Provisional

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# International Law Commission

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

**Provisional summary record of the 3536th meeting**

Held at the Palais des Nations, Geneva, on Monday, 12 July 2021, at 11 a.m.

## Contents

***Present:***

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| *Chair*: | Mr. Hmoud |
| *Members*: | Mr. Argüello Gómez |
| | 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. Petrič |
| | Mr. Rajput |
| | Mr. Reinisch |
| | Mr. Saboia |
| | Mr. Šturma |
| | Mr. Tladi |
| | Mr. Vázquez-Bermúdez |
| | Sir Michael Wood |
| | Mr. Zagaynov |

***Secretariat:***

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| Mr. Llewellyn | Secretary to the Commission |

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

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

**Mr. Zagaynov**, noting the complexity and multi-layered nature of the topic and the absence of universal doctrinal approaches to it, said that he wished to thank the Special Rapporteur for his exhaustive fourth report on succession of States in respect of State responsibility (A/CN.4/743). The highly varied opinions on different aspects of the topic expressed by members during the discussion had provided much food for thought, although he was of the view that not all of the criticisms were justified. He agreed with Mr. Murphy that members who had asserted that the Special Rapporteur was seeking to adopt an automatic succession rule seemed to be overstating their position.

Regarding the general approaches adopted in the report, he agreed with other members that the work should be based on the Commission's 2001 articles on responsibility of States for internationally wrongful acts. The proposals related to the responsibility of a predecessor State that continued to exist were thus unnecessary, as that subject was fully covered in the 2001 articles. Issues related to succession, however, fell outside the framework of those articles, although they were mentioned in the commentary thereto, in which it was stated expressly that, in the context of State succession, it was unclear whether a new State succeeded to any State responsibility of the predecessor State with respect to its territory, as the Special Rapporteur had mentioned in the 2016 syllabus for the topic.

Consideration of situations in which State responsibility might be affected by succession was a matter for research. In his view, such situations should not be limited to cases of dissolution of a State or acts having a continuing or composite character. In line with the work of the Institute of International Law, the Special Rapporteur proposed to refer specifically to circumstances in which there was a direct link between the consequences of a wrongful act and the territory or the population of a new State or States, or in which the author of a wrongful act was an organ of the predecessor State that later became an organ of the successor State. Other circumstances could include, for instance, cases in which the successor State continued to benefit from or to bear injurious consequences of the internationally wrongful act.

He agreed with those members of the Commission who doubted whether the other factors mentioned by the Special Rapporteur supported the existence or formation of relevant norms of international law; the report had not dispelled his doubts on that count. As had been repeatedly pointed out, State practice was scarce and diverse and had been interpreted in different and sometimes contradictory ways. He was, therefore, not convinced that there were grounds for making proposals *de lege ferenda*.

The painstaking review and analysis provided in the report once again raised the question of what form the outcome of the work should take and strengthened the conclusion that draft articles were not the best option. Instead of trying to prescribe rules for all possible cases of succession, a sounder course of action might be to offer States an outcome that would guide them and help them to resolve the relevant issues where necessary. The primacy of agreements between the States concerned was reflected in draft article 1 (2). In draft article 5, the subject under consideration was described as "the effects of a succession of States occurring in conformity with international law". Such succession should, at least in most cases, take place in an orderly manner, and the most logical and obvious way to bring about that result was through negotiations. Other formats – whether an analytical report, draft guidelines or model clauses – would be more appropriate for the Commission's output. He would support the idea of setting up either a study group, as suggested by Mr. Rajput, or a working group, as proposed by Sir Michael Wood and Mr. Murphy. It would be useful to hold a brainstorming session for interested members to help develop a better approach for future work on the topic on the basis of a comprehensive analysis. The Special Rapporteur could then take advantage of those collective efforts at subsequent stages of the work.

He agreed with members who considered the principle of equity to be relevant in the context of the topic under discussion, as each case was unique. As the Commission had noted in its consideration of the topic "Succession of States in respect of matters other than treaties",

the general principle of equity should never be lost from view. That argument was also valid for succession in respect of State responsibility.

The work thus far had focused on responsibility in inter-State relations, but Mr. Forteau had raised the important issue of responsibility towards persons or entities other than States. However, he questioned the need to include provisions on that issue in the draft articles, as the topic was already extremely complex and multifaceted, and the Commission had not yet given due consideration to responsibility towards persons and entities other than States. At the suggestion of Mr. Grossman Guiloff, a topic of direct relevance in that regard, entitled "Reparation to individuals for gross violations of international human rights law and serious violations of international humanitarian law", had been included in the Commission's long-term programme of work, although no decision had yet been taken to start work on it. That could be a subject of discussion for interested members of the Commission if an appropriate forum was created.

On the wording of the proposed draft articles, he shared the doubts expressed by Mr. Reinisch, Mr. Park and others as to the usefulness of having separate draft articles on the different forms of reparation. The somewhat one-sided focus of the section of the report on satisfaction and of proposed draft article 18 on the investigation of crimes committed and the prosecution of perpetrators, to the detriment of other forms of satisfaction, was not justified. The Commission had previously noted the wide variety of modalities and forms of satisfaction and had refrained from establishing any hierarchy between them. In the commentary to article 37 of the articles on State responsibility, attention was drawn to examples of the most common forms of satisfaction, such as a declaration by a court or an apology. As many members had stated, there was no evidence that the cases in which crimes under international law had been prosecuted in successor States to the former Yugoslavia had ever been considered in the context of satisfaction, State responsibility or succession to such responsibility.

