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Held at the Palais des Nations, Geneva, on Friday, 12 July 2019, at 10 a.m.

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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. Jalloh
	Mr. Laraba
	Ms. Lehto
	Mr. Murphy
	Mr. Nguyen
	Mr. Nolte
	Ms. Oral
	Mr. Park
	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

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)

Ms. Galvão Teles said that she wished to thank the Special Rapporteur for his well-researched third report (A/CN.4/731) and helpful introductory statement, as well as his openness to comments and suggestions, including those made in the Sixth Committee. She also welcomed the memorandum by the Secretariat providing information on treaties which might be of relevance to the future work of the Commission on the topic (A/CN.4/730). Since she agreed with many of the comments that had already been made on the draft articles proposed in the Special Rapporteur's report, she would concentrate on issues of a more general nature. In particular, and without prejudice to the continuation of the work on the topic, the title, possible outcome, general approach and scope of the project merited broader joint reflection.

Like some other Commission members and Member States, she thought it would be beneficial to align the title of the topic with the one used by the Institute of International Law in its work in that area ("Succession of States in matters of international responsibility"), or to choose one of the other options that had been suggested during the Sixth Committee debate, such as "State responsibility problems/dimensions/aspects in cases of succession of States". While the Commission was still discussing the possible existence and content of a general rule of succession or non-succession to rights and obligations, specifically in cases where the predecessor State continued to exist after the date of succession of States, the current title seemed to imply that there was always a succession in respect of State responsibility. A different title would lead to a different and perhaps more appropriate approach. The focus of the work of the Institute of International Law, namely the effects of a succession of States in respect of the rights and obligations arising out of internationally wrongful acts, was a closer approximation to the scope of the Commission's topic than succession of State responsibility *per se*.

As the Special Rapporteur and members of the Commission had repeatedly described relevant State practice as "diverse, context-specific and sensitive", consideration might be given to whether possible alternative outcomes of the project, such as principles, conclusions or model clauses, would be more appropriate than draft articles. The Working Group on methods of work was currently discussing that very issue. That decision might be deferred until the substantive work had progressed further, but the possibility of such a change should be borne in mind, as it could have an impact on the way in which the provisions were drafted.

Given the different positions that existed on the general approach to the topic, particularly with regard to the possibility of devising a general rule of succession or non-succession with respect to matters of State responsibility, and the fact that the proposed draft articles had already been changed considerably as a result of those differences, the clarifications given in paragraphs 15 to 23 of the report were extremely useful. In 2018 the Drafting Committee had added a paragraph to draft article 1 in order to clarify the subsidiary nature of the draft articles, but that did not obviate the need to find a coherent and balanced manner of dealing with cases in which there was no agreement between the States concerned by the succession.

The Special Rapporteur had taken a balanced and sensible approach by ruling out both the automatic extinction of responsibility and the automatic transfer of responsibility in cases of succession of States and by highlighting the difference between situations in which the predecessor State continued to exist after the date of the succession of States and those in which it ceased to exist. However, the wording of draft articles 12, 13 and 14, in particular, was too ambiguous, particularly the expression "may request reparation", which could be understood to refer to either a legal right or a discretionary option. The explanation given in paragraph 34 did not sufficiently address that concern.

She supported the inclusion of diplomatic protection, addressed in draft article 15, in the scope of the project. The fact that the Commission had previously dealt with State responsibility and diplomatic protection as two different topics was not relevant if the goal

of the topic at hand was to take a comprehensive approach to issues of responsibility arising in the context of State succession. It seemed desirable to offer clear rules or principles to ensure that, when a natural or legal person was the victim of an internationally wrongful act committed by a State, such a victim was not prevented from obtaining reparation by the fact that a succession of States had occurred and the State responsible for the act had ceased to exist or had become a different State. The solution proposed in draft article 15 was consistent with the Commission's articles on diplomatic protection and the Institute of International Law resolution on the topic. The draft article appropriately provided that a successor State could exercise diplomatic protection under special circumstances and could continue a claim in exercise of diplomatic protection that had been initiated by a predecessor State, without prejudice to the application of rules of State responsibility relating to the nationality of claims and rules of diplomatic protection. Such a provision seemed appropriate, albeit primarily as a recommended practice, in order to avoid situations in which a person could not be protected at all. As part of that recommended practice, the Commission could indicate that, when exercising diplomatic protection, the successor State should balance the interests of the person in question against its own considerations.

In conclusion, she recommended that the draft articles should be referred to the Drafting Committee. Due consideration should be given to the comments made in the plenary debate and to general, but fundamental, issues such as the title and scope of the topic, the form of the outcome and the general approach. She commended the Special Rapporteur on his work and his programme for future work, which would allow the Commission to complete the first reading of its output on the topic during the current quinquennium.

Mr. Grossman Guiloff said that he welcomed the attention paid in the report to the comments made by Member States in the Sixth Committee, but cautioned against drawing general conclusions from comments that had been made by only one State or very few States. Like the Special Rapporteur, he thought that, despite the diversity and limited nature of State practice in the area, it was still possible to distil from existing practice common principles that might be useful to States in the future. He noted, however, as had several other Commission members, that more geographically diverse examples of State practice, provided that they were sufficiently relevant to the legal questions under consideration, could usefully be taken into account in the future work on the topic. The case of Cuba after it had achieved independence from Spain might be of interest, as might the changes in sovereignty over territory that had occurred after the War of the Pacific as a result of the 1904 treaty between Bolivia and Chile.

He concurred with the Special Rapporteur's approach of combining the Commission's dual functions of progressive development and codification in the draft articles, as the two were not always distinguishable. Cases of State succession presented practical challenges to the vindication of rights and the fulfilment of obligations that had existed prior to the date of succession. He was therefore not of the view that the Special Rapporteur's rejection of both an automatic rule of succession and an automatic rule of non-succession was confusing. A change in State sovereignty did not negate the wrongfulness of acts perpetrated prior to succession. Although he agreed with Mr. Reinisch and others that there was a general rule of non-succession to rights and obligations, that rule was not without exceptions. There was widespread agreement that practice in that area was context-specific; that observation, in his view, strengthened the Special Rapporteur's argument that there was no automatic rule governing succession.

