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Held at the Palais des Nations, Geneva, on Tuesday, 9 July 2019, at 10 a.m.

Contents

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Present:

Chair:	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. Šturma
	Mr. Tladi
	Mr. Valencia-Ospina
	Mr. Vázquez-Bermúdez
	Mr. Wako
	Mr. Zagaynov

Secretariat:

Mr. Llewellyn	Secretary to the Commission

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

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

Succession of States in respect of State responsibility (agenda item 6) (*continued*) (A/CN.4/731)

The Chair invited the Commission to resume its consideration of the third report on succession of States in respect of State responsibility (A/CN.4/731).

Mr. Hassouna said that he wished to express his deep appreciation to the Special Rapporteur for his third report. The approach taken by the Special Rapporteur deserved the Commission's support.

He generally agreed with the overall methodology adopted by the Special Rapporteur in his third report and welcomed the clarifications provided in paragraphs 17 to 23 regarding the work undertaken on the topic to date. During the seventy-third session of the Sixth Committee in 2018, some States had raised the issue of the scarcity of State practice in relation to the topic. In paragraph 19 of the report, the Special Rapporteur had acknowledged that State practice in the area was "diverse, context-specific and sensitive," but had also asserted that the inconclusiveness of State practice did not mean that the Commission's work on the topic was impossible or could not be useful. He himself fully agreed with the Special Rapporteur that the Commission's role was not limited to mere codification of well-established rules of international law; it also included the "progressive development of international law", as set forth in Article 13 of the Charter of the United Nations.

The excellent memorandum prepared by the Secretariat, entitled "Information on treaties which may be of relevance to the future work of the Commission on the topic" (A/CN.4/730), provided a helpful overview of relevant legal documents that were primary evidence of State practice. However, it was apparent that, with a few notable exceptions, most of the treaties referenced in the memorandum were devolution treaties originating from the historical context of decolonization, which was just one special case of State succession. Moreover, most of the treaties were concerned with a special case and did not suffice as evidence of a general rule of State succession in respect of State responsibility. He nevertheless had no doubt that the memorandum would assist the Special Rapporteur in incorporating more examples of State practice in his analysis.

In paragraph 17 of the report, the Special Rapporteur fully recognized the subsidiary nature of the draft articles, an issue commented on by some delegations in the Sixth Committee, and the priority of agreements between the States concerned. He himself therefore welcomed the Special Rapporteur's statement, in the same paragraph, that the draft articles being prepared under the current topic had to be understood as having a residual character.

On the question of the form of the draft articles, during the debate in the Sixth Committee a range of views had been presented by States, including preferences for, *inter alia*, draft articles, general conclusions, draft guidelines and model clauses. The Working Group on methods of work had considered all of those options at its most recent meetings. The Special Rapporteur had not addressed in the third report the form the output of the topic would take, having initially proposed to deal with the topic on the basis of draft articles. He himself continued to take the position that the Commission should postpone a final decision on the matter until it had concluded more substantive work on the topic and was better placed to select the most suitable outcome. At that point, it could make any necessary drafting adjustments to the form of the final output.

A number of delegations in the Sixth Committee had highlighted the importance of maintaining consistency 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 2001 articles on responsibility of States for internationally wrongful acts. In that context, he agreed with the view expressed by the Special Rapporteur in paragraph 18 of the report that work on the topic must preserve such consistency while taking into account the differences in the nature of legal relations based

on treaties and the nature of those concerning property rights and obligations stemming from an internationally wrongful act. As a general rule, therefore, the Commission's work should not contradict its previous work; rather, it should build on it to fill the existing legal gaps in the field of State succession. Lastly, some States had suggested changing the title of the topic, a suggestion he did not agree with at such an advanced stage of the Commission's work on the topic.

In paragraph 20 of the third report, the Special Rapporteur stated that while in the second report he had focused on the question of the transfer of obligations arising from the commission of an internationally wrongful act, he would in the current report consider the issue of the transfer of rights. However, it was commonly acknowledged that many obligations were merely the counterparts or mirror images of other rights. For example, the 1978 Vienna Convention and the 2015 resolution of the Institute of International Law on succession of States in matters of international responsibility combined obligations and rights under the relevant articles. However, the Special Rapporteur's approach indicated a distinction between the rules that could be drawn from State practice on obligations and those that could be drawn from State practice on rights. While he appreciated the Special Rapporteur's reasons for dividing the analysis into two categories, as explained in paragraph 42 of the report, he believed that it would be necessary to revise the proposed draft articles at a later stage in order to bring back together the interlinked concepts of rights and obligations.

Turning to the sources relied on in the report, he said that he welcomed the Special Rapporteur's inclusion of a diverse set of examples of State practice. However, many parts of the report still relied only on European sources. He himself had compiled a list of all the cases directly referenced by the Special Rapporteur in the footnotes of the report and had found that 22 of the 36 cases involved at least one European country, while the remaining 14 related solely to States outside Europe. He therefore believed, as had been requested in the Sixth Committee, that it was still necessary to consult more sources from different parts of the world. A comprehensive review of State practice in relation to the topic was important in ensuring that the Commission's work would serve situations of succession worldwide. Although in that regard the Commission had received valuable information from the memorandum prepared by the Secretariat, it should nevertheless continue to solicit additional material from States, organizations, academic institutions and other sources.

In addressing cases of succession of States where the predecessor State continued to exist, the Special Rapporteur referred to the case of Namibia. Before Namibia had gained independence in 1990, the United Nations General Assembly had explicitly recognized the right of its future Government to claim reparation for damages against South Africa as a result of the latter's illegal occupation and human rights violations. In another section of the report, on cases of succession of States where the predecessor State ceased to exist, the Special Rapporteur referred to a case arising after the dissolution of Czechoslovakia, in which the United Nations Compensation Commission, in response to a claim filed by the Czech Republic, had made a recommendation on the amount of compensation to be paid for damage caused by Iraq to the Czechoslovak Embassy in Baghdad. The question that arose in that regard was whether the two cases were the only ones to have been addressed by the United Nations in the context of succession of States, and whether there existed a general practice of the United Nations or of regional organizations in that field.

With regard to cases of succession of States where the predecessor State ceased to exist, the Special Rapporteur referred to two categories, the unification of States and the dissolution of States. With regard to the former, paragraphs 70 to 73 of the report discussed the United Arab Republic, which had been created as a result of the merger of Egypt and Syria in 1958. In that case, the United Arab Republic had submitted claims requesting compensation from both the United Kingdom and France for damage caused as a result of their military intervention against Egypt, one of the two predecessor States, during the Suez crisis in 1956. The issue of claims had eventually been settled through the conclusion of an agreement between the United Arab Republic and the United Kingdom, in 1959, and an agreement between the United Arab Republic and France, in 1958. Hence, neither the United Kingdom nor France had objected to the right of the United Arab Republic, as the

successor State, to claim reparation for internationally wrongful acts committed by them against Egypt, the predecessor State, before the date of succession.

A further example of the unification of States in the Middle East was the case of the United Arab Emirates. For more than a century, the seven independent sheikhdoms that now constituted the United Arab Emirates had been under a British protectorate. In December 1971, the United Kingdom had ended its protectorate relationship in the region and the newly independent sheikhdoms had agreed to form the United Arab Emirates. That case in fact demonstrated two categories of State succession: the emirates had first gained independence from the United Kingdom, and had then merged to form a union which had led to the creation of a prosperous new State.

