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International Law Commission

Seventy-third session (first part)

Provisional summary record of the 3579th meeting

Held at the Palais des Nations, Geneva, on Wednesday, 11 May 2022, at 10 a.m.

Contents

Present:

Chair:	Mr. Tladi
Members:	Mr. Al-Marri
	Mr. Argüello Gómez
	Mr. Cissé
	Ms. Galvão Teles
	Mr. Grossman Guiloff
	Mr. Hassouna
	Mr. Laraba
	Ms. Lehto
	Mr. Murase
	Mr. Murphy
	Mr. Nguyen
	Ms. Oral
	Mr. Ouazzani Chahdi
	Mr. Park
	Mr. Petrič
	Mr. Rajput
	Mr. Saboia
	Mr. Šturma
	Mr. Valencia-Ospina
	Mr. Vázquez-Bermúdez
	Sir Michael Wood

Secretariat:

Mr. Llewellyn	Secretary to the Commission

The meeting was called to order at 10 a.m.

Succession of States in respect of State responsibility (agenda item 5) (A/CN.4/751)

Mr. Šturma (Special Rapporteur), introducing his fifth report on succession of States in respect of State responsibility (A/CN.4/751), said that the report was focused on the problem of a plurality of States in respect of responsibility in cases of succession of States. In addition, it addressed some miscellaneous and technical issues, such as the numbering of the draft articles and their overall structure. The approach taken in the report was intended to facilitate the completion of the first reading at the current session.

In chapter I of the report, he recalled some general considerations applicable to the topic as a whole, namely the subsidiary nature of the draft articles, the priority to be given to agreements between the States concerned and the consistency of the project with the Commission's previous work, in particular its articles on responsibility of States for internationally wrongful acts. His intention was not to rewrite the general rules on State responsibility, which continued to serve as the basis for any study of responsibility, even one focused on situations of State succession.

In the same chapter and in chapter II, he addressed a number of terminological issues, including the fact that the term "plurality of States" encompassed both responsible and injured States. While that term was well known, since it was used in articles 46 and 47 of the articles on State responsibility, the term "shared responsibility" had begun to be used more widely only in recent years, thanks in particular to the guiding principles on shared responsibility in international law produced by a group of international lawyers at the University of Amsterdam. According to the authors, the guiding principles built on the existing rules of the law of international responsibility and sometimes offered "novel interpretations of the law of international responsibility". The question of the possible contribution of those principles to the interpretation or development of the general rules of international responsibility fell squarely outside the scope of the topic, which, in accordance with draft article 1 (1), was limited to "the effects of a succession of States in respect of the responsibility of States for internationally wrongful acts".

There were three reasons why the guiding principles were of limited use in the context of the topic of succession of States in respect of State responsibility. First, in its work on the topic, the Commission was aiming to clarify the consequences of responsibility in situations of succession of States, making clear that succession of States had no impact on attribution, whereas the guiding principles were focused on the question of what constituted the international responsibility of States and other international persons. Second, the guiding principles addressed only the plurality of responsible international persons, whereas the Commission needed to examine both the plurality of injured States and the plurality of responsible States with a view to the possible transfer of rights and obligations. Third, the paradigm of shared responsibility presupposed the commission by multiple international persons of one or more internationally wrongful acts that contributed to an indivisible injury. In the context of succession of States, however, a wrongful act was usually committed by one State, namely the predecessor State, but the injury remained after the date of succession.

In chapter III of the report, he addressed three scenarios of relevance to the plurality of States in respect of responsibility in cases of succession of States: the plurality of injured successor States, the plurality of responsible successor States and the particular aspects of plurality of States in cases of continuing or composite acts.

Regarding the first of those scenarios, namely the plurality of injured successor States, it was important to recall that succession of States could affect one or more injured States. The right to reparation was merely a consequence of the internationally wrongful act of the responsible State; that State and its wrongful act remained the same and were not affected by territorial modifications giving rise to the succession of States. Of course, not all categories of succession of States were equally relevant in that regard. The typical situation was that of the dissolution of a State, where the predecessor State ceased to exist and several successor States emerged. In the report, reference was made to claims submitted to the United Nations Compensation Commission by the Czech and Slovak Federative Republic prior to the dissolution of that State but in respect of which decisions to award compensation had been

adopted after dissolution. Another example cited in the report concerned the payment of reparations by Germany in the context of the secession of Pakistan from India in 1947. The most complex case of a plurality of successor States, however, was that of the former Yugoslavia. In that context, the principle of equitable distribution had been outlined in Opinion No. 1 of 29 November 1991 of the Arbitration Commission of the International Conference on the Former Yugoslavia before being enshrined in the 2001 Agreement on Succession Issues concluded by the successor States of the Socialist Federal Republic of Yugoslavia.