There seemed to be a consensus among the Commission members that succession to rights and obligations was influenced more directly by politics than by law, but, in his view, the two were not always separate. A more granular analysis of the context-specific practice and political responses of States in that area could show whether such practice had given rise to specific legal concepts and could reveal both common and divergent patterns. Questions might usefully be asked as to the criteria that had been used to settle claims, whether there were similarities in the language used and whether the actors involved had been motivated solely by political considerations. The application by States of different legal norms to determine succession or non-succession to rights and obligations did not mean that there was no legal basis for such decisions, as the issue was not of a binary nature.

The existence of more than one practice, or of political influences, especially in such a diverse area, should not be taken as a sign that there was a complete absence of legal foundation. If the Commission held the identification of legal norms to such a rigid standard, it would run the risk of neglecting its role in the codification and progressive development of international law. The Special Rapporteur had correctly identified the need for exceptions to the general rule of non-succession and had sufficiently justified the approach adopted. The proposed draft articles were grounded in existing State practice, and thus provided a useful legal framework that States might subsequently use in resolving pre-existing issues of reparation for internationally wrongful acts in situations that were complicated by State succession. The Commission might wish to enrich its discussion by considering, for example, how general principles of law, including principles of fairness, could support the Special Rapporteur's conclusions; it should be remembered that codification might cover not only customary law, but also general principles of law.

It could be argued that the legal significance of the right to reparation was diminished by the use of the words "may request reparation" in paragraph 34 of the report and in draft articles 12, 13 and 14. He agreed with Mr. Murphy and many other members that the use of such language indicated ambiguity as to whether a successor State had a legal right to request reparation from the responsible State. Although that concern was addressed in paragraph 136, the use of such "soft language" might nevertheless imply that the right was purely theoretical and not available in practice. He supported Mr. Murphy's proposal that the wording of draft articles 12, 13 and 14 should be revised in order to align it with that of draft article 6, in which the words "invoke the responsibility of" more clearly reflected the presence of a legal right rather than a moral obligation.

He agreed with Mr. Park that the Drafting Committee should discuss further whether the obligations and rights of States ought to be addressed separately or together in the context of each type of succession. As to Mr. Murphy's suggestion that the draft articles should be organized into a convention, he was of the opinion that it was too soon to take such a decision, particularly in view of the small number of comments received thus far from Governments. He also agreed with Mr. Park and others that the title of the topic should not be changed.

He disagreed to a certain extent with the Special Rapporteur's use of the terms "subsidiary" and "residual" interchangeably in describing the nature of the draft articles. As mentioned in paragraph 17 of the report, the draft articles were designed to serve a subsidiary purpose in cases where the States involved had not made other agreements relating to pre-existing rights and obligations. However, the draft articles were also referred to, in the same paragraph, as "residual", a word that, particularly in Spanish (*supletorio*), unfortunately gave the impression that the articles were additional rather than supplementary to such agreements.

In paragraph 39 of the report, the Special Rapporteur used the example of lump-sum agreements to illustrate a situation in which an injured State might accept less than full reparation as full and final settlement of a claim. However, in the light of other examples of State practice in which lump-sum settlements had later been recast by national courts as inadequate alternatives to full reparation, the Commission should tread carefully in making such generalized statements and should focus instead on practice. Courts in the Republic of Korea had recently awarded additional reparations to Korean nationals who had been wronged by Japan in the Second World War, despite the existence of a previously negotiated lump-sum agreement. Similarly, courts in the United States of America had allowed claims seeking further compensation from German nationals and companies, even though lump-sum agreements had previously been concluded. Those cases had been settled through the creation of a new compensation fund. Such examples indicated that the idea of full reparation could be reinterpreted even in cases where lump-sum agreements existed, and therefore that the existence of such an agreement did not necessarily mean that the injury had been repaired in full and was thus without consequence in terms of the topic at hand. It was important to consider to what extent such developments were relevant to the topic.

He agreed that draft article 12 should be referred to the Drafting Committee. He hoped that the wording could be revised to more adequately reflect the nature of the right to

reparation; alternatively, the complexities involved could be dealt with in the commentary, which should also distinguish between the right of a successor State to claim reparation and the right of individuals to seek it. Draft article 12 related only to the right of a State to claim reparation for an internationally wrongful act, leaving aside the potential right of individuals to claim reparation irrespective of the action taken by a requesting State. In that regard, the Commission should consider the numerous developments in practice. The general rule set out in draft article 12 should precede the enumeration of the three cases in which it applied, and he agreed with the Special Rapporteur's decision to combine different but related situations of State succession that had the same legal result. Drawing up separate draft articles for situations that were similar to each other would lead to unnecessary repetition.

Mr. Reinisch had proposed that the right to claim reparation in certain cases of succession should be based on the principle of unjust enrichment and had invoked that principle to justify the limitation set out in draft article 12 on the circumstances in which States could claim reparation, with the purpose of that limitation being to ensure that the requesting State truly had been injured by an internationally wrongful act and was not unjustly enriched by reparation for an injury that it had not suffered. However, such an approach was problematic, as the principle could also be invoked inversely as a way to determine whether a pre-existing injury remained without redress. While the concept of unjust enrichment might be an appropriate metric in some cases, it was insufficient to gauge the fulfilment of the obligation to make reparation in all cases, especially those involving violations of international human rights law or international humanitarian law. In such cases, unjust enrichment would be difficult to prove. Moreover, the articles in part two, chapter II, of the articles on responsibility of States for internationally wrongful acts, which covered the concept of full reparation, did not mention unjust enrichment. A focus on unjust enrichment could, for States seeking to exercise diplomatic protection on behalf of their nationals, create an additional burden that was not supported by State practice or customary norms. In paragraphs 49 and 50 of the report, the Special Rapporteur discussed the concept of an "injured State" in the context of the articles on State responsibility, under which the obligation to make reparation was based on the breach of an obligation itself, rather than on the resulting material damage or the improved situation of the responsible State. The exception covered in draft article 12 (2) was sufficiently justified without reference to the principle of unjust enrichment. If the Commission chose to refer to that principle, it should do so in the commentary.