Among cases of dissolution of States, mention was made in the report of the separation in 1961 of the United Arab Republic, as well as the dissolution of Yugoslavia in 1991 and 1992 and of Czechoslovakia in 1993. The latter two cases provided examples of States or international judicial bodies accepting the claim of a successor State for reparation for damage resulting from an internationally wrongful act against the predecessor State. Another interesting case in that context was that of the Ottoman Empire, which had ceased to exist in the aftermath of the First World War and had been succeeded by Turkey, which had continued the Empire's international legal personality. As a result, internationally wrongful acts committed by or against the Ottoman Empire were now said to be attributable to Turkey. In addition, two categories of State succession were applicable in the case of the Ottoman Empire: secessions from it, where part of an already existing State formed a new one, and cessions from it, where territory was transferred from the Empire to an already existing State.

The report emphasized the role of agreements in the unification and dissolution of States. Such agreements were also alluded to in several draft articles, notably draft articles 12 and 14. In his view, the Special Rapporteur should attempt to address in greater detail the important role of succession agreements, the prevalence of which continued to be a significant element of State practice in relation to the topic. The Special Rapporteur could therefore provide examples of such agreements that demonstrated their variety, such as lump sum agreements and different forms of reparation agreements. The Special Rapporteur could further consider drafting model clauses to be used as a basis for negotiation of agreements on succession in respect of State responsibility, or compiling an annex of contemporary agreements pertaining to the dissolution of States. Such work would be of practical value for States.

The Special Rapporteur dealt at length with the issue of reparation for injury arising from internationally wrongful acts committed against the nationals of the predecessor State. It was indeed a complex issue that was still subject to doctrinal debate and division in academic circles. While the Permanent Court of International Justice had supported the principle of continuing nationality with its *dicta* in the *Panevezys-Saldutiskis Railway* and the *Mavrommatis Palestine Concessions* cases, individual judges and scholars held strong dissenting opinions. Looking at the practice of the Commission in the 2006 articles on diplomatic protection and the 2015 resolution of the Institute of International Law, the Special Rapporteur had followed the contemporary approach which upheld the trend of an exception from the continuing nationality principle in the case of lawful State succession. In that context, Professor Marcelo Kohen, the Rapporteur of the Institute of International Law on the topic, had recently commented on that trend, stating that it aimed at ensuring that no internationally wrongful act remained unpunished as a consequence of the mere occurrence of State succession. He himself therefore supported the nuanced position adopted by the Special Rapporteur, which reconciled two extremes, namely the strict principle of continuing nationality and the complete abandonment of that same principle.

In the report, the Special Rapporteur had made frequent reference to the approach to the topic adopted by the Institute of International Law. The work of the Institute undoubtedly held practical value for the Commission and could serve as a guide for the Special Rapporteur. However, the work of the Institute or any other private organization was neither binding on the Commission nor determinative of the legal issues it should pursue with respect to the current topic.

Turning to draft article 2, on use of terms, he noted that in chapter I (C) of the report, the Special Rapporteur clarified the concept of "succession", as distinguished from "legal succession", and the notion of "continuity" of States. The Special Rapporteur might consider adding those clarifications as additional definitions in draft article 2. Alternatively, they should at least be included in the commentary so as to ensure appropriate interpretation of the draft articles. It would also be valuable to add a definition of the notion of "injury" in draft article 2. The Special Rapporteur could also consider adding further definitions contained in the 2015 resolution of the Institute of International Law and the 1978 and 1983 Vienna Conventions, including "devolution agreement", "internationally wrongful act" and "international responsibility".

Draft article 12 (2), on cases of succession of States when the predecessor State continued to exist, stipulated that the successor State "may" request reparation from the responsible State, thereby emphasizing its discretion to do so and limiting that discretion to the option of reparation. The Special Rapporteur could consider broadening the scope of that discretion so as to encompass other rights and obligations.

The text of draft article 13, on uniting of States, was rather unclear as to whether a pre-existing State with which a successor State joined would itself become a successor State. The Special Rapporteur should therefore consider adding in paragraph 1 the words "and no predecessor State continues to exist" after "and so form one successor State".

Draft article 14 (2), on dissolution of States, stipulated that such 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. The Special Rapporteur should first clarify the claims and agreements to which the paragraph referred; he should also consider using the words "direct link" instead of the Latin word "nexus", or at least clarify the latter word's meaning in the commentary. In addition, he should consider replacing the notion of "nationals" of the successor State with the wider notion of "population" of the successor State. Lastly, the words "relevant factors" at the end of the paragraph should be clarified in the commentary as including "unjust enrichment".

Concerning draft article 15, on diplomatic protection, the Special Rapporteur should consider adding to the case of the successor State that could exercise diplomatic protection in respect of a person who was its national, the case of diplomatic protection on behalf of a person having dual nationality, namely that of the successor State and that of the predecessor State that continued to exist. The draft article might also draw on the work on diplomatic protection in cases of multiple nationality contained in the Commission's articles on diplomatic protection.

On the future programme of work, he supported the Special Rapporteur's proposal to focus, in the fourth report, on forms and invocation of responsibility in the context of succession of States, as well as procedural issues and situations of plurality of successor States. In addition, the Special Rapporteur should consider adding to the list any issue of significance pertaining to the topic and raised during the Commission's discussion at the current session.

To conclude, he said that he supported the referral of all the draft articles to the Drafting Committee.

Mr. Reinisch said that he would like to thank the Special Rapporteur for his third report and the Secretariat for preparing its memorandum on the topic.

He shared Mr. Park's scepticism about whether, despite the disclaimer in paragraph 16 of the second report (A/CN.4/719), the Special Rapporteur's approach was not in fact one that involved the replacement of a theory of non-succession with a theory of succession. The reference in that same paragraph to a "more flexible and realistic approach" was linked to another point mentioned repeatedly in the third report, and which had also been raised in the previous reports, namely that State practice in relation to the topic was "diverse, context-specific and sensitive". It could be said that State practice was diverse and context-specific in any field of international law; he doubted, however, whether it was sensitive.

In fact, the sensitivity perceived by the Special Rapporteur appeared to apply only in regard to those cases of State succession where the predecessor State ceased to exist. It was

in those cases that the Special Rapporteur proposed a rule of succession into State responsibility incurred by the predecessor State. Why that should not also apply in other cases where a predecessor State continued to exist had not been explained, although it had been noted that situations in which there was no longer any responsible authority should be avoided, as had been pointed out by the Special Rapporteur in paragraph 167 of his second report, where, citing Patrick Dumberry, he had stated that the strict "application of the principle of non-succession in the context of dissolution of State would be in complete contradiction with the very idea of justice". In fact, the only justification for the approach proposed by the Special Rapporteur appeared to come from Professor Marcelo Kohen, the Rapporteur of the Institute of International Law on the topic, who had commented that the application of a strict non-succession rule would result in the victim no longer having any possibility of obtaining reparation if the wrongdoer State ceased to exist.

It was that approach to succession of States in respect of State responsibility that was anticipated in the current title of the topic. In his view, the title was misleading, and he endorsed the proposal mentioned in paragraphs 4 and 12 of the third report that the title should be changed to either "State responsibility problems in cases of succession of States" or "State responsibility aspects in cases of succession of States". The current title misleadingly suggested that there would be something akin to a succession of States in respect of State responsibility.

