Provisional

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International Law Commission
Seventy-third session (first part)

Provisional summary record of the 3581st meeting
Held at the Palais des Nations, Geneva, on Friday, 13 May 2022, at 10 a.m.

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Present:

Chair:	Mr. Tladi
Members:	Mr. Argüello Gómez
	Mr. Cissé
	Ms. Escobar Hernández
	Ms. Galvão Teles
	Mr. Grossman Guiloff
	Mr. Hassouna
	Mr. Laraba
	Ms. Lehto
	Mr. Murase
	Mr. Murphy
	Mr. Nguyen
	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:

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)

Sir Michael Wood said that he wished to begin by thanking the Special Rapporteur for his thoughtful fifth report and for his oral introduction to the topic "Succession of States in respect of State responsibility". Part one of the report recalled some important points about the origin of the topic and reminded members how fiendishly difficult the topic was. It lay at the interface of some of the most challenging areas of international law: State responsibility and State succession. The topic was challenging both intellectually and even in terms of drafting. The Commission had known, on taking up the topic, that the Institute of International Law had just adopted a resolution and report on the subject, which represented a very brave attempt to make sense of the issues at hand. It was not obvious that the Commission could do better, especially given the paucity of relevant State practice and *opinio juris*. However, it could be instructive, even at the current stage of the Commission's work, to compare its output with that of the Institute, specifically the Institute's 2015 resolution on "Succession of States in matters of international responsibility" and its commentaries. There were undoubtedly some important lessons to be learned from what the Institute had – and had not – done.

Members had known all along that it would be no simple matter for the Commission to set forth *lex lata* rules, or even proposals, by way of progressive development of international law. Not only was there an almost complete lack of State practice and *opinio juris*, but such materials as were available were of an *ad hoc* nature and so were of doubtful relevance, even as an inspiration for progressive development. That point had once again been illustrated in the fifth report, where the case law of the European Court of Human Rights cited dealt with responsibility *vis-à-vis* private persons, for human rights violations, mostly in the context of the right to property under Protocol No. 1 to the European Convention on Human Rights. Care was needed in seeking guidance based on analogy in such a politically sensitive field.

Early in the report, the Special Rapporteur considered the term "shared responsibility" and, rightly, found it to be "of limited use for the topic of succession of States". The Special Rapporteur also looked at questions concerning situations where there was a plurality of injured States or a plurality of responsible States. He agreed with the Special Rapporteur's conclusion that there was no need to include provisions on those matters in the Commission's work.

He also agreed with the Special Rapporteur's suggestion that there was no need for draft article 3, on the relevance of the agreements to succession of States in respect of responsibility, or draft article 4, on unilateral declarations by a successor State, which had been referred to the Drafting Committee some time ago, but which remained pending. While he could broadly agree with the Special Rapporteur's proposals for restructuring, as set out in annex III to the fifth report, the question of whether such an exercise would be useful at that stage in the Commission's work depended on what direction it aimed to take during the current session. In any event, first, the Commission would have to complete its work on the texts of the provisions, be they draft articles, guidelines or whatever. Only then could it sensibly decide whether some rearrangement was necessary. He did not agree with all the Special Rapporteur's suggestions. For example, like other members, he was not convinced that there was merit in including the proposed new definition of "States concerned".

There were undoubtedly some drafting improvements that could be made once the Commission had an overall view of where it might be going and what texts would be included. For example, members needed to decide whether to include, in one form or another, any of the five draft articles which had been referred to the Drafting Committee in 2021 but which had not yet been considered in full by it; he was referring, of course, to the draft article on composite acts, renumbered in the report as draft article 6, and the draft articles on reparation, renumbered as draft articles 18 to 21. As he had explained in plenary the previous year, he saw no need for any of those provisions. He maintained that, by trying to include them, the Commission would be seeking to restate, or rewrite, the law on State responsibility.

The risk was that, in doing so, the Commission might misstate the law. The Drafting Committee's work on composite acts earlier that week had shown the dangers.

