

Provisional

For participants only

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International Law Commission
Seventy-first session (second part)

Provisional summary record of the 3478th meeting

Held at the Palais des Nations, Geneva, on Thursday, 11 July 2019, at 10 a.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. Jalloh
Mr. Laraba
Ms. Lehto
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 10.05 a.m.

Cooperation with other bodies (agenda item 10) (*continued*)

Visit by the President of the International Court of Justice

The Chair welcomed Judge Abdulqawi Ahmed Yusuf, President of the International Court of Justice, and invited him to address the Commission.

Judge Yusuf (President of the International Court of Justice) said that he welcomed the opportunity to address the Commission on the occasion of its seventy-first session. Since July 2017, seven new cases had been added to the Court's docket. During that period, the Court had rendered five judgments – two on the merits, including a judgment in two joined cases, one on compensation and two on preliminary objections – and an advisory opinion. It had also issued three orders on requests for the indication of provisional measures and one order on counterclaims. The Court was currently deliberating on two cases relating to disputes, one between India and Pakistan and the other between Ukraine and the Russian Federation. What was remarkable was the sheer breadth and diversity of the cases brought before the Court and the importance to the parties of the issues lying at the heart of those cases. Currently, the Court's docket contained cases involving States from various regions of the world, including the Americas, Asia, Africa and Europe. It was thus clear that countries from all around the globe continued to place their trust and confidence in the Court to settle their disputes, including disputes that raised particularly thorny issues in a politically sensitive context.

Rather than entering into a description of those cases, with which Commission members were most probably already acquainted, he wished to discuss specific legal issues which the Court had been called upon to elucidate and which were of particular relevance to the Commission's work. He would address three such issues: the first related to the determination of the existence of an international legal obligation arising from exchanges between two States; the second concerned the role of United Nations General Assembly resolutions in the formation of rules of customary international law; and the third concerned the obligation of reparation for environmental damage. Those issues had been addressed by the Court in the case concerning the *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, in its advisory opinion on the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, and in its 2018 judgment on reparations in the case concerning *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, respectively.

In the case concerning the *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, the Court had addressed the determination of the existence of obligations arising from inter-State negotiations conducted over an extended period of time and the basis on which such obligations might arise. Specifically, it had been asked to determine whether Chile had an obligation, as a result of its exchanges with Bolivia, to negotiate with the latter an agreement granting it sovereign access to the Pacific Ocean.

The dispute between those two countries had its historical origins in the War of the Pacific in the late nineteenth century. Under the terms of the Treaty of Peace and Friendship of 20 October 1904, which had officially ended the conflict between Bolivia and Chile, Bolivia had lost its access to the Pacific Ocean. The dispute that Bolivia had brought before the Court had not, however, focused on the question of the validity of that Treaty, nor had Bolivia asked the Court to declare that it had a right to sovereign access to the sea. Rather, the dispute had centred on whether the exchanges and negotiations that had taken place between the parties since the conclusion of the Treaty had led to the existence of an obligation to negotiate the sovereign access of Bolivia to the sea.

It had not been the first time that the Court had had to deal with questions relating to the obligation to negotiate under international law. In some cases, the Court had been called upon to interpret existing legal obligations to negotiate under specific treaty provisions and, more specifically, to ascertain their meaning and scope. For example, in its 2011 judgment in the case concerning the *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v. Greece)*, the Court had had to consider whether the applicant had violated its obligation to negotiate in good faith, as required by article 5 (1)

of the Interim Accord, which provided, *inter alia*, for the establishment of diplomatic relations between the parties. The Court, referring to the jurisprudence of the Permanent Court of International Justice in *Railway Traffic between Lithuania and Poland*, and to its own jurisprudence in relation to the *North Sea Continental Shelf* cases, had confirmed that an obligation to negotiate did not imply an obligation to reach an agreement and had clearly pointed out the difference between those two obligations. For the Court, the test to be applied in such circumstances was whether the parties had conducted themselves in such a way that negotiations were meaningful.

In another set of cases on negotiations, the Court had had to determine the legal significance and scope of the requirement to resort to negotiations before submitting a case to the Court. Such a requirement was included in some compromissory clauses and optional clause declarations under article 36 (2) of the Statute of the Court. In its 2011 judgment on preliminary objections concerning the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, the Court had clarified that the undertaking of “negotiations” and the existence of a “dispute” were distinct as a matter of principle, and that negotiation required a genuine attempt by one of the disputing parties to engage in discussions with the other disputing party with a view to resolving the dispute. Accordingly, the Court had held that in the absence of evidence of a genuine attempt to negotiate, the precondition of negotiation was not met.

While those earlier cases were distinguishable from *Bolivia v. Chile*, the Court had nonetheless based itself, in the first instance, on that established jurisprudence on negotiations and the possibility of obligations arising from such negotiations, but had used the opportunity to expand on that jurisprudence. The Court had noted, at the outset, that the existence of an obligation to negotiate had to be ascertained in the same way as the existence of any other legal obligation. Negotiation was part of the usual practice of States in their bilateral and multilateral relations. However, the fact that a given issue was negotiated at a given time was not sufficient to give rise to an obligation to negotiate. For there to be an obligation to negotiate on the basis of an agreement, the terms used by the parties, the subject matter and the conditions of the negotiations must demonstrate an intention of the parties to be legally bound. Such an intention, in the absence of express terms indicating the existence of a legal commitment, could be established on the basis of an objective examination of all the evidence.

In terms of the methodology followed, the Court had adopted an approach similar to that used in earlier cases, which although entirely different in subject matter had required the Court to carefully review all the evidence adduced by the parties in order to make a determination as to their intention to be legally bound. For example, in the case concerning the *Maritime Dispute (Peru v. Chile)*, there had been no shared understanding of the parties concerning the course of their maritime boundary. The Court had thus considered each evidentiary element in the case file, including agreements, understandings, fishing activities and all other relevant practices, to determine whether and to what extent the parties had agreed on a maritime boundary.

