

Provisional

For participants only

5 August 2019

Original: English

International Law Commission
Seventy-first session (second part)

Provisional summary record of the 3475th meeting

Held at the Palais des Nations, Geneva, on Monday, 8 July 2019, at 3 p.m.

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Present:

Chair: Mr. Šturma
later: Mr. Hmoud (First Vice-Chair)
Members: Mr. Al-Marri
Mr. Argüello Gómez
Mr. Aurescu
Mr. Cissé
Ms. Galvão Teles
Mr. Gómez-Robledo
Mr. Grossman Guiloff
Mr. Hassouna
Mr. Huang
Mr. Laraba
Ms. Lehto
Mr. Murphy
Mr. Nguyen
Mr. Nolte
Ms. Oral
Mr. Park
Mr. Rajput
Mr. Reinisch
Mr. Ruda Santolaria
Mr. Saboia
Mr. Tladi
Mr. Valencia-Ospina
Mr. Vázquez-Bermúdez
Mr. Wako
Mr. Zagaynov

Secretariat:

Mr. Llewellyn Secretary to the Commission

The meeting was called to order at 3.10 p.m.

Protection of the environment in relation to armed conflicts (agenda item 4) (*continued*)
(A/CN.4/728)

Report of the Drafting Committee (A/CN.4/L.937)

Mr. Grossman Guiloff (Chair of the Drafting Committee), introducing the report of the Drafting Committee on the topic “Protection of the environment in relation to armed conflicts” (A/CN.4/L.937), said that the Committee had devoted seven meetings to the topic between 27 May and 4 June 2019. It had discussed the draft principles presented by the Special Rapporteur in her second report (A/CN.4/728), together with reformulations that she had proposed to the Committee in response to suggestions made, or concerns raised, during the debates in the plenary Commission and in the Committee. At the current session, the Committee had provisionally adopted a total of eight draft principles.

The Committee had also discussed the overall structure of the entire set of draft principles and had undertaken a final *toiletage* of the text. As a result, changes had been made to the placement and titles of certain parts of several draft principles, thereby affecting their numbering. Altogether, the Committee had adopted 28 draft principles on first reading, given that the Commission had already provisionally adopted or taken note of 20 draft principles on the topic.

The eight new draft principles provisionally adopted by the Committee were draft principles 8 to 12, 18 and 19, and 26. Draft principles 1 and 2 had been left as provisionally adopted by the Commission. The only change was that they had been placed under a new part one, entitled “Introduction”.

No changes had been made to draft principles 3 to 7, which were under part two, the title of which had been changed by the Committee from “General principles” to “Principles of general application”. The Committee was of the view that the new title better reflected the applicability of the draft principles thereunder. The draft principles under part two did not necessarily apply to all phases of armed conflict, but, as emphasized by the Special Rapporteur, they applied to more than one phase. It had been agreed that that point would be clarified in the commentary.

Draft principle 8 came under part two and was entitled “Human displacement”, as originally proposed by the Special Rapporteur. It related to the environmental effects of human displacement due to armed conflict. As highlighted by the Special Rapporteur in her second report, human displacement was a typical consequence of the outbreak of armed conflict and could give rise to significant human suffering in addition to environmental damage.

The draft principle contained a recommendation that States, international organizations and other relevant actors should take appropriate measures to prevent and mitigate environmental degradation in areas where persons displaced by armed conflict were located, while providing relief and assistance for such persons and local communities.

The Drafting Committee had modified the version of the draft principle that had originally been proposed, as draft principle 14 *bis*, in the Special Rapporteur’s second report. A specific reference to “international organizations” had been added after the word “States” to clarify that such organizations were among the entities to which the draft principle was addressed. There was an understanding that the commentary would explain that the phrase “other relevant actors” included, for example, non-governmental organizations and development agencies. The word “armed” had been added before the word “conflict” to align the draft principle with the scope of the topic and with the language used in the other draft principles. The words “and assistance” had been inserted after the word “relief” to clarify the extent of the recommendation. It should be recalled that, in the context of the topic “Protection of persons in the event of disasters”, the Commission had used the term “relief assistance”. In draft principle 8, the expression “relief and assistance” had been used to capture the type of assistance involved where human displacement occurred. The terms were not intended to convey any meaning other than that given to them in humanitarian work generally.

Draft principle 9 had also been placed in part two. The Drafting Committee had reformulated the draft principle, which had originally been proposed as draft principle 13 *quater* in the Special Rapporteur's second report. Unlike that original proposal, draft principle 9 contained two paragraphs and referred only to "responsibility"; the words "liability" and "liable" had been deleted. Bearing in mind the views expressed by several members, the Committee had agreed that the provision should deal only with the responsibility of States and that any form of liability in the context of the topic should be addressed elsewhere.

