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International Law Commission
Seventy-second session (second part)

Provisional summary record of the 3535th meeting
Held at the Palais des Nations, Geneva, on Friday, 9 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. Grossman Guiloff
	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:

Mr. Llewellyn	Secretary to the Commission

The meeting was called to order at 11 a.m.

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

Ms. Escobar Hernández said that the Special Rapporteur's fourth report on succession of States in respect of State responsibility was characterized by an organized and systematic analysis of relevant issues, following the programme of work set out in his first report. As in his previous reports, the Special Rapporteur had managed to remain concise without foregoing an analysis of doctrine, jurisprudence and practice and had taken care to ensure consistency with the Commission's previous work on related areas of international law, in particular its work on succession of States and on State responsibility.

The Special Rapporteur had devoted his third and fourth reports to the relationship between the succession of States and the effects or – to use the terminology of the 2001 articles on responsibility of States for internationally wrongful acts – "content" of responsibility, including reparation, cessation and guarantees of non-repetition, although, by addressing the issue of reparation first, he had altered how the two categories of effects were dealt with, which did not seem to be entirely justified.

Reparation was in fact the central focus of the third and fourth reports, although it was approached from a different angle in each of them. In the third report, the Special Rapporteur had analysed the issue from a limited perspective, with reference only to the right of the injured State to request reparation when that State was the one affected by the succession. Accordingly, the sole purpose of the draft articles proposed in that report had been to determine the relations between the predecessor State and the successor State or States without the need, at least in principle, to take into account the responsible State, whose obligation of reparation would not be substantively altered, at least in the abstract, regardless of whether the injured State was the predecessor or a successor.

The fourth report seemed to go a step further by addressing specific forms of reparation. That strategy was in principle beyond reproach, since it followed the model of the articles on State responsibility, which set out the obligation of reparation and the scope of that obligation before dealing with the forms that such reparation could take. However, it had led to a significant change of approach.

Draft articles 16 and 17 shared a common structure. They each regulated a different form of reparation – restitution and compensation, respectively – and the specificities of succession in that regard. Paragraphs 1 and 2 of the draft articles defined the obligation of reparation incumbent upon the predecessor State and, if no such obligation existed, the cases in which reparation could be requested from a successor State. Those rules would not pose major logical problems. However, paragraph 4 of the two draft articles addressed the issue of reparation from the perspective of the injured State, with reference only to the possibility of the successor State requesting reparation for wrongful acts committed against the predecessor State. She could understand why the Special Rapporteur had chosen not to refer to the right of the predecessor State to request reparation, since the phenomenon of succession seemed not to necessitate any specific considerations in that case, but not why both perspectives had been included in a single draft article, particularly when the draft articles proposed in the fourth report were compared with draft articles 12, 13 and 14, which concerned the right of the injured State, whether the predecessor or a successor, to request reparation. The Drafting Committee might wish to consider turning paragraph 4 of draft article 16 and paragraph 4 of draft article 17 into separate provisions or finding a way to establish a more direct link between those paragraphs and draft articles 12, 13 and 14.

In that same context, paragraph 3 of draft articles 16 and 17 was not consistent with the specific rules of State responsibility, in particular those governing reparation. It provided for the possibility that an agreement between the successor State and the predecessor State could alter the rules on the scope of the responsible State's obligation to provide restitution or compensation. Whatever form it took, an agreement of that kind applied only to the relations between the successor State and the predecessor State and, therefore, could in no event have any effects on the injured State, still less alter the rules of the articles on State responsibility that governed the obligation of reparation and the content and scope of

restitution and compensation. She therefore considered that paragraph 3 should be deleted or should at least undergo a comprehensive revision in the Drafting Committee.

She agreed with the Special Rapporteur that there was a need to identify the criteria for determining that it was the successor State that had to provide restitution or compensation. In her view, two criteria to which special attention should be paid were the fact that the injury continued to affect territory or persons that were under the jurisdiction of the successor State and unjust enrichment, whether prohibited in application of a stand-alone principle identified as such or in application of the principle of equity. While she did not wish to weigh in on the question of whether unjust enrichment was indeed a stand-alone principle, she agreed with other members of the Commission that the expression "may request" was ambiguous. In any event, that expression should be understood as the recognition of a right to request restitution or compensation, in paragraph 4, or of an obligation to participate in restitution or compensation, in paragraph 2, on the part of a successor State. Although that ambiguity could no doubt be resolved in the commentary, it would be preferable, for the purposes of clarity, to find a more appropriate expression than "may request" in the draft article itself.

Draft article 18, on satisfaction, seemed acceptable, although some amendments would certainly need to be made in the Drafting Committee. In particular, she agreed with the Special Rapporteur that the form of satisfaction mentioned in paragraph 2 was important, since practice showed that, in a number of cases, the prosecution of the alleged perpetrators of crimes under international law had constituted an undeniable form of satisfaction when the wrongful act attributable to the State had consisted of tolerating, concealing or failing to respond to such a crime. However, while fully in agreement with the underlying idea of paragraph 2, she believed that it would be useful if the Special Rapporteur could redraft the paragraph or at least provide a clearer explanation in the commentary, since it was not obvious from the report whether the responsibility that was repaired through that form of satisfaction was the responsibility of the individuals found guilty or that of the State for its own acts. It was clear that there was a link between those two forms of responsibility, and she could see merit in clarifying how that link operated in terms of satisfaction.