Draft article 14 should be referred to the Drafting Committee, but the phrase "such claims and agreements" in paragraph 2, which did not feature elsewhere in the draft article, required further clarification. The Drafting Committee should also consider Ms. Oral's comments regarding the use of the term "nexus".

Concerning draft article 15, which should also be referred to the Drafting Committee, the fact that diplomatic protection was not the only recourse for the vindication of rights should be explained, at least in the commentary. Diplomatic protection was an important avenue for the fulfilment of States' obligations towards other States. However, while States often exercised diplomatic protection on behalf of their nationals, individuals also had a right to reparation that could not be erased by changes in geographical borders. That should be made clear either in the draft article itself, perhaps in the "without prejudice" clause in paragraph 3, or in the commentary thereto.

He supported the Special Rapporteur's modern, nuanced approach to the issue of continuous nationality, which was intended to avoid the inequitable consequences that could arise from a more traditional, rigid approach, and agreed with the comments made by other members in that regard. Requiring that a person must have had continuous nationality in order to bring a reparation claim was inconsistent with the object of reparation, at least in cases where the nationality of the person whose rights had been violated had changed for a reason unrelated to the bringing of the claim. With regard to Mr. Murphy's suggestion that draft article 15 did not sufficiently reflect the safeguards enumerated in article 5 (3) and (4) of the articles on diplomatic protection, his own view was that those provisions were in line with the nuanced approach taken by the Special Rapporteur and that the Drafting Committee should discuss whether the safeguards in question should be mentioned

explicitly. Adherence to the modern approach also promoted consistency with the articles on diplomatic protection and the work of the Institute of International Law at its 2015 session.

Mr. Rajput, while welcoming both the Special Rapporteur's third report (A/CN.4/731) and the memorandum by the Secretariat (A/CN.4/730), said that the Secretariat should have been given a broader mandate to study the overall practice in the area of succession of States instead of confining itself to the study of treaties. In general, the difficulty of the Special Rapporteur's task was compounded by the scarcity of State practice in relation to the topic; the insignificant number of States that had become parties to the two multilateral instruments that related to succession of States, one of which had yet to come into force; and the fact that academic opinions on the subject were divided.

With the exception of some of Mr. Grossman Guiloff's points, he largely agreed with the comments made by other Commission members. Treaties dealing with the issue were more reflective of *quid pro quo* bargaining than of any precise practice. The statement made by the delegation of China in the Sixth Committee, to which Mr. Murphy had referred, had alluded to the political compulsions and choices that dictated the conclusion of such agreements. Some of the other State practice mentioned in the report had a rather chequered history. In considering the practice, the Commission should take care not to allow any ideological predilection or natural law instinct to colour its interpretation so as to suit a particular outcome.

The comments made by Ms. Galvão Teles had persuaded him that there was merit in revisiting the title of the topic. Aligning it more closely with the title used by the Institute of International Law, and thereby rendering it much more neutral, was a valid suggestion, though he did not think that the word "aspects" should be added; such a change could create the impression that responsibility was transferred in cases of succession.

For a number of reasons, the outcome of the topic should be draft guidelines, rather than draft articles. The 1978 Vienna Convention on Succession of States in Respect of Treaties had attracted fewer than 30 States parties, even though it reflected the "clean slate" principle that the Special Rapporteur was reluctant to adopt, while the 1983 Vienna Convention on Succession of States in Respect of State Property, Archives and Debts had not even attracted enough States parties to enter into force. It was therefore unrealistic to expect that a proposed convention on an issue of succession would be supported by States. Furthermore, the current topic related to an extremely sensitive area of State succession that was rife with controversy to a far greater extent than the two areas covered by the 1978 and 1983 Vienna Conventions. The Commission should not be expending its energy on producing an instrument that would not be used by its ultimate addressees. Producing draft guidelines would give the Commission more flexibility to make policy choices and inform States accordingly. It would also dovetail with the Special Rapporteur's overall objective, as set out in draft article 1 (2), of drafting provisions that were subsidiary in nature; moreover, it would accommodate the "soft" language used in some of the draft articles, which had been the subject of some debate. Changing the nature of the output at the current juncture would give States a clear indication of the direction that the Commission was taking and would allow the Commission to reorient its perspective before it finished the project. The work done thus far was sufficiently advanced to enable the Commission to take a reasoned decision in that regard, which would also facilitate the drafting of further reports and the commentaries.

Succession to obligations should be treated differently from succession to the right to reparation for wrongs suffered by a predecessor State; the latter was in the nature of an acquired right and was therefore transferable to a successor State. Nothing in legal doctrine, however, recognized acquired obligations, as was also evident from the Commission's discussions on succession of States in respect of matters other than treaties. While that position might appear to lack consistency, it was legally justifiable. The wrongful acts of a predecessor State could not be imputed to the successor State, either as a general rule or in the context of decolonization. In cases where the predecessor State suffered a wrongful act, however, the right to reparation could be transferred to the successor State, except in certain situations in which the predecessor State continued to exist, as there was no demise of the wrongdoing State. He therefore supported the Special Rapporteur's approach of keeping the

provisions on the transfer of responsibility separate from those on the transfer of the right to reparation, rather than merging them or placing them in the same section of the draft articles.

In line with the reasoning adduced by other members, he took the view that the examples cited in the report did not convincingly support the draft articles proposed. The conclusions drawn did not necessarily or precisely follow from the practice on which they purported to rely. The Special Rapporteur might consider grounding the proposals in policy considerations so as to avoid creating the impression that they were of a normative nature; that would make them more acceptable to States.

He did not agree with the Special Rapporteur's statement, in paragraph 19 of the report, that the non-conclusiveness of State practice did not allow the existence of the "clean slate" principle to be asserted as a legal basis governing the relations between States. The inconclusiveness of State practice could only be understood to mean that State responsibility was not transferred from the predecessor State to the successor State. To claim that responsibility was thus transferred would mean that the successor State had an obligation under international law and that the transfer of State responsibility was therefore in the nature of a transfer of obligations and the creation of an obligation for the successor State, which was a new sovereign entity. Obligations could not be deemed to have been created under international law unless their existence was supported by State practice. Insufficient or inconclusive practice meant that there was no obligation. In the absence of positive proof, based on State practice, that responsibility was transferred from the predecessor State to the successor State, the presumption of non-succession would continue to operate, especially in cases of decolonization. The Commission should not depart from that general proposition, which was acknowledged in the 1978 Vienna Convention.