The Special Rapporteur appeared to use the ostensible inconclusiveness of many State succession practices to say that there was in fact nothing that would point either towards a rule of non-succession or towards one of succession into responsibility. He himself was of the view that the Special Rapporteur was mistaken in that respect, since the examples presented in the report demonstrated that, in a clear majority of cases, successor States as a general rule did not legally succeed into obligations or rights stemming from State responsibility incurred by their predecessor States. The same point must be taken into account with regard to the third report, which focused on the issue of whether a successor State succeeded into rights stemming from State responsibility incurred by third States against their predecessor States.

That view was also amply supported by the Special Rapporteur's proposed draft articles, which stated that in cases of partial State succession where the State committing an internationally wrongful act continued to exist it remained responsible, and that other successor States did not succeed into the legal responsibility of their predecessors. It was also extensively evidenced in a number of past cases of State succession.

State practice showed that successor States only very exceptionally, if at all, legally succeeded into the responsibility of their predecessors. Rather, an assessment of those instances indicated either a voluntary decision by successor States to take over the consequences of State responsibility or a formal acknowledgement by them that they had been unjustly enriched and thus felt an obligation to compensate for a wrongful act that had originally triggered the responsibility of their predecessors.

Against that background, he wished to remind the Special Rapporteur of his remark in the second report to the effect that he was not suggesting the replacement of one highly general theory with another. In fact, it appeared that using the concept of unjust enrichment was a much more appealing way to address the specific aspects of individual cases in a flexible and realistic manner.

He welcomed the distinction made by the Special Rapporteur in paragraph 28 of the report between succession as the factual situation of the replacement of one State by another and succession in the legal sense, as the transfer of rights and obligations from a predecessor State to its successor State as a result of a factual succession. However, it was unclear on what basis the Special Rapporteur could claim, as he did in paragraph 29, that neither the 1978 Vienna Convention nor the 1983 Vienna Convention employed the word "succession" in the sense of a legal succession, given that the exact purpose of both conventions was to determine under which conditions which kind of treaties, assets or liabilities could be transferred from a predecessor State to a successor State.

It was precisely the question of whether the rights and obligations of a predecessor State could be transferred to a successor State that was governed by the law of State

succession. The Special Rapporteur appeared to recognize that fact in paragraph 33, where he clearly distinguished cases of continuity and cases of what he termed "adaptation", or "novation", where a successor State agreed to take over rights and obligations of a predecessor State of its own accord, from succession as a devolution of rights and obligations as a result of the application of a rule of international law. The latter form of succession, which the Special Rapporteur called "automatic succession", was that with which the Commission was concerned in the present context.

Paragraph 34 of the report was particularly cryptic. There, the Special Rapporteur stated that the third report "does not assert any automatic succession to rights and obligations arising from internationally wrongful acts (State responsibility), which would be a result of an automatic operation of rules of international law". Properly understood, that would mean that the rules of State succession did not envisage any situation where there could be a legal succession into rights and obligations arising from internationally wrongful acts. He himself fully agreed with that assessment, which reflected the traditional rule of "non-succession". However, it conflicted with what the Special Rapporteur proposed in certain situations, especially where the predecessor State ceased to exist.

Draft articles 12 (2), 13 and 14 provided that successor States "may request" reparation for wrongful acts committed against their predecessors, wording which seemed to suggest that there was such an "automatic succession". In paragraph 34 the Special Rapporteur explained that the meaning of the phrase "may request reparation" was that a successor State could raise the issue of reparation, but did not have any right to request it. In that sense, the phrase "may request reparation" seemed to indicate merely that a State could ask for something, without any entitlement to do so. It was unclear whether the wording of draft articles 12 (2), 13 and 14 properly reflected that understanding.

Starting at paragraph 51, the report addressed two different forms of State practice: cases of State succession where the predecessor State continued to exist, and cases of State succession where the predecessor State ceased to exist. One example provided in the report, involving the separation of Pakistan from India in 1947, demonstrated how reparation claims related to the Second World War made against Germany by the Allied Powers, including the then British Dominion of India, had been handled in the context of State succession. However, the question that arose was what that practice indicated. The agreement reached by India and Pakistan in 1948 to the effect that the share of reparations allocated to the British Dominion of India should be divided between them and the resulting additional protocol to the original reparation agreement could be interpreted and regarded as a treaty by which some Allied Powers had agreed, *inter se*, on the allocation of reparations; however, whether it could be seen as a reflection of a rule of international law that required such an outcome was questionable. He therefore doubted whether one could conclude, as was done in paragraph 55, that the "example shows that both the continuing State and the successor State were entitled to reparation for injury from internationally wrongful acts predating the date of succession of States".

The example given in paragraph 56 involving the restitution of works of art by the Soviet Union to the German Democratic Republic in the late 1950s was ambiguous. First, the status of the German Democratic Republic as a successor State created by secession from Germany was contested; second, whether the restitution of works of art was a form of reparation under State responsibility, rather than an example of the prevention of unjust enrichment, was debatable; third, the decision by the Soviet Union to return the works of art to the German Democratic Republic, its ally, rather than the Federal Republic of Germany, was probably more politically motivated than based on legal considerations. Most importantly, it was unclear whether the return of the works of art could be regarded as an act that the Soviet Union believed itself to be legally bound to perform.

Starting at paragraph 57, the Special Rapporteur presented a number examples of treaty practice where newly independent States were entitled to receive reparation for injury caused before their independence on the basis of an agreement with the responsible State. One such example related to the willingness of Japan to provide compensation to Indonesia, Malaysia and Singapore on the basis of bilateral lump sum agreements. It was doubtful whether such State practice supported the view in paragraph 64 that the reparation for damage caused by an internationally wrongful act committed before the date of succession

could be claimed even after the date of succession, since the aforementioned State practice could be regarded as the practice of parties entering into a treaty and thereby founding an obligation, in the sense of novation, and not one confirming an obligation arising from an existing rule of international law that called for succession. In that context, it was worth recalling that, under draft article 1 (2), the draft articles applied without prejudice to any agreement reached by the States concerned. Special agreements reached in the light of specific political considerations could therefore hardly be seen as reflecting a general rule.

On that basis, parts of the proposed draft article 12 were questionable. Draft article 12 (1) was on fairly secure ground inasmuch as it simply affirmed that a State that continued to exist could request from the responsible State reparation even after the date of succession of States. However, draft article 12 (2) seemed highly problematic in that it appeared to give the same right to a successor State. The language of draft article 12 (2) paralleled that of draft article 12 (l), in that it employed the formulation "may request from the responsible State reparation". As he had already noted, the Special Rapporteur suggested in paragraph 34 that the meaning of the phrase "may request reparation" was that a successor State could raise the issue of reparation but apparently had no right to request it. If that was indeed the case, the usefulness of draft article 12 (2) as a guideline was questionable – it was, of course, always possible to ask for something. If, however, contrary to the explanation provided in paragraph 34 and in line with the ordinary meaning of the language of the draft articles, the phrase "may request reparation" was intended to indicate that a successor State should have such a right, then draft article 12 (2) was problematic because it did not seem to be supported by State practice.

He welcomed the fact that draft article 12 (2) incorporated elements of the notion of unjust enrichment by limiting the successor State's right to claim reparation to special circumstances where an injury related to the part of the territory or the nationals of the predecessor State that became the territory or the nationals of the successor State. In the light of that recognition, however, it would perhaps be preferable to formulate a guideline or an article that rooted any possible claims to reparation in the concept of unjust enrichment, and not in State succession law. In any event, the current formulation was rather vague and would at least need to be explained and illustrated in further detail in the commentary.

