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**International Law Commission**
**Seventieth session (second part)**

**Provisional summary record of the 3435th meeting**
Held at the Palais des Nations, Geneva, on Tuesday, 24 July 2018, at 10 a.m.

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***Present***:

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|---|---|
| *Chair*: | Mr. Valencia-Ospina |
| *Members:* | Mr. Argüello Gómez |
| | Mr. Aurescu |
| | Mr. Cissé |
| | Ms. Escobar Hernández |
| | Ms. Galvão Teles |
| | Mr. Gómez-Robledo |
| | Mr. Grossman Guiloff |
| | Mr. Hassouna |
| | Mr. Hmoud |
| | Mr. Huang |
| | Mr. Jalloh |
| | Mr. Laraba |
| | Ms. Lehto |
| | Mr. Murase |
| | Mr. Murphy |
| | Mr. Nguyen |
| | Mr. Nolte |
| | Ms. Oral |
| | Mr. Ouazzani Chahdi |
| | Mr. Park |
| | Mr. Peter |
| | Mr. Petrič |
| | Mr. Rajput |
| | Mr. Reinisch |
| | Mr. Ruda Santolaria |
| | Mr. Saboia |
| | Mr. Šturma |
| | Mr. Tladi |
| | Sir Michael Wood |
| | Mr. Zagaynov |

***Secretariat***:

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| Mr. Llewellyn | Secretary to the Commission |

*The meeting was called to order at 10.05 a.m.*

**Succession of States in respect of State responsibility** (agenda item 10) (*continued*) (A/CN.4/719)

**The Chair** invited the Commission to resume its consideration of the second report of the Special Rapporteur on the topic of succession of States in respect of State responsibility.

**Ms. Escobar Hernández** said that the intense debate elicited by Mr. Šturma's excellent report should not be seen as a reflection of its quality but rather of the controversial and complex nature of the topic and the fact that other institutions, such as the Institute of International Law and the International Law Association, had taken up the same topic. However, the consideration of the topic by other institutions was not sufficient reason for the Commission to refrain from doing so, nor did the fact that the Special Rapporteur had taken into account the work of those institutions in his report diminish its value. On the contrary, it would have been incompatible with the aim of preparing a serious and high-quality report to ignore those institutions' contributions, especially those of the Institute of International Law. At the same time, in its consideration of the topic, the Commission should be guided by its own mandate and role as a subsidiary body of the General Assembly of the United Nations.

The starting point for the Special Rapporteur's work on the topic had been the gap in international law arising from the fact that the Commission's articles on responsibility of States for internationally wrongful acts defined the rules for the attribution of internationally wrongful acts but made no provision for the special problems posed by the succession of States with regard to the rights and obligations arising from international responsibility. That focus had led the Special Rapporteur to begin draft article 6 with a reference to the inalterability of the rules for the attribution of an internationally wrongful act as a consequence of State succession. However, some of the proposals for possible exceptions set out subsequently in draft articles 6, 7, 8 and 9 were based, precisely, on special rules for the attribution of an internationally wrongful act that had already been set out in the articles on State responsibility and that reproduced arguments and wording that had been used by the Commission during its lengthy consideration of that topic.

Such an attempt to totally separate attribution and succession was the main problem with the analysis presented in the report and with the draft articles proposed in it. Although attribution and succession were conceptually distinct from one another, as the Commission had expressly pointed out in the commentary to article 10 on State responsibility, their separation should not be the main principle guiding the Commission's work on the topic, as that approach could not provide an adequate response to the problems arising from State responsibility in respect of succession or offer any kind of guidance to States that might face such problems in the future.

One argument that might help to clarify the situation was the fact that the attribution of an internationally wrongful act to a State was the necessary trigger for the relations which arise from responsibility and that such attribution could be determined only with regard to an existing State. It immediately followed from that argument that, with regard to succession, an internationally wrongful act could not be attributed to a State that did not exist at the time of the act. The general rule therefore had to be that there was no succession in respect of responsibility.

Yet, that was not the only possible argument. One could consider, for instance, a hypothetical situation in which internationally wrongful acts committed by an insurrectional or other movement that led to the birth of a new State were attributed to that new State, in accordance with article 10 of the articles on State responsibility, and in which other such acts, committed in the same period and in the same territory by organs or agents of the State, were attributed to the predecessor State, in accordance with articles 4 and 5 of the articles on State responsibility. Although those situations corresponded to specific rules on the attribution of internationally wrongful acts, she was not sure that one could state categorically that those rules had no relation whatsoever to succession of States.

That was especially true when one considered that the term “succession of States” was understood in the draft articles to mean “the replacement of one State by another in the responsibility for the international relations of territory”. The immediate effect of jointly interpreting the provisions corresponding to those two situations was to establish a system for the distribution of responsibility between two States that existed at different times, for internationally wrongful acts committed at the same time in the same territory, but in which only one of them assumed “responsibility for the international relations of territory” at the time in question.

That argument showed how the succession of States in respect of State responsibility could be approached from different perspectives. It might be more useful to approach the topic based on an analysis of State responsibility that highlighted how its essential elements were, or were not, affected by succession. That approach could also be applied, for example, to the issues of reparation and the invocation of responsibility. A more analytical and less normative focus might help to identify the relationship between the current topic and the regimes of State succession that had already been dealt with by the Commission and that could not be separated from it, as illustrated by the comments made by Mr. Reinisch regarding succession in respect of State debt or those of Mr. Nolte concerning the expropriation of foreign property. The suggestion made by the representative of Austria during the debate in the Sixth Committee of the General Assembly to change the title of the topic implied a change in its focus and methodology.

Since the change in the approach to the topic she had suggested appeared to be more consistent with a set of draft conclusions or recommendations, it could lead the Commission to change the form of its outcome. In her view, it was not necessary or even appropriate to continue following the same format used by the Commission when it had considered other aspects relating to State succession. Not only had times changed since the 1960s and 1970s, but the topic of succession of States in respect of State responsibility presented particular attributes that warranted a different approach. The final output of the Commission’s work on the topic should not be seen as being diminished if it was not submitted in the form of draft articles.

With regard to the existence of a general rule of non-succession and the identification of exceptions to that rule, although she agreed in theory with the approach taken by the Special Rapporteur in draft articles 6, 7, 8 and 9, she was not entirely sure that that approach was adequately reflected in the wording of those provisions. The latter seemed to convey a permanent conditionality, as illustrated by the use of such expressions as “subject to the exceptions” or “if particular circumstances so require”. While the structure of those draft articles and the use of that wording were consistent with the existence of a general rule of non-succession, they nevertheless greatly complicated the identification of such a rule.

Such conditionality was, conversely, not found at all in draft articles 10 and 11, where the principle of succession in the case of the uniting and dissolution of States was enunciated in a simpler and more conclusive manner. Apart from considerations concerning the substantive content of draft articles 6 to 9, on the one hand, and draft articles 10 and 11, on the other, the difference in the style of their drafting would certainly be noticed by readers and should perhaps be re-evaluated by the Drafting Committee.