With regard to draft article 19, it would be more logical to place a draft article on assurances and guarantees of non-repetition before the draft articles on reparation. Her basic concern was that consistency should be maintained with the articles on State responsibility. She did not agree that, for the purposes of the succession of States, reparation was more relevant than other effects of responsibility. She wished to know why the Special Rapporteur had chosen to prioritize reparation and, above all, why he had chosen to limit himself to guarantees of non-repetition and not to include cessation, which might be of special relevance, particularly in the case of composite and continuous acts.

It would be advisable to spell out the "circumstances" mentioned in paragraph 2. In her view, those circumstances could be likened, *mutatis mutandis*, to those set out in paragraphs 2 and 4 of draft articles 16 and 17. In any case, further detail was warranted in that regard.

Draft article 7 *bis* was an appropriate supplement to draft article 7. Its content should nevertheless be examined in the Drafting Committee with a view to making it easier to understand. In addition, it did not fully reflect all the issues addressed in the report in relation to composite acts. That said, she had no substantive objections to the draft article.

The Special Rapporteur's proposed future programme of work seemed logical, since the two issues that he proposed to address, namely, shared responsibility and situations in which there were several successor States, were of undeniable relevance to the topic.

She recommended that all the draft articles proposed in the fourth report should be referred to the Drafting Committee for further analysis in the light of the various comments made in the plenary.

Sir Michael Wood said that he could be fairly brief in his comments on the Special Rapporteur's fourth report on succession of States in respect of State responsibility, as he was in agreement with much that had been said so far in the debate, including by Mr. Reinisch, Mr. Rajput and Mr. Forteau. The fourth report once again raised the question of where the topic was heading. Indeed, it reinforced his concerns in that regard.

He agreed with the comments made by Mr. Forteau regarding the 2019 memorandum by the Secretariat (A/CN.4/730), which contained information on treaties that might be of relevance to the Commission's future work on the topic. As he had noted in his statement on the Special Rapporteur's third report, many of the materials in the memorandum concerned State succession to rights and obligations under treaties, while others concerned private or public law obligations, which were hardly within the scope of the topic. Therefore, little in the memorandum seemed directly relevant to the topic under discussion; that realization, however, was in itself very valuable.

The fourth report made for very interesting reading, at least at the level of theory. On a practical level, he shared Ms. Lehto's regret that the draft articles already adopted by the Commission or referred to the Drafting Committee had not been annexed to the report. Of course, that was not entirely the Special Rapporteur's fault, as the Drafting Committee had provisionally adopted a number of draft articles earlier at the current session, after the report had been finalized.

The overall impression given by the report was that there was very little State practice or *opinio juris* on which the Commission could base its work. The report therefore came across as rather abstract. Again, that was not the Special Rapporteur's fault; it was inherent in the task that had been entrusted to him. Nevertheless, the Commission's task was not to write an academic thesis.

It was rather surprising that the fourth report did not include more references to the recent and highly instructive work of the Institute of International Law on State succession in matters of State responsibility. The Institute frankly admitted that the output of its work on that topic was based on policy, as it too had been unable to find sufficient practice to reach conclusions about what the law actually was. Unlike the Institute, which was a private body, the Commission did not have the luxury of simply following personal policy preferences. As a subsidiary organ of the General Assembly, it had a quite different task, namely, to contribute to the progressive development and codification of international law, in close association with States. It was already obvious that the way in which the topic was developing was a cause of much unease among States.

As he had noted in 2019 in his statement on the Special Rapporteur's third report, it was difficult to see any great enthusiasm in the Sixth Committee for the Commission's work on the topic. On the contrary, there was a great deal of criticism. There might well be good reason why questions of State responsibility arising in connection with the succession of States were either dealt with by specific agreement, as had been the case, to some extent, in the former Yugoslavia, or were simply left unresolved.

The underlying problems with the topic remained. Above all, there was a lack of State practice. As he had mentioned in previous debates, the Commission needed to step back to reflect on where it was heading. At the current session, many members of the Commission had once again raised very pertinent questions about the direction of travel.

The Special Rapporteur's fourth report needed to be read together with his third. Both reports dealt mainly with reparation. As other members of the Commission had noted, the ambiguous wording "may request" could be found, with reference to reparation, in both reports. That seemed to be no more than "soft law". Such an approach might be appropriate as a last-minute compromise, but to start with such legally empty wording seemed questionable.

He would not comment on chapters I and II of the report, although they contained a number of very broad assertions that he found questionable. They did not seem to be operational, and he would not expect much of their content to appear in the commentaries.

In chapter III of the report, the Special Rapporteur proposed five rather long draft articles, which raised many questions, both of substance and of drafting. The real question, however, was whether they were needed at all. Regarding draft article 7 *bis* on composite acts, he noted in passing that there was a degree of confusion in the report between composite acts and continuing acts, which, to his mind, were not the same.

