Provisional

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# International Law Commission

**Seventy-third session (first part)**

**Provisional summary record of the 3580th meeting**

Held at the Palais des Nations, Geneva, on Thursday, 12 May 2022, at 10 a.m.

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Succession of States in respect of State responsibility (*continued*)

***Present***:

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| *Chair*: | Mr. Tladi |
| *Members*: | Mr. Al-Marri |
| | Mr. Argüello Gómez |
| | Mr. Cissé |
| | Ms. Escobar Hernández |
| | Mr. Forteau |
| | Ms. Galvão Teles |
| | Mr. Grossman Guiloff |
| | Mr. Hassouna |
| | Mr. Jalloh |
| | 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 |
| | Mr. Zagaynov |

***Secretariat***:

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| 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) (*continued*) (A/CN.4/751)

**Mr. Jalloh** said that, in the succinct fifth report on succession of States in respect of State responsibility (A/CN.4/751), the Special Rapporteur had wisely refrained from proposing any new draft articles. Although only three States had provided written submissions in response to the request for comments on the topic made in the Commission's 2021 report (A/76/10, chap. III (A)), over two dozen delegations had commented on it in the Sixth Committee. The uneven progress made as a result of the complexity of the topic, the limited time allocated to the Drafting Committee at previous sessions and the impact of the coronavirus disease (COVID-19) pandemic meant that the Commission must now address a large quantity of pending draft articles, taking into account the wide range of views expressed by States, if it was to achieve its aim of completing a first reading at the current session and submitting a full package of well-considered draft articles and commentaries to States for their feedback.

As noted in the summary of the debate in the Sixth Committee, set out in chapter I of the report, the views expressed on the draft articles and commentaries adopted thus far were heterogeneous. That was at least partly due to what the Nordic countries had aptly referred to as the "challenging intersection of law on State succession and law on State responsibility". In navigating that challenge, the Commission could be guided by at least four themes that had emerged over the last few years. First, almost all States recognized that there was little State practice on the topic, and there seemed to be a general consensus that the Commission's work was subsidiary to State agreements.

Second, given the limited State practice and the nature of the topic, some States had encouraged the Commission to consider an outcome other than draft articles. Sierra Leone, for example, had noted that, whether the Commission opted for draft articles or a "softer" outcome such as draft guidelines or draft conclusions, it should state plainly which path it had chosen, since that choice would have methodological implications for its work on the topic. He himself had previously stressed the importance of transparency in relation to the topic. Although he maintained that, as a general rule, the Commission should be guided by the specific needs of each topic under consideration, opting for a non-binding outcome might alleviate some of the concerns repeatedly expressed by States on the topic at hand.

Third, several States had underlined the practical importance of aligning current efforts with the Commission's previous work. Fourth and perhaps most important was the seeming competition between the "clean slate" rule and the rule of "automatic" succession. While he appreciated the Special Rapporteur's attempt to summarize States' positions on the issue in paragraph 11 of the report, he did not believe that the Commission had expressly adopted a position for or against the clean slate rule, which applied in the specific context of decolonization and newly independent States. In his view, on the basis of the extremely limited comments from a relatively small group of States, it could not yet be concluded that "most States agreed (or at least did not dispute) that neither the clean slate rule nor automatic succession could be accepted as general rules".

He supported the Special Rapporteur's general methodology and his conclusions, especially on the alleged dichotomy between codification and progressive development, as well as his view that it was not the Commission's intention to rewrite the general rules on State responsibility. The Commission should make clear that it did not intend to use succession as an excuse to deviate from those general rules. As he had stressed in the plenary debate at the seventy-second session, the Commission had expressly set aside the issue of succession in its 2001 articles on responsibility of States for internationally wrongful acts. In any case, any substantive errors in the application of the rules set forth in the 2001 articles to the specific context of succession should be addressed by the Drafting Committee.