It could be concluded that practice supported the priority of specific agreements between the States concerned. Where there existed no such agreement and no particular link between one or more successor States and the injury, the solution seemed to be to apply the principle of equitable distribution. The responsible State could not refuse a claim by a successor State solely on the basis that there existed a plurality of injured States; such a refusal would be contrary to article 46 of the articles on State responsibility.

Concerning the second of those scenarios, namely the plurality of responsible successor States, it should be recalled that there were different categories of succession. Where a predecessor State continued to exist, the injured State continued to be entitled to invoke the responsibility of the predecessor State, even after the date of succession. Two other categories of succession, namely the union of two or more States to form a successor State and the incorporation of one State into another State that continued to exist, excluded any issue of plurality, since they resulted in a single State. The real problem in that context was that of the dissolution of a State. Once again, agreements played a key role. Under draft article 11, the injured State and the relevant successor State or States were required to agree on how to address the injury arising from the internationally wrongful act. With regard to the invocation of responsibility, which merely began a process of negotiation or judicial settlement of a dispute, the injured State should be able to rely, *mutatis mutandis*, on article 47 of the articles on State responsibility.

However, the available practice showed that, owing in particular to relevant agreements and national legislation, responsibility was generally borne by one successor State rather than being shared between two or more. Separated responsibility had typically been established on the basis of the territoriality principle. Most cases stemmed from the dissolution of the former Yugoslavia, and the case law of the European Court of Human Rights was a valuable source of information in that regard.

As for the third of those scenarios – the particular aspects of plurality of States in cases of continuing or composite acts – he had analysed the specific cases of acts having a continuing character and composite acts in previous reports and had proposed the draft articles originally numbered 7 and 7 *bis* on that basis. A plurality of States was possible in such cases. If two or more successor States continued or completed a wrongful act begun by the authorities of the predecessor State, they would bear responsibility for that act. However, their responsibility would be based on the general rules on State responsibility rather than on the rules of State succession.

He had come to the provisional conclusion that there was no need to propose a dedicated draft article on plurality of States or shared responsibility in the context of succession. Most cases encountered in practice involved either the responsibility of a predecessor State that continued to exist or the responsibility of a successor State either for its own acts or for the acts of a predecessor State with which it had a special link. The territorial link and other criteria had already been addressed in other draft articles and the commentaries thereto.

He had considered the possibility of adding a clause to state that the draft articles were without prejudice to articles 46 and 47 of the articles on State responsibility. However, although the draft articles were indeed without prejudice to those provisions, they were also without prejudice to other rules of State responsibility. That said, he would not object to the adoption of a general “without prejudice” clause, if the Commission or the Drafting Committee wished to include one.

In chapter IV of the report, he put forward proposals for the consolidation and restructuring of the draft articles with a view to facilitating the adoption of the entire set on

first reading. Over the course of the Commission's work on the topic, some of the draft articles referred to the Drafting Committee had been left pending between sessions, which had led to confusion about the status of the project. The current session represented the last opportunity to finalize the proposals pending in the Drafting Committee and to adopt the entire set of draft articles and commentaries thereto on first reading. While that task would be challenging, it was by no means impossible.

The consolidated and renumbered draft articles on succession of States in respect of State responsibility were contained in annex III of the report. He had divided them into four parts and was proposing a title for each: Part I was entitled "General provisions", Part II "Reparation for injury resulting from internationally wrongful acts committed by the predecessor State", Part III "Reparation for injury resulting from internationally wrongful acts committed against the predecessor State" and Part IV "Content and forms of obligations arising from State responsibility in the context of succession of States". He was proposing that draft articles 3 and 4, on the relevance of the agreements to succession of States in respect of responsibility and on unilateral declarations by a successor State, respectively, which had been proposed in 2017 in his first report (A/CN.4/708), should be deleted in view of the evolution of the debate and the other draft articles provisionally adopted in the intervening years.

The draft articles that had not been provisionally adopted by either the Commission or the Drafting Committee had already been referred to the Drafting Committee. The changes proposed in his fifth report were therefore of a purely technical and stylistic nature.