Paragraphs 67 to 82 of the report provided examples of State succession where the predecessor State or States ceased to exist, as a result of unification or dissolution. On the basis of those examples, the Special Rapporteur proposed draft articles 13 and 14, according to which, the successor State or States were considered to be in a position to request reparation from the responsible State. The proposed draft articles again used the formulation "may request", and in paragraph 81 the Special Rapporteur seemed to equate that not to a right, but rather to the possibility for the successor State to submit claims to reparation, which was a much more nuanced and weaker entitlement, if indeed it could be considered an entitlement at all. Moreover, the examples given in support of such a possibility were not very convincing. For instance, the compensation agreements reached between France and the United Arab Republic and the United Kingdom and the United Arab Republic, the successor State that had been created by the merger of Egypt and Syria in 1958, which was described in paragraphs 70 *et seq*., seemed to have been the result of a political bargain and did not indicate any sense of obligation on the part of France or the United Kingdom arising from entitlement on the part of the successor State to reparation.

With regard to the dissolution of States, the Commission had repeatedly discussed the relevance of the special agreement that had brought the case concerning the *Gabčíkovo-Nagymaros Project (Slovakia/Hungary)* before the International Court of Justice. As the Special Rapporteur acknowledged in paragraph 76, in that case both States had acknowledged that there was no principle of *ipso jure* succession to the obligation to repair and to the right to reparation. It was therefore questionable whether the *Gabčíkovo-Nagymaros* case could be seen as State practice supporting the notion that a successor State resulting from the dissolution of a State could request reparation from a responsible State. The same doubts applied to the Agreement on Succession Issues concluded among the successor States of the former Yugoslavia, which was mentioned in paragraph 80 of the report. According to the Special Rapporteur, article 1 of annex F to the Agreement also

dealt with possible issues relating to internationally wrongful acts committed against third States before the date of succession. However, the provision, cited in footnote 79, referred only to various rights and obligations, and none of the examples mentioned in that article indicated that wrongful acts or questions of responsibility were also included. Rather, that indicated that the article was limited to rights and obligations in the sense of assets and liabilities, or, in the language of State succession law, State property and State debts.

The final issue addressed in the report concerned a successor State's right to exercise diplomatic protection in cases where the injured person suffered the injury before becoming a national of the successor State, which called the principle of continuity of claims into question. The Special Rapporteur offered a detailed account of the theoretical underpinnings of the question, including the Commission's previous work on diplomatic protection and case law supporting an exception to the requirement of continuity of claims in cases of State succession. However, as with draft articles 12 and 14, some of the precedents cited merely demonstrated that States had been willing to make amends on a voluntary basis for acts that had harmed individuals who had become nationals of successor States. Although there were certainly good reasons *de lege ferenda* for an exception to the principle of continuity of claims in cases of State succession, it could be misleading to list such cases as examples *de lege lata*. Nevertheless, he was sympathetic to the notion of making an exception to the principle of continuity of claims in cases of State succession in order to avoid a situation in which an individual was not protected at all. Thus, following the example of the Commission's work on diplomatic protection, a sensible solution would seem to be a recommended practice along the lines of article 15 of the articles on diplomatic protection or even a provision reflecting the progressive development of the law.

Mr. Murphy said that he wished first to turn to the debate in the Sixth Committee in 2018, which was addressed in paragraphs 6 to 14 of the report. A number of important general comments had been made in that debate about the current topic, as well as some quite specific comments about the draft articles that were already being considered by the Drafting Committee.

In his view, the general comments were rather mixed. While some positive statements had been made, several States had been rather critical of the project. One criticism, which was acknowledged in paragraph 7 of the report, was that there was insufficient State practice for the Commission to be formulating rules in the area covered by the topic. For example, China, whose views were not acknowledged in paragraph 7, had stated there was a paucity of relevant State practice, and that what little practice that did exist was specific to complex political and historical contexts that varied from State to State, all of which posed a real challenge to any attempt to codify a general rule.

Such general views had specific implications for some of the draft articles that currently remained in the Drafting Committee. For example, Austria had maintained that State practice did not warrant the solution set forth in the provisions of draft articles 10 and 11, and that the practice characterized by the Special Rapporteur's second report was not very convincing, since most of the cases cited therein concerned succession into treaties or debts, or explicit acknowledgements of responsibility by the successor State. Even some supportive States had maintained that the paucity of State practice warranted proceeding with caution. Some States, such as Estonia, had indicated that it would be helpful to know which aspects of the draft articles reflected existing State practice and which aspects should be considered *de lege ferenda*. In paragraph 19 of the third report, the Special Rapporteur attempted to respond to concerns about the lack of State practice, but more needed to be done. Perhaps the Commission should candidly and transparently acknowledge at the outset of the commentary that there was very limited State practice in the area covered by the topic, so as to avoid complaints that it was pretending to develop rules that reflected settled law. Alternatively, the project might be approached more directly as an effort to develop new law by means of a convention, which States could choose to accept or reject.

Another criticism expressed in the Sixth Committee concerned the geographic scope of State practice analysed by the Commission, an issue addressed at the current meeting by Mr. Hassouna. Despite efforts by the Special Rapporteur to expand the range of the Commission's research, not all States believed that enough was being done in that regard. For example, Malaysia had recommended that the Special Rapporteur should consider

analysing State practice in regions outside Europe, such as Asia, Africa and the Americas and include the outcome of that study in future reports on the topic.

A further criticism raised in the Sixth Committee concerned the way in which the draft articles were organized. The Czech Republic, for example, had indicated that the fact that the draft articles were presented without having been organized into various parts with appropriate titles caused confusion. The Special Rapporteur seemed to have taken that criticism on board, given the proposals in the third report for new titles to parts II and III, as well as new draft articles that indicated the scope of those parts. He supported those proposals, but the proposed draft articles "X" and "Y" could perhaps have been numbered "6 *bis*" and "11 *bis*" so as to make it easier to understand where they were placed. It could also be helpful for the Special Rapporteur to prepare for the Drafting Committee a working document that contained an outline of all the proposed draft articles and headings, as it would provide a much clearer picture of the Special Rapporteur's overall vision for the project. Among other things, it might allow for a better understanding of why the draft articles proposed for part II were not mirrored by the draft articles proposed for part III, and could clarify whether there was any merit to Mr. Park's suggested reorganization of the draft articles, whereby for each scenario of succession issues relating to responsibility and issues relating to rights were addressed together.

Finally, conflicting views had been expressed in the Sixth Committee about the degree to which the Commission should replicate provisions that appeared in the 1978 Vienna Convention on Succession of States in Respect of Treaties and the 1983 Vienna Convention on Succession of States in Respect of State Property, Archives and Debts. While several States were supportive of the idea of replicating the approach previously adopted by the Commission, others were not. One of the more interesting comments had come from Austria, which had stated, with respect to the proposed draft article 8 on newly independent States, that a specific reference to such a group of States was perhaps not needed, given that the articles on nationality of natural persons in relation to the succession of States did not contain a reference to that category of States, and that the present topic did not need to deal with the category either since the draft articles would not have a retroactive effect. In any event, the Commission should be cognizant of such criticisms by States as it moved forward, both in developing the draft articles and in adopting the commentary.