Lastly, as Mr. Petrič had pointed out, issues of State responsibility were of a sensitive nature. The Commission's previous outputs on succession, in respect of both treaties and State property, archives and debts, contained provisions on their temporal application. Such provisions were included in both the 1978 Vienna Convention on Succession of States in respect of Treaties and the 1983 Vienna Convention on Succession of States in respect of State Property, Archives and Debts, with article 7 of the former and article 4 of the latter both entitled "Temporal application of the present Convention". Paragraph 1 of both articles read: "Without prejudice to the application of any of the rules set forth in the present Convention to which the effects of a succession of States would be subject under international law independently of the Convention, the Convention applies only in respect of a succession of States which has occurred after the entry into force of the Convention except as may be otherwise agreed." In both cases, the provisions had emerged not from intergovernmental negotiations, but from proposals made by the Commission. There was no reason not to include a similar provision in the outcome of the work on the topic at hand, regardless of its final form.

He once again wished to thank the Special Rapporteur for his work and hoped that the Commission, through its collective efforts, would be able to reach the best possible decisions on the extremely difficult, contradictory but interesting topic under consideration.

**Ms. Oral**, thanking the Special Rapporteur for his valuable fourth report, said that she welcomed its consistency with the 2001 articles on responsibility of States for internationally wrongful acts, which, as Mr. Jalloh had noted, were arguably the Commission's most important prior work on the topic. As mentioned in the report, several States had emphasized that any departure from that precedent that could not be justified by the context of State succession should be approached with great caution.

She had not been a member of the Commission when the topic had been placed on the long-term programme of work, but assumed that the members at the time had been aware of its nature, including the lack of State practice and the nuances of its relationship to the Commission's prior work. She therefore did not support the idea of downgrading the status of the chosen method of work to a study group, as that would not reflect positively on the Commission.

The Special Rapporteur had made clear from the outset that the draft articles were of a subsidiary nature; she therefore would assess them in that context. She agreed with Mr. Zagaynov and Mr. Murphy that the Special Rapporteur was not introducing a rule of automatic succession, but viewed with some hesitancy the idea that the obligation to provide reparation for acts of the predecessor State that had taken place before the date of succession should be transferred to the successor State, as the concept appeared to be inconsistent with the requirement of attribution under article 2 of the 2001 articles on State responsibility, the commentaries to which noted that each State was responsible for its own internationally wrongful conduct. She also agreed that there were very strong equity considerations that would militate against burdening a new State with the obligation to provide reparation, in any form, for an act that it had not committed. Reparation for the injured State was clearly also a matter of equity, but a delicate balance must be achieved while maintaining consistency with the articles on State responsibility. The commentaries to the draft articles under consideration would need to provide a careful explanation of that important divergence from the accepted rule.

The commentaries should address the important point raised by Mr. Forteau concerning the relationship between the nature of the reparation owed by the State that had committed the internationally wrongful act and the notion of "debt" in relation to the 1983 Vienna Convention on Succession of States in respect of State Property, Archives and Debts. The lack of State practice remained a challenge, and the information shared by Mr. Hassouna and Mr. Jalloh concerning Africa was therefore welcome. Information should be sought from other regions as well.

She recognized that, in the context of reparation in situations of State succession, lump-sum agreements were one way in which States sought to settle claims arising from internationally wrongful acts. However, such agreements could raise competing considerations of equity and State agreement, on the one hand, and the principle of full reparation, on the other. She agreed with Ms. Lehto that, while lump-sum payments were used in practice, they should not undermine the accepted rule concerning the obligation of full reparation.

As mentioned by other members, the phrase "may request" in proposed draft articles 16 (2) and (4), on restitution, and 17 (2), on compensation, which provided an option for the injured State in cases where it was materially impossible for the predecessor State to make restitution, might seem to be stating the obvious. However, the absence of such an option might also be misconstrued; she therefore understood the reason for its inclusion. The wording of proposed draft article 17 (4) provided that a successor State could request compensation from a State which had committed an internationally wrongful act against the predecessor State if the successor State continued to bear injurious consequences of the act after the date of succession of States. In that regard, it was important, as the Special Rapporteur acknowledged in paragraph 63 of the report, to ensure that the commentaries explained the requirement of a clear direct link between the damage caused and the successor State's territory or population, because it was the injured State that was entitled to reparation under international law.

Noting that proposed draft article 18 (1) mirrored the wording of article 37 (1) of the 2001 articles on State responsibility concerning cases where the injury could not be made good by restitution or compensation and the responsible State was thus obligated to provide satisfaction, she said she agreed with Ms. Lehto that, where the wrongful acts consisted of the most serious international crimes, investigation of the crimes and prosecution of the persons responsible seemed to be a particularly appropriate modality. The commentaries to the 2001 articles on State responsibility indicated that disciplinary or penal action against the individuals whose conduct had caused the internationally wrongful act was one possible form of satisfaction.