He welcomed the Special Rapporteur's clarifications, in chapter II, of the terms "plurality of States", "shared responsibility" and "injured State". Chapter III repeated much of what had previously been covered in the Special Rapporteur's third report (A/CN.4/731). Regarding the situations referred to in chapter III (A), "Plurality of injured successor States",

he believed that the Commission's prior work on State succession and that of Professor Marcelo Kohen and the Institute of International Law would continue to provide meaningful assistance when the Drafting Committee considered draft articles 14, 15 and 16, as renumbered in annex III of the report, concerning possible rules on reparations in cases of succession of States when the predecessor State continued to exist.

In chapter III (B), "Plurality of responsible successor States", the Special Rapporteur dealt with the more challenging issue of the responsibility of predecessor States in three types of succession of States, namely the cession of a part of the territory, the creation of a newly independent State and the separation of a part or parts of the territory. Given that the Commission's previous debates on that issue had already resulted in the provisional adoption of draft article 9, which provided that an injured State continued to be entitled to invoke the responsibility of the predecessor State even after the date of succession, it was not clear to him why the issue was being revisited.

The fact that most of the examples of State practice cited in chapter III (A) of the report related to just one geographical region did not reflect faults in the Special Rapporteur's methodology or a lack of concern for diversity of viewpoints. The reliance on European examples of succession seemed to be a function of political developments in that region following the break-up of the former Soviet Union. The 2019 memorandum by the Secretariat providing information on treaties which might be of relevance to the future work of the Commission on the topic (A/CN.4/730) had included summaries of only three non-European examples: India and Pakistan; Malaysia and Singapore; and South Sudan and Sudan.

During the debate on the Special Rapporteur's first report at the sixty-ninth session, Mr. Peter had given several examples of succession in Africa (A/CN.4/SR.3379). Due to the various forms of control that foreign Powers had exercised over nearly all African countries, there were varied examples of succession on that continent that should not be overlooked. Various African countries had negotiated agreements involving the clean slate rule and other legal issues, mostly in the context of decolonization. In addition to examples of succession agreements between African and European countries, there were agreements between Egypt and Syria and between African countries themselves.

In chapter III (C), the Special Rapporteur discussed how particular aspects of plurality of States in cases of continuing or composite acts were addressed in draft articles 5, "Acts having a continuing character", and 6, "Composite acts". He generally endorsed draft article 6. He also shared the Special Rapporteur's view that the issue of plurality of States involved in continuing or composite acts did not need to be addressed differently under the topic of succession of States in respect of State responsibility, but could be resolved on the basis of the general rules of State responsibility. An example of that approach was the 1992 International Court of Justice judgment on preliminary objections in the case concerning *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, in which the Court had rejected the objection by Australia that it could only be sued in conjunction with the other two States concerned, whereas they had been held separately liable as they had committed separate acts.

Regarding the partial conclusions in chapter III (D), he agreed with the Special Rapporteur that none of the analyses or considerations presented in the report suggested the need for a special rule on plurality of States in the context of succession or on shared responsibility and that there was no need to propose a new draft article on plurality of States. He also tended to agree that the alternative proposal of adopting a "without prejudice" clause could lead to a clash of interpretation with articles 46 and 47 of the articles on State responsibility, although he would be interested in hearing the views of other members on that point.

In part three of the report, the Special Rapporteur acknowledged that the circumstances in which the Commission had worked on the topic had been less than optimal. The Special Rapporteur had organized and renumbered the provisions in preparation for the first reading, and had set out the consolidated and renumbered draft articles in annex III. That departure from the usual practice of grouping articles together by their adoption status would prove useful for State delegations and any other readers following the topic.

He found the Special Rapporteur's arguments in favour of adding a definition of "States concerned" to draft article 2 to be persuasive. He also agreed that the provisions

proposed as draft articles 3 and 4 in the Special Rapporteur's first report (A/CN.4/708) were no longer necessary. The former, in particular, was problematic because it implied that the theory of automatic succession came into play in the succession of States in respect of State responsibility, whereas in fact such succession to responsibility was governed primarily by agreements.