In *Bolivia v. Chile*, the Court had proceeded in a similarly systematic and meticulous manner, reviewing and considering what weight, if any, should be given to the facts and information advanced in support of each party’s arguments. A particularity of the case was that Bolivia had advanced various examples of practice, such as unilateral declarations and bilateral instruments, which it argued had created legal obligations. The Court had first looked at whether any of the instruments invoked by the applicant gave rise to an obligation to negotiate the sovereign access of Bolivia to the Pacific Ocean. One of those instruments was the joint declaration signed at Charaña by the Presidents of Bolivia and Chile on 8 February 1975, known as the Charaña Declaration. The relevant section of the Declaration, as reproduced in the Court’s 2018 judgment on the case, read:

Both Heads of State, within a spirit of mutual understanding and constructive intent, have decided (*translated by Chile as “have resolved”*) to continue the dialogue, at different levels, in order to search for formulas (*translated by Chile as “seek formulas”*) to solve the vital issues that both countries face, such as the landlocked situation that affects Bolivia, taking into account the mutual interests (*translated by*

Chile as “their reciprocal interests”) and aspirations of the Bolivian and Chilean peoples.

Having carefully reviewed the origin, context, language and purpose of the Charaña Declaration, the Court had concluded that it could not be characterized as a treaty establishing a specific legal commitment to negotiate the sovereign access of Bolivia to the Pacific Ocean. The Court had considered that the document possessed the nature of a political document stressing the spirit of solidarity between the two States. In short, the Court had found that the wording of the Declaration did not convey the existence or the confirmation of an obligation to negotiate the sovereign access of Bolivia to the Pacific Ocean. After having reviewed the instruments cited by Bolivia, the Court had carefully reviewed the other legal bases invoked by the applicant, namely acquiescence, estoppel and legitimate expectations, which, according to Bolivia, could be sources of an obligation to negotiate its sovereign access to the sea. The Court had then addressed the arguments put forward by Bolivia based on the Charter of the United Nations and the Charter of the Organization of American States. In the view of the Court, no instrument, act or conduct thus examined provided a legal basis for an obligation binding on Chile to negotiate the sovereign access of Bolivia to the sea.

With regard to the argument advanced on the basis of “legitimate expectations”, Bolivia had claimed that the multiple declarations and statements made by Chile over the years had given rise to the expectation that the sovereign access of Bolivia to the sea would be restored. On that basis, Bolivia had argued that the alleged denial by Chile of its obligation to negotiate had frustrated its legitimate expectations. It was the first time that the Court had been called upon to pronounce on the applicability of “legitimate expectations” in establishing the existence of obligations under international law. The applicant had relied on what it referred to as the “doctrine of legitimate expectations”, stating that such a doctrine was applied in the context of investment arbitration. In response to that line of argument, the Court had acknowledged that references to “legitimate expectations” could be found in awards concerning disputes between a foreign investor and the host State in the context of the application of fair and equitable treatment clauses contained in bilateral investment treaties. The Court could not, however, conclude from those references that there existed in general international law a principle that would give rise to an obligation on the basis of what could be considered a “legitimate expectation”. The Court had thus clarified that the notion of “legitimate expectations” belonged to the special domain of investor-State arbitration and could not be transposed to general international law.

Bolivia had also advanced an argument based on what it referred to as the “cumulative effect” of declarations, joint statements and exchanges between the parties. It had claimed that even if there was no instrument, act or conduct from which, if taken individually, an obligation to negotiate its sovereign access to the Pacific Ocean arose, all those elements could cumulatively have “decisive effect” for the existence of such an obligation. In other words, for Bolivia, the historical continuity and cumulative effect of those elements should be taken into account when assessing whether an obligation to negotiate had arisen in the exchanges between the two States. In the view of the Court, however, the argument advanced by Bolivia was predicated on the assumption that an obligation could arise through the cumulative effect of a series of acts even if it did not rest on a specific legal basis. Having found that no obligation to negotiate the sovereign access of Bolivia to the Pacific Ocean had arisen for Chile from any of the invoked legal bases taken individually, the Court had been of the view that a cumulative consideration of the individually claimed bases could not add up to the overall result of giving rise to an obligation.

Despite its general finding that no obligation to negotiate the sovereign access of Bolivia to the Pacific Ocean existed between Bolivia and Chile, the Court had recalled that the parties had a long history of dialogue, exchanges and negotiations aimed at identifying an appropriate solution to the landlocked situation of Bolivia following the War of the Pacific and the Treaty of Peace and Friendship of 1904. In the view of the Court, the periodic exchanges and statements of the parties reflected attempts made in good faith to address the landlocked situation of Bolivia. It had therefore concluded that the parties

should continue their dialogue and exchanges, in a spirit of good neighbourliness, to address the issues relating to the landlocked situation of Bolivia, the solution to which they had both recognized to be a matter of mutual interest.

Turning to the second topic of his presentation, namely the formation of rules of customary international law, he said that he wished to commend the Commission for its work on the topic, especially the draft conclusions on the identification of customary international law that it had adopted at its seventieth session in 2018. Draft conclusion 12 concerned the role that resolutions adopted by international organizations or at intergovernmental conferences might play in the formation of rules of customary international law. The conclusions of the Court in its advisory opinion on the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* were of particular relevance in that regard. The two questions on which the advisory opinion of the Court had been requested were set forth in resolution 71/292 adopted by the General Assembly on 22 June 2017. The first question, which was of particular interest in the context of the formation of rules of customary international law, read:

Was the process of decolonization of Mauritius lawfully completed when Mauritius was granted independence in 1968, following the separation of the Chagos Archipelago from Mauritius and having regard to international law, including obligations reflected in General Assembly resolutions 1514 (XV) of 14 December 1960, 2066 (XX) of 16 December 1965, 2232 (XXI) of 20 December 1966 and 2357 (XXII) of 19 December 1967?

In order to be able to pronounce on whether the process of decolonization of Mauritius had been lawfully completed, having regard to international law, at the moment of its independence, the Court had had to determine, *inter alia*, when the right to self-determination had become a rule of international law binding on all States. To that end, the Court had first sought to indicate the relevant period where it should place itself to determine when the right to self-determination had become a rule of international customary law. The Court had ruled that the process of decolonization of Mauritius had been situated by the General Assembly itself in the period between the separation of the Chagos Archipelago from its territory in 1965 and the independence of Mauritius in 1968. Such a time frame did not, however, prevent the Court from considering the evolution of the law on self-determination since the adoption of the Charter of the United Nations and General Assembly resolution 1514 (XV) of 14 December 1960. In the view of the Court, State practice and *opinio juris* were consolidated and confirmed gradually over time. The Court had therefore been of the opinion that it could rely on legal instruments that post-dated the period in question, namely the period identified by the General Assembly in resolution 71/292, when those instruments confirmed or interpreted pre-existing rules or principles.