The Committee had added a new paragraph 1 to the draft principle that contained a general rule on responsibility of States for internationally wrongful acts in connection with environmental damage for the purposes of the topic under consideration; it also served as an introduction to paragraph 2. Paragraph 1 read: "An internationally wrongful act of a State, in relation to an armed conflict, that causes damage to the environment entails the international responsibility of that State, which is under an obligation to make full reparation for such damage, including damage to the environment in and of itself."

The purpose of the paragraph was to reflect a general obligation of States. Its wording made clear that the internationally wrongful act had to be in relation to an armed conflict and that the obligation of the responsible State to make full reparation for the environmental damage caused included damage caused to the environment *per se*. That language was modelled on articles 1 and 31 (1) of the articles on responsibility of States for internationally wrongful acts. It was also inspired by the judgment of the International Court of Justice in *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, *Compensation Owed by the Republic of Nicaragua to the Republic of Costa Rica*, in which the Court had found that "it is consistent with the principles of international law governing the consequences of internationally wrongful acts, including the principle of full reparation, to hold that compensation is due for damage caused to the environment, in and of itself".

Paragraph 1 had been adopted on the understanding that the commentary would explain that the provision would apply only if two elements were present: first, the act that caused the damage to the environment must be internationally wrongful, in the sense that it violated one or more of the rules of the law of armed conflict that provided protection to the environment, or other applicable rules of international law; and second, such a rule or rules must be binding on the State in question. It was understood that the provision was to be applied in accordance with the rules on responsibility of States for internationally wrongful acts and that the meaning of the expression "in and of itself" would be explained in the commentary. Finally, it had been agreed that, since environmental damage might be difficult to quantify and define, the commentary should include the non-exhaustive list set forth in paragraph 35 of decision 7 (1992) ([S/AC.26/1991/7/Rev.1](#)) of the United Nations Compensation Commission, which had been established by the Security Council in 1991 to deal with claims concerning the Iraqi invasion and occupation of Kuwait.

Paragraph 2 of draft principle 9 contained a "without prejudice" clause specifying that the draft principles were without prejudice to the rules on responsibility of States for internationally wrongful acts. Paragraph 2 corresponded to paragraph 1 as originally proposed by the Special Rapporteur, but had been modified by the Drafting Committee. First, the word "existing" had been deleted, on the grounds that it was superfluous and would misleadingly anchor the provision in a specific point in time. Second, the words "rules of international law on responsibility and liability of States" had been replaced with "rules on the responsibility of States for internationally wrongful acts". The change had been introduced to align the provision with language previously used by the Commission in relation to State responsibility, and in particular with the articles on responsibility of States for internationally wrongful acts. The Committee had determined that the "without prejudice" clause should become paragraph 2 and should follow the substantive text of paragraph 1. Lastly, it had decided that the title of the draft principle should be changed to "State responsibility", which better reflected the substance of the provision.

Paragraph 2 of draft principle 13 *quater*, as proposed by the Special Rapporteur in her second report, had been reformulated as a stand-alone draft principle 26. Paragraph 3 of that original proposal, which restated the idea that damage to the environment in and of

itself was compensable under international law, was reflected in paragraph 1 of draft principle 9. After discussing the matter, the Drafting Committee had concluded that the concept, including with regard to “ecosystem services”, should be explained in the commentary.

Draft principle 10, which had also been placed in part two, was entitled “Corporate due diligence”; that title was the same as the title of the draft principle 6 *bis* proposed in the Special Rapporteur’s second report. It contained a recommendation that States should take appropriate legislative and other measures aimed at ensuring that corporations and other business enterprises operating in or from their territories exercised due diligence with respect to the protection of the environment, including in relation to human health, when acting in an area of armed conflict or in a post-armed conflict situation. The draft principle explained that such measures included those aimed at ensuring that natural resources were purchased or obtained in an environmentally sustainable manner.

An extensive debate had taken place in the Drafting Committee regarding several aspects of draft principle 10. First, members had discussed the meaning of the words “appropriate legislative and other measures”. The word “appropriate” had been chosen in place of the word “necessary”, which had been proposed by the Special Rapporteur, in order to give States flexibility when they decided what measures to take at the national level. There was an understanding that the commentary would explain that “other measures”, which included judicial and administrative measures, could be wide-ranging.

Second, some members of the Committee had been in favour of retaining the words “to ensure” after “legislative and other measures”, as originally proposed by the Special Rapporteur, rather than replacing them with “aimed at ensuring”. The Committee had decided, however, that the latter wording better reflected the purposive nature of draft principle 10 and the fact that it contained a recommendation to States.

Third, the Drafting Committee had considered it necessary to insert the words “and other business enterprises” after “corporations”. It had taken the view that referring only to “corporations” would limit the scope of the provision by failing to capture other business enterprises that might be acting in an area of armed conflict or in a post-armed conflict situation. In that connection, there was an understanding that the commentary would explain that the exact nature of a corporation or other business enterprise depended on the national law of the State concerned.

