to distinguish clearly between those two concepts. Although the question was dealt with to some extent in the Special Rapporteur's first report (A/CN.4/708), it had not yet been examined in sufficient detail. In that report, the distinction was described as being dependent on whether the obligation of reparation or compensation arose before or after the date of succession. He was not fully persuaded by that argument, because the obligation of reparation arose "automatically upon commission of an internationally wrongful act" and therefore also existed prior to the date of succession in the situations referred to by the Special Rapporteur. Mr. Reinisch had referred obliquely to that temporal dimension by distinguishing between "liquidated" and "unliquidated" debts and had conceded that the distinction had been criticized in the doctrine. In reality, there was a degree of overlap between State debts, in the sense of the 1983 Vienna Convention on Succession of States in respect of State Property, Archives and Debts, and reparation as understood in the law of international responsibility. In its 1981 draft articles on succession of States in respect of State property, archives and debts, the Commission had applied a very broad definition of State debts that included delictual debts, *inter alia* those based on international responsibility. It would be helpful to clarify that point before entering into any substantive discussion on the regime of succession in respect of reparation.

Where the victim was a private individual, a clear distinction must be made between State debts that were based on domestic law or private international law, State debts that arose "in conformity with international law", as stated in article 33 of the 1983 Vienna Convention, and reparation under the law of international responsibility. All those considerations had an impact on the Commission's assessment of State practice in respect of succession. Many of the examples of treaties cited in the 2019 memorandum by the Secretariat actually concerned State debts that were owed to private individuals under domestic law, rather than reparation owed under international law. Those agreements did not, therefore, appear relevant to the current topic.

The question of reparation for private individuals in cases of succession was also linked to the long-standing, and controversial, issue of acquired rights, which Mr. Rajput had touched upon in connection with the rights of foreign investors. It did not seem prudent for the Commission to reopen the divisive discussion around acquired rights, which had more bearing on primary rules than on secondary rules.

In any event, if the draft articles were intended to cover all types of international responsibility, as indicated in draft article 1 provisionally adopted in 2019, then the State's right of reparation must be linked with private individuals' right of reparation, which, again, perhaps had more bearing on primary or special rules than on customary law on responsibility. A number of complex questions arose in that connection. For example, in paragraph 31 of the fourth report, the Special Rapporteur stated that "the States concerned

are free to arrive at an agreement that provides less than full reparation". The question was whether that freedom existed even in cases of human rights violations. The International Court of Justice, in its 2012 judgment in *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, had found that, with regard to practice in peace treaties, "it is difficult to see that international law contains a rule requiring the payment of full compensation to each and every individual victim as a rule accepted by the international community of States as a whole as one from which no derogation is permitted". That, however, did not touch upon the question of whether inter-State lump-sum reparation agreements prevented private individuals from seeking reparation on their own behalf for harm that was not sufficiently compensated for under the lump-sum agreement.

Another question was whether the possibility of a friendly settlement between States was compatible, in all cases, with certain conventions, for example the European Convention on Human Rights, which placed limits on friendly settlements by making them conditional upon respect for human rights. The lack of sufficient practice on such questions in the context of succession of States and the fact that individuals' right to reparation was not dealt with in the 2001 articles on State responsibility made it very difficult to propose draft articles on the subject.

The Special Rapporteur's proposed solution to that difficulty was simply to state, in draft articles 16, 17, 18 and 19, that the injured State or successor State "may request" reparation. That sole focus on States as victims, to the exclusion of other subjects of international law, was a questionable approach. Furthermore, the word "may" was a source of confusion in the legal sphere. As Mr. Reinisch had noted, if the intention was merely to describe a possibility, then the statement was self-evident, since nothing ever prevented a State from requesting something. If, on the other hand, the intention was to indicate that States had the right to make such a request, as Mr. Hassouna had appeared to suggest with his proposal to replace "may request" with "is entitled to", draft articles 16 to 19 then became problematic, since the Special Rapporteur had not shown that there was any substantial practice from which an indisputable right to reparation could be inferred.