Turning to the basic approach to the topic, he noted that, in his oral introduction at the previous meeting, the Special Rapporteur had indicated that the primary purpose of the third report was to address questions of reparation for injury resulting from an internationally wrongful act, for which the predecessor State had not received full reparation before the date of succession of States. While that was the aim of the present report, it might be beneficial at the current juncture to step back for a moment to consider progress on the topic thus far. As the topic had unfolded, the Commission's basic approach seemed to have settled into the following propositions. First, there was no automatic extinction either of the responsibility or of the rights of a predecessor State, nor any automatic transfer of such responsibility or rights to a successor State, in cases of succession of States. Therefore, the default rule was that the predecessor State continued to have obligations and rights arising from the rules on State responsibility, notwithstanding the succession. Second, when special circumstances so warranted, a successor State could seek reparation from a third State for damage caused by an internationally wrongful act of the third State to the predecessor State. Third, when special circumstances so warranted, an injured third State, or other subject, could seek reparation from a successor State for the damage caused by an internationally wrongful act of the predecessor State. Fourth, the principal purpose of the draft articles was to specify when such special circumstances arose. Those circumstances could be described based upon various scenarios, such as the dissolution of a State or the unification of States. Fifth, such rules applied as background rules; States could always negotiate agreements on the issues at stake, and those agreements would govern their legal relations.

If that was the basic approach, there was one particular aspect that he found very unclear and on which he would welcome clarification from the Special Rapporteur. If special circumstances existed such that one State could request reparation from another State, it was unclear whether the first State was exercising a legal right to claim reparation

from the second State, or whether the first State was simply raising the possibility that it could receive reparation from the second State by virtue of the special circumstances that existed between the two States, despite the absence of any legal obligation on the second State to provide such reparation. The third report was ambiguous and inconsistent in its use of the phrase "may request reparation".

However, if the above-mentioned phrase implied that the first State was exercising a legal right to reparation, it was a very weak way of indicating the existence of that right. In that regard, he wished to recall the text that the Special Rapporteur had proposed in his second report for draft article 6 (2), which read: "the injured State or subject may … invoke the responsibility of the predecessor State". That formulation was a much clearer expression of a legal right; if the expression of a legal right was indeed what was intended, then a similar formulation should be used. However, if what was intended was that the first State had no legal right to reparation and was dependent on the generosity of the second State, the term "reparation" should not be used at all, given that it was closely tied to rules on State responsibility. It was always true that one State could request generosity *ex gratia* from another State, whether or not special circumstances existed, so it was not clear exactly what the point was in such a "rule". Moreover, the Commission's mandate was to progressively develop and codify international law, not to identify situations where States had a moral or ethical obligation to pay heed to requests from other States. Mr. Reinisch had raised the interesting concept of unjust enrichment as a possible lens through which to view the topic analysed in the third report. However, it was questionable whether the concept was appropriate to the fact patterns at issue in the topic under discussion, since it spoke to a legal right, not to the possibility of *ex gratia* reparation, and normally operated in the context of property or contract loss, rather than in the context of a delict or a tort.

As for the specific proposals contained in the report, he saw no need to change the title of the topic. Furthermore, it was not obvious that a definition of the phrase "States concerned" was needed in draft article 2: the phrase had been used in the Commission's work on many topics without a definition, with the context typically making the meaning clear. However, he would not oppose the referral of such a proposal to the Drafting Committee, if the other members so wished.

Turning to the primary focus of the third report – reparation for injury committed against a predecessor State – he said that the newly proposed draft articles 12, 13 and 14 could be understood in the context of the basic approach that he had previously outlined. In the report, the opening discussion in support of those three draft articles was somewhat overly focused on theory and academic writings, leading to what were, in his view, some erroneous statements. He did not agree, for example, with the Special Rapporteur's description, in paragraph 48, of the constitutive theory of the recognition of States as "outdated" and would not like it to be reflected in the Commission's commentaries to the draft articles. In his view, the constitutive theory, which held that statehood was achieved only when an entity was recognized by other States, reflected many practical aspects of the contemporary recognition of States, given that most benefits of statehood – the ability to join international organizations and the ability to conclude treaties with other States, for instance – could be acquired only once other States had recognized the entity as a State and accorded it such benefits. Indeed, the constitutive theory was especially salient in explaining the "holy grail" pursued by entities that aspired to demonstrate and solidify their statehood: admission to the United Nations.

Starting at paragraph 51, the report turned to somewhat safer ground and focused more on relevant State practice, which was nevertheless sparse and at times involved situations that States had viewed as *sui generis*, and therefore not reflective of a broad rule of international law. Even so, it was useful to review the practice in question; in that regard, he wished to acknowledge the memorandum prepared by the Secretariat on the topic, which provided extensive information on treaties which might be of relevance to the Commission's work.

As Mr. Park had observed, draft article 12 (1) combined three different succession scenarios into one paragraph, so as to indicate that an injured predecessor State that continued to exist could pursue reparation. While he did not object to such a concise presentation of scenarios, he again had concerns about the phrase "may request reparation".

In draft article 12 (1), which dealt with the situation of the predecessor State's ability to continue to pursue a claim, the wording should express a legal right to invoke the responsibility of the third State. However, the phrase used, namely "may request … reparation", seemed weak in that respect. Moreover, the same phrase was used in draft article 12 (2), which dealt with the situation of the successor State, whereas one would expect the legal situation to be different for the successor State. In addition, it was doubtful that the phrase "in special circumstances" in the same paragraph was necessary; he would therefore suggest its deletion. In draft article 12 (3), the word "compensation" should perhaps be replaced with "reparation".

Draft articles 13 and 14 would both benefit from further scrutiny by the Drafting Committee. In particular, he agreed with Mr. Hassouna that, in draft article 14 (2), the meaning of the phrase "such claims and agreements" was not clear, given that draft article 14 (1) did not refer to any claims or agreements.

Turning to draft article 15, on diplomatic protection, he noted, in that regard, that chapter IV of the report dealt in some detail with the application of the "continuous nationality" rule in the context of the succession of States. As was well known, in order to bring a claim for diplomatic protection, a State must establish that the person on whose behalf it was bringing the claim was a national of that State. The rule of continuous nationality required that a State could exercise diplomatic protection in respect of a person, natural or legal, who was a national both at the time of the injury in respect of which the claim was brought and at the time of the presentation of the claim or, possibly, the date of the judgment by the relevant court or tribunal.

He had two comments about the discussion in the report of the rule of continuous nationality. First, the proposed draft article seemed to have been developed without sufficient consideration for the Commission's articles on diplomatic protection: although they were mentioned in the report, draft article 15 did not follow them. The requirement of continuous nationality was stated in article 5 (1) of those articles; article 5 (2) then indicated that, exceptionally, the continuous nationality rule did not apply in a situation of succession with regard to diplomatic protection by a successor State.

The Special Rapporteur's report used article 5 (2) of the articles on diplomatic protection as a basis for draft article 15 (1) of the current topic. However, draft article 15 failed to replicate the two safeguards established in 2006 to preclude diplomatic protection even in the context of State succession, which were set out in article 5, paragraphs 3 and 4, of the articles on diplomatic protection. The Commission's commentary to the latter articles explained that the safeguards were designed, at least in part, to avoid abuse of the lifting of the continuous nationality rule. While the proposed draft article 15 (3) might be intended to preserve those safeguards, in his view, the safeguards should be expressly included in the draft article, as they were directly relevant to the exception to the continuous nationality rule relating to State succession. That relevance derived from the possibility that the successor State might be pursuing diplomatic protection against the predecessor State for harm that had occurred while the person was a national of the predecessor State; or the successor State might be pursuing diplomatic protection against any State but, after the date of the official presentation of the claim, the person being protected acquired the nationality of the State against which the claim was being brought.