The Special Rapporteur presented the relationship between the general rule and the exceptions to it as a model based on practice. However, it was very difficult to reach that conclusion from the analysis contained in the report. On the contrary, the report highlighted the use of international agreements and treaties to resolve the problems of State responsibility in relation to State succession, which highlighted the case-by-case nature of the solutions adopted in such situations. While treaties could not be excluded from the general concept of international State practice, which could serve to identify a customary norm, in her view the necessary conditions for identifying such a norm were not in place in the present case. Thus, it would perhaps be preferable to place more emphasis on the diversity of solutions and on the specifics of each case, following the approach taken by the Institute of International Law in its 2015 resolution on succession of States in matters of international responsibility, article 3 of which referred to the “subsidiary character” of the

guiding principles it contained, in the absence of any different solution agreed upon by the parties concerned.

The Special Rapporteur's decision to deal separately with succession in respect of the obligations and rights arising from responsibility meant that the Commission had no overview of the final effect produced by the proposed rules, making it difficult to assess the balance between those rights and obligations. Such a balance was important when deciding on possible exceptions to the general rule of non-succession. During the Commission's debate on the topic the previous week, certain policy considerations had become clear, namely the successor State's interest in not being required to assume responsibility for an internationally wrongful act that could not be attributed to it and the injured State's interest in being able to invoke responsibility and obtain reparation, even in the case of a succession of States. Those interests were closely linked and it was very difficult to determine in abstract terms which of them took precedence. If, however, the issue was analysed in terms of the succession of obligations and rights, perhaps the difficult balance between those two legitimate interests could be better understood. For that reason, the Commission should, at its seventy-first session, review the wording of the draft articles in question in order to allow for a comprehensive and parallel approach to succession in respect of both obligations and rights.

Turning to the draft articles, she noted that draft article 5 reproduced a clause that appeared 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, and the articles on nationality of natural persons in relation to the succession of States, as well as in the 2015 resolution of the Institute of International Law. It was therefore a standard clause, but its inclusion had given rise to the expression of divergent views by Commission members during the debate on the topic, echoing a much earlier debate in the Commission in 1972, at the time of its adoption on first reading of the draft articles on succession of States in respect of treaties. Notwithstanding those debates, the Commission had retained the clause in the sets of draft articles that had eventually become the 1978 and 1983 Vienna conventions. In addition, the commentaries to the two sets of draft articles did not provide sufficient reasons for retaining or excluding it, nor were conclusive reasons given by States in their comments. It could be concluded only indirectly from those commentaries that some Commission members were not willing to accept under the category of succession of States cases in which the transfer of territory took place in contravention of international law. Only one State, the United States of America, had attempted to infer any practical consequences from that precept, noting in its comments regarding the draft articles on succession of States in respect of treaties that, if the clause were retained, it should be clarified in that clause that a new State whose succession did not occur in conformity with international law would be bound by the obligations arising from succession but could not enjoy the rights it conferred. In any case, that distinction had not been retained in the commentaries.

Consequently, the meaning of draft article 5 remained inconclusive, which explained why some Commission members had suggested that the Commission's current session might be the right time to reflect on its possible deletion. Yet, despite the lack of clarity of that clause, she found no justification for excluding it from the current draft articles, since it was not the first time that the issue had arisen and since the circumstances in which succession was being considered had not changed. In addition, as the Special Rapporteur had stated in paragraph 29 of his report, articles 6 and 3, respectively, of the 1978 and 1983 Vienna conventions could perhaps be best understood as referring to the principle that no territorial acquisition resulting from the threat or use of force should be recognized as legal. From that perspective, it seemed preferable to retain draft article 5 as it currently stood. If a decision was made to delete it, it would be imperative to explain in the commentary why the Commission had changed its position in the present circumstances and had not done so, for example, in 1999, when it was adopting the draft articles on nationality of natural persons in relation to the succession of States.

She shared the views expressed by Mr. Aurescu regarding the meaning of the advisory opinion of the International Court of Justice on *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo* and, in particular

— contrary to what might be deduced from paragraph 29 of the report — his view that the Court had taken a position only on the accordance with international law of a unilateral declaration of independence and not on the effects that such a declaration might have on statehood and the recognition of Kosovo by third States.

Draft article 6 referred both to the attribution of an internationally wrongful act to a State and to the invocation of responsibility and claim for reparation addressed to the responsible State by the injured State. Those were two different matters, and only paragraphs 2 and 4 referred, strictly speaking, to succession. However, it was not necessary to delete the paragraphs that related directly to the attribution of an internationally wrongful act and to the invocation of responsibility. The draft article should be revised in order to clarify the components of the general rule, namely: succession did not alter the rules for the attribution of internationally wrongful acts; responsibility continued to attach to the State to which the wrongful act had been attributed and therefore the general rule of non-succession applied; and the invocation of responsibility and claim for reparation were to be addressed to the State responsible for the internationally wrongful act — in principle, the predecessor State, except in cases where an exception applied. Draft article 6 was the only one in the report that considered the issue of succession from the dual perspective of the injured State — regarding rights, or invocation of responsibility and claim for reparation — and the responsible State, regarding obligations. She wished to know whether there was any special reason for that.

With regard to draft articles 7, 8 and 9, she endorsed the Special Rapporteur's approach, which was guided by the objective of maintaining continuity with the Commission's previous work. In particular, it was noteworthy that newly independent States were dealt with in a separate draft article — although there was no reference to them with regard to succession in respect of nationality — that took into account the specificity derived from the rule on the attribution of an internationally wrongful act contained in article 10 (2) of the articles on State responsibility.

In view of the parallel structure and wording of the three draft articles, which resulted in a certain amount of repetition, consideration might be given to their revision and simplification by the Drafting Committee. In any case, it was essential to reformulate paragraph 1, which was practically identical in all three draft articles, so as to enunciate the principle of non-succession more directly, deleting the expression "subject to the exceptions". In addition, the word "secession" should be deleted from draft article 7, for the reasons expressed previously by other Commission members.

Draft articles 7, 8 and 9 incorporated certain concepts that merited further analysis, in particular "organ of a territorial unit of the predecessor that has later become an organ of the successor State" and "direct link between the act or its consequences and the territory of the successor State or States". It would be useful to evaluate whether those concepts constituted genuine exceptions to the general rule of non-succession; whether they could be considered as rules applicable to the sharing of responsibility in relation to the obligation to make reparation; or whether they should be considered only as material elements to be taken into account when negotiating an agreement between the injured State and the predecessor and successor States that would bring an end to a dispute over an invocation of responsibility and claim for reparation.

In respect of draft articles 10 and 11, the Special Rapporteur had chosen to reverse the principle of non-succession and to affirm the principle of succession in respect of the uniting of States and a presumption of succession in respect of the dissolution of a State, the latter being subject to the need for a prior agreement between the successor States. She was not fully convinced that the treaty practice referred to in the report was a sufficient basis for those draft articles; on the contrary, the draft articles seemed to point to the lack of a general rule applicable in cases of succession that involved the disappearance of the predecessor State. At the same time, she was not fully convinced that the protection of the interests of successor States was the only argument to be taken into account in deciding on succession or non-succession in such cases. On the contrary, it might be preferable to address that issue from the perspective of succession in respect of the rights of the injured State. Consequently, she would refrain from stating her position on that issue until she had

seen the Special Rapporteur's third report, which was scheduled for the seventy-first session of the Commission.

Lastly, regarding the future programme of work on the topic, she took note of the proposals contained in paragraph 191 of the report and looked forward with great interest to the analysis of succession in respect of the rights arising from responsibility. She recommended referring all the draft articles to the Drafting Committee.