He also disagreed that unjust enrichment could serve as a general basis for the argument concerning a nexus with the territory or nationals of the successor State. The principle of unjust enrichment could not be applied generally, but only to impose an obligation to make reparation upon a State that had actually benefited from a wrongful act, rather than upon a State that was perceived to have done so.

Although the Special Rapporteur had repeatedly claimed not to believe in automatic succession, he appeared to be trying to persuade the Commission to change the existing rule of non-succession to responsibility to a rule of succession to responsibility in his reports. Paragraphs 25 to 32 of the third report, in particular, seemed to have been crafted for that purpose. However, the discussion in those paragraphs ran counter to the past work of the Commission, especially on the 1978 and 1983 Vienna Conventions and on the current topic. In adopting its definition of "succession" as the replacement of a predecessor State by a successor State, the Commission had never intended to include a normative claim of succession to responsibility as part of that definition. Neither the 1978 nor the 1983 Vienna Convention defined "succession" in that manner, and the Commission should not introduce a change based on the dictionary meaning cited in paragraph 28 of the report. He hoped that the Special Rapporteur did not intend to ask the Commission to reopen the discussion on what had already been adopted, albeit provisionally, in the Drafting Committee, or to expand the scope of those provisions beyond what had been agreed to in the two Vienna Conventions. Moreover, there was no need to raise concerns about ambiguities concerning the concept of statehood in the context of the current topic, as was done in paragraph 31 of the report.

In paragraph 32, to revive the possibility of automatic succession to responsibility, the Special Rapporteur cited Mr. Mohammed Bedjaoui's second report on succession of States in respect of matters other than treaties (A/CN.4/216/Rev.1); as presented, however, the quotation was open to misinterpretation. The full context made clear that Mr. Bedjaoui had been dealing exclusively with the acquired rights of successor States, not their obligations. Mr. Bedjaoui's analysis could not be extended to cover succession to responsibility for the wrongdoing of a predecessor State, even if it might be helpful in relation to the question of whether a successor State could seek relief for wrongs suffered by the predecessor State. In fact, Mr. Bedjaoui had proposed that there should be no succession to obligations.

He agreed with the points raised by Mr. Reinisch in relation to paragraph 34 of the report and by Ms. Oral regarding the "special circumstances" referred to in paragraph 36. The mention of "special circumstances" in draft article 12 (2) was unclear: did it refer to situations in which there was a nexus with the territory or the nationals of the predecessor State, or to something more? If the provision was not intended to cover any additional special circumstances, the reference could be omitted altogether.

It would be useful if the draft articles provisionally adopted or still being discussed by the Drafting Committee could be appended to future reports for ease of reference; a bibliography would also be beneficial. The draft articles proposed in the third report should be referred to the Drafting Committee, which should also consider changing the nature of the Commission's output on the topic to draft guidelines.

Mr. Jalloh said that the Special Rapporteur's third report on succession of States in respect of State responsibility was well written and well structured, and provided an excellent basis for debate. The Special Rapporteur would have the difficult task of finding a compromise between the extremely divergent viewpoints expressed within the Commission.

Before making some general observations about the report, he wished to raise a few points concerning the memorandum by the Secretariat on the topic (A/CN.4/730), which contained information on treaty practice and was highly appreciated, particularly at a time of budget constraints. The Secretariat had followed a sound three-part methodology in compiling the information, which would serve as a useful reference for the Commission, delegations in the Sixth Committee and other stakeholders, including scholars and practitioners of international law. He particularly appreciated the broad and inclusive approach that the Secretariat had taken in an attempt to capture a wide range of succession-related treaties that had been registered under Article 102 of the Charter of the United Nations and that addressed the possible transfer of rights and obligations arising from internationally wrongful acts. Moreover, although the memorandum was not intended to be exhaustive or to draw any legal conclusions, it covered a long timespan starting from around 1945 and dealt *inter alia* with so-called "devolution agreements" and "claims agreements" concluded in the context of decolonization. Thus, it went beyond traditional succession agreements and encompassed circumstances in which parties reserved their positions regarding the admission of their liability or responsibility, or transferred the latter to successor States. He did not agree with other members who had argued that such agreements might not be relevant to the Commission's work on the topic.

In the memorandum, the Secretariat cited 47 bilateral or multilateral instruments, in the form of either treaties or other types of documents, from virtually all the regions of the world. He had been struck by the fact that quite a few of the instruments had been concluded by a handful of major Western States with countries in Africa, Asia or Latin America and the Caribbean, and he had also noticed a number of agreements between the United Kingdom and a number of its former colonies in Africa. There were more recent examples arising from the end of the cold war and the fall of the Berlin Wall, some of which were more pertinent to the topic than others. However, they all suggested that State practice was based on some type of politically agreed solution, which meant that it was hard to formulate hard and fast general legal rules to govern what were highly complex and fact-sensitive issues. The compilation of treaties in the memorandum was perhaps useful for another, more substantive reason, which was that it would help the Special Rapporteur to provide more examples of State practice in relation to succession to responsibility in the future.

It appeared that the Special Rapporteur had not had time to take all the findings from the memorandum into account during the preparation of the third report. Consequently, and in view of the valid concerns expressed by other members and some States over the apparent scarcity of State practice, he would propose that, resources permitting, the Secretariat should build on its excellent work by studying other forms of practice, such as diplomatic acts and correspondence, conduct in connection with resolutions adopted by international organizations or at intergovernmental conferences, conduct in connection with treaties, executive conduct, legislative and administrative acts and perhaps even decisions of national and international courts and arbitral bodies.

Turning to the report, he said that he wished to commend the Special Rapporteur for attempting to respond to previous debates on the topic, including by summarizing the debates held in the Commission and the Sixth Committee in 2018 and by working on the commentaries to the provisionally adopted draft articles in order to give States the important opportunity to comment on the Commission's work. He also appreciated the Special Rapporteur's flexibility and willingness to take account of the often diverging viewpoints of other members.