His second comment concerning the treatment in the report of continuous nationality arose from paragraph 98 of the report, in which the Special Rapporteur appeared rather hostile to the arbitral award in the case, *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, referring to it as "unusual in investment arbitration" and "rightly criticized". The aspect that was supposedly unusual was the award's broad statement that nationality must be continuous not just until the date of diplomatic presentation of the claim, but until issuance by the tribunal of the award as well. He accepted that some academics did not appreciate such a broad statement, and the Commission itself had not followed it when setting forth the general rule on continuous nationality in article 5 (1) of its articles on diplomatic protection. Yet many Governments had cited the *Loewen* award favourably, especially when its conclusions were stated in somewhat narrower terms. The narrower understanding of the award in the *Loewen* case – which in his view was correct – was that a State was no longer entitled to exercise diplomatic protection in respect of a person who

acquired, after the date of the official presentation of a claim, the nationality of the State against which the claim was being brought. Indeed, the Commission itself had adopted that understanding of the *Loewen* precedent in its commentary to article 5 (4) of the articles on diplomatic protection, noting that the award was in harmony with a number of other cases. Therefore, he would not like the Commission's commentaries to the draft articles on the present topic to refer disparagingly to the *Loewen* precedent. Indeed, as was stated in the third report, the *Loewen* case was irrelevant to a situation of State succession and it did not present any authority as to the question at hand; it was therefore unclear why the Special Rapporteur focused on the *Loewen* award at all.

In conclusion, he supported the referral of all the proposed draft articles to the Drafting Committee.

Mr. Al-Marri welcomed the Special Rapporteur's third report, which, like his previous reports, had been thoroughly researched and contained a well-balanced analysis and pragmatic recommendations. The phrase "succession of States" referred to a change in sovereignty from one State to another State, a change that could occur either when a State ceased to exist, such as in the case of the former Soviet Union or Czechoslovakia, or where the predecessor State continued to exist, for example in cases of territorial cession, secession, or the creation of a newly independent State. Under international law, the term "succession of States" referred to the inheritance of rights and obligations under a treaty or claims against a predecessor State or its national debt. Such an event gave rise to a set of legal issues and created no presumption in terms of automatic transmission of rights and obligations from a predecessor State to the successor State or States. In that sense, it was completely different from the concept of "succession" under municipal law.

Referring to the debate in the Sixth Committee of the General Assembly, he said that he wished to highlight a number of points made by the Special Rapporteur in his third report. First, all draft articles being prepared under the current topic had to be understood as provisions having residual character. Second, the work on the topic must preserve consistency with both the articles on the responsibility of States for internationally wrongful acts and the 1978 and 1983 Vienna Conventions. Third, subject to considerations of economy in drafting and avoidance of needless duplication, the articles should be formulated in view of different categories of succession of States, following the different categories of succession of States identified in the 1978 and 1983 Vienna Conventions. Fourth, the invocation of responsibility might depend on particular circumstances, such as the existence of a territorial or personal nexus; or other considerations, such as the existence of unjust enrichment; or the determination of an equitable proportion when it came to distribution of losses and reparation. Fifth, the main consequence of an internationally wrongful act was the obligation to provide full reparation, which could take different forms. However, for the purpose of the current topic, it seemed appropriate to consider the question of reparation without entering into specific forms of reparation, the main objective being to leave room for additional settlement between States concerned, on a case-by-case basis. Sixth, the Commission's work on the topic could involve both codification and progressive development of international law. Lastly, the question of separate or joint treatment of responsibility obligations and rights in the context of succession depended on an analysis of all relevant elements.

With regard to those legal issues that required clarification or needed to be taken into consideration when fashioning a regime that would govern succession of States in respect of State responsibility, the Special Rapporteur proposed, in his third report, to deal with the issue of reparation of injury caused to the predecessor State, which became a matter of concern to the successor State. The draft articles prepared under the current topic applied solely to cases where the injured State did not receive full reparation before the date of succession of States. According to draft article 12, both the predecessor and successor States would be entitled, under certain circumstances, to claim reparation from another State for causing injury to the predecessor State owing to an international wrongful act or several such acts for which it was responsible. The Special Rapporteur's report also underlined the need to deal with issues concerning succession of rights, given the possibility of plurality of injured States and different categories of succession of States.

Having analysed several relevant examples of the dissolution and the separation of States in the report, the Special Rapporteur, while stressing the primary role of agreements, concluded that there seemed to be support for the possibility for the successor States to submit claims for reparation even for damage caused by internationally wrongful acts committed before the date of succession.

On the question of damage suffered by nationals of a predecessor State before separation or dissolution, neither the doctrine nor the practice was uniform in respect of the right of the successor State to espouse their claims by way of diplomatic protection. There was disagreement among commentators on that matter, given the fact that internationally wrongful acts resulting in injury were committed before the date of succession against the nationals of the predecessor State who became its nationals after the date of the commission of the acts, that is, after the date on which the damage occurred.

In his report, the Special Rapporteur took a nuanced position with respect to the principle of continuous nationality. He accepted such a rule as a traditional condition in the law of diplomatic protection, but he also maintained the exception to the rule of continuing nationality in cases of State succession.

In conclusion, he was in favour of referring the newly proposed draft articles to the Drafting Committee.

Mr. Aurescu commended the Special Rapporteur for his third report and the Secretariat for its excellent memorandum on treaties of relevance to the Commission's future work on the topic. He said that he welcomed, in particular, the Special Rapporteur's efforts to clarify, in the section of his report on additional general considerations, important concepts, such as succession, continuity and discontinuity; it would have been helpful if such clarifications had been included from the beginning, in the first report on the topic.

Referring to paragraph 45 of the third report, on the continued right of the predecessor State to claim reparation from the wrongdoing State for its acts committed before the date of succession of States, he said that it would have been useful for the report to provide examples of the situation described by the Special Rapporteur, namely, one in which a predecessor State, after the date of succession of States, claimed reparation for the injury caused by an internationally wrongful act to the population of a territory that had become a part of the successor State, on the basis of the fact that such wrongful act had occurred before that date of succession of States.

He wished to commend the Special Rapporteur for the clear presentation in chapter III of his findings on claims for reparation in different categories of State succession. However, as was emphasized in the report, State practice was diverse and inconclusive. At the same time, he would like to note that few elements from the doctrine and judgments of international courts and tribunals were used to support the conclusions of the report. The examples of State practice provided in chapter III (A) (1) of the report, while interesting, seemed insufficient to support the view that the reparation for damage caused by an internationally wrongful act committed before the date of succession could be claimed even after the date of succession.

He was not convinced that the agreements provided as examples of State practice necessarily led to the conclusion that reparation could be claimed by the predecessor State. The object of the Agreement on reparation from Germany, on the establishment of an Inter-Allied Reparation Agency and on the restitution of monetary gold, was to prescribe the manner in which reparation was distributed between debtors and not the *locus standi* of the debtor to claim reparation from the creditor. That was particularly relevant, since Germany was not a party to the Agreement, which had been concluded among creditors, the debtor being absent.