He supported the Special Rapporteur's proposals in respect of Parts II and III of the draft articles. He had no objection to the proposal to use the title "Content and forms of obligations arising from State responsibility in the context of succession of States" for Part IV of the draft articles. With regard to the possibility of grouping the provisions in that part into two larger draft articles, he agreed with the Special Rapporteur that any alterations made to those draft articles by the Drafting Committee should concern only the style and not the substance. At the seventy-second session, he had suggested that those draft articles should include definitions of restitution, compensation, satisfaction and guarantees of non-repetition. He also believed that draft article 21, "Assurances and guarantees of non-repetition", could benefit from references to the case law of regional human rights bodies such as the Inter-American Court of Human Rights and the African Commission on Human and Peoples' Rights. In paragraph 2 of that draft article, clarification of the situations where the predecessor State continued to exist and where it ceased to exist might be helpful.

He shared the Special Rapporteur's view, expressed in paragraph 89 of the report, that the programme of work for the topic in the next quinquennium should be determined by the Commission in its new composition, although the creative proposal put forward by Mr. Murphy at the 3579th meeting should also be considered. No options should be ruled out, including precedents such as the establishment of a working group on the topic, as had been done at the sixty-ninth session for the topic of protection of the environment in relation to armed conflicts. In any case, the Commission should approach the matter with caution, keeping in mind the implications of its decisions not just for the topic under discussion but also for future topics.

It was regrettable that the Commission would not benefit from the Special Rapporteur's expertise on the topic during the next quinquennium. He wished to pay tribute to Mr. Šturma for his commitment and collegial spirit and for his extensive contributions to the codification and progressive development of international law.

**Mr. Park** said that the Special Rapporteur's fifth report dealt mainly with two issues: whether the provision concerning plurality of States in the context of succession was necessary, and the consolidation and restructuring of the draft articles.

Regarding the first issue, which concerned the legal problems that arose in situations where there was a plurality of injured successor States or responsible successor States, he agreed with the Special Rapporteur's conclusion in part two of the report that there was no need to propose a new draft article on plurality of States. However, that decision should not be interpreted as implying a rule of automatic succession in relation to State responsibility, since articles 46, "Plurality of injured States", and 47, "Plurality of responsible States", of the 2001 articles on responsibility of States for internationally wrongful acts, which remained the basis for the study of responsibility even in situations of succession of States, presupposed circumstances where there existed a responsibility on the part of the State. To avoid or minimize that concern, reference could perhaps be made to article 7, "Plurality of successor States", of the 2015 Institute of International Law resolution on succession of States in matters of international responsibility. That article focused on the equitable apportionment of the rights or obligations of the successor States.

With regard to the issue of shared responsibility, he believed that the term should be spelled out clearly as "responsibility of more than one State" so that it would neither convey a novel interpretation nor be confused with the theoretical discussion that appeared in the commentaries to the guiding principles on shared responsibility in international law that had been issued by a group of international lawyers and did not address succession of States. He also agreed with the Special Rapporteur that the Commission should not seek to rewrite the general rules on State responsibility.

Turning to part three of the report, on the consolidation and restructuring of the draft articles, he said that his comments would focus on the Special Rapporteur's proposals with respect to the draft articles pending in the Drafting Committee.

Regarding the inclusion of a definition of "States concerned" in draft article 2, "Use of terms", he maintained the view he had expressed at the seventy-first session that there was no need to define that term if the definition was to be "broad enough to capture all possible situations", as stated in the third report (A/CN.4/731).

He agreed with the Special Rapporteur's proposal to omit the provision originally proposed as draft article 3, "Relevance of the agreements to succession of States in respect of responsibility", because draft article 1 (2), as provisionally adopted by the Commission, covered the issue of relevance of agreements to succession of States in respect of responsibility. It also emphasized the draft articles' subsidiary nature, as they applied in the absence of any different solution agreed upon by the States concerned.