The Special Rapporteur had, however, based some of his proposals on the notion of equity, which appeared to be a possible approach. The fact that in 2001, the Commission had used a similar argument to justify article 27 of the articles on State responsibility could be used to support that solution. In the commentary to article 27, the Commission had emphasized that "an innocent third State" – the injured State – could not be made to bear the cost of the harm alone. That type of consideration might have some bearing on the topic at hand. Such an approach nonetheless presupposed at least an incipient practice along those lines; recent treaty practice in that regard might perhaps suffice.

He was more sceptical, however, about the potential role of the "principle" of unjust enrichment, which had been raised several times during the debate and which the Special Rapporteur seemed to take for granted as an established principle of international law. Whether it was clearly a general principle of international law was not certain, however; such a principle was not mentioned anywhere in the articles on State responsibility, and he was unaware of any international jurisprudence that had enshrined it as a stand-alone basis for reparation in international law.

On a more technical level, the draft articles proposed by the Special Rapporteur in the fourth report posed a number of other difficulties. Beginning in paragraph 72, the Special Rapporteur made reference to *erga omnes* and *jus cogens* obligations in discussing the remedy of satisfaction. However, draft article 18 did not specify precisely who could request satisfaction as a form of reparation: was it only the injured State, or any State entitled to invoke responsibility under article 48 of the articles on State responsibility? Draft articles 16, 17 and 19 made provision only for the injured State. However, under article 48 of the articles on State responsibility, States other than the injured State could also claim from the responsible State cessation of the wrongful act, assurances and guarantees of non-repetition and "performance of the obligation of reparation". The draft articles under consideration should therefore take account of such States.

In the fourth report, some of the passages addressing the question of causation were difficult to follow. For example, paragraph 53 referred to "reasonably proximate" causation,

but paragraphs 62 and 63 used the phrase “a sufficiently clear direct link”, denoting a stricter criterion for causation that did not appear to be entirely in line with current jurisprudence on compensation. There were also questions surrounding the extent to which the “without prejudice” clause in draft articles 16 (3) and 17 (3) was binding on injured States and whether predecessor and successor States could in fact decide between themselves on the apportionment of reparation, while the injured State had no say in the matter. In the section on satisfaction, the lengthy passages on international criminal law were puzzling. Insofar as it was incumbent on all States to combat impunity for international crimes, he did not see how a succession of States would pose any particular problem in that regard or modify the scope of existing obligations under international criminal law.

On the other hand, he wondered why no draft article had been proposed on the cessation of wrongful acts, whereas proposals had been made on continuing acts and composite acts, which were closely related to the obligation of cessation. One question that merited particular consideration was how the obligation of cessation applied in cases involving composite acts or continuing acts that occurred during the succession process. One of the limits of the Special Rapporteur’s approach was the assumption that succession was an instantaneous event that occurred from one moment to the next. That idea was central to draft article 7, adopted in 2019, which referred to “the date” of succession, in the singular. In certain cases, succession could be a process that extended over time, as in the case of the dissolution of the former Yugoslavia. In Opinion No. 1 of 29 November 1991, the Arbitration Commission of the International Conference on the Former Yugoslavia had found that Yugoslavia was “in the process of dissolution”, and it was not until 4 July 1992, in its Opinion No. 8, that the Arbitration Commission had found that the process was complete. In such a situation, in the event of a continuing or composite act, it was not impossible that, for a certain period of time, there would be an overlap between the responsibilities of the State that was in the process of disappearing and those of the State that was in the process of being created. In his view, the question merited more detailed study.

There were also a number of drafting issues that should be rectified by the Drafting Committee if the draft articles were referred to it. For example, draft articles 16 and 19 should specify that only those predecessor States that were responsible for wrongful acts were bound by the obligation of reparation.

To conclude, he said that it might not be advisable to add new draft articles to the agenda of the Drafting Committee in 2021, since the Committee already had something of a backlog on the current topic. Moreover, on balance, draft articles might not be the most suitable outcome for the topic. Guidelines and model clauses might be preferable as a means of helping States involved in a succession of States to find appropriate solutions and of ensuring that the Commission’s work on the topic was of practical use, given the lack of clear and well-developed practice. Finally, in his view, the Commission must be careful not to reshape the law of international responsibility; rather, it should focus only on those aspects that were specific to the succession of States, including with respect to the questions addressed in the fourth report with regard to the obligation of reparation.

The meeting rose at 12.20 p.m.