With regard to reference to the case law of the International Court of Justice, he did not agree that the only case referred to in the report, *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, allowed for a solid conclusion on the matter. It was difficult to infer, as the Special Rapporteur had done in his report, that the Court had implicitly recognized the right to submit a claim for a new State because it had decided that it had jurisdiction over the dispute. The jurisdiction of a court over a specific dispute was the result of the

existence, in one form or another, of a consensus between the parties to that dispute regarding the court selected in order to resolve the dispute and the parameters of the dispute. If the existence of that consensus was challenged, the court decided its competence. That procedure had nothing to do with the recognition of a substantial right to submit a claim. Furthermore, an implicit conclusion allegedly reached by the International Court of Justice was not sufficient to support such a final conclusion as that reached by the Special Rapporteur. In the light of the valuable information contained in the memorandum prepared by the Secretariat, which contained a multitude of treaties relevant to the topic, the report might have included additional examples of State practice.

He had similar observations to make about chapter III (B) of the report, which was also descriptive and not entirely convincing: there were few examples of agreements relating to succession of States where the predecessor State ceased to exist and those that were provided were not fully analysed; there were few examples of case law; and there was limited reference to the doctrine. While the sources used by the Special Rapporteur were valuable, the report might have elaborated on the reasons behind his particular selection.

He welcomed the structure of chapter IV of the report, which demonstrated a possible evolution in the approach to reparation for injury arising from internationally wrongful acts committed against the nationals of the predecessor State. However, in paragraph 90, the Special Rapporteur failed to give any examples to support his conclusion that "traditional legal doctrine claims that when the nationality of the person injured as a result of an internationally wrongful act committed by a third State changes between the date when the injury is caused and the date when the reparation claim is made, the principle of continuous nationality would result in hindering the reparation". Although certain authors had been quoted in previous paragraphs, their conclusion had been rather different to the one reached by the Special Rapporteur. In other words, the argument that for a State to exercise diplomatic protection on behalf of the person injured as a result of an internationally wrongful act of a third State, that person should have its nationality also at the date of the award did not necessarily lead to the conclusion that reparation was hindered, from the perspective of diplomatic protection. In his view, reparation, *per se*, was not hindered, as the individual could still be subject to diplomatic protection. What might be hindered was the possibility for the successor State to exercise diplomatic protection because the transfer of the right to reparation from the predecessor State to the successor State had not occurred. However, if the Special Rapporteur was of the view that reparation was hindered altogether because neither the predecessor State nor the successor State could use diplomatic protection – the former because the individual was no longer its national and the latter because the right of diplomatic protection had not been transferred – that conclusion should be exhaustively demonstrated, particularly because it was not thoroughly reflected in the traditional doctrine. Nor was that conclusion reflected in custom. As the Special Rapporteur mentioned in paragraph 92 of his report, the Commission's articles on diplomatic protection provided that, in certain cases, diplomatic protection could be exercised by the successor State.

The Special Rapporteur's general approach was interesting in seeking to demonstrate that the traditional condition of continuous nationality existed, that it did not entail any exceptions, and that it was outdated because it could have negative consequences, as opposed to the modern approach, which was preferable. However, it would have been advisable for the Special Rapporteur to state his conclusion in that respect more clearly.

He disagreed with the Special Rapporteur's contention in paragraph 99 that the traditional legal approach supported the principle of non-succession to the right to reparation. In his view, that approach led to an unjust and outdated validation of the principle of continuous nationality. The purpose of section B was rather unclear. It seemed to be drafted as an answer to a question which section A did not ask and, in point of fact, to deal with continuous nationality. It apparently confirmed that certain safety nets were available in situations that might result in deadlock over reparation by recalling that the Commission's articles on diplomatic protection provided that, in situations where the application of the principle of continuous nationality would create inequitable results, States could resort to diplomatic protection, notwithstanding the absence of continuous nationality. Although the case law and practice to which the Special Rapporteur referred in

support of that argument were interesting and valuable, an analysis of the interrelationship between the draft articles proposed by the Special Rapporteur and the articles on diplomatic protection would have been preferable, as it would have pinpointed questions requiring clarification during the Commission's work on the current topic.

Turning to the proposals for new draft articles, he considered that draft article Y and the title of Part III, both of which used the term "injury", might be inconsistent with the Commission's earlier work, namely its articles on responsibility of States for internationally wrongful acts, which contained no mention of injury. Paragraph 1 of draft article 12 was rather convoluted; the phrase "in the cases of succession of States" was redundant and could be deleted, because it merely reiterated the title of the draft article. The thesis of the draft article should precede subparagraphs (a) to (c) listing the possible situations where State succession might take place. Furthermore, the draft article should be recast to preclude any inference that injury constituted a condition for invoking State responsibility, since the provisions on State responsibility were premised on the idea that responsibility stemmed from the occurrence of wrongful acts.

The use of the word "may" in that and the following draft articles was problematic, because as a law-making text they should set forth rights and obligations, not suggest options or possibilities. Of course, the position would be quite different if the Commission decided to draw up guidelines or other kinds of normative texts.

In draft article 13, the beginning of paragraph 1 could be reworded to read "When two or more States unite into one successor State", and the issue of the word "may" would have to be addressed. Paragraph 2 served no useful purpose and could therefore be deleted, as draft article 1 (2) contained a general disclaimer that read "The present draft articles apply in the absence of any different solution agreed upon by the States concerned".

Paragraphs 1 and 2 of draft article 14 were disjointed. In paragraph 2, the word "such" was confusing as it wrongly implied that paragraph 1 referred to claims and agreements. At the same time, he was unsure whether the word "agreements" in paragraph 2 was appropriate in the context of a request for reparation, since the term "agreement" implied that a solution had been found and that the claim no longer existed. The reference to "other relevant factors" in paragraph 2 was unclear, as the report said nothing on the subject. He therefore suggested that draft article 14 (1) and (2) should be reworded. The terminology employed in paragraph 3 was also questionable. From reading the report, it would seem that the Special Rapporteur had really intended to refer to the legal concept of a set-off, or the balancing of common debts to the same creditor, rather than to compensation. What he had said earlier about the verb "may" also applied to that draft article.

The wording of draft article 15 (1) was inconsistent, as it referred in one place to the diplomatic protection of a person and in another to the protection of a person or corporation. The phrase "in a manner not inconsistent with international law" was strange, because it suggested that there might be a sort of semi-legal way of acquiring nationality. Those issues required clarification, as did the relationship between paragraphs 1 and 2. Plainly, those paragraphs meant that both the successor and the predecessor State could exercise diplomatic protection under analogous conditions, which should be explicitly stated. Again, for the same reasons as those stated earlier, the verb "may" was debatable.

The Commission clearly endorsed the theory of non-succession as far as State responsibility was concerned and considered that all the draft articles had a subsidiary nature or residual character. That meant that whenever the States concerned decided otherwise, the rights and obligations they established through an agreement, took precedence and replaced the Commission's draft articles. That was not a new situation; the 1978 Vienna Convention and the 1983 Vienna Convention were also framework conventions, the provisions of which were subsidiary in nature.

The problem was that the draft articles proposed in the report did not set forth rights and obligations but merely outlined options and possibilities, as reflected in the excessive use of the verb "may" in virtually all of them. That was not appropriate language for a treaty. The articles on responsibility of States for internationally wrongful acts did not

employ the verb “may” and it could be found only in the few provisions of the two above-mentioned conventions that covered certain eventualities.