With reference to the determination of the rules of international law that were applicable to the process of decolonization of Mauritius, the Court had first looked at the normative context in which the right to self-determination had emerged. The Court had recalled that the Charter of the United Nations consecrated respect for the principle of equal rights and self-determination of peoples as one of the purposes of the United Nations. The Charter also included provisions that would allow non-self-governing territories ultimately to govern themselves. In its advisory opinion on the *Legal Consequences for States of the Continued Presence of South African in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, the Court had observed that “the subsequent development of international law in regard to non-self-governing territories, as enshrined in the Charter of the United Nations, made the principle of self-determination applicable to all of them”. It was therefore those normative developments that had occurred since the adoption of the Charter that the Court had had to examine in order to determine with certainty when the right to self-determination had crystallized into a rule of customary international law that was binding on all States. As early as 1971, in the *Namibia* advisory opinion, the Court had stressed that another important stage in the development of international law was the Declaration on the Granting of Independence to Colonial Countries and Peoples, contained in General Assembly resolution 1514 (XV), which embraced all peoples and territories that had not yet attained independence.

In the Court's advisory opinion on the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, the Court had had to elaborate further on that statement to determine the role of General Assembly resolutions in the emergence of the right to self-determination as a rule of customary international law and in particular the role played in that context by resolution 1514 (XV) itself. The Court had found that that resolution, adopted in 1960, represented a defining moment in the consolidation of State practice on decolonization, insofar as it clarified the content and scope of the right to self-determination. The Court had further emphasized that the resolution had a declaratory character with regard to the right to self-determination as a customary norm, in view of its content and the conditions of its adoption. In examining the period following the independence of Mauritius, the Court had observed that the nature and scope of the right to self-determination of peoples were reiterated in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations. By recognizing the right to self-determination as one of the "basic principles of international law", that Declaration also confirmed its binding character under customary international law.

After recalling that the right to self-determination of the people concerned was defined in General Assembly resolutions 1514 (XV) and 2625 (XXV) by reference to the entirety of a non-self-governing territory, the Court had noted that both State practice and *opinio juris* at the relevant time confirmed the customary law character of the right to territorial integrity of a non-self-governing territory as a corollary of the right to self-determination. Consequently, in the view of the Court, the peoples of non-self-governing territories were entitled to exercise their right to self-determination in relation to their territory as a whole, the integrity of which must be respected by the administering Power. It followed that any detachment by the administering Power of a part of a non-self-governing territory, unless based on the freely expressed and genuine will of the people of the territory concerned, was contrary to the right to self-determination. The Court had arrived at that conclusion in terms of the applicable law and in terms of the right to self-determination as a customary rule of international law at the moment of the independence of Mauritius. That finding had led the Court to declare that "having regard to international law, the process of decolonization of Mauritius was not lawfully completed when that country acceded to independence in 1968, following the separation of the Chagos Archipelago".

Turning to the subject of compensation for environmental damage, he said that the Court had recognized, in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, that the environment was not an abstraction but represented "the living space, the quality of life and the very health of human beings, including generations unborn". He was therefore pleased to note that the Commission's current programme of work featured three topics directly related to the protection of the environment in international law. He further noted that draft principle 9 of the draft principles on protection of the environment in relation to armed conflicts provisionally adopted by the Drafting Committee on first reading reaffirmed the principle of full reparation for environmental damage in the context of armed conflict, including damage to the environment in and of itself. The principle of full reparation for damage by internationally wrongful acts had been first consecrated by the predecessor of the International Court of Justice, the Permanent Court of International Justice, in the case concerning the *Factory at Chorzów*. It had been subsequently endorsed and applied by the International Court of Justice and had been later codified by the International Law Commission in article 31 of its articles on responsibility of States for internationally wrongful acts. However, the International Court of Justice had not had the opportunity to pronounce itself on the applicability and concrete application of the principle of full reparation to environmental damage caused by internationally wrongful acts. The case concerning *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* had provided the Court with an opportunity to clarify the principles of international law governing the very question of the compensability of environmental damage and the methods for the assessment of such compensation.

Recalling that in its earlier judgment of 2015, the Court had found that sovereignty over a disputed territory of some three km² along the border between Costa Rica and Nicaragua belonged to Costa Rica and that, consequently, the activities of Nicaragua in that territory between 2010 and 2013, including the excavation of three small channels, or *caños*,

and the establishment of a military presence, were in breach of the sovereignty of Costa Rica. The Court therefore had held that Nicaragua had incurred the obligation to make reparation for the damage caused by its unlawful activities and that Costa Rica was entitled to receive compensation for material damages caused by Nicaragua. The Court also had decided that, failing an agreement between the parties within 12 months of the judgment, the Court itself would settle the compensation issue in a subsequent procedure. When the parties had failed to conclude such an agreement, it had duly fallen to the Court to address the question of compensation. To that end, the Court had gone back to general international law in order to establish more clearly the principles governing compensability for environmental damage. It had thus recalled that compensation could be an appropriate form of reparation, particularly in those cases where restitution was materially impossible or unduly burdensome, a general principle that was already reflected in article 35 of the Commission's articles on State responsibility.

Starting with that principle, the Court had stated, without any ambiguity, that damage to the environment, and the consequent impairment or loss of the ability of the environment to provide goods and services, was compensable under international law. Detailing the scope of the compensation for environmental damage, the Court had explained that such compensation might include two types of reparation: indemnification for the impairment or loss of environmental goods and services in the period prior to recovery and payment for the restoration of the damaged environment. With respect to the latter type of reparation, the Court had clarified that, since natural recovery might not always suffice to return an environment to the state in which it had been before the damage had occurred, active restoration measures might be required in order to return the environment to its prior condition, insofar as that was possible.