She had no comments on proposed draft article 19, which applied only to cases where the predecessor State continued to exist, meaning that attribution was not an issue.

Composite acts, addressed in proposed draft article 7 *bis*, were breaches of obligations based on an aggregate of conduct, rather than individual acts. The responsibility of the State nevertheless began with the first act, even if it did not amount to a wrongful act in and of

itself. However, the wording of the proposed draft article, particularly its paragraph 1, was confusing. She appreciated Mr. Park's alternative proposals, which took account of the work of the Institute of International Law and might usefully be considered by the Drafting Committee. In particular, the Institute's resolution on State succession in matters of State responsibility and the commentaries thereto offered a useful foundation: in the commentaries to article 9, specific reference was made to article 11 of the Commission's articles on State responsibility, which mentioned acknowledgement and adoption by the successor State of the conduct of the predecessor State as its own. The final "completing" act or omission would thus overcome the hurdle of attribution. A second situation in which the requirement of attribution could be met was where the predecessor and successor States engaged in actions or omissions that were, in aggregate, wrongful, regardless of which of those States was responsible for the final completing act or omission. That should be explained in the commentaries, as should the distinction between that situation and situations where the predecessor and successor States shared responsibility. The Special Rapporteur had indicated that shared responsibility would be covered in the fifth report, together with the issues that arose when there was a plurality of injured successor States or responsible successor States.

Thanking the Special Rapporteur for his dedication to the work, she recommended that draft articles 7 *bis*, 16, 17, 18 and 19 should be referred to the Drafting Committee.

**Mr. Šturma** (Special Rapporteur), summing up the discussion on his fourth report on succession of States in respect of State responsibility, said that he wished to thank the members of the Commission who had contributed to the very rich and interesting debate, supporting or criticizing the report and even the general approach to what was a complex and delicate topic.

He wished to clarify the apparent contradiction between the general comments on lump-sum agreements made in chapter II, paragraphs 29 to 31, and the references to various agreements, including lump-sum agreements, in later parts of the report. That issue, which had been raised by Mr. Rajput and to some extent by Mr. Forteau, Ms. Lehto and Mr. Nguyen, was not the result of any selective approach or policy considerations. As noted in paragraph 29, in 2019 some Commission members had called for a discussion of the relationship between lump-sum agreements and the principle of full reparation. His general comments on such agreements had not been intended to exclude them from the analysis; he had simply adopted a cautious and qualified approach because he had not been able to conclude that they had the status of customary international law. He nevertheless accepted them as State practice and considered them to be very important for the topic, even if they were not an expression of customary law.

In response to a question raised by Mr. Forteau, he said that, in his view, States that concluded lump-sum agreements were free to arrive at an agreement that provided less than full reparation. That opinion was supported by the arguments set out in the report, particularly regarding the dispositive nature of the rule of full reparation, and by the 2012 judgment of the International Court of Justice in *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*. It also reflected the consistent practice of Czechoslovak and Czech courts in refusing individual claims brought by persons affected by the post-Second World War nationalization of property if they were covered by the lump-sum agreements concluded between the former Czechoslovakia and certain other countries. He agreed with Mr. Murphy, Ms. Lehto and Ms. Oral that the fact that claimants might not get what they wanted did not deny full reparation as a principle.

That conclusion should, however, be qualified to the extent that human rights treaties, such as the European Convention on Human Rights, could enable individuals to present claims if certain conditions were met, in particular compatibility *ratione temporis* and *ratione materiae* with their provisions. Judgments of the European Court of Human Rights, such as its 1995 judgment in *Papamichalopoulos and Others v. Greece* (Article 50) and its 2004 judgment in *Broniowski v. Poland*, seemed to confirm the principle of full reparation, the partial compensation paid to victims not precluding their claims. However, the judgments had been based on insufficient compensation due to national legislation, rather than inter-State lump-sum agreements.

He agreed with Mr. Hassouna, Mr. Nguyen, Mr. Jalloh, Mr. Grossman Guiloff and Mr. Murphy that practice from regions other than Europe should be included, and would welcome any examples. He also agreed with Mr. Hassouna that the Commission had a role to play in the progressive development of international law even when there was insufficient practice.