As Mr. Reinisch had convincingly explained, by taking up those new draft articles, the Commission would essentially be seeking to restate, or rewrite, the law on State

responsibility. The risk was that, in so doing, it would misstate the law or at least that, by applying the law to wholly exceptional circumstances of State succession, it would place it in a straitjacket, often based on no practice whatsoever. That would not help States. The Commission ran the risk of making general statements about the law that were based on nothing more than the writings of a few publicists. Indeed, the report contained a number of broad statements about the law on State responsibility, not all of which were fully consistent with the articles on State responsibility and the commentaries thereto.

For the reasons he had mentioned, which had been explained in greater detail by other members of the Commission, he tended to agree with those members who questioned whether the draft articles proposed in the fourth report should be referred to the Drafting Committee, at least in 2021.

Regarding chapter IV of the report, he believed that he was not alone in thinking that the Special Rapporteur's hope that a first reading might take place in 2022 was unrealistic. Indeed, the time had come for the Commission to give serious consideration to the intended final outcome of its work on the topic. Various options had been mentioned during the debate, for example by Mr. Forteau. He was becoming increasingly doubtful that draft articles were appropriate. Therefore, he proposed that, early at the following session, the Commission should constitute a working group to review and take stock of the topic. The aim would be to determine how best the topic could be taken forward in the light of the views of States. That was a procedure that the Commission had used in the past, with good results.

Mr. Murphy said he was pleased that more members had been able to attend the second half of the session in person, as, to his mind, the Commission worked best in that format.

The Special Rapporteur's fourth report on the topic provided a very interesting, thoughtful and useful discussion of important issues. He wished to make a number of general observations: first, the members who had asserted that the Special Rapporteur was seeking to adopt an automatic succession rule seemed to be overstating their position. The draft articles proposed did not appear to provide for such a rule. At most, they were asserting that the succession of responsibility occurred in certain limited circumstances and did not occur in other circumstances.

While those members who had asserted that the draft articles were simply repeating existing rules on State responsibility might be correct in some respects, that was not true of all or even most of the proposed provisions. In any event, he agreed that the focus of the Commission's work should not be on restating existing rules on State responsibility but on trying to clarify how those rules operated in the specific factual scenario of a succession of States, especially given that the 2001 articles on responsibility of States for internationally wrongful acts had left that issue open. It could fairly be asked, once a succession of States had occurred, how that succession might affect or not affect the responsibility of the predecessor State, the successor State and concerned third States.

He agreed with the members who felt that the legal status of the proposed formulation "may request", in draft articles 16 and 17, was ambiguous. On the one hand, such a provision might be interpreted as simply acknowledging that an injured State could make a request to a successor State, which could then refuse it. If so, there was no legal content to the provision. On the other hand, such a provision might imply that the injured State had a legal right to invoke the responsibility of the successor State. The latter interpretation seemed to him to be more correct in that the provisions proposed by the Special Rapporteur included certain conditions that must first exist before the request could be made. By providing that the request could only be made when those conditions existed, it appeared that the Special Rapporteur was contemplating legal circumstances where the injured State was entitled, as a matter of law, to pursue a claim against a successor State.

As other speakers had noted, some of the draft articles did not read well and could benefit from work in the Drafting Committee. For example, draft article 16 (1) contained no text indicating that any particular State had committed a wrong against another State, resulting in a rule that was detached from the underlying scenario that the Special Rapporteur seemed to have in mind.

While he agreed that State practice in the area in question was limited, he believed that the Commission should do its best to ascertain what practice did, in fact, exist, and to do so on a global scale. The memorandum from the secretariat was helpful in that regard, as was the work of the Institute of International Law. It had also been very interesting to hear from Mr. Hassouna and Mr. Jalloh about some of the practices in Africa. It was incumbent upon all members to assist the Special Rapporteur in identifying relevant practice from their respective countries and regions. One form of practice was lump-sum agreements. He himself had been involved in the negotiation of several such agreements, including the 1995 Agreement between the Government of the United States of America and the Government of the Socialist Republic of Vietnam concerning the Settlement of Certain Property Claims, referred to previously by Mr. Nguyen. He simply wished to point out that, while lump-sum agreements often involved payment of an amount that was well below the face value of the claims, that did not mean that full reparation had not been paid. It just meant that the claimant or claimants had not obtained what they wanted, which was actually a rather common outcome in international adjudication.

Like other speakers, he had doubts about the value of having the draft articles address different forms of reparation. One concern was that doing so entailed making certain general statements about the law of State responsibility, such as on the primacy of restitution, which might not fully reflect the Commission's prior work, and which were not directly relevant to the unique situation of succession. Another concern was that pursuing draft articles on those different forms of reparation resulted in some unfortunate repetition. A third concern was that there did not appear to be an important reason for highlighting those different forms of reparation for the purposes of the topic at hand. For example, if the main reason for having a draft article on satisfaction was to highlight the prosecution of crimes under international law, then, at a minimum, the Commission needed to be convinced that prosecution of such crimes was, in fact, a form of satisfaction. As other members had noted, the practice recounted in the fourth report did not demonstrate that the States concerned regarded those prosecutions as a form of "satisfaction", at least as it was understood for the purpose of the law of State responsibility.