Chapter V of the report set out his proposed future programme of work for the topic. Adopting the entire set of draft articles on first reading would benefit States, since they would be able to read a consolidated text and prepare detailed comments and observations instead of making cursory remarks on a work in progress. It would also be helpful for the future Commission, which might decide to resume its work on the topic after it had received comments and observations from States. The Commission would find itself in a difficult position at the beginning of the new quinquennium if the first reading had not been completed. It was therefore his sincere wish that the Commission would complete the first reading at the current session, and he would do his utmost to facilitate the achievement of that goal.

Mr. Rajput said that, while he agreed in principle with the future programme of work proposed by the Special Rapporteur in his fifth report, it would be very ambitious to try to complete the first reading at the current session.

Some factors were conducive to completing the first reading at the current session. For instance, he fully supported the proposed deletion of draft articles 3 and 4: he was pleased that the Special Rapporteur had come to accept the argument that he and other members had made in 2017, when they had opposed the referral of those provisions to the Drafting Committee and the Special Rapporteur had rejected his suggestion as "cherry picking". He saw no reason to add a definition of "States concerned", which was merely a description of a factual situation: no such definition was provided in the 1978 Vienna Convention on Succession of States in respect of Treaties, the 1983 Vienna Convention on Succession of States in respect of State Property, Archives and Debts or the relevant resolution of the Institute of International Law. An explanation could be provided in the commentary. He did not intend to comment on the other provisions that remained pending in the Drafting Committee. He agreed with the Special Rapporteur's conclusion that there was no need to propose a new draft article on plurality of States or shared responsibility. There was also no need for a clause stating that the draft articles were without prejudice to articles 46 and 47 of the articles on State responsibility.

However, there were other factors that posed obstacles to the completion of the first reading at the current session. While the decision not to propose any new draft articles was the right one, some of the substantive discussions in the report were unnecessary, unconvincing and often misleading. The purpose of those discussions was not clear. He assumed that the Special Rapporteur planned to incorporate them into the commentaries or that they were intended to provide additional support for the draft articles that were pending in the Drafting Committee or for a proposal for a "without prejudice" clause.

It was clearly necessary to address some of those substantive arguments, since the Special Rapporteur wanted to revert to his preferred theoretical approach – which was not supported by the Commission but rather was met with severe resistance – which would permit a possible transfer of rights and obligations arising from State responsibility even where, as a result of an absence of attribution and a change in the legal personality of the State, there was no succession to State responsibility. The Special Rapporteur seemed to rely on plurality of States and, in particular, articles 46 and 47 of the articles on State responsibility to support his proposition that responsibility could be succeeded to. He did not agree with the proposals put forward in that regard.

He was not convinced by the practice of citing agreements that were the result of a *quid pro quo* bargain as examples of the application of equitable principles, as the Special Rapporteur did in the report. For example, the Agreement on Succession Issues concluded in 2001 after the dissolution of the Socialist Federal Republic of Yugoslavia, which was cited in paragraphs 38 and 39, concerned the freedom of States to decide whether and how to apportion responsibility in the succession; it did not deal with the issue of responsibility *per se*. It would be incorrect to presume that, because the successor States had all assumed a share of the assets, the Agreement constituted an example of equitable succession in respect of State responsibility and thus offered a kind of precedent. The sharing of assets was an outcome of the Agreement, but the Agreement itself was about sharing assets and liabilities, which was a matter addressed by the Vienna Convention on Succession of States in respect of State Property, Archives and Debts, and not about sharing responsibility. It did not address a situation of absolute succession.

Further speculative propositions could be found elsewhere in the report. In paragraph 44, for example, the Special Rapporteur misleadingly suggested that the Agreement on Certain Economic Matters concluded in 2012 upon the separation of South Sudan from the Sudan expressly confirmed the territorial principle and the need for good faith negotiations to conclude the apportionment of external debts. The Special Rapporteur proffered that Agreement as a basis for his preferred theory of territoriality, and expected the Commission to endorse that theory, despite acknowledging in a footnote that the Agreement had not been registered under Article 102 of the Charter of the United Nations, which meant that he had drawn conclusions regarding the agreement without having seen it. Furthermore, the title of the Agreement suggested that it too was related to the apportionment of debt and thus fell within the scope of the Vienna Convention on Succession of States in respect of State Property, Archives and Debts in the same way as the Agreement on Succession Issues did.