Another general issue raised in the debate concerned the concept of unjust enrichment as a ground for responsibility, which had been supported by Mr. Reinisch and commented on more sceptically by Mr. Forteau, who, supported by Mr. Zagaynov, seemed to prefer the notion of equity. An old and rather controversial issue, unjust enrichment was certainly relevant as one of the special elements or circumstances that supported the exceptional transfer of obligations arising from State responsibility to a successor State or States. However, he could not accept it as the only ground for the responsibility of successor States, for a number of reasons: (1) the concept of unjust enrichment was regarded in doctrine as ambiguous and imprecise; (2) it was not a stand-alone or supreme principle, but was based on more general principles of justice and equity; (3) it was not a rule or principle of customary international law but rather, in the view of many scholars and some courts and tribunals, in particular the Iran-United States Claims Tribunal and investment tribunals, a general principle of law; (4) the concept or principle of unjust enrichment belonged to primary rather than secondary rules on State responsibility, which might even imply a disconnection of payments due on the basis of unjust enrichment from any injury resulting from an internationally wrongful act; (5) unjust enrichment was often linked to the concept of acquired rights, which could recall the narrow and outdated approach to State responsibility represented by the proposals of then Special Rapporteur García Amador that had been rejected by the Commission in 1963; and (6) exclusive reliance on unjust enrichment, like the old and narrow concept of State responsibility for injury caused to aliens, addressed only material damage, whereas it was neither logical, nor in line with modern international law, even in situations of succession of States, to propose reparation only for expropriated or damaged possessions of foreign investors, but not for genocide, crimes against humanity or torture and other serious violations of human rights. Moreover, any such limitation on the topic would have given rise to the concerns raised by Mr. Rajput regarding the protection of foreign investors. He had therefore avoided the express inclusion of the term “unjust enrichment” in the proposed draft articles, although he accepted it as one of the special circumstances justifying the transfer of obligations to successor States. He agreed with Mr. Petrič, however, that the report should have included better justification for the responsibility of a successor State. Explanations in that regard could be provided in the commentaries, unless the Drafting Committee or the Commission decided to mention special circumstances in the text of the draft articles: they could include unjust enrichment and equity, a link between a wrongful act or injury and the territory and/or population of a successor State or States, and the fact that the author of the internationally wrongful act was an organ of the predecessor State that had later become an organ of the successor State.

He would not extensively reiterate his position concerning the assertions of some members, in particular Mr. Reinisch and Mr. Rajput, and possibly Sir Michael Wood, that he had repeatedly proposed the principle of automatic succession. As Mr. Murphy, Mr. Zagaynov and Ms. Oral had rightly pointed out, those assertions were overstated, to put it mildly. Indeed, the text of the proposed draft articles did not suggest automatic succession. If he had been in favour of automatic succession, he would have drafted his proposals using much stronger language. As Mr. Murphy had observed, the draft articles asserted that succession of responsibility occurred in certain limited circumstances and did not occur in other circumstances. His stance could be described as favouring limited and conditional succession, since he agreed with Mr. Grossman Guiloff that State practice did not support the primacy of either the “clean slate” principle or automatic succession. He was grateful to all the members who had correctly understood his position, including those who had supported his approach based on the subsidiarity of the draft articles and the priority of agreements. In addition, he agreed that in the law of State succession as developed between the 1960s and 1980s, the clean slate was the rule that had applied to newly independent States. However, he did not see why the clean slate doctrine should be elevated to a general rule applicable to all categories of succession; those who had asserted such a rule had not provided any convincing evidence to support it.

Another general question raised by several Commission members concerned the usefulness of draft articles on situations that were all sufficiently covered by the 2001 articles on responsibility of States for internationally wrongful acts. As he had indicated in his introductory statement, he had tried, for the sake of completeness, to capture situations where the normal rules of State responsibility applied even in circumstances involving a succession of States, as well as situations involving succession *stricto sensu*, namely the limited and conditional transfer of obligations or rights arising from State responsibility. Therefore, he agreed with Mr. Forteau that the articles on State responsibility might not cover all aspects of the topic at hand. He also agreed with Mr. Murphy that the draft articles had the potential to complement the articles on State responsibility. That was precisely the aim of the topic: to fill gaps in the codification of rules on State responsibility and rules on the succession of States. The draft articles were intended to answer the questions of whether and how State succession affected, or did not affect, the responsibility of the predecessor State, the successor State and any third States concerned. However, he agreed with those members who had noted that the draft articles should avoid repetition, an issue that he would address when he discussed the individual draft articles and suggested amendments thereto.

Another question concerned the value of including separate draft articles on the different forms of reparation. Some members, namely Mr. Nguyen, Mr. Park and Mr. Jalloh, had requested clarification of the two situations where the predecessor State continued to exist and where it ceased to exist. In addition, Mr. Reinisch, Mr. Park, Mr. Jalloh and Mr. Grossman Guiloff had suggested that the draft articles should reflect the fact that different categories of State succession and particular circumstances within them might lead to different solutions. As those issues seemed to be related, he would address them together. Generally, he agreed with the suggestions made, but wished to point out that the new draft articles should be read in conjunction with those proposed in the second and third reports, which had been adopted or were pending in the Drafting Committee. At that stage, he had treated different categories of State succession separately and had paid special attention to the difference between cases where the predecessor State continued to exist and those where it ceased to exist, since that difference was essential to the question of whether the predecessor State or the successor State had certain obligations or rights arising from State responsibility. By contrast, the fourth report was focused on the content and forms of legal consequences of internationally wrongful acts. For that reason, the draft articles were structured differently. Nevertheless, he would consider the proposals that the draft articles on different forms of reparation should be simplified so as to avoid unnecessary repetition.