**Ms. Lehto** said that, although States often preferred to solve issues of succession through negotiation, they would surely welcome a set of rules or principles on which they could draw in such negotiations. That had been one of the conclusions reached at the side-event organized during the first part of the Commission's current session. In view of that, it might be appropriate to include a specific reference in the draft articles to their subsidiary nature.

She endorsed the view expressed by other Commission members, including the Special Rapporteur, that the Commission's work on the topic could usefully build on the efforts already carried out by the Institute of International Law, which had recently studied the succession of States in matters of international responsibility. The Commission's work could further benefit from interaction with States, in terms of seeking their views on the proposed draft articles and requesting information concerning their practice. She agreed with Mr. Hmoud, Ms. Escobar Hernández and other Commission members who had underscored the value of States' views on the topic.

Nevertheless, as indicated by Mr. Hassouna, any expansions on, or departures from, the provisions of the Institute's 2015 resolution on State succession in matters of State responsibility should be well-founded. In that regard, it was not obvious that the decision of the Special Rapporteur to separate the transfer of obligations from the transfer of rights at the current stage should result in two sets of more or less identical draft articles. The Institute had said that its general approach in the 2015 resolution had been to find solutions that implied the existence of a State assuming the obligations stemming from an internationally wrongful act. That approach had been challenged in the Commission's debate on the topic but should not be completely discarded as a relevant consideration.

Turning to the draft articles, she said that draft article 5 should be retained for the purposes of consistency with the 1978 and 1983 Vienna conventions and the Commission's articles on nationality of natural persons in relation to the succession of States. As indicated in paragraph (2) of the commentary to article 3 of those articles: "… it is evident that the present draft articles address the question of the nationality of natural persons in relation to a succession of States which took place in conformity with international law. The Commission considered that it was not incumbent upon it to study questions of nationality which could arise in situations such as illegal annexation of territory." She agreed with the Special Rapporteur that, in such situations, there was no State succession.

Mr. Reinisch had pointed out that failure to apply the present provisions to an unlawful successor State could privilege such an entity by exempting it from responsibility. It could also be argued that including illegal situations within the scope of the draft articles would mean that such entities could benefit from the rights arising from the rules of State succession.

With regard to draft article 6, she agreed with Commission members who had suggested that the general rule of non-succession should be expressed more clearly in that provision. The assumption in paragraph 2 did not seem to be problematic, as in cases of continuity there was no change of sovereignty. Paragraph 3 was not problematic either, given that it seemed to capture the situation referred to in paragraph (3) of the commentary to article 11 of the Commission's articles on State responsibility, which indicated that: "… if the successor State, faced with a continuing wrongful act on its territory, endorses and continues that situation, the inference may readily be drawn that it has assumed responsibility for it." In such a case, the successor State would incur responsibility for its own conduct. Paragraph 4 did not seem, strictly speaking, to be necessary, and the phrase "as provided in the following draft articles" could perhaps be located elsewhere in the provision. The draft article as a whole would benefit from some streamlining. Several

drafting suggestions intended to make the text clearer had already been made and could be discussed by the Drafting Committee.

Draft article 7 (2) and (3) addressed the particular circumstances in which obligations arising from an internationally wrongful act could pass to the successor State, even though the predecessor State continued to exist. She agreed with those Commission members who had drawn attention to the somewhat vague nature of the phrase "particular circumstances". It was also unclear why paragraph 3 referred only to a direct link between the act or its consequences and the territory of the successor State or States and not also to the population. That was one aspect in which the proposed draft articles differed from the 2015 resolution of the Institute of International Law. It would be helpful to clarify the concept of a direct link by specifying whether it meant that the territory was a core element of the wrongful act. The same comments were valid for draft article 9.

Paragraph 4 of draft article 7, which provided for a special case of continuity, corresponded to article 10 (2) of the articles on State responsibility. She could support the inclusion of that paragraph, as well as that of draft article 8 on newly independent States, even though they overlapped slightly. She agreed with the Special Rapporteur that there was a reason to distinguish between cases of dissolution and unification, in which the original State disappeared, and cases of separation of parts of a State, through secession, in which there was a continuator State.

Although the Institute of International Law had found it quite logical that obligations stemming from the commission of an internationally wrongful act should pass to the successor State when two or more States united and that the relevant rights and obligations also passed to the successor State when a State was incorporated into another existing State, such rules might be too categorical given the diversity and complexity of situations of State succession. She noted that the Special Rapporteur had proposed a default rule in case the States concerned, including the injured State, demurred.

The wording of draft article 11 (1) was obscure. In particular, it was not clear how the phrase "subject to an agreement" should be construed. The inclusion in the second paragraph of the requirement that States should negotiate in good faith was important. The Drafting Committee might wish to consider what other factors should be taken into account.

She was in favour of referring all the draft articles to the Drafting Committee.

**Mr. Cissé** said that the topic should be approached cautiously on account of its complexity. Like the first report, the second report said nothing about succession of States on the African continent, although the latter had been and still was a veritable laboratory in that respect. The recently created State of South Sudan should have been listed among the examples of State practice underpinning draft article 8 on newly independent States. The two much older examples of Morocco and Namibia, while of relevance to the study, did not confirm the existence of exceptions to the rule of non-succession.

Draft articles 6, 7 and 8 prompted many questions. With regard to draft article 6, he wondered how a general rule could be posited in the absence of well-established State practice, especially when the Special Rapporteur acknowledged the diversity of that practice. Since there was nothing to codify without State practice, the only avenue left was that of the progressive development of *lex ferenda* which should not, however, call into question well-settled principles of international law such as non-succession in respect of State responsibility. Paragraph 3 of that draft article was incomprehensible. How could the mere fact that an internationally wrongful act was continuous render the successor State responsible for it? Could an internationally wrongful act which lasted for some time always be attributed to a successor State, even when it was neither the author nor the source of such an act? What sort of breach of an international obligation did the Special Rapporteur have in mind? How could a successor State be bound by an obligation which had arisen before it existed as a State? Should that obligation not be borne exclusively by the predecessor State? If paragraph 3 were to set forth an exception to the general rule of non-succession, it would have to be recast more clearly, above all if the draft articles were to be turned into an international treaty or convention, or clarified in the commentary.

Paragraph 4 referred to "the injured State" without further explanation. If that signified the successor State, the paragraph should be more explicit. Did the expression "injured subject" refer to a State (since a State was a subject of international law), or did it refer to an individual, or to natural or legal persons under private or public law who had suffered injury from an internationally wrongful act and who was claiming reparation? If that were so, provision should be made for procedural safeguards enabling injured subjects to file a claim for compensation with the competent national or international courts. The phrase "also or solely" was even more confusing. Perhaps what the Special Rapporteur wanted to say was that the injured State or subject could claim compensation for the damage done by an internationally wrongful act either from the predecessor State or from the successor State or States.

The wording of draft article 7 was vague. It would be more correct in legal parlance to speak of the separation of a State's territory rather than the separation of parts of a State. Paragraph 1 referred to secession without explaining what kind of secession was meant. Would secession obtained unconstitutionally, and therefore unlawfully, come within the ambit of the draft articles? Paragraphs 2 and 3 referred to undefined "particular circumstances" which would nonetheless place the successor State under obligations. Such an exception was perplexing and the Special Rapporteur's tentative explanations were far from convincing. It was inappropriate for the Commission to consider the conduct of an insurrectional movement. Careful perusal of paragraph 4 would seem to indicate that the Commission gave priority to the role of such movements in the establishment of new States and lent them some sort of legality. That paragraph should simply be deleted.