As noted in the report, most States seemed to have a favourable view of the topic and the Commission's progress to date, yet it was clear that some States had concerns about the complexity of the topic and the implications of the apparent scarcity of State practice for the assessment of the topic's rightful place in international law. The Commission should continue to bear those important concerns in mind, especially given that Sweden, on behalf of the Nordic countries; Slovenia; the Bahamas, on behalf of the Caribbean Community; and Malaysia had expressed gratitude for the close cooperation between the Commission and the Sixth Committee and for the fact that their comments had been taken into consideration.

Some States had proposed that the title of the topic should be changed to "State responsibility problems in cases of succession of States", while Belarus and Portugal had instead suggested that the words "aspects" or "dimensions" might be more appropriate than "problems". He wondered whether there was any need to change the title of the topic, which in his view was adequate, but he would remain flexible in that regard. If the title was changed, he would prefer a short formulation such as "State responsibility in relation to succession of States".

Some States had raised concerns that seemed even more fundamental and could affect the methodology applied to the topic, and had suggested different types of outcomes such as guidelines or conclusions rather than articles. That underscored the continued importance of the ongoing discussion on nomenclature within the Working Group on methods of work. He was grateful to the Chair of the Working Group for having raised the issue earlier in the session, and would welcome any additional feedback on the non-paper on the matter that he had circulated in May 2019.

As was rightly noted in the report, the issue of what the Commission's output should be was also of interest to delegations in the Sixth Committee, and not only in the context of the topic under consideration. Proposals in that regard had been made by several States, including Romania, which had stated that it would find the topic to be of relevance if it resulted in a set of model clauses, and the Russian Federation, which had proposed that the final product should be an analytical report. He looked forward to hearing the fully considered views of the Special Rapporteur on the subject, but tended, for the time being, to concur with the point made by Israel that it was too early to determine the final form of the Commission's work on the topic. Given the specific nature of the topic, flexibility was important. Thus, the Commission might wish to consider delaying a decision on the final form of the project until further substantive progress had been achieved. It could then debate the issue and take a more deliberate decision on the matter, and might even wish to invite additional comments from States. At the same time, he acknowledged the argument made by some members that there was a connection between the final outcome of the Commission's work and the substance of what it was already adopting. He would leave it to the Special Rapporteur to propose the most suitable way forward.

Regarding methodology, he wished to respond to the seven important proposals put forward in paragraphs 17 to 23 of the report. First, he appreciated the Special Rapporteur's acknowledgement of the subsidiary nature of the draft articles and the priority of agreements between the States concerned, as affirmed in draft article 1 (2) provisionally adopted by the Drafting Committee. Second, he agreed with the Special Rapporteur that the Commission was not confronted with a stark choice between Scylla and Charybdis, as the summary of the Sixth Committee debate on the topic seemed to imply. The work on the topic should be consistent with both the articles on responsibility of States for internationally wrongful acts and the Commission's prior work on issues of succession. That consistency should extend not only to terminology but also, if and when appropriate, to the solutions found for relevant substantive issues. However, as noted by the Special

Rapporteur and by other members of the Commission, the differences between legal relations based on treaties, on the one hand, and those concerning property rights and obligations stemming from internationally wrongful acts, on the other, ought to be taken into account.

The Commission's earlier work on State responsibility was the most relevant to the topic under consideration, since it centrally tackled the substantive question of responsibility for internationally wrongful acts. Moreover, although the articles on responsibility of States for internationally wrongful acts had not yet been formally codified in a multilateral convention, they enjoyed a certain level of authority among States, as evidenced by State and judicial practice and by several recent studies conducted by the Secretariat on their influence on dispute settlement.

On the two previous occasions when the Commission had dealt with issues of succession, namely in the context of the topics "Succession of States in respect of matters other than treaties" and "Succession of States in respect of treaties", the two Special Rapporteurs – Mr. Mohammed Bedjaoui and Sir Humphrey Waldock, respectively – had taken different approaches to certain core issues, which meant that the Commission had been left with some inconsistencies of approach, even in respect of matters that were generally interrelated. For example, articles 14, 26 and 34 of the Vienna Convention on Succession of States in Respect of State Property, Archives and Debts had been identified as reflecting substantively inconsistent positions. The Commission might wish to bear such considerations in mind when determining the extent to which it should draw on its prior work.

The third point to which he wished to respond was the Special Rapporteur's acknowledgement that "State practice is diverse, context-specific and sensitive" in the area of succession or non-succession in respect of State responsibility. That idea, which had first been stated in paragraph 16 of the Special Rapporteur's second report (A/CN.4/719), apparently continued to pervade the discussion of the topic, yet the same could be said of many international law topics. While most members of the Commission and several delegations had expressed agreement with that view, the Special Rapporteur noted, in paragraph 19 of the third report, the wide-ranging views that had been expressed in relation to the possibility of formulating applicable rules, and went on to assert – rightly, in his view – that the inconclusiveness of State practice did not necessarily render careful work on the topic useless. The Commission's role was not restricted to the codification of well-established rules of international law. Rather, it included "the promotion of the progressive development of international law", as set out in the Commission's statute.

In the end, even those who were sceptical of the topic could not but acknowledge that the articles on responsibility of States for internationally wrongful acts were, in key respects, reflective of customary international law. However, as vital as they were in establishing the *Grundnorm* of State responsibility, they did not resolve more specific questions that arose when one of the parties to the legal relationship resulting from an internationally wrongful act was affected by a succession of States. He therefore fully concurred with the Special Rapporteur that an exercise aimed at clarifying the rules applicable in such situations could take the form of progressive development. At the same time, he would be concerned if that led the Commission to categorize certain provisions as reflecting codification and others as resulting from progressive development. Such specificity could not easily be identified in the well-established practice of the Commission, which had taken the so-called "composite" view of codification and progressive development since at least the late 1950s. Thus, the Commission would be well advised to repeat what it had done in the past in relation to other topics, which was to set out, transparently, what could be found in the entire package that would ultimately be submitted to States.