Some members had expressed a desire for clarification of the terminology relating to “forms” of responsibility and “legal consequences”, which was, indeed, a legitimate question. In using the word “forms”, he had probably been influenced by the reference to the “content, forms and degrees of international responsibility” in the title used by the Commission at the first-reading stage of its work on the articles on State responsibility. He had had in mind part two of the articles on State responsibility, which was entitled “Content of the international responsibility of a State”. He agreed that it would be more appropriate to refer to legal consequences in general and forms of reparation in particular.

While those questions were related to the structure and terminology of the draft articles, other questions and comments were related to their substance. He had in mind, in particular, Mr. Forteau’s suggestion that a reference to “States other than the injured State” should be included in the proposed draft articles. Similarly, Mr. Grossman Guiloff had proposed that the consequences of violations of *erga omnes* obligations should be considered with regard to all forms of reparation, not only satisfaction. He agreed that such consequences *erga omnes* were not limited to satisfaction, although the analysis in the report focused on that form. Even though the context of State succession usually required an analysis of the relations between the injured State and the predecessor State and/or the successor State, relations *erga omnes* were not excluded. That was another argument in favour of avoiding exclusive reliance on the concept of unjust enrichment. However, rather than incorporating the reference into all of the draft articles, he would prefer to deal with those consequences separately, either in another draft article or in the commentaries.

Even more challenging was the proposal to explore the legal consequences of State succession in respect of responsibility in relation to private persons. That issue, which had

been raised by Mr. Forteau, had two aspects. The first was a kind of critique of the draft articles that related to the articles on State responsibility and the legal consequences at the inter-State level, given that many examples of practice and judicial decisions concerned injury caused to individuals. On the one hand, he disagreed when it came to the draft articles that had been provisionally adopted or were pending in the Drafting Committee, as they were aimed only at clarifying which State, the predecessor or the successor, should be understood to have obligations or rights arising from State responsibility. In other words, they corresponded to part one of the articles on State responsibility, which dealt with the internationally wrongful act of a State and was general in nature. Those articles were also applicable, and indeed were applied by courts and tribunals, in relation to individual claims.

On the other hand, he agreed in part, as far as the new draft articles were concerned, because they addressed the content of legal consequences, which was a matter covered by part two of the articles on State responsibility. As set out in article 33 of the articles on State responsibility and the commentary thereto, part two directly applied only to obligations of the responsible State "to another State, to several States or to the international community as a whole". He agreed that in cases of injury caused to individuals, the principles contained in articles on reparation could apply only *per analogiam*. They were only occasionally referred to by some courts, such as the European Court of Human Rights.

That situation reflected the shape of contemporary international law, which now comprised not only traditional State-centred law but also new human-centred rules. However, while the two sets of rules coexisted, they were not fully harmonized, which gave rise to gaps. Since one of the Commission's roles was to fill such gaps, he supported various proposals on the new topic concerning responsibility for injury to individuals that had been discussed in the Working Group on the long-term programme of work.

In the context of the current topic, he proposed to resolve those issues in the manner used in the articles on State responsibility. First, it would be useful to bridge any possible gap between the draft articles proposed in the previous reports and the draft articles on the content of responsibility. That could be done by means of a new, introductory draft article Z, which could read: "The obligations arising from international responsibility of the State concerned which are entailed in accordance with the provisions of parts [one to three] involve legal consequences as set out in this part." Next, the issue of legal consequences between States, including obligations *erga omnes* and in relation to private persons, could be addressed in a draft article 16 *ante*, which would mirror article 33 of the articles on State responsibility and would read:

> 1. The obligations of the State concerned set out in this part may be owed to another State, to several States, or to the international community as a whole, depending in particular on the character and content of the international obligation and on the circumstances of the breach.
>
> 2. 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.

Turning to general drafting issues, he said that the wording most frequently commented upon had been "may request". Several members had asked for clarification of its meaning, and Mr. Nguyen had proposed the alternative wording "give notice". Unfortunately, that wording, which was based on article 43 of the articles on State responsibility, where it was used in the context of invocation of responsibility by an injured State, would not be helpful in the context under discussion. It could be appropriate, however, if the draft articles also included a part on implementation. He supported Mr. Hassouna's proposal to replace the words "may request" with "is entitled to" in draft articles 16 (4) and 17 (4). In other places, the words "may request" might also be replaced with slightly stronger language. On balance, such provisions should stress the exceptional and conditional character of such obligations, possibly with an indication that they represented progressive development, where appropriate. The alternative proposal by Mr. Murphy provided one possibility.

Ms. Escobar Hernández, Mr. Grossman Guiloff and Mr. Murphy had suggested the addition of a provision on cessation. He supported Mr. Murphy's alternative suggestion on

the merging of draft articles 16 to 19 and the creation of a draft article 15 *bis* on cessation and non-repetition.

Moving on to the comments made on individual draft articles, he said that, with regard to draft article 7 *bis*, several members had supported the inclusion of a separate provision on composite acts. However, some members had also proposed drafting changes to make that draft article shorter and clearer. Mr. Park and Mr. Murphy had even proposed alternative texts, and he would be happy to work on that basis.