Fourth, the Special Rapporteur’s original proposal included the words “and precaution” after “due diligence”. The Drafting Committee had deleted those words on the grounds that the notion of “precaution” was inherent in the notion of “due diligence” and that, insofar as the draft principle was not related to the precautionary principle under environmental law, that deletion was appropriate as a way to avoid misunderstandings.

Fifth, there had been differing views on the reference to “human health” in the draft principle. Some members of the Drafting Committee had taken the view that the reference should be deleted, as “human health” lay outside the scope of the topic. Other members had expressed the view that the protection of the environment and human health were intrinsically linked and that the reference should thus be retained. The Committee had found that the phrase “with respect to the protection of the environment, including in relation to human health” was an acceptable compromise that confined the draft principle to the scope of the topic. There was an understanding that the commentary would explain that “human health” was being referred to in the context of the protection of the environment.

Sixth, members had discussed whether the phrases “area of armed conflict” and “post-armed conflict situation” were precise enough for the purposes of the draft principle, since they were not defined or used elsewhere in the draft principles. In particular, some members had raised the concern that the phrases were unclear, in that they could relate either to a geographical notion or to a period in time. The Committee had concluded, however, that the phrases should be retained, on the understanding that their meaning for the purposes of the draft principle would be explained in the commentary.

Lastly, a debate had taken place on the second sentence of draft principle 6 *bis* as originally proposed by the Special Rapporteur, in particular the use of the word “equitable”.

Some members had taken the view that that word should be deleted because it was too general and could imply an intention to impose a fair trade obligation on States. The view had also been expressed that, if the word “equitable” was deleted, the word “environmentally” should also be deleted, since the term “environmentally sustainable” did not accurately capture the concept of sustainability. Other members had argued that the word “equitable” should be retained, as it was commonly used in the context of corporate responsibility. The Drafting Committee had settled on the deletion of the word “equitable”, on the understanding that the phrase “environmentally sustainable manner” was not being used in a way that deviated from the established concept of sustainability that encompassed ecological, economic and social aspects.

In that vein, draft principle 10 had been adopted on the understanding that the concerns raised by members of the Drafting Committee on several issues, including the references to “human health”, “area of armed conflict” and “post-armed conflict situation”, and the deletion of the word “equitable”, would be addressed in the commentary.

Draft principle 11 had also been placed in part two. It was based on the Special Rapporteur’s proposed draft principle 13 *quinquies*, which employed the word “responsibility”. In the light of views expressed by several members, the Drafting Committee had agreed that the provision should deal only with the “liability” of corporations and other business enterprises in the context of the topic. As a result, references to “responsibility” had been deleted.

The Drafting Committee had made a number of changes to the text originally proposed by the Special Rapporteur. Draft principle 11 contained a recommendation to States, and had three components. First, States were encouraged to take appropriate legislative and other measures aimed at ensuring that corporations and other business enterprises operating in or from their territories could be held liable for harm caused by them to the environment, including in relation to human health, in an area of armed conflict or in a post-armed conflict situation. Second, the text explained that such measures should, as appropriate, include those aimed at ensuring that a corporation or other business enterprise could be held liable to the extent that such harm was caused by its subsidiary acting under its *de facto* control. Third, it explained that, to that end, as appropriate, States should provide adequate and effective procedures and remedies, in particular for the victims of such harm.

The first sentence of draft principle 11 borrowed language from draft principle 10, and contained a general recommendation to States on the subject of corporate liability. The second sentence addressed the relationship between parent companies and their subsidiaries. It sought to clarify the scope of the general recommendation contained in the first sentence. Some members had expressed concern that the second sentence would enter the realm of application of extraterritorial jurisdiction and had argued that it should be deleted and its contents addressed in the commentary. Other members had been in favour of retaining the second sentence, as its focus on the relationship between parent companies and their subsidiaries provided added value. The Drafting Committee had concluded that the second sentence should be retained on the understanding that the various elements therein would be carefully explained in the commentary. The Committee had also debated the use of the expression “acting under its *de facto* control” and the meaning of that phrase for the purposes of draft principle 11. One suggestion had been that a distinction should be drawn between *de facto* control over a corporation and *de facto* control over a particular act. The Committee had concluded that *de facto* control was to be interpreted in accordance with the requirements of each national jurisdiction. It had agreed that the meaning of the expression “*de facto* control” for the purposes of draft principle 11 would be explained in the commentary.

The Committee had also agreed that the third and final sentence of draft principle 11 referred to both the first and second sentences. The words “adequate and effective procedures and remedies” were a general formulation that allowed States to exercise flexibility when applying the provision at the national level. The concept of “victims” was understood not to be limited to that of “human health”, as “victims” was a broader concept that included individuals who made a living from the environment itself. The Committee had agreed that the matter should be addressed in the commentary.

Since the language of draft principle 11 was aligned with that of draft principle 10, the explanations that he had given about the commentary to draft principle 10, in particular in relation to “human health”, “area of armed conflict” and “post-armed conflict situation”, also applied to draft principle 11.