However, notwithstanding the Special Rapporteur's efforts to rationalize the draft articles in the report, it was still far from clear where the Commission was going with the topic at hand. The previous year, he had suggested that the Commission should step back and consider where the topic was heading and had noted that there did not seem to be much enthusiasm in the Sixth Committee for what the Commission was doing. It was not clear that States wished to have prescriptive rules in that field. Such rules could act as a straitjacket in a diverse range of extreme political situations. Given that fact and the necessarily abstract nature of the draft articles, members might wish to consider preparing some kind of report instead. The previous year, he had suggested that, at the present session, a working group might be set up to review the matter, which he believed to be the best way of moving forward at the present juncture.

Mr. Murphy had made a concrete suggestion for concluding the topic in 2022, which, as others had indicated, both in the current debate and informally, merited serious consideration. Mr. Murphy had proposed that the Commission should seek a more flexible format for the outcome of its work, such as a report containing analysis and recommendations, similar to what had been done, for example, in 2014 for the final report on the topic "Obligation to extradite or prosecute (*aut dedere aut judicare*)". That proposal would involve convening a working group, chaired by the Special Rapporteur, rather than continuing with the Drafting Committee, with the aim of producing a final report that would be annexed to the Commission's annual report for 2022. That course of action, in his view, would be entirely feasible: the Commission had the materials needed for such a report to hand. In his view, such a report in 2022 would be a useful outcome for States.

If, however, the Commission could not conclude its work in 2022 or if, for some reason, it was not possible to produce a final report, then the Commission's annual report would nonetheless need to set out clearly the current state of the work on the topic, including some of the main points on which members had made progress and the difficulties that they had encountered. Those points could include those highlighted in the report: first, issues relating to the residual nature of the draft articles; second, the priority to be given to agreements between the States concerned; third, an explanation of the "middle-ground" position adopted by members in the clean-slate versus automatic succession debate; fourth, the relationship between the topic at hand and the 2001 articles on responsibility of States for internationally wrongful acts; and, fifth, the nature of the exercise being undertaken by the Commission, whether *lex lata*, progressive development of international law or other.

Regardless of the type of report produced, it would be important that States should indicate frankly their views in the Sixth Committee in autumn 2022 in New York. The Commission should carefully frame a request to States in that regard. However, if the Commission was unable to complete the topic in summer 2022 with a report, he hoped that States would indicate clearly whether they wished it to continue with the topic, and, if so, what outcome they would find useful. Various options could then be considered by the Commission in 2023, such as appointing a new Special Rapporteur and proceeding to complete a first reading, with or without substantial modifications, or concluding the topic at the Commission's next session with a report by a working group specially convened for that purpose.

He proposed that members should hold informal consultations, chaired by the Special Rapporteur, at the end of the current debate, to decide on the way forward. Time set aside for the Drafting Committee could be used for that purpose. The Commission would then proceed in the light of the informal consultations either to continue with the Drafting Committee or to set up a working group, as suggested by Mr. Murphy. He hoped that the Special Rapporteur would be open to at least considering that proposal in his summing up of the debate.

Mr. Petrič said that he wished to express his appreciation for the work of the Special Rapporteur and for his efforts to bring the topic to a successful conclusion. He largely shared the views expressed by Mr. Murase, Mr. Rajput, Mr. Murphy, Sir Michael Wood and others about the difficulty of knowing how best to conclude the topic. He supported the Special Rapporteur's proposal to delete draft articles 3 and 4.

The topic “Succession of States in respect of State responsibility” was indeed complicated and contradictory, as he had experienced first-hand through his involvement in resolving debt-related issues in Slovenia following the dissolution of the Socialist Federal Republic of Yugoslavia, together with the International Monetary Fund, the Paris Club and the London Club, and his involvement in the negotiations that had culminated in the adoption of the Vienna Convention on Succession of States in respect of State Property, Archives and Debts. From his experiences, he had learned that succession cases, in their various aspects, were diverse, and that succession problems were often political, not simply legal. Caution was therefore needed in preparing draft articles on the topic. The best solution in cases of State succession in general and in cases of State succession involving wrongdoing in particular was to endeavour to reach an agreement. Only when all attempts to negotiate had failed might international law have a role to play and, even then, it might be difficult to apply the rules concerned.