Mr. Forteau and Ms. Escobar Hernández had suggested that the issue of how the obligation of cessation applied in the case of a composite or continuing act that occurred during the succession process should be addressed. In his view, the alternative texts of draft article 7 *bis* and draft article 15 *bis*, which merged cessation and non-repetition into one provision, were helpful. The more detailed aspects could be explained in the commentaries. He agreed with Mr. Forteau and Mr. Petrič that succession sometimes involved a process, as it had in the case of the former Yugoslavia. In other cases, such as the dissolution of Czechoslovakia, there was a single undisputed date of succession.

He agreed with Ms. Escobar Hernández and Mr. Murphy that the order of the legal consequences referred to in the draft articles should be the same as in part two of the articles on State responsibility, and would make proposals accordingly.

Draft article 19, on assurances and guarantees of non-repetition, had been supported by Mr. Jalloh, Mr. Grossman Guiloff and Ms. Escobar Hernández, and in part by Mr. Reinisch. Several other members had proposed drafting changes. He agreed with Mr. Grossman Guiloff, Mr. Hassouna and Mr. Jalloh that the commentary should include examples of "appropriate" assurances and relevant practice.

Draft articles 16, 17 and 18 dealt with the three forms of reparation, namely restitution, compensation and satisfaction. The most frequent comments regarding draft articles 16 and 17 had related to the words "may request", which he had already addressed, and to a certain discrepancy between the treatment of obligations, in paragraphs 1 and 2, and rights, in paragraph 4. He agreed with that assessment. However, he did not agree that paragraph 1, on predecessor States, was superfluous, since one of the goals of the draft articles was to confirm that obligations based on the general rules of State responsibility applied even in situations of State succession, nor could he agree to the deletion of paragraph 2, since the exceptional and limited transfer of obligations to the successor State was the key element in cases where the predecessor State ceased to exist. However, he was open to proposals on amendments; Mr. Murphy's proposed draft article 15 *ter* might provide a good basis for discussion in the Drafting Committee.

The comments on paragraph 3 of draft articles 16 and 17 called for a clarification. Unlike Mr. Park, he did not see those paragraphs as superfluous in view of draft article 1 (2), which was a general provision that accorded priority to agreements on all issues concerning succession of States in respect of State responsibility. The "without prejudice" clause in paragraph 3 of draft articles 16 and 17 addressed the special case of apportionment agreements between the successor State and the predecessor State. For example, if an injured State claimed restitution from a predecessor State that was no longer in a position to return the object in question because the object was in the territory of a successor State that enjoyed the benefit of the wrongful act, the predecessor State could instead pay compensation to the injured State and conclude an apportionment agreement providing for a set-off with the successor State. Of course, the converse of that process would apply if the injured State claimed restitution from the successor State. Thus, apportionment agreements did not limit the freedom of injured States to present their claims; their aim was only to settle the claims or interests between the predecessor and successor States.

Regarding draft article 18, on satisfaction, although he agreed that the principle of full reparation included satisfaction, which could take the form of investigation and prosecution of crimes, satisfaction could perhaps be joined with the other forms of reparation, without the need for a special draft article. At the same time, draft article 18 had broadly been supported by several members. Some members seemed to support the inclusion of a reference to international crimes in paragraph 2, while others had expressed reservations about such a reference. Several members had requested evidence that the prosecution of international

crimes was a form of satisfaction, as well as clarification of who would be provided with satisfaction as a result.

In that respect, in addition to the arguments presented in the report, he wished to draw attention to the oral pleadings of 28 April 2021 in the case concerning *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* before the International Court of Justice. In that case, one of the measures of satisfaction being sought was the conduct of investigations and criminal prosecutions of individuals implicated in violations of international humanitarian law and international human rights standards. That claim showed that the prosecution of international crimes could well be a form of satisfaction. Of course, that form of satisfaction would be easier to claim in a bilateral dispute where military intervention and occupation had occurred, as in the aforementioned case, than in more complex processes of violent dissolution and succession of States, such as had occurred in the case of the former Yugoslavia. Nevertheless, the establishment of the International Tribunal for the Former Yugoslavia and the International Criminal Court also demonstrated that the investigation and prosecution of crimes committed in violation of obligations *erga omnes* was in the interest of the international community as a whole.

In the members' remarks on the future programme of work on the topic, it had been said that the goal of adopting the draft articles on first reading in 2022 was not realistic. He wished to note that the relevant paragraph of the report had been drafted at the beginning of 2020, in the light of the planning process for future sessions of the Commission that had been conducted in 2019, before the beginning of the crisis caused by the coronavirus disease (COVID-19) pandemic. At that time, it had appeared that the Commission would complete two second readings and one first reading in the fourth year of the quinquennium, leaving sufficient time for two second readings and at least one first reading in the fifth year. The situation now seemed more complicated, since many draft articles were pending in the Drafting Committee. As he had indicated in the report, the goal of completing the first reading in 2022 depended mainly on the progress made in the Drafting Committee.

With regard to the final outcome, he agreed with Mr. Hassouna that the final decision on the form of the Commission's work should be postponed until the substantive work had been completed. However, some other members, including Mr. Zagaynov, had proposed that the outcome should consist of a report or some other final product. Therefore, although Mr. Hassouna's proposal was in line with the usual methods of work, he was open to discussing alternative forms.