The title of draft principle 11 was “Corporate liability”. The only change that the Committee had made to the Special Rapporteur’s original proposal had been to replace the word “responsibility” with “liability”, for the reasons that he had already stated.

Draft principle 12, which was based on the Special Rapporteur’s proposed draft principle 8 *bis*, was the first draft principle included in the new part three on principles applicable during armed conflict. It had been inspired by the text of the Martens clause as contained in the Hague Convention respecting the Laws and Customs of War on Land, the Geneva Conventions of 12 August 1949 and the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I). The draft principle provided that, in cases not covered by international agreements, the environment remained under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.

Divergent views had been expressed in the Drafting Committee with regard to the phase or phases of armed conflict during which the draft principle was applicable and where it should consequently be placed among the other draft principles. The Committee had ultimately agreed that the provision should be placed at the beginning of part three and that the commentary should explain that it also applied in situations of occupation.

The reference to “the principles of humanity” had given rise to a debate in the Drafting Committee, as such principles specifically served human beings. The Committee had concluded that the expression should be retained so as to preserve the integrity of the text of the original Martens clause and to demonstrate the intrinsic link between the survival of people and the state of the environment in which they lived.

Some members had emphasized that the reference to “present and future generations” in the Special Rapporteur’s original proposal should be deleted so as not to distort the text of the original Martens clause. Others had expressed the view that the draft principle applied to all phases of armed conflict and that the reference should therefore be retained. Another argument had been that the interest of present and future generations was already covered by the term “public conscience”. The Drafting Committee had ultimately decided that the matter would be better addressed in the commentary, and the reference had accordingly been deleted. In addition, the word “from” had been repeated in front of the words “the principles of humanity” and “the dictates of public conscience” in order to align the text further with that of the Martens clause contained in article 1 (2) of Protocol I additional to the Geneva Conventions of 1949.

The Special Rapporteur had originally proposed that the title of the draft principle should be “Martens clause”. However, the Drafting Committee had decided that, in order to bring greater clarity to the provision, and given the scope of the topic, the title should be changed to “Martens clause with respect to the protection of the environment in relation to armed conflict”.

Draft principle 12 had been adopted on the understanding that its inclusion neither meant nor implied that the Commission was taking a position regarding the legal consequences of the Martens clause. That understanding would be explained in the commentary.

The Drafting Committee had decided not to make any changes to the text of draft principles 13 to 17, which corresponded to draft principles 9 to 13 as provisionally adopted by the Commission. Those draft principles had also been included in the new part three.

Draft principle 18, which corresponded to the Special Rapporteur’s proposed draft principle 13 *ter*, set out the prohibition of the worst forms of misappropriation of resources in armed conflict, which could be characterized as pillage. The prohibition of pillage was enshrined in the Geneva Convention relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), the Protocol additional to the Geneva Conventions of

12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II) and national legislation, as well as in military manuals. The inclusion of a provision prohibiting the pillage of natural resources that could be subject to ownership and constitute property had thus been deemed useful. The Drafting Committee had provisionally adopted the text of the draft principle as proposed by the Special Rapporteur in her second report. The meaning of the word “pillage” in the draft principle would be explained in the commentary. Reference would also be made in the commentary to the broader context of illegal exploitation of natural resources, which underscored the applicability of the prohibition of pillage to such resources, and it would be explained that, given the scope of the topic, the draft principle pertained only to the pillage of natural resources.

The Drafting Committee had decided to change the title of the draft principle from “Pillage” to “Prohibition of pillage” so as to better reflect its content.

The Drafting Committee had adopted the text of draft principle 19, which was based on the Special Rapporteur’s proposed draft principle 13 *bis*, with changes aimed at ensuring closer alignment with article I of the 1976 Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques. The draft principle provided that, in accordance with their international obligations, States “shall not engage in military or any other hostile use of environmental modification techniques having widespread, long-lasting or severe effects as the means of destruction, damage or injury to any other State”. It served as a specific provision prohibiting the deliberate manipulation of the environment for use as a weapon.

Some members had taken the view that the expression “in accordance with their international obligations” encompassed only treaty obligations. The commentary would explain that the expression “environmental modification techniques” had the same meaning as the one set forth in article II of the Environmental Modification Convention, and would address the issue of environmental modification techniques in the context of non-international armed conflicts.

The Drafting Committee had debated whether a draft principle should be added to address the matter of weapons that had a serious impact on the environment. Indeed, the view had been expressed that the topic could not be addressed comprehensively unless the issue of weapons, in particular biological and chemical weapons, was considered. The Drafting Committee had concluded that such a draft principle was not necessary for the purposes of the topic and might even be misleading. It had agreed that the commentary should specify that the Commission’s work on the topic was without prejudice to existing rules on specific weapons.

No changes had been made to the text of draft principles 20 to 22, which corresponded to draft principles 19 to 21 as previously adopted provisionally by the Drafting Committee and noted by the Commission. They remained under part four of the draft principles, entitled “Principles applicable in situations of occupation”. Following the restructuring of the draft principles, part four now preceded the part that had originally been proposed as part three, which was now entitled “Part five: Principles applicable after armed conflict”.