The Court had then turned to the methods for the valuation of environmental damage. First, the Court had observed that international law did not prescribe any specific method of valuation for the purposes of compensation for environmental damage. Thus, with regard to compensability of environmental damage, the Court, in line with draft principle 9 of the Commission's draft principles on protection of the environment in relation to armed conflicts, had concluded that it was consistent with the principles governing the consequences of internationally wrongful acts, including the principle of full reparation, to hold that compensation was due for damage caused to the environment, in and of itself, in addition to expenses incurred by an injured State as a consequence of such damage. Thus, while the Court had been of the view that compensability as such should be grounded in the existing principles of international law governing internationally wrongful acts, including the principle of full reparation, the Court had clearly preferred to base the methods for the valuation of such damage on the specificities of the case at hand.

Second, the Court had reaffirmed the requirement of a direct and causal nexus between the wrongful act and the injury suffered by Costa Rica. However, the Court had remained fully aware of the particular features of compensation for environmental damage. One such feature was that the causal link between the wrongful act and the damage might be uncertain in environmental cases, either because the damage had several concurrent causes or because there was a lack of scientific evidence to prove the link. Nonetheless, the Court had affirmed that the absence of adequate evidence as to the extent of the material damage would not automatically preclude an award of compensation for that damages. As the Court had already held with regard to human rights violations in the case concerning *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, when the nature of an injury was such that assessing damages with certainty was impossible, compensation could be determined based on equitable considerations or just and reasonable inferences.

Third, the Court had decided not to follow the valuation methods proposed by the parties, but to approach the valuation of environmental damage "from the perspective of the ecosystem as a whole", by adopting "an overall assessment of the impairment or loss of environmental goods and services prior to recovery, rather than attributing values to specific categories of environmental goods and services and estimating recovery periods for each of them".

Thus, in its overall valuation, the Court had considered four categories of environmental goods and services: trees felled by Nicaragua in the process of digging the *caños*, other raw materials removed as part of the clearance of the *caños*, gas regulation and air quality services lost as a result of such removal, and biodiversity impaired or lost as a result of the felling of the trees, the clearing of the area and the removal of other raw materials. In order to compensate for the damage to the environment, the Court had fixed an amount that it considered approximately to reflect the value of the impairment or loss of environmental goods and services until recovery. Additionally, the Court had granted a sum for the restoration costs claimed by Costa Rica in respect of the internationally protected wetland that was the area in dispute between the partners.

Fourth, the Court had distinguished between the damage to the environment *per se* and the costs incurred by the State in relation to such damage. Thus, in addition to the damage to the environment itself, the Court had held that costs and expenses incurred by Costa Rica could be reimbursed if a sufficiently direct and certain causal nexus was established between the internationally wrongful conduct and the heads of expenses for which Costa Rica sought compensation. The Court had identified specific categories of costs to be considered, such as remediation expenses and monitoring costs.

Through its 2018 judgment in *Costa Rica v. Nicaragua*, the Court had laid down a solid framework for the reparation of environmental damage in inter-State disputes. In the process, the Court had given concrete meaning to the principle of compensation for damage to the environment *per se*. It had also established a clear approach to the valuation of environmental damage from the perspective of the ecosystem as a whole, by including an overall assessment of impairment or loss of environmental goods and services until full recovery could be attained.

The Court would undoubtedly face future cases in which it would be required to quantify various environmental damages. A number of questions were yet to be resolved, since the calculation of the damages and costs were tailored to the specific aspects of the case between Costa Rica and Nicaragua. For instance, the valuation of environmental damage might raise questions regarding the Court's use of its power under Article 50 of its Statute to appoint experts to assist in the valuation of damage. Nonetheless, the case demonstrated the Court's willingness to assist States in dealing with new legal issues that divided them, whatever the legal nature of the dispute or the level of technical complexity involved. Moreover, in a world in which environmental protection was becoming an increasingly critical issue, it was hoped that the Court's ruling would serve to dissuade States from engaging in acts that damaged the natural world.

The Court currently had 17 cases on its docket, featuring a number of multifaceted legal issues. The most recent case had been brought before the Court on 7 June 2019 by Guatemala and Belize by means of a special agreement, which they had concluded several years previously. The case was unique not in nature, but in the manner in which it had been brought: before seizing the Court, both countries had held national referendums to determine whether their respective populations were in favour of submitting such a delicate dispute to the Court for final settlement. Both referendums having achieved overwhelmingly positive results, the Court was now seized of the matter. The case reflected the increasing confidence being placed in the work of the Court, which in turn had led to an increasing workload. The Court, which was often faced with complex legal and technical issues raised in contentious and advisory proceedings, aimed to offer practical solutions, based on sound legal principles, to assist all States and international organizations and ultimately to contribute to peace and stability among nations.

Mr. Tladi said that the advisory opinion of the International Court of Justice on the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* had been a source of great debate in the Commission's work on the topic "Identification of customary international law" and, more recently, on the topic "Peremptory norms of general international law (*jus cogens*)". Specifically, there had been some contestation as to what conclusions the Commission could draw from the fact that, notwithstanding that many States in their pleadings, both oral and written, had referred to the right to self-determination as a peremptory norm of general international law, the Court had remained silent on the subject. He wondered if, in the Court's view, the right to self-determination as

a rule of customary international law had not yet been elevated to peremptory status. On the other hand, as some members had argued, the fact that in a number of individual opinions the right to self-determination had been identified as a peremptory norm and that not a single member of the Court had held otherwise could perhaps be taken as an indication that the Court did indeed view that right as a peremptory norm. It had also been argued that, by attaching particular consequences to the breach of that norm, especially the duty to cooperate, a duty associated with peremptory norms, the Court was again indicating that it viewed the right to self-determination as a norm of *jus cogens*. He would be very interested to hear Judge Yusuf's view on that debate.

Mr. Hassouna, said that he recalled that Judge Yusuf, in his keynote address to the Commission on the occasion of the commemoration of its seventieth anniversary (A/CN.4/SR.3422), had expressed optimism about some developments in the international legal order, but had been less sanguine about others. He therefore wished to know what role, apart from that of settling differences between States on the basis of the rule of law, the Court could play in confronting the challenges stemming from violations of treaty obligations, the abandonment of multilateralism, the illegal use of force and the violation of international humanitarian law. Was Judge Yusuf still optimistic about the future?

Mr. Hmoud said that he wished to know whether Judge Yusuf personally regarded the right of peoples to self-determination as *jus cogens* or an *erga omnes* right. What legal status did the Court accord to the outcome of the Commission's work? Did it view that work as an indication of certain principles? He also wondered whether the Court considered that the decisions of other courts and tribunals must be consonant with its own interpretation of the principles of international law.