He also wished to make some specific observations and suggestions in relation to the proposed draft articles. With regard to draft article 7 *bis*, on composite acts, he thought that there was value in such a draft article. However, to his mind, the Special Rapporteur's proposal could be simplified, perhaps along the lines proposed by Mr. Park. There was no need to address a composite act where the underlying acts had been committed solely by a predecessor State, nor was there a need to address a composite act where the underlying acts had been committed solely by a successor State. It should be obvious that the normal rules of State responsibility applied in those situations, a fact which could be noted in the commentary. The Commission could, however, make clear that, in a situation where a succession of States had occurred, and there were acts of the predecessor State that had occurred before the date of succession and acts of the successor State that had occurred thereafter, it was possible for the successor State to be responsible for a wrongful act having a composite character based on all the preceding acts. He wished to put forward the following proposal:

Draft article 7 *bis*

Acts having a composite character

The breach of an international obligation by a successor State may occur through a series of acts or omissions that commence with a predecessor State and continue with a successor State, and that are defined in the aggregate as wrongful. The breach occurs when the action or omission of the successor State occurs which, taken with the other acts and omissions of the predecessor State and of the successor State, is sufficient to constitute the wrongful act.

With regard to all the other proposed draft articles, he believed that draft articles 16 to 19 could be reworked into just two provisions: first, a draft article on "cessation and non-repetition" and, second, a draft article on "reparation". That order was consistent with the sequence found in the 2001 articles on responsibility of States for internationally wrongful acts. The draft article on cessation and non-repetition, which he would refer to as draft article

15 *bis*, did not need to address the responsibility of a predecessor State in the period before the date of succession, nor did it need to address the responsibility of a successor State for acts committed after the date of succession. Again, those scenarios fell squarely under the normal rules on State responsibility, and the commentary could say as much. Rather, the draft article would simply focus on the situation where a predecessor State had committed an act prior to the date of succession, and would make clear that, after the date of succession, the predecessor State continued to have obligations of cessation and non-repetition. In other words, the draft article would clarify that the obligations of cessation and non-repetition by a predecessor State were not affected by the fact of a succession of States. He wished to put forward the following proposal:

Draft article 15 *bis*

Cessation and non-repetition

A predecessor State that is responsible for an internationally wrongful act that occurs before the date of succession of States is, after the date of succession, under an obligation:

(a) to cease that act, if it is continuing;

(b) to offer appropriate assurances and guarantees of non-repetition, if circumstances so require.

The draft article on reparation, which he would refer to as draft article 15 *ter*, would not be structured around the different forms of reparation; it would be more generic in nature. However, it would seek to clarify situations, perhaps of the type that Mr. Reinisch had in mind as being useful. The first situation would be where a predecessor State had committed a wrongful act before the date of succession; draft article 15 *ter* would make clear that the predecessor State remained obligated to make full reparation after the date of succession, if it had not already done so. For that situation, he suggested using a "without prejudice" clause to address the possibility of a claim by an injured State against a successor State, such as on the basis of unjust enrichment. He had noted the scepticism expressed by Mr. Forteau about a "principle" of unjust enrichment in international law; perhaps the Commission could avoid using that term in the draft article itself, but discuss the possibility of such a claim in its commentary.

The second situation that could be addressed in draft article 15 *ter* would be where a successor State must make full reparation for wrongful acts as identified in draft article 7 and 7 *bis* – in other words, full reparation for the successor State's wrongful acts of a continuing or composite character that were connected to the period before the date of succession. That second situation might also encompass draft article 13 on "uniting of States" if that draft article was adopted.

The third situation that could be addressed in draft article 15 *ter* would be where a third State had injured a predecessor State before the date of succession and a successor State wished to pursue a claim after the date of succession for that injury. Such a claim might be identified as possible where the responsible State had not already made full reparation, the predecessor State had ceased to exist, and the act had caused injury to persons or property associated with the successor State. He conceded that State practice relating to that third situation might be minimal, and would be content with referring to that situation in the commentary as progressive development of law. His concrete written proposal for draft article 15 *ter* would be circulated to members in due course.

Normally, he did not provide such detailed alternatives for proposed draft articles. However, the debate so far suggested that there might be a real divide among members as to whether to send the draft articles to the Drafting Committee. His hope was that, by putting forward such detailed proposals, sceptics might be convinced that there could be a path forward in the Drafting Committee. He supported sending the proposed draft articles to the Drafting Committee subject, as usual, to the views expressed in the debate, which included views that all, some or none of the proposed articles might be adopted. He was also open to and supportive of ideas for advancing the Commission's work, such as Sir Michael Wood's proposal to convene a working group at the Commission's next session, if doing so would help narrow the divide among members.