With regard to part five itself, no changes had been made to the text of draft principles 23, 24 and 25, which corresponded, respectively, to draft principles 14, 18 and 15 as provisionally adopted by the Commission. The Drafting Committee had placed the draft principle on sharing and granting access to information immediately after the draft principle on peace processes.

Draft principle 26 on relief and assistance was closely linked to draft principle 25 on post-armed conflict environmental assessments and remedial measures. It addressed situations in which damage had been caused to the environment, and encouraged States to take appropriate measures so that the damage did not remain unrepaired or uncompensated, when the source of environmental damage in relation to an armed conflict was unidentified or reparation was unavailable, and to consider establishing special compensation funds or providing other forms of relief or assistance. The draft principle had been placed in part

five because the Drafting Committee had agreed that it applied only in post-armed conflict situations.

The meaning of the words “reparation”, “unrepaired” and “uncompensated” and the link between those words in draft principle 26 and the term “remedial measures” in draft principle 25 had given rise to a debate in the Drafting Committee. The meaning of the words in question and the connection between draft principles 25 and 26 would be explained in the commentary. The Drafting Committee had decided that the ultimate objective of draft principle 26 was to regulate relief and assistance in situations in which the source of environmental damage was unidentified or reparation was unavailable. The provision was accordingly entitled “Relief and assistance”.

No changes had been made to the text of draft principles 27 and 28, which had previously been provisionally adopted by the Commission as draft principles 16 and 17.

He wished to clarify one last issue that had been raised in the Special Rapporteur’s second report and debated in the plenary Commission, namely the use of the terms “natural environment” and “environment”. The Drafting Committee had decided to retain the language provisionally adopted by the Commission, on the understanding that the issue would be discussed during the second reading.

As the Commission had completed its work on the topic, he recommended the adoption, on first reading, of the entire set of draft principles on protection of the environment in relation to armed conflicts.

The Chair invited the members of the Commission to proceed with the adoption of the text and titles of the draft principles provisionally adopted by the Drafting Committee on first reading ([A/CN.4/L.937](#)).

Draft principles 1 to 28

Draft principles 1 to 28 were adopted.

The Chair said he took it that the Commission wished to adopt, on first reading, the text and titles of the draft principles on protection of the environment in relation to armed conflicts, as a whole.

It was so decided.

Ms. Lehto (Special Rapporteur), thanking the members of the Commission, the Secretariat and assistants for their contributions to the work on the topic, said that the Commission’s adoption of the set of draft principles on first reading was very timely, as the International Committee of the Red Cross (ICRC) was finishing its work on the revised guidelines on the protection of the environment in times of armed conflict. The two projects were complementary: the ICRC guidelines restated the rules of the law of armed conflict aimed at protecting the environment, whereas the Commission had approached the topic from a broader perspective. She wished to commend the first Special Rapporteur on the topic, Marie G. Jacobsson, and the Commission as a whole, for the manner in which the topic had been framed, including the decision to take a temporal approach, which had made it possible to benefit from recent advances in knowledge about the environmental effects of armed conflict.

Mr. Hmoud, First Vice-Chair, took the Chair.

Succession of States in respect of State responsibility (agenda item 6) ([A/CN.4/731](#))

Mr. Šturma (Special Rapporteur), introducing his third report on succession of States in respect of State responsibility ([A/CN.4/731](#)), said that part one of the report provided an overview of the work completed thus far on the topic and of the 2018 debate in the Sixth Committee. As the work was in its early stages, he was willing to consider any suggestions and necessary modifications that might be proposed. At the same time, he intended to follow the plan of work that he had laid out in his first report ([A/CN.4/708](#)), while avoiding undue haste in producing new draft articles. Accordingly, the report proposed only four new substantive draft articles, in addition to one new definition and two provisions on the scope of parts II and III of the draft articles. Chapter I (B), specifically

paragraphs 17 to 23, offered clarification of the general approach adopted in the light of past debates, and chapter I (C) reflected the need for a clearer explanation of some complex issues related to the intersection between succession of States and the law of State responsibility. The approach ruled out both the automatic extinction of responsibility and the automatic transfer of responsibility in cases of succession of States.

Part one of the report also referred to the complex situations that might arise when both a predecessor State and one or more successor States could claim reparation from a wrongdoing State. If one such State received full reparation from the wrongdoing State, the other State or States could eventually seek compensation as well. However, that idea would be elaborated upon in the fourth report. Finally, in relation to the time element, the draft articles applied only to situations where injury had not been made good by reparation before the date of succession of States, as was expressly stated in draft articles X and Y.