As the break-up of the Ottoman and Habsburg Empires and the dissolution of the Socialist Federal Republic of Yugoslavia, the Soviet Union and Czechoslovakia had demonstrated, succession-related issues could take many forms and, in the past, succession-related practices had varied greatly from State to State. The same could be said of succession-related matters that had arisen in connection with decolonization processes, including the recent cases of the Sudan and Eritrea. While there was arguably a large amount of State practice on which the Commission could draw, that practice was very contradictory. The Commission could not therefore claim the existence of a common State practice from which future rules of international law could be drawn and codified. Moreover, the diversity of past practice by States in succession matters arguably prevented the Commission from safely identifying rules in the context of the progressive development of international law.

As the Special Rapporteur himself had pointed out, past practice by States did not yield clear answers, particularly concerning the succession of responsibility for wrongful acts. However, one thing was clear: in the event of succession, any new State should only be held responsible for wrongful acts committed when the State already existed. Predecessor States, however, should be held responsible for wrongful acts committed prior to succession, when they still existed. Wrongful acts committed after succession were clearly attributable to the State whose organs had committed them, whether it was the new successor State or the predecessor State, whose legal personality endured if it continued to exist. In his view, that point was not expressed clearly enough in the fifth report.

In the case of the Socialist Federal Republic of Yugoslavia, the Agreement on Succession Issues had not been signed until 2001 and none of the newly independent States had taken over the legal personality of the predecessor State. The separation of Montenegro and Kosovo were basically secessions and not the result of dissolution. The case of *Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the former Yugoslav Republic of Macedonia* did not have much bearing on succession, because the legal acts in question had occurred many years after Slovenia had gained independence and were therefore clearly attributable to that State. Several newly independent States had compensated citizens and foreign nationals for wrongful acts of the Socialist Federal Republic of Yugoslavia on a purely voluntary basis which had nothing to do with succession, any obligation under international law or shared State responsibility. It would therefore be wrong to regard those sovereign acts of the new States as acts resulting from succession.

The Commission should endeavour to complete the first reading of the draft provisions at the current session. However, the Drafting Committee should decide as soon as possible whether they should really take the form of draft articles, or whether it might not be advisable to call them “conclusions”, “guiding principles” or “guiding rules”. He personally would prefer the term “guiding rules” owing to the diversity of practice. Articles had to be drafted rigorously in the light of well-established, unanimous, consistent practice and *opinio juris*, none which existed in respect of the topic. If the provisions were termed “guiding principles” or “guiding rules”, the Commission could confine itself to trying to steer State practice without placing States under any legal obligations. The knowledge acquired during research into the topic would then not be lost and States would have an opportunity to consider the Commission’s findings as a whole over the following two years. The Special

Rapporteur should express his view on the way forward when he summarized the Commission's debate on the topic.

Mr. Cissé said that it was unclear whether the restitution referred to in draft article 18 (1) pertained to property, archives or something else. Almost all African States had been faced with the problems of succession after they had gained their independence in the 1960s. It was therefore regrettable that the report had not devoted suitable attention to those cases. The restitution of African cultural artefacts and art which had been transferred to European museums and private collections during the colonial era was a very sensitive political and diplomatic issue. However, in recent years, several African States had achieved some success in securing the return of works of art from France and the United Kingdom, not only on the basis of equity and political goodwill, but also by relying on the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property and the International Institute for the Unification of Private Law (UNIDROIT) Convention on Stolen or Illegally Exported Cultural Objects.

The Commission was missing an excellent opportunity to promote progress in international law on succession of States in respect of State responsibility for restitution, even if there was a lack of uniform State practice, because the question of restitution could have been dealt with by taking account of the above-mentioned *lex lata* and by opening a window to *lex ferenda* through an indication of what law might apply to the subject in the future.

He was in favour of referring the draft articles to the Drafting Committee, even if the form that the provisions should take was decided at a later stage.

Organization of the work of the session (agenda item 1) (*continued*)

The Chair said that, in order to accommodate the move to three-hour meetings and in view of developments in the Commission's consideration of the various topics, a revised version of the programme of work had been circulated to members and was available in hard copy in the meeting room. If he heard no objection, he would take it that the changes to the programme of work were acceptable to the Commission.

It was so decided.

The meeting rose at 10.55 a.m.