Mr. Petrič said that, broadly speaking, he shared the concerns raised by members about the Commission's approach to the topic. Succession of States in respect of State responsibility was the last major succession-related topic in international law on which the Commission would prepare draft articles that would, hopefully, form the basis of a treaty. The topic was particularly difficult because responsibility for wrongful acts was a very sensitive issue. There was a need for caution when trying to attribute responsibility for wrongful acts to a successor State when that State had not committed the wrongful acts in question. Under the approach advocated by the Special Rapporteur, successor States might end up bearing that responsibility in certain circumstances. That was the crucial problem that he had identified in relation to the topic at hand.

He wished to stress that, in cases where the predecessor State no longer existed, he was not opposed to applying the "clean slate" principle. However, while taking that approach might be appropriate in certain situations, there should be strong legal reasons for doing so. In the absence of any such reasons, that approach might prove dangerous in that a State might, in certain circumstances, become responsible for acts that had been committed prior to its existence.

With regard to sources of law, he wished to recall that he had been involved in the succession processes in the former Socialist Federal Republic of Yugoslavia and in the lengthy negotiations that had culminated in the conclusion of the 2001 Agreement on Succession Issues by the successor States. At the time, four of the new successor States had argued that none of the five successor States to the former Socialist Federal Republic of Yugoslavia was responsible for the legal continuity of the former State. However, one successor State had insisted that it was responsible for that continuity. The discussions had continued for so long because the parties understood that whatever decision was reached would influence the whole succession process. The fall of the Milošević regime in Belgrade had allowed a compromise solution to be reached, based on the principle that none of the five successor States was responsible for the legal continuity of the former State.

Each case of succession was distinct; many such cases existed, and an abundance of literature and practice was available. While an analysis could be made of several European cases and several contemporary cases in Africa, overall, there was not much practice concerning responsibility for wrongful acts in cases of succession. He fully agreed with those members who had suggested that the Special Rapporteur might endeavour to pay more attention to practice outside Europe. An analysis of practices from around the world would make for a more well-balanced report.

Matters such as treaties and responsibility for wrongful acts were dealt with differently depending on the type of succession concerned. In some cases, the predecessor State still existed post-succession, whereas that was not the case in cases of dissolution. Cases of unification might involve the integration of a new territory into a pre-existing State or the unification of two subjects of international law. It would be helpful if the Special Rapporteur could give greater coverage to the different types of succession, which had an impact on how specific problems were resolved and on the determination of responsibility for wrongful acts.

In cases of succession where the predecessor State continued to exist, that State alone was generally responsible for any wrongful acts committed. That line of reasoning was reflected in the first paragraph of draft articles 16, 17, 18 and 19. That point was clear and was confirmed by State practice. Cases of dissolution, where the predecessor State no longer existed and there was no legal continuity, were more problematic. Such cases raised the question of whether wrongful acts committed prior to succession were effectively expunged with the disappearance of the predecessor State or whether they could be transferred, under certain conditions, to successor States. Acts committed by successor States after succession were attributable to those States and were not part of the succession process. There were also cases in which the date of succession was a matter of dispute, as in the case of the former Socialist Federal Republic of Yugoslavia. Although a succession date in April 1992 had been agreed, it was not universally recognized, as demonstrated by the fact that two successor States had celebrated thirty years of their existence in June 2021.

When a former State which had committed wrongful acts had ceased to exist, the question remained as to who, if anyone, was responsible for those acts. The first paragraph

of draft articles 16, 17, 18 and 19 made it clear that, in cases of succession of States where a predecessor State continued to exist, that State bore responsibility for those acts. He fully agreed with the Special Rapporteur on the subsidiary nature of the draft articles and on the priority to be given to agreements between the States concerned and on the inclusion of language to that effect in the draft articles. Moreover, he believed that, in preparing draft articles on the topic, the Commission should address certain matters in general terms and not include too many stipulations, so as to avoid straitjacketing States. Such an approach might well make it easier to resolve problems of succession, particularly problems related to responsibility for wrongful acts. The Commission should avoid trying to offer solutions for every kind of situation in case States did not find them acceptable.

Most importantly, the Special Rapporteur's approach to the topic implied that, in certain situations, responsibility for wrongful acts could pass to the successor State or States if the predecessor State no longer existed. The main reasons put forward to justify the creation of such an obligation for a successor State or States related to practical circumstances, equity and the prohibition of unjust enrichment. However, he wondered whether those reasons were sufficient to justify taking a step that might result in successor States being held responsible for acts that they had not committed. The special circumstances in which that transfer of responsibility might feasibly occur should be explained in more detail and should be serious enough to warrant the passing of responsibility for wrongful acts to a successor State when that State had not committed them. To his mind, the prohibition of unjust enrichment should not be advanced as a reason for transferring obligations *vis-à-vis* wrongful acts from one State to another when the latter State had nothing to do with those acts. Although equity had been put forward as a reason in favour of transferring responsibility for wrongful acts to a successor State or States if the predecessor State no longer existed, it could also be argued that, in keeping with that principle, States should never have to bear responsibility for wrongful acts they had not committed. The step being proposed by the Special Rapporteur was therefore problematic from an equity standpoint.