Part two of the report dealt with the “passive” aspect of State responsibility in respect of reparation for injury resulting from internationally wrongful acts committed against a predecessor State, where the succession of States concerned the injured State or States. The approach adopted in the report differed from the one taken by the Institute of International Law, which had addressed simultaneously the secondary rights and obligations related to different categories of succession of States. One important difference between succession to the right to reparation and succession to obligations arising from State responsibility was that the former was merely a consequence of the internationally wrongful act of the responsible State, which was not affected by the territorial modifications that had given rise to the succession of States. In his report, the possible transfer of rights was therefore analysed separately from the possible transfer of obligations.

In part two of the report, situations in which the predecessor State continued to exist after the date of the succession of States were considered separately from situations in which the predecessor State ceased to exist. Succession of States did not affect the right of a predecessor State that continued to exist to claim reparation from a wrongdoing State for acts committed before the date of succession; that premise was based on the general rules on State responsibility. However, it did not answer all questions that could arise from situations in which the injury primarily or exclusively affected a part of the territory that became territory of the successor State, as might be the case when the injury caused by an internationally wrongful act against a predecessor State affected persons who subsequently became nationals of the successor State, as in situations such as decolonization, separation or transfer of the territory. It was hard to imagine that such a predecessor State could, after the date of succession, still claim reparation for injury caused to the population of a territory that had become a part of the successor State.

In the second type of situation, when a predecessor State that had been the victim of an internationally wrongful act of another State ceased to exist, the prevailing opinion in doctrine was that the right to reparation did not devolve from the predecessor State to the successor State. However, differentiation between cases of dissolution and cases of separation of a State was often based on broader political considerations rather than the application of objectively assessable criteria. Consequently, blind application of the criteria for determining the continuity of legal personality could result in the discriminatory treatment of States that were in a situation of disputed continuity. Furthermore, doctrinal opinions based on the idea that the right to claim reparation for injury belonged only to the predecessor State seemed to be a reflection of the old positivist doctrine that had viewed State responsibility as a capacity closely linked to legal personality, not as a body of rights and obligations of a secondary nature.

Chapter III analysed claims for reparation in different categories of State succession on the basis of State practice, which consisted mainly of agreements and a few decisions of international courts. State practice was limited owing to the limited number of cases of succession of States. Draft articles 12, 13 and 14 distinguished between situations in which the predecessor State continued to exist after the date of the succession of States and situations in which it ceased to exist. In respect of the former, draft article 12 was based on the principle that a predecessor State might request reparation from the wrongdoing State even after the date of succession. However, under paragraph 2 of that draft article, the successor State could request reparation from the responsible State in special circumstances

where the injury related to the part of the territory or the nationals of the predecessor State that had become the territory or nationals of the successor State.

In draft articles 13 (Uniting of States) and 14 (Dissolution of States), concerning the idea that the successor State might request reparation from the responsible State, the use of the expression “may request” was meant to rebut any allegation of automatic succession. As practice showed that most agreements were reached as a result of claims, that wording simply reflected the idea that a successor State was able to present a claim or request for reparation. That idea was fully compatible with the general approach that gave priority to agreements, which was expressly recognized in draft article 1 (2), as provisionally adopted by the Drafting Committee in 2018. Draft article 13 (2) also mentioned the possibility that another agreed solution might be reached. Draft article 14 (2), furthermore, recalled that any claims and agreements should take into consideration a nexus between the consequences of an internationally wrongful act and the territory or nationals of the successor State, an equitable proportion and other relevant factors. Such factors might include the principle of unjust enrichment.

Chapter IV dealt with possible succession to the right to reparation in cases where an internationally wrongful act had been committed against nationals of the predecessor State. The analysis of State practice on which it was based was even more extensive than that related to injury arising from such acts committed against the predecessor State itself, and included agreements and cases referred to arbitral bodies, international courts or the United Nations Compensation Commission. The chapter also showed that the possibility that a successor State might make a claim for reparation was far from being remote or purely theoretical. That possibility concerned more than inter-State relations; it also had important practical consequences for States’ ability to effectively exercise diplomatic protection in case of injury suffered before the date of succession by individuals who had subsequently become their nationals.

Chapter IV was based on the distinction between the traditional approach, as reflected in the rule of continuous nationality, and the modern approach, developed over more than a century, that rejected the strict application of that rule in situations where the loss of the former nationality and acquisition of the new nationality occurred in a manner not inconsistent with international law. Both modern practice and doctrine, including the Commission’s previous work on the topic of diplomatic protection, seemed to confirm that a change of nationality resulting from succession of States was now largely accepted as an exception to the rule of continuous nationality. Draft article 15 (Diplomatic protection) thus proposed a solution that was consistent with the Commission’s articles on diplomatic protection and the relevant resolution of the Institute of International Law. Under paragraph 1, a successor State could exercise diplomatic protection under special circumstances; under paragraph 2, a claim in exercise of diplomatic protection initiated by the predecessor State could, under the same conditions, be continued after the date of succession by the successor State. Paragraph 3 specified that the first two paragraphs were without prejudice to the application of rules of State responsibility relating to the nationality of claims and rules of diplomatic protection.