The conclusions that the Special Rapporteur drew from the decision of the Austrian Supreme Court referred to in paragraph 45 were also problematic. The Supreme Court had rejected a claim brought against the Russian Federation in respect of an internationally wrongful act of the former Soviet Union on the grounds that the Russian Federation bore no responsibility. However, the Special Rapporteur had somehow concluded that responsibility for the internationally wrongful act could be attributed to the Russian Federation, even though the Supreme Court had stated that the question of whether the transition from the Soviet Union to the Russian Federation was a case of State succession had no bearing on the case.

None of the cases brought before the European Court of Human Rights that were mentioned in the report could be cited as examples of succession in respect of State responsibility either. In *Zaklan v. Croatia*, for example, to which the Special Rapporteur referred in paragraph 50, the European Court had concluded that Croatia was responsible not because it was a successor State but because it continued to hold the properties confiscated from the applicant. That conclusion meant that the internationally wrongful act should be considered to be of a continuing character and was thus covered by the draft article 7 – renumbered as draft article 5 – provisionally adopted by the Commission. In all the other cases cited, the rulings established only the need to negotiate in good faith; while noting that territoriality could be a factor in such negotiations; they did not state that the territorial link in and of itself constituted a basis for succession of responsibility. The fact that Croatia had assumed responsibility for damage caused in the former Socialist Federal Republic of Yugoslavia under the special law cited in paragraph 52 was also unconvincing as an example: Croatia had assumed that responsibility voluntarily, not out of a sense of obligation in respect of succession of international responsibility. It was not therefore correct to make a connection

between agreements and decisions, on the one hand, and plurality of States, on the other. Plurality of States as addressed in articles 46 and 47 of the articles on responsibility of States for internationally wrongful acts was part of the procedural provisions for invoking responsibility, not a substantive provision.

A major obstacle to the completion of the first reading of the topic was the Special Rapporteur's insistence on repeating proposals already rejected by the Commission. In paragraphs 31 to 33, for example, he claimed that the Commission had accepted his view that the right to reparation was not affected by territorial modifications, whereas in fact that question remained pending before the Drafting Committee and was hotly contested. An even greater obstacle to completion was the debate over the format of the outcome of the Commission's work. It had been suggested on a number of occasions, on the basis of comments and observations from States, that the outcome should be draft guidelines rather than draft articles. The Special Rapporteur had repeatedly deferred the question, stating that it would be better addressed at the time of the first reading, yet his fifth report was strangely silent on the matter. Until that important issue was resolved, the Drafting Committee would be unable to achieve any realistic progress. Otherwise, it might be better for the Commission to consider completing work on the topic by means of a study group, as previously suggested by certain States.

He hoped that it would be possible to reconcile the differing views and avoid having to take that alternative route. With cooperation and support of the Special Rapporteur, it should be possible to complete the first reading in the current year. With that goal in mind, he urged the Special Rapporteur to reconsider the views expressed by members of the Commission in order to remove the obstacles to progress.

Mr. Murphy, recalling the debate on the topic in the Sixth Committee, said that the views expressed there remained somewhat mixed and, although there had been positive statements, some States had been quite critical. Romania, for example, had failed to see the normative character of the proposed draft articles, "many of which were simply an application of the rules of customary law on responsibility of States for internationally wrongful acts to the particular situation of State succession". Some States had warned that, in issuing draft articles, the Commission might be inaccurately rewriting the law on State responsibility, while others had questioned the utility of the topic, given the paucity and inconsistency of State practice. The United Kingdom had reiterated its "long-standing concern that it was not possible to extrapolate general conclusions from specific cases in a topic such as the one under consideration, where priority must be given to agreements between the States concerned, and where those agreements were the product of context-specific negotiations, inevitably combining political, cultural and legal considerations".

The fifth report fairly captured the core themes of States' comments, which had highlighted the need for agreements between States to take priority and questioned what format would be most appropriate for the outcome of the Commission's work, whether the clean-slate rule or the automatic succession rule had primacy, and whether the Commission was codifying or progressively developing international law, given the relatively sparse and ambiguous State practice. In response, the Special Rapporteur had reiterated the premises on which the work was proceeding, including his conclusion that neither the clean-slate principle nor the principle of automatic succession could be considered to constitute a general rule.