Mr. Vázquez-Bermúdez said that he would be grateful for an explanation of why the Court, in its advisory opinion on the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, had confined itself to finding that the right of peoples to self-determination was an *erga omnes* obligation which all States had a legal interest in protecting. Why had it been reluctant to express an opinion on whether the right of peoples to self-determination was a peremptory norm of international law?

Mr. Grossman Guiloff said that he was curious to know what opportunities and challenges for the Court arose from the trend towards interdependence in international relations due to the inability of individual States to resolve pressing issues facing humanity and the conflicting trend towards the increasing questioning of the international order based on the rule of law.

Ms. Oral said that the Court had set an important precedent in considering the matter of environmental compensation in the case concerning *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*. She would therefore like to know how the Court had devised its approach to the evaluation of compensation.

Judge Yusuf (President of the International Court of Justice) said that the Court had deemed it unnecessary to address the matter of whether the right to self-determination was a peremptory norm of international law in its advisory opinion on the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, because that had not been the point at issue. The General Assembly's question had been whether the decolonization process of Mauritius had been lawfully completed. The Court did not usually engage in rambling *obiter dicta* or make statements that were not directly relevant to its conclusions, especially in an advisory opinion. The position would have been different had the question concerned the treaty which had been concluded between the United States of America and the United Kingdom of Great Britain and Northern Ireland after the separation of the archipelago. If it had been called upon to determine the treaty's validity, the Court might well have had to examine whether it violated a *jus cogens* norm. In fact, the Court looked forward to receiving the Commission's conclusions on the topic of *jus cogens*.

In response to the questions asked by Mr. Hassouna and Mr. Grossman Guiloff, he said that while there were challenges and threats to the international order, there were also many positive developments. They included more frequent recourse to the Court and a burgeoning caseload encompassing several aspects of current conflicts and tensions around

the world. International law was a bulwark against barbarism. Unfortunately, barbaric acts often preceded the formulation of international law. The basic challenge facing all peoples of the world lay in finding a way of strengthening the rules of international law before human cruelty led to the commission of barbaric acts. As international lawyers could raise awareness of the inherent risks and dangers of certain trends, the Commission could play a leading role in that respect.

In 2018, he had addressed the General Assembly, twice, and the Security Council on the importance of multilateralism. Indeed part of the joint mission of the Court and the Commission was to promote and ensure global peace and security through law. It was therefore crucial to remind States of their legal obligations in that connection. He was pleased that his close and informal dialogue with the Security Council had proved to be rich and fruitful.

Turning to Mr. Hmoud's two questions about the outcome of the Commission's work, he considered that there had always been a cross-fertilization of ideas and influences between the Commission and the Court, which he was sure would continue in the future. The Commission's texts were a constant source of inspiration for the Court.

As other judicial bodies generally followed the Court's interpretation of rules of international law, he did not believe that much fragmentation was really taking place. On the contrary, it was the unity and common language of international law which enabled the 15 judges who came from all four corners of the world and different legal traditions to communicate with each other and arrive at unanimous or majority determinations of legal issues. The global South's role in the codification and progressive development of international law was likely to grow in the future.

Replying to the question put by Ms. Oral, he said that environmental protection was an increasingly important area of the law. The method of evaluating environmental damage had to be tailored to the specificities of each case. In the case concerning *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* the Court had rejected the wholesale adoption of the methods proposed by the parties on the grounds that they were somewhat self-serving. However, it had taken certain elements of those methods and combined them with considerations of equity in order to arrive at a just solution.

The Chair thanked Judge Yusuf for his valuable statement and informative replies to members' questions.

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

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).

Ms. Lehto said that the Special Rapporteur's well-researched third report helped to clarify the difficult interface between the law of State succession and the law of State responsibility. The fact that the Special Rapporteur had explained his methodology in paragraphs 17 to 23 had been most useful. She agreed with the general approach to the topic set out therein.

As previous speakers had noted, State practice in questions of succession to State responsibility was scarce and not always very helpful. As one writer, Patrick Dumberry, had noted, succession to the right of reparation was rarely raised explicitly by successor States and therefore remained untested before judicial bodies.

The scarcity of State practice had prompted comments on the final form of the outcome of the Commission's work on the topic. Recalling that the Special Rapporteur, when introducing his first report in 2017, had said that the choice of draft articles as an appropriate form for the outcome would be supported by the precedents of the Commission's work, she noted that, while the draft articles on succession of States in respect of State property, archives and debts and the draft articles on succession of States in respect of treaties had formed the basis of two conventions, that had not been the case of

the articles on responsibility of States for internationally wrongful acts or the articles on nationality of natural persons in relation to the succession of States. In 1999, the Commission had recommended that the General Assembly should adopt its articles on nationality of natural persons in relation to the succession of States in the form of a declaration. Those examples showed that casting an outcome of the Commission's work in the form of draft articles did not necessarily signify that they should serve as the basis of treaty negotiations or that they reflected settled law. The final form of the Commission's work on the current topic would probably have to be reconsidered at a later stage of its deliberations. There was no reason to change the title of the topic.

Draft articles X and Y and the titles proposed for parts II and III were useful in that they made for greater clarity of the draft articles. She welcomed the fact that the draft articles made it plain that the scope of the topic encompassed only internationally wrongful acts for which the predecessor State, or other injured State if the predecessor State had committed the wrongful act, had not received full reparation before the date of succession of States. She wondered whether it would be sufficient to place the definition of "States concerned" in the commentary, rather than in article on the use of terms.

She agreed with the Special Rapporteur that the situation in respect of reparation for injury resulting from internationally wrongful acts committed against the predecessor State was quite different from a situation in which it was the predecessor State which had perpetrated the internationally wrongful act. Most importantly, the question of international responsibility as such was not affected by the succession of States, because the State responsible for the internationally wrongful act remained the same and was not affected in any way by the territorial modifications giving rise to the succession of States, as the Special Rapporteur had explicitly stated in paragraph 42 of the report.

It made sense to cluster the different cases of succession in two broad categories according to whether the predecessor State continued to exist or ceased to exist after the date of succession.