However, he had reservations concerning the Special Rapporteur's proposal to omit the provision originally proposed as draft article 4, "Unilateral declaration by a successor State". In practice, it was not unusual for a successor State to make a unilateral declaration providing for its assumption of all the rights and obligations of the predecessor State, as noted in paragraph 75 of the report, yet unilateral declarations were not covered by draft article 1 (2), which specified that the draft articles applied in the absence of any different solution "agreed upon by the States concerned". If, as noted in paragraph 76 of the report, the provision might be interpreted in a manner that would put the wrongdoer in a better position than the injured State, perhaps paragraph 2 of draft article 4, as proposed in the Special Rapporteur's first report (A/CN.4/708), could be substantively redrafted. Otherwise, if the majority of members were in favour of omitting draft article 4, the issue should be mentioned clearly in the general commentary to Part II of the draft articles.

Concerning draft article 4 as renumbered in annex III of the fifth report, "No effect upon attribution", he agreed with the Special Rapporteur's suggested placement of the provision before draft article 5, "Acts having a continuing character". He also agreed that the provision played a pivotal role in the draft articles. Draft article 6, "Composite acts", was the logical counterpart to draft article 5, and he agreed with its placement directly thereafter.

The proposed inclusion of draft articles 8 and 13, which dealt with the scope of Parts II and III, respectively, was an issue of form rather than substance, as he had stated during the debate at the seventy-first session, and could be discussed once the Commission had agreed on the overall structure of the draft articles. He supported the Special Rapporteur's proposal to harmonize the title and the first few words of draft article 13 with the language of draft article 8.

Concerning Part IV of the draft articles, although he remained unconvinced that specific draft articles on the content and forms of reparation were needed in relation to the topic, for the reasons he had laid out at the seventy-second session (A/CN.4/SR.3533), he would respect the Commission's decision to refer the draft articles proposed by the Special Rapporteur to the Drafting Committee.

Regarding the form of the final outcome of the Commission's work on the topic, he wondered whether draft articles were in fact the most appropriate choice. Some of the draft articles proposed or adopted thus far, namely those in Parts I and IV of the draft articles, were of a normative and prescriptive nature, whereas others, namely those in Parts II and III, were of a recommendatory nature. While consistency with the Commission's previous work in respect of State succession was important, State practice in that area was both insufficient and inconsistent, though the rarity of State succession did not rule out the possibility of progressive development and codification of international law. The Commission should heed States' reactions and should re-examine their preference for a "softer" outcome, such as draft guidelines or draft conclusions.

Mr. Murphy's proposal that a working group should be established to discuss the future direction of the topic warranted examination. He fully respected the position of the Special Rapporteur, whether or not it was aligned with that view. If the current path was

followed, he hoped that the draft articles would be adopted on first reading at the current session.

**Mr. Nguyen** said that he supported the general approach taken in the Special Rapporteur's fifth report, an approach that had also been welcomed by States in the Sixth Committee. The general rule of non-succession must be respected. The few exceptions to that rule could not be allowed to undermine the priority to be given to agreements between the States concerned with regard to succession to State responsibility. Any question on the succession of States in relation to State responsibility should be settled by agreement and not according to either the automatic succession rule or the clean slate rule. In the context of State succession, no State should assume more than its share of responsibility for the legal consequences of internationally wrongful acts in which it had been directly or indirectly involved, and no injured State should claim compensation in excess of the damage it had suffered. Such a result could be achieved only through agreement between the States concerned.

He agreed with the Special Rapporteur on the need to maintain consistency with the Commission's previous work on the question of plurality of States, in terms of both responsible and injured States. The theory of shared responsibility, as set out in the guiding principles on shared responsibility in international law recently developed by a group of international lawyers, should be applied with caution in the context of succession of States. First, the theory referred widely to multiple international persons, meaning not only States but also international organizations, while the Special Rapporteur's report focused on the limited number of States involved in a succession of States. Second, the theory dealt with cases where multiple international persons were responsible for a single wrongful act that resulted in an indivisible injury. In a situation of State succession, the single character of an act was seriously affected by the date of the succession of States. The responsibility of the predecessor and successor States was divided by the date of the succession of States and the agreement of the States concerned.