Unlike paragraph 1 of draft article 8, which was unproblematic as it followed the general rule of non-succession, the substance of paragraph 2 was difficult to grasp, since the report linked the act, its consequences, the territory of the successor State, the former dependent territory and the enjoyment of substantive autonomy, which were deemed to be particular circumstances justifying an exception to succession. In fact, that paragraph, far from connoting an exception to succession, to some extent confirmed the rule of non-succession, because the obligations stemming from an internationally wrongful act of the predecessor State could not be transferred to the successor State unless the latter agreed. It could therefore be presumed that, without any such agreement, there would be no automatic transfer of obligations from the predecessor to the successor State. As it stood, paragraph 3 gave the impression that it was the conduct of the liberation movement that was at issue in the establishment of a new State. The role of international law, however, was simply to take note that a liberation movement had established a new State and draw all the legal consequences therefrom. If paragraph 3 remained unchanged, the Special Rapporteur must draw a conclusion from it.

He recommended referral of all the draft articles to the Drafting Committee.

**Mr. Ouazzani Chahdi** said that the topic of succession of States in respect of State responsibility should be approached with caution owing to its complexity and political dimension. International law in that area should foster legal certainty and stable international relations.

He agreed with the general approach proposed in chapter I, section B, and with using a combination of deductive and inductive methods when applying the rules on State responsibility for internationally wrongful acts to State succession. It would, however, be wise to define the notions used in that context, such as "attribution of the internationally wrongful act", as had been done in the Commission's articles on responsibility of States for internationally wrongful acts. He also concurred with the Special Rapporteur's analysis of the Commission's earlier work on legality of succession and therefore supported draft article 5, which replicated a provision contained in the 1978 and 1983 Vienna conventions and the articles on nationality of natural persons in relation to the succession of States, and which was also reproduced virtually word for word in article 2 (2) of the 2015 resolution of the Institute of International Law on succession of States in matters of international responsibility.

Like a number of other members, he wondered why the Special Rapporteur intended to deal with obligations and rights separately in two different reports. While the Special

Rapporteur was correct in holding that the rarity of cases of State succession should not prevent the Commission from formulating some general or special rules on the matter, the examples of succession which he supplied in the report seemed to refute the general rule of non-succession which should be guiding the Commission's work. At all events, the successor State always remained free to accept the obligations flowing from the internationally wrongful acts of the predecessor State.

The notion of a newly independent State should be clarified on the basis of the definition provided in the aforementioned resolution of the Institute of International Law, according to which a newly independent State was "a successor State the territory of which immediately before the date of the succession of States was a dependent territory for the international relations of which the predecessor State was responsible". In general, that term applied to States which had not disappeared during the colonial period, but which had retained their international legal personality as protectorates under international law. It could likewise be applied to States which re-emerged from the break-up, dissolution or unification of States.

An answer to the question of whether the category of newly independent States could be applied in the case of international protectorates might be found in the book *La succession d'États à Madagascar* by the late Daniel Bardonnet. Other examples existed in Africa. Conversely, State succession did not apply to Morocco which had remained a sovereign State throughout the protectorate period, as the International Court of Justice had noted in the *Case concerning rights of nationals of the United States of America in Morocco*.

The draft articles contained terms or passages which required some elucidation and which must therefore be reviewed by the Drafting Committee. One such term was "the injured State or subject" in draft article 6 (2). The wording and content of paragraph 4 of the same article likewise called for re-examination. The phrase "if particular circumstances so require" in draft articles 7, 8 and 9 should be either revised or deleted by the Drafting Committee.

He had no objection to the referral of all the draft articles to the Drafting Committee.

**Mr. Šturma** (Special Rapporteur) said that he welcomed the prevailing opinion in the Commission that the topic of succession of States in respect of State responsibility was one it should deal with, but the question remained of how that should be done in order to achieve a balanced and generally acceptable outcome. Subsequent reports would provide answers to a number of the questions raised during the rich and very helpful debate. Some members had expressed doubts about the suitability of the topic for codification, or even the feasibility of that task. He, along with a number of other members, considered that it was a topic of general international law which was suitable for both codification and progressive development. He had tried in his study to shed light on some lacunae in the Commission's earlier codification work in the fields of State responsibility and succession of States.

The purpose of his second report was to explain the possible impact of succession of States on general, secondary rules of State responsibility. His aim was not to invent new norms, but rather to follow well-established rules and employ the terms used in both those areas of international law. He wished to draw attention to paragraph (3) of the commentary to article 11 of the articles on responsibility of States for internationally wrongful acts, which stated that: "In the context of State succession, it is unclear whether a new State succeeds to any State responsibility of the predecessor State with respect to its territory. However, if the successor State, faced with a continuing wrongful act on its territory, endorses and continues that situation, the inference may readily be drawn that it has assumed responsibility for it." That passage should be interpreted as an invitation to the Commission to take up the topic, not to exclude it from its work.

Nothing in the articles on State responsibility suggested that responsibility for an internationally wrongful act, or, to be more precise, the legal consequences of such a wrongful act, vanished because of State succession. The fact that those articles did not include a "without prejudice" clause, such as that contained in article 73 of the Vienna Convention on the Law of Treaties, might imply that obligations arising from State responsibility were in principle applicable notwithstanding succession of States. That was

the starting point which informed the general and special rules proposed in the second report. The proposal made by two members to change the title of the topic to "State responsibility problems in cases of succession of States" merited further consideration.

While some members had been in general agreement with the methodology which he envisaged, others had considered that there was not enough relevant State practice to justify pursuing the topic. Although he had acknowledged in his report that such State practice as was available was diverse, context-specific and sensitive, he believed that his approach was consistent with the Commission's mandate progressively to develop international law. Indeed, it was his intention to combine both progressive development and codification of international law.

Some members had been of the opinion that the report relied too heavily on policy considerations, or that successor States might assume obligations for political reasons rather than *opinio juris* in favour of a general succession rule. He personally failed to see a distinction between *lex ferenda*, *lex desiderata* and policy considerations. Like Mr. Nolte, he tended towards the view that State practice was also influenced by policy considerations. State practice was not necessarily good and policy was not necessarily dubious. In fact, the two were interrelated and policy considerations were also an inherent part of law-making.

A number of members had addressed the question of which sources could or could not be relied on. Three members had taken the view that reliance on existing treaties might be misleading, owing to their narrowness of scope and the fact that they bound only the parties to them. While of course the *pacta tertiis* rule applied and treaties resulted from specific political negotiations, they were nevertheless binding agreements between States and as such they were a form of State practice.

Admittedly there was little case law with regard to some infrequent kinds of succession, and it was true that many issues were settled out of court. However, there was a slow but growing trend to refer cases to the European Court of Human Rights. He disagreed with the view that judgments in human rights cases were not relevant to the topic and that they concerned civil liability and not international responsibility. The European Convention on Human Rights was an international treaty and the European Court of Human Rights was an international, albeit regional, court. He failed to see how a finding by the Court that the Convention had been violated would not concern the international responsibility of a State. The Court was not a third or fourth instance of a national judicial system, but the international judicial body competent for supervising the compliance of States with their obligations under the Convention in respect of both individuals and other States. That was also true of other courts such as the Inter-American Court of Human Rights, although its case law might be of greater relevance to ongoing violations of the American Convention on Human Rights than to succession of States, as all instances of succession in Latin America had taken place before the adoption of the Convention.