The formulation "may request", which appeared in draft articles 12, 13 and 14, had also been used in the 2015 resolution of the Institute of International Law on succession of States in matters of international responsibility. However, in that resolution it was used seemingly interchangeably with the formulation "may invoke international responsibility". Professor Marcelo Kohen and Patrick Dumberry had recently explained that formulation as referring to the rights arising from an internationally wrongful act committed against the predecessor State. More clarity would be welcome on whether the words "may request" were intended to have a different meaning in the context of the draft principles.

There was room for improvement in the drafting of draft article 12 (1); several proposals had already been made in that regard. With respect to draft article 12 (2), she agreed with its main thrust regarding the special circumstances under which the successor State could also request reparation. A link between a wrongful act or its consequences and the territory or population of the State was a relevant consideration in that context. The wrongful act might have affected a particular territory and caused significant environmental damage, or it might have affected a specific population through, for instance, human rights violations. While such an exception to the general non-succession rule in cases in which the predecessor State continued to exist was clearly warranted, she, like Ms. Oral, found the wording vague, in that it required only that the injury related to the part of the territory or nationals of the predecessor State that had become the territory or the nationals of the successor State. As also pointed out by Ms. Oral, the resolution of the Institute of International Law, on the other hand, required either that the wrongful act had affected the territory or persons which, after the date of succession, were under the jurisdiction of the successor State or that there was a direct link between the consequences of the wrongful act and the territory or population of the successor State. The existing wording of draft article 12 (2) made the provision unnecessarily broad.

There was some inconsistency between draft article 12 (2), which referred to the injury relating to the part of the territory or the nationals of the successor State, and draft article 14, which referred to a "nexus between the consequences of an internationally wrongful act and the territory or nationals of the successor State". The notion of "nationals"

seemed unnecessarily limitative; “persons under the jurisdiction of the successor State” or “population of the successor State”, as used in the resolution of the Institute of International Law, might be preferable.

While the different scenarios concerning the unification of States had been explained in the report, draft article 13 perhaps summarized the essential elements of such situations a little too succinctly. For purposes of comparison, article 13 of the resolution of the Institute of International Law read “when two or more States unite and form a new successor State, and no predecessor State continues to exist, the rights or obligations arising from an internationally wrongful act of which a predecessor State has been either the author or the injured State pass to the successor State”.

Draft article 14 (2) was of crucial importance, although its wording required some refinement along the lines of her earlier comments. Mention of “an equitable proportion” was very relevant in the context of agreements between different successor States. In that regard, reference could perhaps be made to Opinion No. 1 of the Badinter Arbitration Commission of the Conference on Yugoslavia. The reference in draft article 14 (2) to “such ... agreements”, without further explanation, appeared to be an unnecessary shortcut.

Concerning draft article 15, the corresponding section of the report was interesting and well argued. The application of the continuous nationality rule in the context of State succession might indeed result in a situation in which neither the former nor the new State of nationality could exercise diplomatic protection on behalf of an individual. Mr. Dugard, as the Commission’s Special Rapporteur on diplomatic protection, had commented on that rule in his first report (A/CN.4/506/Add.1), saying that it had “outlived its usefulness” and had “no place in a world in which individual rights are recognized by international law and in which nationality is not easily changed”.

Draft article 15 (1) mirrored article 5 (2) of the articles on diplomatic protection, with slight changes. The isolated mention, in paragraph 1, of “the corporation” might require some explanation, but the drafting was otherwise adequate. The additional safeguards contained in article 5 of the articles on diplomatic protection could be explained in the commentary.

To conclude, she supported the suggestions for the future work on the topic and the referral of all the draft articles to the Drafting Committee.

The Chair, speaking as a member of the Commission, said that he wished to thank the Special Rapporteur for his well-researched third report, and the Secretariat for its useful memorandum.

During the debate on the topic in the Sixth Committee in 2018, several delegations had pointed to the scarcity and diversity of relevant State practice and its susceptibility to divergent interpretations. That observation reflected a clear impediment to the Commission’s work that had existed from the outset and the difficulty in deducing rules based on State practice that essentially depended on agreements between the States concerned. When two or more States agreed on matters of succession and the allocation of responsibility, many of the considerations taken into account were more political than legal in nature. Such considerations were not always reflected in the *travaux* of such agreements, which made it hard to identify the rules that those States had followed or taken into account. While deference to agreements between States on succession matters relating to responsibility had been reflected in the draft articles proposed in the Special Rapporteur’s previous reports, it did not contribute much in terms of the formulation of general default rules that would apply when no such agreements existed.

Although filling the gaps was an important goal of the Commission’s work on the topic, there were several considerations that should be taken into account in that connection. The Commission should not depart from the existing rules that formed part of international law, most importantly the default rule of non-succession of responsibility. The Special Rapporteur, in several of the proposals and explanations contained in his previous reports, had departed from that rule and moved towards a rule of succession. That approach had met with significant opposition within both the Commission and the Sixth Committee. The Special Rapporteur did not appear to have altered that approach in the third report, notably

in sections I (B) and (C) of chapter I. Filling the gaps did not mean proposing rules that conflicted with the articles on responsibility of States for internationally wrongful acts, including the rules on attribution, most of which were considered customary international law. If, under the proposed draft articles, a successor State was legally treated as responsible for wrongful acts that were not attributed to it, that would constitute a contravention of the articles on State responsibility. While principles such as unjust enrichment might be applied in seeking reparations from such a State, that would fall outside the context of State responsibility and therefore should not be dealt with in the current topic. Another option was to change the title of the topic; for example, a title along the lines of “reparation for injury arising from internationally wrongful acts in State succession matters” would allow for the proposal of rules based on legal concepts other than State responsibility to provide reparations for injury stemming from wrongful acts.

With regard to the subsidiary nature of the rules, the draft articles proposed in the Special Rapporteur’s reports were generally normative in their formulation. While that approach was appropriate when codifying existing rules, it should not necessarily be applied to the development of new rules. In the case of the current topic, either the draft articles should be formulated using non-normative language or the commentary should make clear that new rules were being proposed for relevant situations. Most importantly, the proposed *lex ferenda* rules should be based on solid grounds and not depend on policy preferences. It was not adequate to advance, as legal reason, that responsibility should not stop “at the door of succession” or to present the “existence of a territorial or personal nexus” as a legal basis for invocation of responsibility.