Third, the theory of shared responsibility *prima facie* provided for an equal division of responsibility among international persons responsible for an internationally wrongful act that led to an indivisible injury. It created an exception to the general rule of responsibility, where a State was responsible for the legal consequences of its own internationally wrongful act. In a situation of succession of States, the successor State might succeed to the predecessor State's responsibility arising from the commission of internationally wrongful acts in respect of the territory to which the succession of States related. The scope of application of the rule of responsibility differed depending on whether the predecessor State continued to exist, there was a uniting of States, or there was a dissolution of States. In the context of succession, the main question was how to invoke responsibility for injury, not how to attribute responsibility.

Fourth, shared responsibility could be engaged in situations of aid or assistance or situations of control. Owing to the presumably antagonistic state of relations in a succession of States, a situation where the predecessor, if it continued to exist, and successor States knowingly aided or assisted each other or acted in concert in committing an internationally wrongful act was quite rare. Without agreement, a successor State could not bear responsibility for an internationally wrongful act committed by the predecessor State, with the exception of responsibility that was engaged in situations of continuing acts and composite acts. Fifth, multiple international persons could cause an indivisible injury to a State that later became a predecessor State after the date of a succession of States. In that case, each successor State could separately invoke the responsibility of the multiple international persons that had committed the internationally wrongful act, depending on the part of the respective territory and people that were under its control. The claim of each successor State should then be defined in an equitable manner so that the amount of the reparations was not more than the damage suffered. He therefore supported the Special Rapporteur's analysis concerning situations involving a plurality of injured successor States, a plurality of responsible successor States, and particular aspects of plurality of States in cases of continuing and composite acts.

To his understanding, there was no rule on plurality in the theory of State responsibility; there were only situations involving a plurality of injured States or a plurality

of responsible States, both of which were clearly identified in the articles on responsibility of States for internationally wrongful acts.

Analyses of cases involving a plurality of injured successor States should take account of two different situations: those where the predecessor State continued to exist and those where it ceased to exist. In the former case, the predecessor State could request reparation even after the date of succession of States and allocate a part of the reparations in an equitable manner among injured successor States. In the latter case, each successor State could individually claim reparation from the State responsible for the internationally wrongful act that had injured the predecessor State before the date of succession of States. For example, shares of the reparations paid to the four victorious Powers after the Second World War had subsequently been allocated to the successor States that had emerged as a result of decolonization. That example confirmed that the agreement of all the States concerned was a precondition for the full reparation of injury.

He welcomed the Special Rapporteur's analysis of situations involving a plurality of responsible successor States, together with the relevant examples provided. He fully supported the Special Rapporteur's conclusion that each of the responsible successor States was obliged to make reparation only for injury resulting from its own act or an act of the predecessor State to which it had a territorial or institutional link. He agreed that succession to State responsibility must be governed by the general rules identified in the Commission's articles on State responsibility, not by "shared responsibility", and that there was no need for a new draft article on plurality of States.

**Mr. Hassouna** said that, while he supported the general approach taken in the Special Rapporteur's fifth report, which was based on the general conclusions enumerated in paragraph 17, the report drew only on European practice even though States in the Sixth Committee had called for the use of a wider variety of sources. A comprehensive review of State practice was important to ensure that the Commission's work on the topic would prove useful in situations of succession worldwide. For instance, the report could have referred to the case of the Ottoman Empire, which had ceased to exist in the aftermath of the First World War, as an example of a situation in which there had been a plurality of successor States.

In the Sixth Committee, States had expressed different views on the form that the outcome of the Commission's work on the topic should take. While the Special Rapporteur's initial proposal had been to prepare a set of draft articles, his own view was that draft guidelines would be more appropriate. States had also requested the Commission to maintain terminological and substantive consistency with its previous work, and the Special Rapporteur had accordingly focused on the articles on State responsibility. However, it would have been useful to draw on the Commission's work on other relevant topics as well, such as the articles on nationality of natural persons in relation to the succession of States or the articles on diplomatic protection. Those outputs could help to shape the draft articles on the current topic, while also fostering the progressive development of international law.