He appreciated the ambition evident in the Special Rapporteur's decision to address situations in which, because the predecessor State no longer existed, no responsibility for wrongful acts committed prior to succession could be deemed to exist. Caution was also important, however, and that caution was apparent in the Special Rapporteur's choice of the words "may request" in draft article 16 (2) and (4), draft article 17 (2) and (4) and draft article 19 (2), according to which an injured State might request, respectively, restitution, compensation, or assurances and guarantees of non-repetition. How the words "may request" should be interpreted was, for him, one of the main points of interest in the report. Did those words imply a legal right for the injured State, and a legal obligation for the requested State? If they did not, and the request carried no obligation for the requested State to respond in a particular manner, the draft articles in question would be more or less irrelevant. If they did, and a legal relationship between the injured and the successor State was implied, the situation was more complex. In the light of existing practice in cases of succession, attempting to establish a legal obligation for the successor State would be going too far. The principle that every State should be responsible only for wrongful acts and violations that it had committed in its own right remained valid and should be respected.

As the topic was a very important one, and also a very sensitive one, it should remain on the Commission's agenda. Work should continue on it, but without pressure or haste. It was clear that the Commission would not be able to complete the first reading at the current session, and probably not even at the next one, but it should take the time necessary to achieve the best possible result. As the Special Rapporteur was fully cognizant of opinion and sentiment within the Commission and the Sixth Committee, his view on how best to proceed would be of particular interest and importance.

He was in favour of sending the proposed draft articles 16 to 19 to the Drafting Committee for discussion. The reservations that he had previously expressed in relation to the proposed draft article 7 *bis* had not been dispelled but he was not opposed to that draft article also being referred to the Drafting Committee for discussion.

Mr. Grossman Guiloff, in a pre-recorded video statement, said that he would like to commend the Special Rapporteur for his exceptional work on the topic. He believed that the quality and legitimacy of the Commission's work on the topic would be enhanced if more

examples of State practice from regions outside Europe were incorporated, as other members of the Commission had suggested, but he appreciated the realistic and flexible approach taken by the Special Rapporteur. While the Commission had the task of identifying general rules for succession of States in respect of State responsibility, the application of those rules was not uniform and, for that reason, the Special Rapporteur's recognition that there were exceptions to the "clean slate" rule in cases of succession of States was commendable; State practice in that area of law, being diverse and context-specific, supported the primacy of neither the "clean slate" principle nor the "automatic succession" principle. That argument was further supported by a submission received from Belarus, which endorsed the idea that the "clean slate" rule should not apply in cases where acts of a predecessor State had caused harm to the territory or population of a newly independent State. Furthermore, as noted in the report, agreements regarding State succession constituted State practice and should not be dismissed as being specific to the cultural context. Such agreements should be treated as reference sources that made it possible to discern certain common elements and that could provide the Commission with a basis for proposing general and subsidiary rules.

Although it was important to remember that the draft articles were of a subsidiary nature and that priority should be given to obligations and pre-existing rights included in any agreements between the States concerned, in cases where no such agreement existed, the work of the Commission could be invaluable to the parties involved. There was a general rule of "non-succession", as El Salvador had correctly pointed out in its 2018 submission, but there were exceptions to that rule. For example, in some situations, the consequences of an internationally wrongful act should be transferred to the successor State.

As a matter of *lex specialis*, agreements between States would take precedence over the proposed draft articles. With regard to the general issues addressed in paragraphs 29 to 32 of the report, he agreed that the principle of full reparation remained a general rule of customary international law. Although lump-sum agreements were common in practice, they should not be considered to settle the claims between the States concerned in full unless that had been the parties' express intention – and that was an issue that would need to be examined on a case-by-case basis. Furthermore, while lump-sum agreements might be appropriate as a means to settle bilateral or plurilateral disputes, that might not be the case when the disputes in question involved violations of *erga omnes* obligations. Such disputes often required the adoption of reparation measures that extended beyond compensation.

As other members of the Commission had noted, the use of the words "may request" could be interpreted as implying that any reparation provided by a successor State was voluntary. However, while there was no automatic rule of succession in respect of State responsibility, it was important to recognize that, when certain conditions were met, the successor State was under an obligation to provide reparation. When the obligations arising from an internationally wrongful act were transferred to a successor State, the injured State must still be able to obtain reparation. It was therefore important to address the issues that Mr. Hassouna had raised when asking whether, in cases of dissolution where genocides or war crimes had occurred prior to succession, the successor State should not be under an obligation to provide satisfaction through domestic prosecution, especially in situations where the perpetrators of the crimes were still in its territory.

Noting a need for clarification that the draft articles were without prejudice to any right of reparation that might be owed to individual citizens of the injured State, he suggested the addition of a further draft article. The new draft article would reproduce the text of article 33 (2) of the 2001 articles on responsibility of States for internationally wrongful acts and would read: "This part is 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." He also thought it important to clarify that the types of reparation that the proposed draft articles addressed were not mutually exclusive. Restitution was the preferred form, but full reparation might very likely include the other forms as well. As provided for in the 2001 articles on responsibility of States, the choice of the form or forms of reparation lay with the injured State, subject to certain limits.