In paragraphs 31 and 32 of the report, the Special Rapporteur dealt with the issue of sovereignty, noting that a successor State derived its sovereignty from its own statehood under international law rather than from the predecessor State. However, he then asserted that a new State could not disengage itself from pre-existing rules and situations and that in some situations, even where there was no transfer of sovereignty, a successor State was entitled to exercise the predecessor’s rights and discharge its obligations because international law so directed. That statement did not necessarily apply to matters of State responsibility in situations other than that of a continuator State. Furthermore, it did not clarify which rules of international law directed a successor State to assume rights and obligations from a predecessor. Lastly, given that legal responsibility of a State arose from its sovereignty, a State that had not existed when the wrongful act occurred could not be said to be responsible for that act or any injury resulting from it.

In paragraph 34, the Special Rapporteur stated that a successor State “may” request reparations for injury caused to a predecessor State, but, according to that paragraph, that did not mean that the report was asserting an automatic succession approach. Nevertheless, the formulation appeared to provide the successor State with the right to make such a request. In situations where the predecessor State ceased to exist, the language used by the Special Rapporteur denoted automatic succession when certain conditions were met.

In paragraph 38 of the report, the Special Rapporteur stated that the aim of the topic was not to provide motives for reopening cases that had been resolved prior to the date of succession of States, and that the draft articles were intended to apply solely to cases in which the injured State had not received full reparations before the date of succession. In that connection it was important to stress that the work of the Commission was not adjudicatory in nature and should not seek to resolve pending disputes between States. The rules proposed should be of a general nature that applied to non-specific cases or situations.

Turning to the issue of injury caused to a predecessor State and the question of whether the right to reparation could devolve or transfer to a successor State, he said that, according to paragraphs 45 to 47 of the report, in situations where the predecessor State continued to exist the prevailing view was that the right of the predecessor to claim reparations was not affected. However, that did not resolve situations where the injury occurred to a part of the territory or population that had later become part of the successor State. The rules on State responsibility provided that a predecessor State that continued to exist retained the right to claim reparations, and he did not see any legal basis for an exception. While in the context of decolonization, the territory in question would no longer be part of the territory of the colonizing State, which could not be described as an injured

continuator or predecessor, in situations of cession or secession, the rules on State responsibility would treat the predecessor as the injured State. Article 42 of the articles on State responsibility was obviously applicable in cases where there was no agreement between the concerned States on the invocation of responsibility, and the State to whom the breached obligation was owed could invoke such responsibility as an injured State. The Special Rapporteur's aim in paragraphs 49 and 50, where he appeared to cast doubt on the concept of "injured State" as used in the articles on State responsibility, was unclear; perhaps he was intending to depart from those articles.

The Special Rapporteur was also critical of the differentiation of treatment for situations of succession when the predecessor ceased to exist, where the successor could not under doctrinal views claim reparations for the injury of the predecessor. The Special Rapporteur described the issue of continuity of legal personality of the successor as being a political consideration and stated that the concept of State continuity based on legal personality was a legal fiction. Once again, he himself did not consider that either of those arguments constituted solid grounds for proposing new rules. If the obligation breached that was owed to a predecessor State which had ceased to exist devolved to the successor State, the successor State should have the right to claim reparation. If it did not have that right, the State responsibility regime would not be a basis for its claim. The fact that political considerations played a role in deciding which State continued the legal personality of a predecessor did not negate a State's legal position as the successor of the rights of the predecessor. As precedents indicated, there was agreement among States as to which State continued the legal personality of a predecessor State – and assumed rights arising from succession – and the draft articles should not interfere with such agreement or with the allocation of rights to claims reparations.

With reference to cases of succession where the predecessor State continued to exist, the three examples set forth in paragraphs 52 to 56 of the report did not represent a basis on which a conclusion could be reached as to a legal rule. The first example, concerning the agreement between France and the Russian Federation in 1997, related to loans and bonds issued or guaranteed to the French Government or French nationals by the Russian Empire in 1917. The second example, concerning the reparations payable by Germany to Pakistan and India in the context of the Agreement on reparation from Germany, on the establishment of an Inter-Allied Reparation Agency and on the restitution of monetary gold, reflected a situation in which Pakistan and India had agreed among themselves on the allocation of claims and reparations, which was not indicative of practice based on a general rule of international law. Similarly, the third example, concerning the agreement between the Soviet Union and the German Democratic Republic for the return of part of the cultural property confiscated by the Red Army in 1945, was also not indicative of practice recognizing the seceding State's right to claim or to receive reparations; rather, it reflected a political choice by the Soviet Union to favour one of its allies during the cold war. More importantly, those examples did not lead to the conclusion contained in draft article 12 (2), which allowed a successor State to request reparations in cases of cession or secession. Draft article 12 (2) provided that such a State "may request from the responsible State reparation in special circumstances where the injury relates to the part of the territory or the nationals of the predecessor State that became the territory or nationals of the successor State". That provision raised a number of questions. What were the "special circumstances" deduced from those examples that warranted such an exception to the rule that a predecessor continuator State had the sole right to claim reparations? What was the legal basis that provided the successor State with that right if the injury "relates" to part of the territory or population that was assumed by succession? What was the meaning of the word "relates" in that context and how was the notion of the "related injury" to the part of the territory or population defined? Given that such questions were not answered in the report, the general rule contained in draft article 12 (1), namely that the predecessor State had the right to claim reparations, remained the valid rule under the State responsibility regime. In his view, the word "may", in draft article 12 (1), should be replaced with "is entitled to", to make clear that it was a right of the predecessor continuator State and to ensure that that State was not placed on the same footing as the successor State in terms of claiming reparations. In draft article 12 (2), the words "notwithstanding paragraph 1" should be deleted to make it clear that the right to reparations belonged to the continuator State – the

injured State – while it was the successor State that was able to seek compensation. The word “reparation” should be replaced with “compensation” since the successor State was not technically the injured State.