In part three of the report, which was quite different from the other parts, chapter V focused on the consolidation and organization of the draft articles submitted thus far, four of which had already been provisionally adopted by the Drafting Committee, while others had been referred to it but had not yet been discussed and adopted; the Special Rapporteur hoped that some new draft articles could also be referred to the Committee during the current session. It seemed useful to organize all the draft articles into parts I, II and III, for which titles were proposed; other parts would be proposed at a later stage. Draft article X addressed the scope of part II, while draft article Y addressed that of part III.

The term “States concerned” was defined in proposed draft article 2 (f) as meaning a State which had committed an internationally wrongful act before the date of succession of States, a State injured by such act and a successor State or States of either of those States. It seemed important to include that definition because the draft articles made frequent use of the term, which had a special meaning in the context of succession of States. Although definitions of other terms had been suggested or considered during the previous year’s debates in the Commission or in the Drafting Committee, the Special Rapporteur had

decided, after thorough consideration, that they should not be included, although other definitions might be included in future reports.

Concerning the future programme of work, he hoped that the Commission would adopt the four draft articles discussed in 2017 and 2018, with commentaries, during the current session. To that end, he had prepared and circulated draft commentaries which, if referred to the Drafting Committee and then adopted, should appear in the Commission's report to the General Assembly so as to provide States with clear information on the progress of work. The Drafting Committee would promptly begin consideration of a working paper, prepared with the assistance of the Secretariat, that contained a revised version of the draft articles submitted the previous year. If time permitted, the Committee might also consider the new draft articles submitted at the current session, if the Commission decided to refer them to the Committee. For obvious reasons, the Special Rapporteur would not be able to prepare commentaries on other draft articles provisionally adopted by the Drafting Committee at the current session, but they would be ready before the beginning of the seventy-second session in 2020.

His fourth report would focus on forms and invocation of responsibility in the context of succession of States, such as restitution, compensation and assurances of non-repetition. Procedural and miscellaneous issues, including problems arising in situations where there were several successor States and the issue of shared responsibility, might also be addressed. Depending on the progress of the debate on the reports of the Special Rapporteur and the overall workload of the Commission, it might be possible to complete the topic on first reading in 2020 or, perhaps more realistically, in 2021.

Mr. Park, welcoming the in-depth analysis of relevant State practice, jurisprudence and doctrine in the Special Rapporteur's third report, said that the suggestion made by some delegations in the Sixth Committee that the title of the topic should be changed to "State responsibility problems in cases of succession of States" would deliberately shift the focus of the topic, thereby undermining the consistency of the Commission's discussions, which had thus far been in line with its previous work on State succession: 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 1999 articles on nationality of natural persons in relation to the succession of States.

The seven general points set out in paragraphs 17 to 23 of the report, in addition to providing useful guidance on the Special Rapporteur's overall approach, revealed potentially controversial aspects of the topic. While he agreed with the points made in paragraphs 17, 18, 19 and 22, the issues raised in paragraphs 20, 21 and 23 merited further consideration.

With regard to paragraph 20, while it was true that the Commission had accepted the Special Rapporteur's proposed programme of work, under which the Commission would first consider the transfer of obligations arising from the commission of an internationally wrongful act and would then consider the transfer of rights, including the possibility of claiming reparation, that did not necessarily mean that the issues of rights, on the one hand, and obligations, on the other, for specific categories of State succession should be dealt with in separate draft articles. That seemed to be the approach favoured by the Special Rapporteur, but he continued to believe that it would lead to duplication and inefficiency, as he had stated at the Commission's seventieth session ([A/CN.4/SR.3431](#)).

In paragraph 21 of the report, the Special Rapporteur suggested that some categories of State succession should be grouped together and dealt with in the same draft article. In particular, as indicated in paragraph 65 of the report, the intention was to merge provisions that dealt with cases in which the predecessor State continued to exist. While he understood that the Special Rapporteur wished to avoid cleaving too closely to work already done on the topic by the Institute of International Law, the Commission should not be afraid to take the same approach as the Institute if doing so would serve its purposes.

Serious discussion was needed as to how best to structure the draft articles, taking into account their intended audience. The Special Rapporteur had suggested that the transfer of rights and the transfer of obligations should be dealt with separately, divided into cases where the predecessor State continued to exist and cases where it had disappeared,

and further subdivided into specific categories of State succession. Another option would be to organize the draft articles according to those specific categories and to deal with rights and obligations for each category together in the same draft article, with additional paragraphs covering specific points. In his view, such a structure would be more effective, as the categories of State succession would be identified first, and then questions regarding rights and obligations would be addressed together. Thus, for each category of State succession, users would find all possible scenarios for the transfer of rights and obligations together in the same draft article. If the Commission decided to deal with rights and obligations in separate draft articles, each category should be dealt with individually, even if it increased the number of draft articles overall. The various circumstances in which predecessor States continued to exist could be dealt with in the same draft article, as the Special Rapporteur had done in draft article 12, but situations in which the predecessor State or States had ceased to exist could not be addressed in that manner. For the sake of consistency, draft article 13, which concerned the uniting of States, should not be merged with draft article 14, which concerned the dissolution of States.