In view of the current status of the project, the Commission needed to consider how best to move forward. Completing a first reading during the current session so that a full set of draft articles and commentary could be transmitted to States for oral and written comment was an option. The Commission would then return to the topic and complete a second reading in 2024, under the guidance of a new special rapporteur. However, he was not convinced that that option was achievable: only 9 of the 21 draft articles that the Special Rapporteur was proposing had been adopted by the Commission or the Drafting Committee; some difficult draft articles were pending consideration; and there were other projects competing for the Commission's time. There was thus a real risk that the first reading would not be completed and that, in its new composition, the Commission would be left to grapple with a mish-mash of provisions, at varying stages of completion, in the next quinquennium.

An alternative option would be to complete the work on the topic in its entirety at the current session, taking advantage of the expertise of the current Special Rapporteur. In that case, the Commission would need to consider a more flexible format for the outcome of its work, such as a report containing analysis and recommendations similar to its 2006 report on fragmentation of international law or its 2015 report on the most-favoured-nation clause. He noted that a number of States had in fact expressed doubt as to whether draft articles were the most appropriate format. The Netherlands, for example, had indicated that "depending on how the work on the topic developed, the final outcome could be a study, a report or an analysis, or possibly a list of issues for consideration in the case of State succession".

If the Commission wished to take that alternative path, a working group chaired by the Special Rapporteur should be established to produce the report. That option had various advantages. It would allay States' concerns about the appearance of codification in the face of minimal practice. Perhaps more importantly, it would allow for an open-textured, recommendatory analysis as opposed to a rules-based analysis – which in any case, in substance, appeared to be the direction that the project was taking. The essence of the "rules" underpinning the current draft articles was simply that a State was entitled to invoke the responsibility of another State and that, thereafter, the States concerned should endeavour to reach agreement. The option also offered the possibility of concluding the topic in the current session under the guidance of the current Special Rapporteur. If the Commission wished to take that path, a plenary decision to refer all its work on the topic to a newly-constituted working group rather than to the Drafting Committee would be needed.

With regard to the substance of the fifth report, he noted that, while the analysis of shared responsibility and plurality of States contained in the second part of the report was interesting, the pay-off was low as no new draft articles on the subject were being proposed. The main new proposals were contained in the third part of the report, in which the Special Rapporteur explained his plan for consolidating and restructuring into four parts the draft articles previously adopted by the Commission or sent to the Drafting Committee. If the Commission decided that draft articles and a commentary should remain the outcome of its work, he had no firm view concerning the Special Rapporteur's proposal to add a definition of the term "States concerned", although the Commission had not included such a definition in most other topics. He agreed that draft articles 3 and 4 were not needed, for the reasons given in the report, and was open to the changes proposed for the title and text of draft article 13 of the renumbered draft articles. He was in favour of combining and streamlining the renumbered draft articles 18 to 21, on reparations and non-repetition, especially since doing so might speed up the Commission's work. The title that the Special Rapporteur was proposing for Part IV of the draft articles was acceptable, although the word "content" was unnecessary and could be deleted.

As the report contained no proposals for new draft articles to be sent to the Drafting Committee, he took no position in that respect. In conclusion, he wished to reiterate that he was in favour of removing the topic from the agenda of the Drafting Committee and establishing a working group to prepare a final report on the topic by the end of the current session.

Mr. Murase said that, while the Special Rapporteur had decided against the inclusion of a draft article addressing plurality of States in respect of succession, he wondered whether it would not be preferable to incorporate a provision in line with article 7 of the 2015 resolution of the Institute of International Law on "Succession of States in matters of international responsibility". He agreed, however, that the question of plurality in respect of State responsibility could be discussed in the commentary. Draft articles 18 to 21 were somewhat heavy for a work that was primarily about State succession and might therefore be merged into a single draft article with the title "Remedial measures". The new draft article 18 could read:

> "In cases of succession of States where a predecessor State continues to exist, that State is under an obligation to make restitution, compensation, satisfaction and assurances and guarantees of non-repetition, provided and to the extent that such remedies are not materially impossible or do not involve a burden out of all proportion, in accordance with the applicable international law."

The remaining content of draft article 18 and the content of draft articles 19 to 21 could be moved to the commentary. He was in favour of sending all the draft articles to the Drafting Committee and hoped that the first reading could be completed in the current session despite the difficulties mentioned by Mr. Murphy.

The meeting rose at 12 noon.