The second report had relied fairly heavily on scholarly writings because they, along with case law, were recognized as a subsidiary means of identifying rules of law. In the past, the Commission had made frequent use of them in situations where State practice had been diverse and context-specific, because they tended to provide a more general view of the matter. As for the texts of the Institute of International Law, he noted that opinions had been divided on the extent to which the Commission should draw on them. He personally considered that the Commission should broadly follow the line taken by the Institute, but depart from it where necessary. It was not unusual for the Commission to deal with a topic which had been considered earlier by a private body, as the interest shown by several bodies in that topic would seem to confirm its relevance. However, as he shared Mr. Huang's concern that excessive reliance on the Institute's work might undermine the Commission's standing as the main entity responsible for the progressive development and codification of international law, he wished to draw attention to some features of his approach to the topic which differed from that taken in the Institute's 2015 resolution. His study relied more on agreements and unilateral declarations and sought to analyse the transfer of rights and obligations separately. It placed greater emphasis on the effects of State succession on State responsibility, which might possibly lead to a change in the title of the topic. Its aim was also to draft new articles on forms of responsibility such as

reparation. While the outcome might not be entirely different, it should be better in some respects.

Members had expressed many and varied views on the question of a general rule. While Mr. Park and Mr. Petrič thought it important to identify a general rule applicable to the topic, Ms. Galvão Teles had pointed out that it might not be useful or possible to do so. Mr. Hassouna was unsure whether a rule of non-succession existed, given the exceptions identified in the report. According to Mr. Zagaynov, there might be no general rule of either non-succession or succession. However, several members had asserted that any general rule should be a rule of non-succession, with provision for exceptions. He agreed with Mr. Park that it was important to identify categories of State succession and shared Mr. Nguyen's view that a realistic and flexible approach was needed and that the principle of non-succession could not be applied too rigidly. He also agreed with Mr. Petrič and Ms. Oral that it was important to study the possible criteria for exceptions and that the Commission should be especially cautious in finding exceptions to the rule of non-succession.

Many members, frequently referring to paragraph 16 of his report, had expressed the view that the Commission's work should not replace a general theory of non-succession with a general theory of succession, even inadvertently. According to them, some of his proposals espoused a general presumption of succession, especially in cases where the predecessor State no longer existed. Mr. Hassouna had suggested that such an approach called the very existence of a general rule of non-succession into question.

While he agreed with the need for both a general rule, or rules, and for exceptions for individual categories of succession, a general rule was arguably more important for those who stressed non-succession as the starting point. His position, as reflected in draft article 6 (1) was that, for the purpose of the creation of responsibility of a State on the basis of an internationally wrongful act by that State, non-succession was an absolute rule. It was clear that both the action or omission and the international obligation breached must refer to that State only. However, neither the report nor the draft articles asserted that a successor State should become the responsible State on the basis of a wrongful act that it had not committed. All the legal consequences of the wrongful act, including any circumstances precluding wrongfulness, the obligation of cessation and possible countermeasures, remained in principle applicable to and the concern of the responsible State, which was the predecessor State. The successor State might be responsible for its own wrongful acts, in the context of a continuing breach or the attribution of acts of an insurrectional or other movement. The provisions concerning those cases were rules on responsibility and attribution, rather than succession, but it was useful to recall them in the context of the current topic.

The real exceptions to the rule of non-succession had a limited but important purpose relating to certain consequences of an internationally wrongful act that did not disappear even if the predecessor State ceased to exist. Similarly, as territory, population, property and debts did not disappear in the event of succession, the exceptions also reflected the fact that certain obligations that would be the subject of future draft articles, such as reparation, compensation or guarantees of non-repetition, might in principle be claimed from the predecessor State, but that that State might or might not be in a position to make such forms of reparation. In exceptional cases — the grounds for which, in addition to agreement, devolution of organs, territorial links, and unjust enrichment or other equitable considerations, could be discussed — the successor State would be in a position to make appropriate reparation. That State should not, however, be held responsible, much less blamed, for acts it had not committed, but rather commended for not leaving the injured State or persons without reparation.

Several members had highlighted the need for consistency with the Commission's previous work in terms of both substance and terminology. In that respect, most had referred to the articles on State responsibility, using the terms "responsibility", "reparation" and "damage" in conformity with those articles. He agreed both with them and with those members who had suggested not using the controversial term "secession", which had been included in draft article 7 in parentheses and could easily be deleted.

There had been some debate on the basic distinction between cases in which the predecessor State continued to exist and cases in which it no longer existed. While Mr. Park and Mr. Grossman Guiloff supported such a distinction, Sir Michael Wood and Mr. Reinisch had expressed disagreement with it on the grounds that it was essentially political and could lead to unjust and inequitable results. In his view, it was not necessarily so. Although policy considerations could not be entirely excluded, the distinction had been drawn on the basis of real differences and was consistent with recognized categories of succession. Whether it might lead to unjust results was a legitimate question; however, the results depended not on the categorization itself but on the specific content of rules and exceptions in individual draft articles. They were, or should be, drafted so as to exclude unjust and inequitable results as far as possible.

Several members had said that analysing the obligations and claims arising from responsibility separately might lead to duplication of work and other methodological difficulties. The separation he had made in his report served mainly for the purpose of analysis and did not exclude a possible merger of draft articles, if thought useful; however, as Mr. Murase had observed, such a separation also echoed the structure of the articles on State responsibility, particularly parts one and two. Mr. Murase had also rightly suggested that the draft articles should make reference to the direct link between an internationally wrongful act and the population, not just the territory, especially in relation to newly independent States, which would be done mainly in the third report.

A number of members were of the view that the subsidiary role of the proposed draft articles must be underlined. He fully agreed with them. Indeed, the content of his first report and draft articles 3 and 4 clearly, though implicitly, confirmed the importance of agreements and unilateral declarations. He had therefore not proposed a special provision on subsidiarity, preferring to clarify the issue in the commentary, but a new provision could be drafted if the majority considered it necessary.

The issue of agreements related to the comments made by Mr. Murase and Mr. Huang, with whom he agreed, to the effect that the injured subject must also consent to any undertaking of responsibility by the successor State. Draft article 3 (3), on agreements other than devolution agreements, would cover that point, following on from the analysis of different kinds of agreements and the *pacta tertiis* principle in his first report, but he accepted that the concept might be better expressed and the rights of an injured third party better protected in an express provision. He also agreed with Mr. Hassouna that all other categories of succession should be defined in draft article 2.

Concerning the variety of practice, case law and other examples adduced in his reports, he agreed that more non-European practice was needed and that references to controversial cases would need to be handled with care. However, given the nature of the topic, they could not be excluded entirely. He expressed appreciation to Mr. Nguyen, Mr. Huang and Mr. Zagaynov for correcting certain inaccuracies concerning the unification of Viet Nam and to Mr. Aurescu for providing examples of case law on Transnistria. He fully supported the suggestion of requesting States to furnish State practice and case law on the topic and asking the Secretariat to prepare a study, focusing in particular on relevant agreements.