He welcomed the fact that the text proposed as draft article 16 was inspired by article 35 of the 2001 articles on responsibility of States. However, as Mr. Park had suggested, draft article 16 (1) should be amended to incorporate the whole of article 35 (b), so that its

concluding phrase would read “or does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation”. In addition, as Mr. Nguyen had noted, it should be made clear that a predecessor State that continued to exist, and was the State responsible for the wrongdoing, would need to prove its inability to make restitution before a successor State’s obligation to provide restitution could be invoked.

The phrasing of draft article 16 (2) could be interpreted as implying that the succession of rights and obligations arising from State responsibility was automatic, and that a successor State was bound to provide restitution when requested, except when restitution was materially impossible or involved a burden “out of all proportion”. Draft articles 17, 18 and 19 could be similarly misconstrued. To prevent misinterpretation, the four draft articles in question should be amended to clarify that they applied only to the extent that a successor State was bound to provide reparation for the acts of a predecessor State – a situation that might arise when the predecessor State had ceased to exist and the successor State had been unjustly enriched or otherwise continued to derive interest from its predecessor’s wrongdoing. A clarification of that kind might allay the concerns expressed by several speakers that the four draft articles might be considered to establish an outright rule of automatic succession.

He agreed that, as Mr. Forteau had noted in an earlier meeting, draft article 16 (3) should be amended to clarify whether the injured State should have a say in any apportionment or other agreement between the successor State and the predecessor State. The “without prejudice” clause included as draft article 17 (3) required a similar amendment, although he also agreed with Ms. Lehto that, when an agreement between the States existed, the subsidiary nature of the rules made that clause unnecessary.

Draft article 16 (4) did not address the potential conflict that might arise when a predecessor State continued to exist and also claimed reparation for wrongful acts affecting persons under the jurisdiction of both the predecessor and the successor States – a situation that might occur when nationals of the predecessor State acquired dual nationality as a result of the succession, or when persons residing in either the predecessor or the successor State were nationals of the other State. He was concerned that that provision limited any successor State’s ability to request restitution from a State that had committed an internationally wrongful act to situations in which the injury caused by that act continued to affect persons or territory that, after the date of succession, were under the jurisdiction of the successor State. A strict reading of that provision would preclude any claim for restitution for injuries caused to the successor State’s nationals unless the injury was continuing. His earlier suggestion that a “without prejudice” clause protecting the rights of individuals should be added was pertinent in that connection. In addition, the commentary should make clear that the phrase “continues to affect” applied to all situations in which full reparation had not been made prior to the date of succession.

With regard to draft article 17, on compensation, he saw a need to clarify the circumstances – which were mentioned in paragraphs 57 and 63 of the report – in which a transfer of obligations to the successor State might be justified even though the predecessor State continued to exist. The clarification could be made by stating that such a transfer would take place in conformity with the relevant provisions of Part II of the draft articles on the topic. It might also be wise to mention that, in cases where the predecessor State ceased to exist, the causality and contribution requirements still needed to be met and a direct link to the successor State needed to be established.

The description of the “particular circumstances” in which an injured State might claim compensation from a successor State that was provided in paragraph 57 of the report should be expanded. One of those circumstances was the situation in which, after the date of succession, the successor State continued to benefit from an internationally wrongful act committed by a predecessor State. However, that condition was too restrictive. Although the provision reflected the need to address unjust enrichment and ensure that compensation could be claimed provided it was not materially impossible, it left the injured State with no possibility of claiming compensation in situations where there was a continuing breach causing material damage but the successor State was not benefiting from it. He would be interested to hear the Special Rapporteur’s views on that matter. Draft article 17 (4) should also address the potential conflict that might arise in the event that the predecessor and

successor States brought claims simultaneously. He also wondered why draft article 17 (4) did not refer to the successor State's capacity to request compensation in respect of an internationally wrongful act that continued to affect territory or persons under its jurisdiction, in line with the text used in draft article 16 (4), in the context of restitution. The language used in the two paragraphs should be harmonized.

Turning to draft article 18, on satisfaction, he said he found it curious that the *erga omnes* nature of certain international obligations was referred to only in that draft article, as *erga omnes* obligations could entail other forms of reparation and did not only give rise to issues of satisfaction. On the other hand, unlike the proposed draft articles on restitution and compensation, draft article 18 did not provide for the situation where a successor State might request satisfaction from a State that had committed an internationally wrongful act against the predecessor State. That omission might be justified by the rarity with which satisfaction was used to redress State responsibility in situations of succession, but the fact that a situation was rare did not make it impossible. Furthermore, the need for satisfaction was well established in the law of reparations. Consequently, he proposed that a third paragraph should be added to draft article 18. The new draft article 18 (3) would reproduce the language used in draft article 17 (4) and would read: "A successor State may request satisfaction from a State which committed an internationally wrongful act against the predecessor State, provided that the predecessor State ceased to exist or, after the date of succession of States, the successor State continued to bear injurious consequences of such internationally wrongful act."

The new paragraph would provide guidance for States in situations where restitution or compensation were not available and satisfaction was therefore the most appropriate, or possibly the only appropriate, remedy.