Fourth, regarding the transfer of rights, or the possibility of claiming reparation, he agreed that the question of separate or joint treatment of obligations and rights in the context of succession was vital, but might depend on an analysis of all relevant elements. While he noted the concerns expressed in that regard by some members of the Commission, he agreed with the Special Rapporteur that the Commission's analysis should precede the decision on the structure of the draft articles.

Fifth, he concurred with the Special Rapporteur that the different categories of succession of States identified in the 1978 and 1983 Vienna Conventions could provide a framework for the Commission's analysis, but he was concerned that the merging of certain draft articles so as to deal with more than one category in the same draft article might ultimately affect the substance of provisions concerning a particular category. Thus, if that was the preferred approach, the Commission must take care to ensure that the substance of the draft provisions concerning each category was not lost in the unification process.

Sixth, the Special Rapporteur asserted that 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 resulting from an internationally wrongful act or the determination of an equitable proportion when it came to distribution of losses and reparation among several States. Those questions were, in his view, the core areas of promise, especially for progressive development.

Seventh, the Special Rapporteur stated that the main consequence of an internationally wrongful act was the obligation to provide full reparation. While a discussion on the issue would have been helpful, he agreed with the Special Rapporteur that the Commission could take an overall approach to the question of reparation, without entering into the substance of specific types of reparation, on the understanding that the articles on State responsibility would apply, *mutatis mutandis*, to the topic under consideration.

He welcomed the statement that had been made in the Sixth Committee in 2018 by the Gambian delegation on behalf of the Group of African States (A/C.6/73/SR.20) with respect to the Commission's report on the work of its seventieth session (A/73/10), given that there had been a paucity of feedback from African States on the Commission's current topics. In that statement, the Group had criticized the language used in the report and had called for its simplification and shortening so as to enhance its user-friendliness. He personally supported all efforts to use simpler language.

Regarding part two of the Special Rapporteur's third report, he appreciated the fact that, in approaching the question of reparation for injury resulting from an internationally wrongful act committed against the predecessor State for which the predecessor State had not received full reparation before the date of succession of States, the Special Rapporteur dealt separately with situations in which the predecessor State continued to exist and those in which the predecessor State ceased to exist. The report included examples of reparations, some of which had been criticized. Concerning the example of the secession of Pakistan from India in 1947 in terms of entitlement to war reparations from Germany, which was cited in paragraph 55 of the report, he wished to note that, according to the Rapporteur of the Institute of International Law for the topic of succession of States in matters of international responsibility, Mr. Marcelo G. Kohen, one of the reasons why it had been possible for Pakistan to receive a share of the war reparation allotted to India was that there had been a "direct link" between the consequences of the wrongful acts and the territory and population of Pakistan.

In paragraph 59 of the report, the Special Rapporteur used *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, which had come before the International Court of Justice, as an example of a case in which a new successor State had been able to claim reparation for wrongful acts committed before the date of succession that had caused injury to its territory, which, at the time of the commission of the acts, had been a dependent territory under the joint administration of Australia, New Zealand and the United Kingdom. Some Commission members had pointed out that the case was perhaps not the most suitable example, given that there had been no final judgment by the Court or admission of responsibility by Australia. However, he noted that, as non-parties to the case, New Zealand and the United Kingdom had not been able to intervene, yet the Court, in its judgment on the preliminary objections, had held that, considering the nature of the regime for the administration of Nauru at the time of the alleged injury, holding Australia responsible could have legal implications for New Zealand and the United Kingdom. As correctly explained by the Special Rapporteur, the Court had not decided on the merits of the case because Australia and Nauru had reached a settlement.

With regard to the future programme of work on the topic, the Special Rapporteur's intention to focus, in the fourth report, on forms and invocation of responsibility in the context of succession of States would greatly advance the work on the topic. The Commission should nonetheless avoid rushing through its analysis in an effort to adhere to the planned schedule.

In conclusion, he was in favour of referring all the proposed draft articles to the Drafting Committee for further consideration.

Mr. Huang said that the memorandum by the Secretariat on the topic of succession of States in respect of State responsibility (A/CN.4/730) showed that there was a scarcity of relevant State practice and that such practice was specific to complex political and historical contexts. Yet, as other members of the Commission had noted, even that limited practice had not been comprehensively dealt with in the Special Rapporteur's third report. As one Member State had emphasized in the Sixth Committee debate on the Special Rapporteur's first report on the topic, which had been submitted at the General Assembly's seventy-second session (A/CN.4/708), the codification of relevant rules of international law in that respect would be very difficult, and the urgency of the Commission's embarking on the codification of such rules at the current stage merited further discussion.

While he was grateful for the Special Rapporteur's summary of the debate in the Sixth Committee at the General Assembly's seventy-third session, as set out in paragraphs 6 to 14 of the third report, the fact that a more comprehensive summary had not been prepared was regrettable. For example, the report did not indicate that some States had previously proposed that rules on State liability should be excluded from the scope of the topic and that the focus should be entirely on secondary rules of State responsibility. Moreover, some States had questioned whether the Commission should continue working on the topic at all and had suggested that its output should take the form of draft guidelines. The Commission should devote serious attention to all the views expressed and recommendations made by States.

The Special Rapporteur had made considerable efforts to gather and analyse State practice but had largely relied on the research output of a few academic institutions and scholars. The Commission should not attempt to develop or invent new rules in the absence of the necessary State practice. Moreover, he could not support the Special Rapporteur's ambiguous position on whether succession to State responsibility was possible. Although he agreed with the decision to consider the matter of diplomatic protection in the report, he did not agree with the oversimplified manner in which it was addressed.

In view of the concerns expressed by States in the Sixth Committee, he would suggest that the Commission should reflect carefully on the final form that its work on the topic should take. He was not in favour of changing the title of the topic to "State responsibility problems in cases of succession of States", as the Commission should ensure consistency with its work on previous topics.

With regard to methodology, the Special Rapporteur continued to compensate for the scarcity of State practice by attaching considerable weight to the work of the Institute of International Law. Draft article 15, for example, was modelled closely on article 10 of the Institute's 2015 resolution on succession of States in matters of international responsibility. Although he agreed with Mr. Park that nothing prevented the Commission from adopting the same approach as the Institute, he was concerned to note that the Special Rapporteur had neither carried out a detailed analysis nor paid due regard to State practice. The Special Rapporteur had sought to redress the balance in the third report by giving greater consideration to State practice and the decisions of international tribunals. However, he agreed with Mr. Hassouna that the analysis relied excessively on the practice of European States while neglecting that of other regions.