He generally agreed with Mr. Murphy's suggestion that consideration should be given to restructuring certain draft articles, although how to tackle draft article 6 would require further reflection. He also agreed that draft article 5, on legality of succession, should be placed immediately after draft articles 1 and 2.

Draft article 5 was consistent with 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 and the articles on nationality of natural persons in relation to the succession of States, and enjoyed wide support. Mr. Nguyen had also pointed out that succession to responsibility should be subject to *jus cogens*. Although he agreed, he considered the concept of conformity with international law to be broader and to include *jus cogens* in any case.

Mr. Aurescu, Mr. Petrič and Ms. Escobar Hernández had supported draft article 5 but queried the philosophical issue of neutrality mentioned in the report, suggesting that

succession of States was either lawful or unlawful, with no third option possible. Such a proposition had a certain logic, and he agreed with their arguments in respect of internal legal orders, where even difficult cases could always be resolved on the basis of legal principles by seeking optimization, rather than selecting a single rule to invalidate or derogate from all others, particularly in the context of the case law of supreme or constitutional courts. International law, however, was a less developed legal system, in which many issues had historically been governed not by law but by politics, or "freedom of action". Modern international law covered more and more areas, thanks to progressive development and codification; nevertheless, it was not clear if it fully covered certain facts, such as the creation of States, revolutions and secession. International law included general principles as well as specific rules, but lack of compulsory jurisdiction prevented the International Court of Justice from playing the role of world constitutional court. In its advisory opinion on *Legality of the Threat or Use of Nuclear Weapons*, the Court itself had seemed to recognize the limits of international law.

Draft article 5 in no way sought to privilege an unlawful successor State by exempting it from responsibility, as suggested by Mr. Reinisch. Instead, the aim was to positively delineate the material scope of the draft articles. Placing draft article 5 after draft articles 1 and 2 would serve that purpose, allowing it to cover not only the draft articles that dealt with the possible transfer of obligations but also those relating to rights arising from responsibility. For good reason, draft article 5 tackled neither the consequences of illegality, nor the potential law applicable in such situations. As argued in his report, it could be said that, in cases of unlawfulness, there would be no State succession at all. Determining the rules applicable to such illegal situations fell outside the scope of the present topic. He agreed with Mr. Jalloh and Mr. Hmoud that unlawfulness of territorial changes was a separate matter from the unlawfulness of succession itself, which was in turn separate from the possible consequences in terms of responsibility. In line with the Commission's consistent practice in the area of State succession, keeping draft article 5 as proposed would emphasize the importance of conformity with international law in that area, leaving aside the difficult issues of the consequences of illegality and determining the applicable law.

Some members had agreed in principle with paragraph 1 of draft article 6. Others had not opposed it but considered it unclear. Mr. Aurescu and Sir Michael Wood had said that it was not sufficiently clear from the wording of draft article 6 that it concerned a general rule, exceptions to which were provided in subsequent articles. The issue was covered both in his report and in paragraph 4 of draft article 6, but he agreed that the wording could be clearer. In the light of his earlier explanation, he hoped that Mr. Petrič and Mr. Hassouna could accept the reference to attribution, although he agreed that it was a separate problem from succession.

Several members had proposed new wording for draft article 6. Although he preferred his original text, which was more general, the proposal made by Mr. Murase, Mr. Jalloh and Mr. Grossman Guiloff had merit, while Mr. Murphy's proposal, supported by Ms. Oral, to make paragraph 1 a stand-alone provision as the only section referring to all cases of State succession effectively captured his intention. Ms. Escobar Hernández's suggestion also deserved consideration.

Mr. Zagaynov's proposal to delete the reference to injured subjects other than States was not purely a matter of drafting but a conceptual issue meriting in-depth consideration. The reference to article 33 (1) of the articles on State responsibility was correct but related only to the applicability of part two and perhaps part three thereof. As the commentary to those articles confirmed, part one, on the origins of State responsibility, was general. The rules, in particular rules of attribution, could and, as the practice of human rights courts and investment arbitration tribunals clearly showed, did apply to breaches of international obligations of States owed to other actors, including international organizations and individuals. In addition, his third report, the aim of which would be to analyse the possible transfer of rights, would certainly include such cases, in addition to claims under diplomatic protection. He therefore preferred to keep the concept broader, at least for the present.

He approached paragraph 2 of draft article 6 in the same light. The wording had been supported by Mr. Reinisch and Mr. Rajput, while Ms. Oral and Mr. Hmoud had

proposed redrafting it. He would prefer to send it to the Drafting Committee in its original form, although that did not preclude possible changes.

Paragraph 3 of draft article 6 had provoked various comments, ranging from agreement to rejection. Some members objected to the provision because it seemed to give different grounds for attribution. Mr. Petrič, Ms. Oral and Mr. Grossman Guiloff had asked for clarification, which was fully justified. He had used a different, "without prejudice" formulation precisely because he was aware that attributing responsibility on the basis of continuing breaches differed from the exceptions set out in paragraph 4 and further developed in subsequent draft articles.

Mr. Petrič and Ms. Oral had suggested deleting the phrase "if it is bound by the obligation" as they found it superfluous or unclear. While it might be superfluous, his aim had been to make it clear that the obligation must also be binding on the successor State. That much was obvious in the case of customary international law, but the obligation might originate in a treaty origin and be subject to succession in respect of treaties, which was a matter separate from succession in respect of responsibility.

Some members had suggested clarifications to paragraph 4 of draft article 6. The reference to reparation in that paragraph had not been intended to render other rules of State responsibility irrelevant: they remained applicable to the predecessor State. In the case of the successor State, the limited and exceptional transfer of certain obligations warranted a cautious approach. Other members had objected to the provision. He refuted those objections, as the provision did not discard the general rule but merely served to introduce the limited exceptions that followed.

Mr. Rajput had referred to boundary treaties. While not covered in the section of the report covering draft article 6, both boundary treaties and other territorial regimes were relevant to the law of State succession. The concept of such territorial regimes had been introduced by the Permanent Court of International Justice in the case of the *Free Zones of Upper Savoy and District of Gex (France v. Switzerland)* and later confirmed by the International Court of Justice in the case concerning the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*. Although others might question the relevance of the 1978 Vienna Convention, there was no doubt about the customary nature of the rule reflected in article 11 thereof on the continuity of boundary and other territorial regimes, such as the bilateral Treaty on the Construction and Operation of the Gabčíkovo-Nagymaros Barrage System. Its relevance to succession in respect of responsibility lay in the fact that the successor State might be in a position to offer a guarantee of non-repetition only if it was still bound by the treaty obligation breached. It might also be seen as a supportive argument, *per analogiam*, for drawing a distinction between succession with respect to responsibility *per se*, which neither the International Law Institute nor his report suggested, and succession to the rights and obligations arising from internationally wrongful acts.

He agreed that the term "secession" should be deleted from the title of draft article 7. He also agreed with Mr. Murase's suggestion that reference should be made to the substantive autonomy of State organs that became organs of the successor State. Mr. Rajput, Mr. Petrič and Mr. Huang had pointed out that the expression "organ of a territorial unit" was unclear. He agreed with Mr. Petrič that the explanation in the report could usefully be included in the commentary.

Many members had commented that the expression "if particular circumstances so require" in paragraphs 2 and 3 of draft article 7 required clarification. Some had proposed its deletion, which he would not object to. Several members had suggested examining the specific criteria more closely. The suggestion of adding the category of unjust enrichment was also worth considering. As he had explained, he was not in favour of deleting paragraph 4 of draft article 7, as some members had proposed, but he was open to drafting changes.