He was not in favour of Mr. Rajput's proposal to establish a study group or Sir Michael Wood's proposal to establish a working group. Instead, he wished to propose that informal consultations should be held on various issues, including the form of the outcome. Informal consultations could serve the same purpose as a working group, since serious consideration would be given to recommendations emanating from such consultations, despite their informal character. Informal consultations also had two additional advantages. First, they could take place at any available time in 2021 and 2022. Any conclusions reached in 2021 could be taken into account in the preparation of the Special Rapporteur's fifth report in 2022. A working group would probably not begin its work until 2022, and its recommendations might not be available until 2023 or later. Second, informal consultations, by their nature, did not require any formal decision to be taken by the Commission. The creation of a working group or study group did require a decision, which, if there was a lack of consensus, would be adopted by a vote; that might cause unnecessary division in the Commission.

In the discussion, at least nine Commission members had recommended that all the draft articles should be referred to the Drafting Committee, while three members had opposed such referral. In addition, Mr. Park had indicated that he was open to referral, and Mr. Forteau had expressed doubts that appeared to concern matters of timing, in view of the workload of the Drafting Committee, rather than matters of principle. Therefore, he wished to recommend that all the draft articles should be referred to the Drafting Committee, taking into consideration all the comments and proposals that had been made in the plenary debate.

**General principles of law** (agenda item 7) (A/CN.4/741 and A/CN.4/741/Corr.1)

**Mr. Vázquez-Bermúdez** (Special Rapporteur), introducing his second report on general principles of law (A/CN.4/741 and A/CN.4/741/Corr.1), said that the continued interest in and practical relevance of those principles, as one of the three main sources of international law, were apparent from the publications issued on the subject and from the continued invocation of such principles in legal disputes since the submission of the second report.

His second report dealt with the methodology for identifying general principles of law. As outlined in paragraph 2 of the report, in 2019, the Commission had reached agreement on a number of aspects of the work on the topic, including the scope and form of the final outcome, the use of Article 38 (1) (*c*) of the Statute of the International Court of Justice as a starting point, the role of "recognition" as the essential condition for the existence of a general principle of law, the need to avoid the use of the anachronistic term "civilized nations", which was found in Article 38 (1) (*c*), and the identification of general principles on the basis of national legal systems, using a two-step analysis. Support had also been expressed for the study of general principles of law formed within the international legal system, although some doubts had been raised on that score as well and had been echoed by some States in the Sixth Committee, as noted in paragraph 3 of the report.

Part one of the report presented a series of general observations concerning the identification of general principles of law. Because the purpose of the topic was to provide practical guidance to all those who might be called upon to apply general principles of law, the Commission should, following the approach it had taken in its work on the topic "Identification of customary international law", limit itself to clarifying how general principles of law and their content could be identified at a specific point in time rather than systematically addressing how general principles of law emerged, changed or ceased to exist.

The second general observation was that there was wide agreement on the centrality of recognition as the essential condition for the existence of a general principle of law. Although Article 38 (1) (*c*) of the Statute of the International Court of Justice used the phrase "recognized by civilized nations", it was obvious that all nations should be considered "civilized", with no distinction or discrimination. He therefore suggested in the report that the Commission should instead use the term "community of nations", which appeared in article 15 (2) of the International Covenant on Civil and Political Rights, an instrument accepted by over 170 States. That term could be seen as a more up-to-date version of the expression used in Article 38 (1) (*c*) that did not alter its meaning or content.

Part two of the report addressed the methodology for identifying general principles of law derived from national legal systems. Both practice and the literature generally indicated that such principles should be identified using a two-step analysis that consisted, first, of determining that a principle common to the principal legal systems of the world existed and, second, of ascertaining that the principle had been transposed to the international legal system. The analysis was a stringent one, not allowing the existence of a general principle of law to be easily assumed, and was aimed at demonstrating that the requirement of recognition under Article 38 (1) (*c*) had been met.

The first step of the analysis was described in detail in part two, chapter II, which made seven key points. First, that step of the analysis was well established in practice and the literature and essentially consisted of a comparative analysis of national legal systems aimed at showing whether a principle was common to them. Second, because Article 38 (1) (*c*) of the Statute of the International Court of Justice required that a principle must be generally recognized by the community of nations, the analysis should cover as many national legal systems as possible. Third, it was not necessary to study every national legal system in the world; a more pragmatic approach was to conduct a wide and representative comparative review covering different legal traditions or families and the various regions of the world. Fourth, the term "principal legal systems of the world" should be used, as in the Statute of the International Court of Justice and the statute of the International Law Commission. Fifth, the determination of whether a principle was common to those legal systems involved comparing rules of national legal systems and extracting the legal principles that were common to them or distilling the principles underlying them. In his view,

there was no need to state at exactly what point a principle should be considered to be common to the principal legal systems of the world, as the answer would depend on each particular case. Sixth, the materials generally considered relevant, both in practice and in the literature, for the first step of the analysis were domestic legal sources emanating from States, such as legislation and decisions of national courts. Seventh, there was scant practice as to the possible role of international organizations in the identification of general principles of law derived from national legal systems. However, as noted in paragraph 72 of the report, it could be argued that, where an international organization had the power to issue rules that were binding on its member States and were directly applicable in those States' legal systems, those rules could be included in the comparative analysis.