The Special Rapporteur also relied heavily on academic research and quoted extensively from the writings of a limited number of scholars. In addition, the Special Rapporteur used a method of *a priori* argumentation in which the theoretical interpretations of scholars were set out first, then a simple catalogue of State practice was provided without reference to the legal opinions of the States concerned, even though such opinions

were essential to *opinio juris*. That approach of putting the cart before the horse called into question the validity of the arguments advanced in the report.

Some of the specific cases cited in the report did not seem to support the Special Rapporteur's conclusions. For example, the Special Rapporteur cited the Agreement of 27 May 1997 between the Government of the French Republic and the Government of the Russian Federation on the final settlement of reciprocal financial and real claims arising prior to 9 May 1945 in support of the statement that the entitlement of a predecessor State to claim reparation from the State responsible for an internationally wrongful act that had been committed before the date of succession was generally accepted. However, that example seemed to prove the exact opposite, as France was the injured State and the Russian Federation was the continuator of the predecessor State, namely the Soviet Union. Concerning the return of works of art and cultural property by the Soviet Union to the German Democratic Republic, as discussed in paragraph 56, the Special Rapporteur failed to demonstrate that the Soviet Union had carried out the return in order to fulfil a State obligation. With regard to the case concerning *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, which was cited in paragraph 59, the Special Rapporteur claimed that the International Court of Justice had "implicitly recognized" the right of a new State to submit a claim by deciding that it had jurisdiction over the dispute. However, the most important ground on which the Court had taken that decision had been the acceptance of its compulsory jurisdiction by both Nauru and Australia.

The Special Rapporteur had established a dichotomy between cases in which the predecessor State continued to exist and those in which it ceased to exist. However, as the system of State responsibility was a highly complex system of secondary legal rules, differences in the primary legal rules underlying State responsibility would in many cases have a greater impact than differences in the specific form of State succession. The members of the Commission should reflect on whether to apply that dichotomy to all cases of State succession or to adopt a different approach. The Special Rapporteur argued that the question of whether a predecessor State continued to exist was largely a matter of political recognition rather than a legal issue. The question then arose as to whether the Special Rapporteur believed that the concept of State continuity was a mere fiction. If so, why was that dichotomy still used in the draft articles? Should the Commission explore ways of determining whether and how a predecessor State continued to exist? He would be grateful if the Special Rapporteur could clarify the matter.

The Special Rapporteur had introduced the concept of diplomatic protection in the report and had proposed draft article 15 on that basis. However, no in-depth analysis of the legal issues involved had been conducted, and the focus was placed instead on a single aspect of diplomatic protection, namely nationality. He would advise the Special Rapporteur to adopt a more cautious approach in that regard. Diplomatic protection was a highly complex and controversial matter, as demonstrated by the failure of the Sixth Committee to reach a consensus regarding the possibility of concluding an international convention or taking other appropriate action on the basis of the Commission's articles on diplomatic protection. Indeed, there remained serious differences of opinion among States regarding some of the most fundamental issues of diplomatic protection. Thus, it was inadvisable for the Commission to consider the issue of diplomatic protection in its work on the topic or to draft any articles on the matter. As the General Assembly would revisit the topic of diplomatic protection at its seventy-fourth session, he hoped that the Commission and the Special Rapporteur would pay close attention to the views expressed by Member States.

In that connection, the Commission should consider whether there was any universally applicable customary international law on diplomatic protection. In 1930, the Hague Conference for the Codification of International Law had adopted on first reading a provision stipulating that international responsibility was incurred by a State if damage was sustained by a foreigner as a result of acts or omissions of its officials, acting within the limits of their authority, when such acts or omissions contravened the international obligations of the State. According to some scholars, that principle had become customary law and had been applied in a large number of court judgments and arbitral awards.

However, there were two counter-arguments in that regard. The first was that, historically, that principle had not been universally applied, as nationals of Western Powers had been its main beneficiaries and the principle had been abused to a serious degree; and the second was that aliens should not enjoy wider protection than nationals. In recent decades, diplomatic protection had continued to serve as a pretext for the use of force against smaller and weaker States. For example, one of the reasons for the decision of the United States of America to send troops into Grenada in 1983 had been to protect American students. In 1989, the United States had invaded Panama on the pretext of protecting the lives and property of its nationals in the territory of that country. Both incidents had been strongly condemned by the international community. In order to limit the abuse of diplomatic protection by Western Powers, Latin American States had formulated the Drago doctrine, which prohibited the use of force by foreign Powers to recover contract debts, and the Calvo clause, which required foreign nationals to agree not to seek diplomatic protection from their State of nationality.

It was also important to consider whether force could be used in exercise of diplomatic protection. In 2000, the Commission's Special Rapporteur on the topic of diplomatic protection, Mr. John Dugard, had suggested in his first report (A/CN.4/506) that States exercising diplomatic protection should be permitted to use force if the protecting State had failed to secure the safety of its nationals by peaceful means; the injuring State was unwilling or unable to secure the safety of the nationals of the protecting State; the nationals of the protecting State were exposed to immediate danger to their persons; the use of force was proportionate in the circumstances of the situation; and the use of force was terminated, and the protecting State withdrew its forces, as soon as the nationals were rescued.

Mr. Dugard had argued that a balance should be struck between the absolute prohibition of the use of force and its unrestricted use. From a policy perspective, it was wise to recognize the right of a State to use force in protecting its nationals but to impose strict limitations so as to prevent abuse. However, in the Commission's debate on the proposal, Mr. Dugard's views had been strongly criticized by the overwhelming majority of members, who had expressed the view that any rule that allowed, justified or legalized the use of force was unacceptable. The articles on diplomatic protection adopted by the Commission on second reading in 2006 thus clearly ruled out the legality of the use of force in diplomatic protection. Article 1 defined diplomatic protection as the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that was a national of the former State with a view to the implementation of such responsibility. Nevertheless, it was not uncommon in international relations for States to use force to protect their nationals abroad.