Mr. Hassouna's suggestion that the reference to agreements in draft article 8 (2) should also be added to draft articles 7 and 9 was a good one, but it should be considered in the light of the possible merger of those three draft articles and with reference to draft article 3. While several members had expressed support for draft article 8, Mr. Reinisch, Mr. Huang and Ms. Galvão Teles had proposed its deletion on the grounds that it was

unnecessary or obsolete. He was keen to see all categories of succession maintained, at least for the purpose of analysis and consistency, but as a matter of drafting he supported Mr. Murphy's proposal to merge the content of draft articles 7, 8 and 9 into a single article so as to avoid unnecessary repetition and resolve many drafting issues. Certain inconsistencies in the French and Spanish versions of those three draft articles would also need to be eliminated. The suggestion to change the words "national liberation or other movement" to "insurrectional or other movement" in paragraph 3 of draft article 8 could serve as the basis for a single paragraph or draft article referring both to separation of part of territory and to newly independent States.

Many of the issues raised with respect to draft articles 7 and 8 were also relevant to draft article 9, and some members had made helpful drafting suggestions; however, his preference to merge the three draft articles would partly resolve those issues. He agreed that the term "an organ of a territorial unit" should be clarified, either in the commentary or by inserting an additional definition in draft article 2. He had intended the phrase to refer to States that were part of a federation, as had been the case of the Czech and Slovak republics in Czechoslovakia or the constituent republics of the former Yugoslavia, or to regions having a substantial degree of autonomy and self-government, such as Crete before its incorporation into Greece.

Ms. Oral had raised the interesting question of whether the notion of a territorial link created some form of obligation *in rem*, but the proposals set out in draft articles 7 to 9 did not go that far. Their starting point remained the rule of non-succession and responsibility of the predecessor State, if it continued to exist. Unlike an *in rem* obligation, which would entail an automatic transfer of obligation to the successor State, the proposed territorial link was only one factor justifying, as a matter of exception, the transfer of certain obligations to the successor. A stronger form of the link, such as in the case of violation of obligations under boundary or other territorial regimes, might resemble an *in rem* obligation; however, a territorial link might simply involve a case where either the object or the victims of a wrongful act were located in an area that was no longer on the territory of the predecessor State. Consequently, it might exclude or limit that State's capacity to make restitution or guarantee non-repetition.

Draft articles 10 and 11, which dealt with situations in which the predecessor State had ceased to exist, had prompted numerous critical comments. Mr. Hassouna and Mr. Grossman Guiloff supported draft article 10, on the uniting of States, but many members had expressed doubt, pointing out that it proposed a general rule of succession, rather than non-succession, essentially for policy reasons. Those members had also stressed that consent of the successor State was imperative in assuming obligations. Some members had expressed the view that draft article 10 was *de lege ferenda*. While they might be partly right, it was in fact a rebuttable presumption, rather than a reversed rule of automatic succession replacing that of non-succession in all circumstances.

Mr. Reinisch and Mr. Nolte had asserted that the examples he had provided were irrelevant and mostly concerned expropriation, which was not an internationally wrongful act *per se*. Others had also raised the issue of expropriation. There was a clear distinction to be drawn between lawful expropriation, which, under General Assembly resolution 1803 (XVII) rather than the more vague terms of the Charter of Economic Rights and Duties of States, was the right of any sovereign State, subject to payment of appropriate compensation, and an internationally wrongful act; however, even expropriation might constitute a wrongful act if the expropriating State did not respect the conditions set in international law, and such cases should not be completely disregarded.

Concerning the case of German reunification, he agreed with the detailed and generally convincing analysis provided by Mr. Nolte, who had also made a helpful proposal to reword draft article 10. He hoped that such an important change would also satisfy those who had stressed the role of agreement.

Draft article 11, on the dissolution of States, was both important and controversial. It enjoyed the support of Mr. Hassouna and Mr. Grossman Guiloff, but Mr. Reinisch and Mr. Petrič opposed it as currently drafted. Sir Michael Wood had expressed the view that it was a very difficult draft article that would require careful consideration and attention to the

views of States. As with draft article 10, some members had invoked the *lex ferenda* argument. Mr. Park, Mr. Reinisch, Mr. Grossman Guiloff and Mr. Ruda Santolaria considered the successor State's consent imperative in the assumption of obligations, but Mr. Grossman Guiloff had added that some mention of how obligations might be transferred in the absence of any agreement should be retained and further clarified.

He had not intended draft article 11 to be the sole provision dealing with dissolution of States but rather as a general, introductory provision to be complemented later by another draft article setting out criteria — similar to the provisions in draft articles 7 to 9 — and additional rules on how to apportion obligations arising from an internationally wrongful act by a predecessor State that had ceased to exist. Given that the current, unqualified wording had created many doubts and misunderstandings, an additional paragraph was needed after paragraph 1 to include such criteria, some of which already appeared in the second sentence of paragraph 2. Paragraph 2 would be renumbered accordingly and could perhaps be redrafted as suggested by Mr. Murase. At the same time, it might not include full details of how obligations would be apportioned, because the issues of the distribution of such obligations, the plurality of States and shared responsibility would require additional analysis in future reports.

Sir Michael Wood, Mr. Murphy, Mr. Petrič and Ms. Escobar Hernández had expressed agreement with the programme of work he had proposed. Mr. Park had rightly observed that the focus of his third report — on the transfer of rights or claims from an injured predecessor — might need careful consideration to avoid duplication of work. According to Mr. Hassouna, the question of how to consider the role of international organizations should be examined, and consideration of the impact of circumstances precluding wrongfulness would be important.

Mr. Zagaynov had expressed concern that the pace of work might be too fast, but the schedule proposed was not unusual for the Commission. In view of the Commission's workload, however, it was realistic to assume that the first reading of the draft articles might not be completed before 2021. Mr. Hassouna and Ms. Oral had said that consideration should be given to drafting model clauses to be used as a basis for negotiating agreements on succession. Although he agreed, the draft articles in their current form, having a subsidiary character, could also serve that purpose.

A large majority of members had expressed support for referring draft articles 5 to 11 to the Drafting Committee, but Mr. Hmoud was in favour of referring only draft articles 6 to 11. Mr. Reinisch and Mr. Huang had said that draft articles 10 and 11 should not be referred to the Drafting Committee, while Mr. Rajput had suggested only referring certain draft articles or paragraphs of draft articles to the Drafting Committee, an approach which was unacceptable because it would destroy the balance between rules and exceptions that he had tried to establish and would lead to the sort of unjust results that Mr. Reinisch and Mr. Rajput himself had warned against. He therefore supported the majority view and recommended referring all the draft articles proposed in his second report to the Drafting Committee.

**Mr. Hmoud** said that, in his statement on the Special Rapporteur's second report, he had indicated that he would be in favour of referring draft articles 10 and 11 to the Drafting Committee on the understanding that their content would be substantively altered. However, the Special Rapporteur had not made clear in his summing-up of the debate that he intended to change the underlying rule. In the view of the vast majority of Commission members, the general rule was that obligations arising from an internationally wrongful act of the predecessor State did not pass to the successor State. Draft articles 10 and 11 represented a departure from that cardinal rule, which was based on article 2 of the Commission's articles on State responsibility.