Draft articles did not seem to be the right normative form for the Commission’s work on the topic. Virtually none of the draft articles presented in the report would pass the test of the Drafting Committee. A number of delegations in the Sixth Committee had suggested that the Commission could produce draft guidelines or model clauses on the subject and in 2016 the Special Rapporteur had considered the option of drawing up principles (A/71/10, p. 411). He fully concurred with the Special Rapporteur that the inconclusive nature and paucity of State practice did not render work on the topic impossible or pointless and that the Commission’s role was not confined to the codification of well-established rules of international law, but also included the progressive development of international law. He also agreed that the Commission should therefore seek to clarify the rules applicable in situations where one of the parties to a legal relationship resulting from an internationally wrongful act was affected by State succession. That exercise would meet the criterion of the progressive development of international law in an area that overlapped with the rules on State responsibility which had already been successfully codified. His sole proviso was that the Commission should thoroughly analyse the form to be taken by its provisions on the topic. The worrying fact that only 4 of the 11 draft articles presented in the previous two years had been provisionally adopted by the Drafting Committee was probably a reflection of the difficult nature of the topic.

In conclusion, he was in favour of referring the draft articles contained in the report to the Drafting Committee, since that was the best place to conduct a detailed examination of all the issues related to the topic.

Mr. Nguyen said that the Special Rapporteur’s compact, focused and clear report took account of States’ comments and feedback and of the views expressed in the Sixth Committee. Like Mr. Park, he agreed with the approach to the topic adopted by the Special Rapporteur in his third report, as set out in paragraphs 17 to 23 thereof, including his recognition of the subsidiary nature of the draft articles and the precedence of inter-State agreements. Both State responsibility and State succession were politically sensitive issues. While State practice with regard to State succession was plentiful, it was rare in the sphere of State responsibility, possibly because the States concerned had tended to rely on agreements rather than on general rules of succession, since they had not wished to relinquish control over the matter. In that connection, he commended the Secretariat on its memorandum. The information which it contained on treaties which might be of relevance to the future work of the Commission on the topic helped to explain States’ attitudes on State responsibility in the event of the succession of States. As for progressively developing international law in the area where the rules of State succession overlapped with those of rules on State responsibility, as advocated by the Special Rapporteur in paragraph 19, he concurred with Sir Michael Wood, Mr. Park and Mr. Reinisch that the Commission must be extremely cautious about creating extensive exceptions to the general rule of non-succession.

The deductive method must be used with great care when considering instances of State practice. Article 3 of the Agreement as to the devolution of international rights and obligations upon the Dominions of India and Pakistan had provided that “Rights and obligations under international agreements having an exclusive territorial application to an area comprised in the Dominion of Pakistan will devolve upon that Dominion”. Since India had been a party to the 1946 Paris Agreement on reparation from Germany, on the establishment of an Inter-Allied Reparation Agency and on the restitution of monetary gold, Pakistan *qua* a new successor State which had seceded from India in 1948 could have directly claimed reparation from Germany. It did not in fact do so because the two dominions had agreed to share their portion of reparation in a protocol signed in Brussels on 15 March 1948.

The 1958 Protocol between the German Democratic Republic and the Soviet Union concerning the restitution of some of the art treasures, books and archives which had been transferred from Germany to the Soviet Union by the Red Army in 1945 had been concluded on the basis of socialist solidarity. It was therefore doubtful whether that protocol amounted to an acknowledgement that the seizure by the Soviet Union of art and

cultural property had been an internationally wrongful act. After reunification in 1990, the Federal Republic of Germany became entitled to claim full reparation. The case of Germany as a double succession should be analysed in depth. The Special Rapporteur was right in concluding in paragraph 64 that reparation for damage caused by an internationally wrongful act committed before the date of succession could be claimed thereafter. However, he should also clarify the relationship between State responsibility for damage caused by genocide, torture and crimes against humanity and State succession.

Draft article Y failed to make it clear that the continued existence or non-existence of the predecessor State was a key element when claiming full reparation, nor did it spell out the rights and obligations of successor States. Like Mr. Park and Mr. Hassouna, he was in favour of treating those rights and obligations in the context of State succession. The State practice cited by the Special Rapporteur showed that, in most cases, the question of reparation was usually settled through peace treaties or lump-sum agreements.

While it had been wise to deal with the separation of parts of a State, newly independent States and the transfer of part of the territory of a State in a single draft article, the inclusion of a definition of each of those cases made draft article 12 rather heavy. It would therefore be advisable to move subparagraphs (a), (b) and (c) of paragraph 1 from draft article 12 to draft article 2, on use of terms, especially as the Special Rapporteur intended to merge articles 7, 8 and 9 in a similar manner. The use of the verb "may" in that paragraph implied that the predecessor State might not have fulfilled its responsibility to claim full reparation for the injury resulting from internationally wrongful acts committed against it. He therefore suggested that draft article 12 should be modified to read:

> In cases of the separation of parts of a State to form a new State, the transfer of part of the territory of a State to another State or when dependent territories acquire independence to establish a newly independent State, when the predecessor State continues to exist, the predecessor State injured by an internationally wrongful act of another State continues to request from this responsible State reparation even after the date of succession of States.

Reparation for injury to part of the territory or some of the nationals of the predecessor State that had become, respectively, the territory or nationals of the successor State involved the predecessor, successor and responsible States. Priority would depend on agreement. Once again, the term "may" was too weak. The successor State responsible for the international relations of the territory and the population residing in it must have the right to conclude an agreement with the predecessor and responsible States on the equitable distribution of reparation due from the responsible State for an internationally wrongful act committed before the date of succession which had caused injury to what had become the successor State's territory and population. Peace treaties concluded after the Second World War supported that approach. Again the verb "may" should be replaced with something stronger in draft articles 13 and 14. When the predecessor State ceased to exist, the only rightful protector of the interests of the territory and population in question was the successor State, which therefore had the right to enter into an agreement with responsible States in order to settle any matters arising out of succession. For that reason, he endorsed the conclusion that in the event of State succession an exception could be made to the principle of continuous nationality.

He supported draft article 15, which echoed articles 5 (2) and 10 (1) of the articles on diplomatic protection. He agreed that, in derogation from the above-mentioned principle, succession entitled the successor State to exercise diplomatic protection in respect of a person or corporation that was its national at the date of the official presentation of the claim, but not at the date of the injury, provided that their status as a national of the predecessor State had been acquired before the date of succession in a manner consistent with international law. However, he wondered why any reference to corporations had been omitted from the first sentence of that draft article.

An extensive bibliography would be useful for readers interested in one of the most controversial, but fascinating, issues in international law.

He was in favour of sending the draft articles contained in the third report to the Drafting Committee for further consideration.

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

Mr. Grossman Guiloff (Chair of the Drafting Committee) said that, for the topic "Succession of States in respect of State responsibility", the Drafting Committee was composed of Mr. Aurescu, Mr. Huang, Mr. Murphy, Mr. Nguyen, Mr. Nolte, Ms. Oral, Mr. Park, Mr. Reinisch, Mr. Ruda Santolaria and Mr. Zagaynov, together with Mr. Šturma (Special Rapporteur) and Mr. Jalloh (Rapporteur) *ex officio*.

The meeting rose at 12.55 p.m.