In the draft articles, the use of the terms "injured State", "responsible State" and "State which committed an internationally wrongful act" to refer to a State other than the predecessor and successor States might cause confusion, as no definition was provided for those terms. He proposed that a paragraph should be added to draft article 2, "Use of terms", defining the term "third State" as "any State other than the predecessor State or the successor State", as in article 2 (*e*) of the articles on nationality of natural persons in relation to the succession of States, and that the language of the other draft articles should be amended accordingly.

Noting that draft article 17 did not address situations in which a claim was brought against the predecessor State in exercise of diplomatic protection, he proposed that a new paragraph should be added to that article, explaining how a claim in exercise of diplomatic protection initiated by a third State against the predecessor State would continue against the successor State if the predecessor State no longer existed. Another issue to be clarified was the identification of the State against which such a claim would be brought, in the event of a plurality of successor States. According to the Institute of International Law resolution on succession of States in matters of international responsibility, the claim brought against the predecessor State would be addressed to "the successor State having the most direct

connection with the act giving rise to the exercise of diplomatic protection". When it was not possible to determine a single successor State having such a direct connection, the claim could be continued against all the successor States. Another issue to be addressed was the case of individuals or companies possessing the nationality of both the predecessor State, if it still existed, and the successor State. In addition, a paragraph could be added to draft article 17 to reflect article 8 of the articles on diplomatic protection, thus extending the exercise of diplomatic protection by the successor State in respect of refugees and stateless persons who had been lawfully and habitually resident in the predecessor State at the date of injury. Alternatively, a reference to article 8 could be included in the commentary.

It would be useful to include a definition of the term "States concerned" in the draft articles, in view of the important role played by agreements in relation to the topic under consideration. In addition, he supported the Special Rapporteur's proposal that the provisions originally numbered as draft articles 3 and 4 should be omitted in their entirety.

The draft articles dealing with restitution, compensation, satisfaction and assurances and guarantees of non-repetition should be regrouped and streamlined under Part IV of the draft articles, which should be entitled "Content and forms of obligations arising from State responsibility in the context of succession of States", as suggested by the Special Rapporteur.

With regard to the future programme of work on the topic, he would welcome any suggestions from the Special Rapporteur on how to proceed with the remaining issues in order to bring the Commission's work on the topic to a successful conclusion. He would be in favour of referring all pending draft articles to the Drafting Committee, which should be given ample time to fulfil its task. His preference would be to finalize the draft articles as draft guidelines instead of starting a new process to be carried out by a working group. He hoped that the Commission would be able to adopt the draft text on first reading at the current session.

**Mr. Al-Marri**, recalling that the Drafting Committee had not been able to provisionally adopt all the draft articles on the current topic not just for lack of time, but also because priority had not been given to the topic, said that a number of decisions still remained to be taken before specific language could be adopted for the pending draft articles, *inter alia* in respect of the clean slate rule and automatic succession. It was clear, in any event, that the draft articles were subsidiary in nature and that priority should be given to agreements between the States concerned, as stated in draft article 1 (2).

Given that the current session was the last one with the current membership of the Commission, the workload of the Drafting Committee was necessarily quite heavy; the draft conclusions on peremptory norms of general international law (*jus cogens*) and the draft principles on protection of the environment in relation to armed conflicts, which were at an advanced stage of consideration, should therefore be given priority. In the circumstances, it would be helpful for the Drafting Committee if a working group could be formed, as suggested by Mr. Murphy, to simplify and streamline the work done thus far and to make recommendations regarding further progress. In conclusion, he said that he deeply appreciated the Special Rapporteur's spirit of consensus and commitment to the work on the topic.

*The meeting rose at 11.10 a.m.*