The second step of the analysis, discussed in part two, chapter III, of the report, essentially involved ascertaining whether a principle common to the principal legal systems of the world had been transposed to the international legal system, as it could not be presumed that a principle existing in national legal systems could be applied internationally. Two requirements were generally found in practice and in the literature for the transposition of such principles: first, the principle had to be compatible with fundamental principles of international law, and second, the conditions had to exist for the adequate application of the principle in the international legal system.

The purpose of the first requirement was to ensure that a legal principle had been recognized by the community of nations not only as just, but also as compatible with the broader framework of international law in which it was to be applied. As indicated in paragraph 84 of the report, a review of practice had suggested that the compatibility required was only with principles of international law that could be considered fundamental. Because of the theoretical lack of hierarchy among the sources of international law, conflicts among rules of international law should, in his view, be resolved through conflict avoidance principles such as *lex specialis derogat legi generali*. The second requirement, which was intended to ensure that the principle in question could properly serve its purpose in international law, was generally thought to call for an examination of the structure of national legal systems, in particular the relevant procedural frameworks, and a determination of whether the structure of the international legal system allowed for the adequate application of that principle. Paragraphs 97 to 106 of the report addressed the types of evidence that could confirm that the two requirements had been met, such as the incorporation of a principle common to the principal legal systems of the world into treaties or other international instruments. Such evidence was, however, not essential; what was key was to determine whether the two requirements had been met.

Part three of the report dealt with the identification of general principles of law formed within the international legal system. In the Commission and the Sixth Committee, doubts had been expressed as to whether there was enough State practice to serve as a basis for meaningful conclusions, and questions had been raised as to how such principles could be distinguished from customary international law and whether the criteria for identifying them might not be stringent enough, meaning that they could be too easily invoked. One of the main difficulties in terms of identifying relevant practice was that imprecise terminology was often used in practice and in the literature, with no express mention of Article 38 (1) (*c*) of the Statute of the International Court of Justice. However, it was clear from the drafting history of Article 38 that the drafters had not intended to limit general principles of law to those derived from national legal systems. In his view, the relevant practice identified in his second report should give the Commission a sufficient basis on which to reach some conclusions.

The terminology employed in practice must be analysed in context, as the terms "general principles of international law" or "principles of international law" were sometimes used to refer to conventional or customary rules or to principles derived from national legal systems, rather than to general principles formed within the international legal system. The methodology used in each specific case to identify the legal nature of the rule applied must be analysed in order to reach a conclusion.

Part three, chapter II, of the report examined the methodology for identifying general principles of law formed within the international legal system. As those were general principles of law in the sense of Article 38 (1) (*c*) of the Statute of the International Court of

Justice, the basic condition for their existence was recognition, which must be wide and representative. It was possible to identify a general principle in that category by ascertaining that it had been widely incorporated into treaties and other international instruments such as General Assembly resolutions; that it underlay general rules of conventional or customary international law, in which case the recognition could be inferred from the acceptance of those general rules by the community of nations; or that it was inherent in the basic features and fundamental requirements of international law.

Part three, chapter III, of the report addressed the distinction between general principles formed within the international legal system and customary international law. While the existence of a general practice accepted as law (accompanied by *opinio juris*, in other words) was the criterion for identifying the latter, recognition by the community of nations was the criterion for identifying the former. Although treaties and other international instruments could serve as evidence of both custom and general principles, in the case of a general principle, it was not necessary to determine the existence of a general practice and *opinio juris*. What mattered was the clear acknowledgement through treaties and other international instruments of the existence of a legal principle of general application. On the basis of a case-by-case analysis, the recognition by the community of nations of the existence of an independent general principle with universal validity must be inferred from those instruments.

The essentially deductive methodology applied with respect to principles underlying general rules of conventional and customary international law was not an aid for ascertaining the existence of a general practice accepted as law, but rather the main criterion for establishing the existence of a legal principle that had a general scope and could be applied to a situation not initially envisaged by the rules from which it had been derived. The deductive methodology was also applied in the case of general principles inherent in the international legal system.

General principles formed within the international legal system also differed from custom by reason of their nature. As noted in paragraph 169 of the report, at least some of the principles formed within the international legal system did not involve specific obligations to act in a certain manner, but rather served as aids to interpretation.

Part four of the report dealt with subsidiary means for the determination of general principles of law and followed the approach taken by the Commission in its work on the identification of customary international law, since, in principle, Article 38 (1) (*d*) of the Statute of the International Court of Justice applied to custom and to general principles of law in the same way. The “rules of law” referred to in that provision clearly applied to the three sources of international law set out in the Statute.

Regarding the future programme of work, he planned to address the functions of general principles of law and their relationship to other sources of international law in his next report, as indicated in part five of the second report. As members of the Commission had supported the proposal that he had made in the first report (A/CN.4/732) to provide a widely representative bibliography listing the main writings related to general principles of law, he would circulate a draft of the bibliography at the current session and would welcome suggestions from members as to which publications should be included.

*The meeting rose at 12.55 p.m.*