Unlike in situations of secession and cession, in situations of decolonization, dependency and trusteeship leading to the creation of newly independent States, the predecessor was not an injured State, because the territory in question belonged not to the predecessor State but to the people of the territory. The examples cited in the report, namely the case concerning *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, the cases involving reparations made by Japan after the Second World War and the case of Namibia and its right to claim reparation, did not establish a rule under international law as such, but they did provide a basis for the progressive development of a rule allowing the newly independent State to request reparation. While peoples had rights under international law, the breach of which entailed responsibility and the right to reparations, he was not convinced that under the existing rules a newly established State whose people were exercising self-determination could be considered to be a successor injured State having direct rights. Nonetheless, such a right to reparation could be claimed under the rules of diplomatic protection.

In cases of succession of States where the predecessor ceased to exist, while the report made a distinction between the unification of States and the dissolution of States, the eventual outcome relating to the suggested rules was the same, namely a rule of succession.

In both situations, the examples in the report provided inconclusive and mixed outcomes that did not assist in the formulation of the rules. In the example of the claims made by the United Arab Republic against the United Kingdom and France and the related agreements that had been reached in connection with the attack on the Suez Canal, neither of the two States had paid damages to the United Arab Republic or indicated that they accepted responsibility for damages. That example was the only one in the report that concerned the unification of States, and it was not possible to draw a conclusion from it with regard to a proposed rule.

Of the examples relating to the dissolution of States, the most pertinent ones were those involving Czechoslovakia and Yugoslavia; however, none of the cited cases provided evidence of the existence of a rule on succession of the right to reparations. In the case concerning the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, the International Court of Justice had referred to the special agreement between Slovakia and Hungary. The claim made by the Czech Republic before the United Nations Compensation Commission in connection with the damage to the Czechoslovak Embassy in Baghdad had been based on the agreement between the Czech Republic and Slovakia, although in that case it could be argued that the Panel of Commissioners had at least recognized a right of succession in claims to reparation when the predecessor ceased to exist. In the example of the Agreement on Succession Issues concluded among the successor States of the former Yugoslavia, the report did not provide any cases where the right of reparation of the former Yugoslavia devolved to any of the successor States. In his view, the examples provided were not sufficient for the progressive development of a rule on succession of right to reparation as contained in draft article 14.

In draft articles 11, 12 and 14, where the Special Rapporteur used the formulation “may request reparation”, it was unclear whether the words were intended to mean a right to reparation or merely a right to seek reparation, or alternatively were intended as a non-binding proposition for the right to reparation. In paragraph 34 of the report, the formulation was said to mean “the possibility for a successor State to raise the issue of reparation of injury caused to the predecessor State”. If that was the case, the words were legally meaningless, since a State could always raise issues with other States. While he himself believed that the intention was in fact to establish a right to reparation, the matter required further clarification. Draft article 14 (2) referred to the need to take into consideration the nexus between the consequences of the wrongful act and the territory and nationals of the successor State, the equitable proportion and other relevant factors. However, the nexus with the territory or the nationals did not make the successor State an injured State. Furthermore, the report did not clarify which other factors should be taken into account or the legal basis on which they should be considered. Those questions needed

to be discussed before a rule on succession could be adopted. In addition, in draft articles 13 (1) and 14 (1) the word “reparation” should be replaced with “compensation”, since “reparation” indicated that the successor States had been injured, which was not the case.

In connection with reparation for injury arising from a wrongful act committed against a national of a predecessor State, the Special Rapporteur had opted to deal with the issue, *inter alia*, in the context of the regime of diplomatic protection, which fell outside the scope of the topic. He himself saw no reason why the Commission should not decide to include that particular aspect of diplomatic protection within the scope of the topic, except if the suggested rule or draft article was inconsistent with the articles on diplomatic protection.

The report reopened debate on the diplomatic protection regime, which in his view was not suitable in the context of the topic, especially in the light of the fact that such issues had been settled in the articles on diplomatic protection. Direct injury or damage had been described in article 1 of the articles on diplomatic protection as having been incurred by the national of the State exercising diplomatic protection. The fact that the State of nationality had the right to exercise such protection and to invoke the responsibility of the State that had committed the wrongful act did not make the State of nationality “indirectly injured or damaged”. The right to exercise protection was simply a procedural means through which the responsibility of the wrongdoing State could be invoked, thereby overcoming the problem of the lack of standing for the injured individual to do the same. Therefore, the right of the State exercising diplomatic protection was asserted in order to protect the interests of its national, rather than because the State itself had been injured directly or indirectly.

The report discussed the problem of combining the traditional legal framework of diplomatic protection with article 44 of the articles on State responsibility insofar as the nationality of claims interfered with the possibility of claiming reparations in cases of State succession. Although the requirement of continuous nationality between the date of injury and the date of initiating the claim for reparations might impede the claim to reparations in the context of diplomatic protection, that issue had also been settled in the articles on diplomatic protection, article 5 (2) of which provided that “a State may exercise diplomatic protection in respect of a person who is its national at the date of the official presentation of the claim but was not a national at the date of injury, provided that the person had the nationality of a predecessor State”.

While he appreciated the discussion in the report regarding, *inter alia*, various aspects of case law and examples of State practice that gave context to draft article 15, the matter had already been settled in the articles on diplomatic protection and did not need to be reopened. Some examples in the report, including the case of *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America* and the reparations for Jewish nationals of several European States during the Second World War, were not related to succession. The example of the 1928 *Pablo Nájera (France) v. United Mexican States* arbitral award was not an exception to the continuous nationality principle, as was made clear in paragraph 124 of the report. The United Nations Compensation Commission claims regime was a special legal regime which made exceptions to the general substantive and procedural rules for claims under international law. Nonetheless, he shared the Special Rapporteur’s view that the exception to the continuous nationality rule in cases of succession should be provided for in the context of the draft articles, as had been recognized in the articles on diplomatic protection. The formulation of draft article 15 (1) was acceptable since it reflected the content of article 5 (2) of the articles on diplomatic protection. It was reasonable to extend the exercise of diplomatic protection initiated by a predecessor State to a successor State in order to continue with the claim.

Concerning the future work on the topic, it would be helpful if the Special Rapporteur could clarify whether the fourth report would include discussion on the different forms of reparation, since paragraphs 23 and 144 of the report appeared to be at odds on that point.

Lastly, pending confirmation from the Special Rapporteur on whether he was willing to revisit certain principles contained in draft articles 12, 13 and 14, he himself recommended sending the draft articles in the report to the Drafting Committee.

The meeting rose at 1.05 p.m.