With regard to the obligation to provide full reparation for an internationally wrongful act, referred to in paragraph 23 of the report, he questioned whether full reparation was a necessary requirement for the topic, given that paragraph 39 of the report emphasized the validity of lump-sum agreements concluded before the date of State succession. Further discussion of the relationship between lump-sum agreements and the principle of full reparation was needed before a general approach could be determined.

Within both the Commission and the Sixth Committee, the general principle of non-succession had been repeatedly noted. The Special Rapporteur's statement that he was not seeking to replace a highly general theory of non-succession with an inverse theory in favour of succession, but rather to adopt what he described as "a more flexible and realistic approach", required further clarification. Despite the Special Rapporteur's assertion that such an approach would exclude "both the (automatic) extinction of responsibility and the automatic transfer of responsibility in cases of succession of States", automatic extinction would become the default principle, with exceptions where necessary, if the principle of non-succession was retained.

The terms used for specific categories of State succession should be clarified and used consistently in the discussion of the topic and the drafting of the articles. For example, he noted that both "unification of States" and "uniting of States" were used in the Special Rapporteur's report. In addition, as he had stated at the seventieth session, it would be preferable to avoid referring to the controversial concept of "secession".

Aside from certain specific issues of wording that could be dealt with by the Drafting Committee, he agreed with both the form and the content of draft article 12, notwithstanding the need to consider the underlying principle of addressing several categories of State succession in the same draft article. The linguistic approach taken by the Special Rapporteur served to emphasize that draft article 12 dealt not with automatic succession but with the mere possibility of claiming reparation under certain special circumstances.

In his view, the two situations covered by draft article 13, namely the merging of two States into a single State and the incorporation of one State into another State, should be dealt with separately. Although the conclusion that rights were transferred might be true in both cases, as both involved the disappearance of predecessor States and the establishment of the new legal personality of the successor State, the two cases were explicitly different in terms of legal change: when two States merged into one, the legal personality of both predecessor States was extinguished, whereas when one State was incorporated into another, the legal personality of only one of the predecessor States was extinguished. He suggested that the two situations should be addressed in separate draft articles, both of which should reflect the general statement that rights could pass to the successor State and that agreement between the States concerned took precedence.

Draft article 14 was entitled "Dissolution of States", but paragraph 1 referred to the separation of parts of a State. That paragraph should instead refer to the situation where a State dissolved and ceased to exist and the parts of its territory formed two or more

successor States. In paragraph 2, the word “agreements” was unclear. If it referred to agreements entered into by or between successor States, such agreements should be considered, perhaps on a priority basis, along with the other elements listed in that paragraph, such as a nexus between the consequences of an internationally wrongful act and the territory or nationals of the successor State, an equitable proportion, and other relevant factors. As it stood, draft article 14 did not reflect what was noted in paragraph 79 of the report, namely an “agreement between the successor States”. He suggested that draft article 14 (3) should be amended to read “The provisions of paragraphs 1 and 2 are without prejudice to any agreement between successor States or any question of compensation between the successor States”.

With regard to diplomatic protection, the Special Rapporteur, having analysed the modern approach taken in legal writings, case law and State practice, had proposed draft article 15, which was intended to avoid the inequitable consequences of the traditional, rigid approach whereby nationality was deemed to be continuous in the context of State succession. That flexible, modern approach deserved support, as State succession entailed an involuntary change of nationality. As noted by the Special Rapporteur, the principle of continuous nationality should not prevent the transfer of the right to reparation from the predecessor State to the successor State. The preamble to the articles on nationality of natural persons in relation to the succession of States stressed that due account should be taken both of the legitimate interests of States and those of individuals. Thus, although diplomatic protection was a right of States, its purpose was to protect the rights of individuals: the State exercised the right for or on behalf of its nationals. Draft article 15 (1) resembled article 5 (2) of the Commission’s 2006 articles on diplomatic protection, as did article 10 (1) of the 2015 resolution of the Institute of International Law on succession of States in matters of international responsibility.

The proposed inclusion of draft articles X and Y to define the scope of parts II and III of the draft articles, respectively, was an issue of form rather than substance, and could be discussed once the Commission had agreed on the overall structure of the draft articles. Regarding draft article 2 on the use of terms, the definition of “States concerned” that the Special Rapporteur had proposed with the aim of capturing all possible situations seemed too broad; such a definition was probably unnecessary. Lastly, regarding the future programme of work proposed by the Special Rapporteur, he cautioned against a hasty examination of the draft articles, given the importance of the topic. The Commission should consider the proposals thoroughly, even if that meant that it was unable to adhere to the planned schedule.

The meeting rose at 5.45 p.m.