**Mr. Nolte** said that he had supported Mr. Hmoud's proposal to give the Drafting Committee wide discretion to alter the content of draft article 10 in particular. His own proposal for draft article 10, which the Special Rapporteur had accepted, would bring about a substantive change of direction. He personally found the Special Rapporteur's explanation satisfactory. In any case, the standard language used to refer draft provisions to

the Drafting Committee should be sufficient to satisfy both the Special Rapporteur and Mr. Hmoud.

**The Chair** said he took it that the Commission wished to refer draft articles 5 to 11 to the Drafting Committee, taking into account the comments, observations and proposals made during the debate.

*It was so decided*.

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

**Mr. Jalloh** (Chair of the Drafting Committee) said that the Drafting Committee on the topic of succession of States in respect of State responsibility was composed of Mr. Argüello Gómez, Mr. Aurescu, Ms. Escobar Hernández, Mr. Grossman Guiloff, Mr. Murphy, Mr. Nolte, Ms. Oral, Mr. Park, Mr. Petrič, Mr. Rajput, Mr. Reinisch, Mr. Ruda Santolaria, Sir Michael Wood and Mr. Zagaynov, together with Mr. Šturma (Special Rapporteur) and Ms. Galvão Teles (Rapporteur), *ex officio*.

**Draft report of the Commission on the work of its seventieth session**

**The Chair** said that, in line with its past practice, the Commission would adopt its report paragraph by paragraph. The members would need to focus on substantive issues in order to ensure the most efficient use of their time.

*Chapter VII. Provisional application of treaties* (A/CN.4/L.920 and A/CN.4/L.920/Add.1)

**The Chair** invited the Commission to consider chapter VII of the draft report, beginning with the portion of the chapter contained in document A/CN.4/L.920.

*A. Introduction*

*Paragraphs 1 to 4*

*Paragraphs 1 to 4 were adopted*.

*B. Consideration of the topic at the present session*

*Paragraph 5*

**Mr. Park**, referring to footnote 4, said that he wished to know whether the decision to reproduce the text of the draft model clauses proposed by the Special Rapporteur but not that of draft guidelines 5 *bis* and 8 *bis*, which the Special Rapporteur had also proposed, was in line with the Commission's usual practice. His preference would be to reproduce the text of draft guidelines 5 *bis* and 8 *bis* in that footnote as well.

**Mr. Murphy** said that, as far as he was aware, if a proposal had been debated, referred to the Drafting Committee, reworked by the Drafting Committee and subsequently adopted with the commentaries, the Commission did not usually reproduce the original text in a footnote in its report, as to do so might cause confusion. The draft model clauses had been included in footnote 4 because, although the Commission had not acted on them, it might nevertheless be useful for the Sixth Committee to see them in the report.

**Mr. Park** said that the Commission's practice in that regard seemed a little inconsistent. For example, in its 2017 report to the General Assembly (A/72/10), chapter VI, on protection of the atmosphere, had not included any footnotes in which the draft guidelines had been reproduced, whereas chapter VII, on immunity of State officials from foreign criminal jurisdiction, had included a footnote in which draft article 7, as originally proposed, had been reproduced. The draft provisions for both of those topics had been adopted with the commentaries.

**Mr. Murphy** said that, in the Commission's 2017 report, the original proposal for draft article 7 on immunity of State officials from foreign criminal jurisdiction had been included in a footnote in chapter VII in order to provide the Sixth Committee with additional information relevant to the debate that had taken place. With regard to chapter

VII of the draft report under consideration, however, the debate had not been reflected, as the Commission had moved beyond it, and the Commission's usual practice in such circumstances was not to reproduce the text of original proposals. However, Mr. Park had been correct to note that the Commission's practice in that regard had not always been consistent, and the Commission should strive to improve the consistency of its working methods.

**Mr. Saboia** said that the reproduction of the draft model clauses in footnote 4 made chapter VII easier to follow.

**Sir Michael Wood** said that the footnote in question might distract the Sixth Committee from the draft guidelines that had been adopted.

**Mr. Tladi** asked whether the Commission would at some point adopt the draft model clauses.

**The Chair** said that the Special Rapporteur's proposal for the draft model clauses had been reproduced in a footnote in order to alert the General Assembly to the fact that the Commission had not yet acted on that proposal. The draft model clauses had not been substantively discussed or referred to any working group. They had been left in the hands of the Special Rapporteur, who might wish to bring them to the Commission's attention in a subsequent report.

**Mr. Murphy** said that it was explained in footnote 16 of the addendum to chapter VII of the draft report (A/CN.4/L.920/Add.1) that the Commission intended to resume its consideration of the draft model clauses proposed by the Special Rapporteur.

**Mr. Gómez-Robledo** (Special Rapporteur) said that the draft model clauses were also mentioned in paragraph 7 of the document currently under consideration.

**Sir Michael Wood** said that it might be clearer for the Sixth Committee if footnote 4 were moved from paragraph 5 to paragraph 7.

**The Chair** said that, in his view, it would make more sense to retain the current text of footnote 4 and to add a new footnote to paragraph 7 containing a cross reference to footnote 4. However, that was a decision for the Special Rapporteur.

**Mr. Gómez-Robledo** said that he agreed with Sir Michael Wood that it would be clearer to move the text of current footnote 4 to a new footnote to be added to paragraph 7.

**Mr. Rajput** said that it would also be helpful to include a cross reference.

**The Chair** said he took it that the Commission wished to move the text of footnote 4 to a new footnote, which would be added to paragraph 7, and to replace it with a cross reference to that new footnote.

*It was so decided*.

*Paragraph 5 was adopted on that understanding*.

*Paragraph 6*

*Paragraph 6 was adopted*.

*Paragraph 7*

**Mr. Murphy** said that, in order to avoid ambiguity, the footnote marker for the new footnote to be added to paragraph 7 should be inserted after the words "a set of draft model clauses".

*Paragraph 7, as supplemented with a footnote, was adopted*.

*Paragraphs 8 to 10*

*Paragraphs 8 to 10 were adopted, subject to their completion by the Secretariat*.

*C. Text of the draft Guide to Provisional Application of Treaties, adopted by the Commission at its seventieth session*

*Title of section C and heading 1*

**Mr. Park** proposed inserting the words “on first reading” after “adopted by the Commission” in the title of section C.

**Mr. Gómez-Robledo** said that he had no strong opinion on the matter. He was not sure what the Committee’s usual practice was in that regard.

**Mr. Tladi** said that, in his view, the title of section C and heading 1 should both be simplified. It was already stated in paragraph 11 that the text of the draft guidelines had been adopted on first reading. As far as he could recall, the Commission did not usually specify in the title of the relevant section of its report that its draft provisions on a given topic had been “adopted by the Commission” at a particular session. He was also not sure about the formulation “draft guidelines constituting the draft Guide to Provisional Application of Treaties”.

**Mr. Nolte** said that the Commission should entrust the Secretariat with applying a uniform style for titles and headings throughout the draft report. His instinct was that the Commission should use the word “draft”, as the guidelines had not yet been adopted on second reading.

**The Chair** said that the title of section C and heading 1 of document A/CN.4/L.920 would be left in abeyance pending a review of the Commission’s relevant practice.

*The meeting rose at 1.10 p.m.*