With regard to the question of whether the Commission should include a separate article on cessation, his view was that, if the Commission accepted the Special Rapporteur's suggestion and decided not to include such an article, a clear explanation as to what constituted continuing harm would still be needed in the commentary. Even though an internationally wrongful act had ceased, its effects might persist, creating a continuing harm. For example, while slavery *per se* had ended, issues of discrimination related to that practice continued, causing continuing harm. He believed that the relationship between continuing harms and the acts at their origin should be acknowledged in the Commission's work, in the same way that the link between the original act and continuing harm was acknowledged in cases of enforced disappearance under human rights law. Articles 14 and 15 of the 2001 articles on responsibility of States could be relevant in that connection.

He supported the inclusion of draft article 7 *bis*, on composite acts. A composite act was described in paragraph 112 of the report as "a situation where the wrongful act consists not of an isolated act, but of a 'practice' or 'policy' that is systematic in character". However, while that description undoubtedly reflected a certain kind of composite act, it should be borne in mind that individual acts adopted pursuant to a policy were not the only composite acts relevant for the purposes of State responsibility. Indeed, an internationally wrongful act might also arise as a result of composite acts undertaken at different moments with the aim of fragmenting the conduct concerned into individual acts that were not unlawful *per se*.

With regard to draft article 7 *bis* (1), he suggested that the Commission should review the last phrase, "such State is responsible only for the consequences of its own act". Although he supported the general rule that the phrase enshrined, it appeared to exclude the transfer of rights and obligations arising from State responsibility that could occur in circumstances other than those envisaged in draft article 7 *bis* (2). However, the obligation established in draft article 7 *bis* (2) – namely, that a successor State should be bound to make reparation by virtue of a direct link between its organs or its territory and those of a predecessor State – should also apply in respect of composite acts partially committed before succession. He suggested that the drafting of that paragraph should be nuanced to reflect those considerations and that the text of draft article 7 should be reviewed in the same light.

Draft article 7 *bis* (2) also raised issues of attribution. It was not clear whether the rule established therein applied only when the successor State adopted the conduct of the predecessor State prior to succession as its own conduct, or whether the rule also applied

when there was a direct link, in terms of State organs or territory, between the conduct of the successor State and the previous conduct of the predecessor State. In addition to issues of causality and contribution, the formulation of that paragraph raised issues with draft article 7, which was premised on the principle of non-succession, whereby, when an internationally wrongful act committed by a successor State was of a continuing character in relation to an internationally wrongful act committed by a predecessor State, the successor State was responsible only for the consequences of its own act after the date of the succession, unless and to the extent that the successor State acknowledged and adopted the act of the predecessor State as its own. In the situations referred to in draft article 7 *bis* (2), how could the injured State receive full reparation? He hoped that the Special Rapporteur's work on shared responsibility would shed more light on that issue. He also wished to suggest that draft article 7 *bis* (2) should include a "without prejudice" clause in respect of the apportionment of responsibility between the successor State and a predecessor State that continued to exist. In addition, as the Special Rapporteur noted in the report, the text of the draft article should make clear that the obligation breached must remain in force and must be binding on a successor State.

He agreed with the content of draft article 19, on assurances and guarantees of non-repetition, and with the Special Rapporteur's treatment of the obligation to offer such assurances, which was an important consequence of international responsibility, particularly in the context of human rights violations. It was therefore crucial that the Commission addressed that obligation in the context of succession of States. He also agreed with the Special Rapporteur's decision to reflect the flexible nature of assurances and guarantees of non-repetition by including the words "if circumstances so require", such wording being in line with the case law of the International Court of Justice. As it would be helpful to include examples of what such circumstances might entail in the commentary, perhaps some of the cases referenced in paragraph 127 of the report could be included in the text.

Noting that, in paragraph 123 of the report, the Special Rapporteur stated that the internationally wrongful act had to be completed in order to give rise, in certain circumstances, to the obligation to offer appropriate assurances and guarantees of non-repetition, he said he believed that the obligation to provide assurances and guarantees of non-repetition could also arise in respect of acts of a continuing character. He would be grateful for clarification on that point.

He noted that issues of shared responsibility, which the Special Rapporteur planned to consider in his fifth report, could have important consequences for forms of reparation. The Special Rapporteur had already mentioned in his fourth report that, even in situations of succession of States, a predecessor State or successor State, or, if appropriate, both, should be under an obligation to make reparation in one or more forms, and that those cases in which both a predecessor and a successor State were under such an obligation could entail situations of shared responsibility. His support for the proposed articles was therefore premised on the understanding that their content might need to be adjusted or supplemented, depending on the outcome of the study of shared responsibility and the related discussions.

Lastly, he recalled that the Russian Federation had proposed a reorganization of the draft articles by category of succession and that other members and States had suggested similar approaches. He believed that reorganizing the draft articles by category of succession would result in clearer, more concise draft articles, would improve the flow of discussions and would allow for more precise formulations of the rules, which, in turn, would enable exceptions to the rule to be captured more accurately. However, he supported the goals and aims of the proposed draft articles and was in favour of sending all five to the Drafting Committee.

The meeting rose at 12.50 p.m.