If the Commission wished to address the matter of diplomatic protection in the draft articles, it should either stipulate expressly that a successor State must not use force in its exercise of diplomatic protection or restate the definition of diplomatic protection contained in article 1 of the articles on diplomatic protection, at least in draft article 2 on the use of terms.

The wording of draft article 15 was based mainly on the Commission's articles on diplomatic protection. In paragraph 2 of that draft article, the Special Rapporteur deviated from the basic approach taken with regard to other aspects of the topic, such as the dichotomy between situations in which the predecessor State continued to exist and those in which it ceased to exist. Moreover, with regard to the Special Rapporteur's lengthy discussion of the principle of continuous nationality and the nature and attribution of nationality, the Commission's 2006 articles and commentaries made clear that the purpose of the principle of continuous nationality was to prevent the abuse of diplomatic protection through the acquisition of a nationality of convenience. It therefore seemed unnecessary to dwell on the matter in the context of succession of States, which was a situation in which the rules governing diplomatic protection could be applied without such a restriction.

He agreed with Mr. Murphy that the safeguards contained in article 5 (3) and (4) of the Commission's articles on diplomatic protection should be incorporated into the draft articles.

With regard to the future programme of work, given the complexity and importance of the topic, he suggested that the Commission should proceed with caution and avoid undue haste. He supported the referral of all the proposed draft articles to the Drafting Committee.

Mr. Zagaynov said he welcomed the fact that the comments and observations made by members of the Commission and by delegations in the Sixth Committee were addressed in detail in the Special Rapporteur's comprehensive and interesting third report. He was grateful for the high-quality memorandum on the topic by the Secretariat, although he agreed with Mr. Rajput that the Secretariat's survey would have been even more useful if it had been broader in scope.

It was telling that the Special Rapporteur and other members of the Commission continued to quote the sentence of the second report in which the State practice of relevance to the topic was described as "diverse, context-specific and sensitive". Indeed, both the third report and the memorandum by the Secretariat confirmed that questions of succession of States in respect of State responsibility were settled through international agreements. In that context, the Commission's work could play but a subsidiary role, as noted in the report. He agreed with the Special Rapporteur on the need for a "flexible and realistic approach" that was based on neither a general theory of non-succession nor a general theory of succession.

The Special Rapporteur stated that the Commission's role was not limited to the mere codification of well-established rules of international law and that an exercise aiming at the clarification of rules applicable in situations of succession clearly met the criteria for its progressive development. He agreed that the Commission should make that position explicit, perhaps in the commentaries to the draft articles. The provisions proposed by the Commission should rest on a firm basis and be geared towards finding support and acceptance among States.

The report included a number of examples involving the Russian Federation. One was the Agreement of 27 May 1997 between the Government of the Russian Federation and the Government of the French Republic on the final settlement of reciprocal financial and real claims arising prior to 9 May 1945, which the Special Rapporteur described, not entirely accurately, as an agreement concerning reparation for the expropriation of bonds after the Russian Revolution of 1917. However, the Agreement also addressed, *inter alia*, claims relating to the intervention of 1918–1922 and resulting from the military operations or hostilities of that period. The Special Rapporteur also noted, again somewhat misleadingly, that the Agreement did not "explicitly mention any legal responsibility of either party". On the contrary, the Agreement stipulated clearly that the execution of its provisions did not constitute a recognition of responsibility by either party.

The relationship of the Russian Federation to the Soviet Union was one of continuity rather than one of succession. The Russian Federation thus continued the legal personality of the Soviet Union. Although that fact was not in dispute, he wished to recall that it had been established in numerous State declarations, international agreements and decisions of the International Court of Justice, including in the case concerning *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*. For that reason, he found it difficult to agree with the Special Rapporteur that the 1997 Agreement demonstrated "the entitlement of the predecessor State to claim reparation from the State responsible for an internationally wrongful act, committed before the date of succession".

In that connection, he fully agreed with a comment that Roman Kolodkin, a former member of the Commission, had made in relation to the Special Rapporteur's first report, namely that questions of succession did not arise in cases in which the responsibility or rights of a predecessor State that continued to exist were entailed, and in which the successor State was not involved. It was important not to confuse the concepts of continuity and succession.

In paragraph 56 of the report, the Special Rapporteur discussed the protocol pursuant to which works of art and cultural property had been returned to the German Democratic Republic by the Soviet Union. The Special Rapporteur described that case as one of "reparation (in the form of restitution) in connection with the end of the Second World

War". The Special Rapporteur included a reference to *State Succession to International Responsibility* by Patrick Dumberry, in which the case in question was described as a clear example of State practice whereby the State responsible for the commission of an internationally wrongful act had provided reparation, in the form of restitution, to a new State, even though that State had not been in existence at the time of the commission of the act. Leaving other aspects aside, he wished to note that, from the text of the protocol, it was clear that the return of property thereunder was in no way interpreted as restitution in connection with an internationally wrongful act. In that connection, he agreed with those members of the Commission who had stressed the need to engage critically with the doctrinal sources used.

In discussing the case concerning *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, the Special Rapporteur argued that, by deciding that it had jurisdiction over the dispute, the International Court of Justice had implicitly recognized the right of a new State, Nauru, to submit a claim relating to the period before its independence. The Special Rapporteur considered that case to be an example of succession and relationship between the successor State and the predecessor State. As far as he recalled, the Court had not clearly and explicitly described the independence of Nauru from the point of view of succession of States. While the applicant, Nauru, had not based its position fully on the rules applicable to succession, the respondent, Australia, had also not regarded the case as one relating to succession or to the rights and obligations that it entailed.

In paragraph 63, the Special Rapporteur addressed the case of Namibia and its right to claim reparation, noting that, in 1990, the General Assembly had explicitly recognized that the future Government of an independent Namibia had the right to claim the payment of damages from South Africa as a result of the latter's illegal occupation and human rights violations. However, he questioned whether the situation of Namibia, in respect of which resolutions of the United Nations Security Council and General Assembly had been adopted, which condemned the regime of South Africa and its continuing illegal occupation of Namibia, as well as continuing acts of aggression against neighbouring independent African States, was a typical case of succession on the basis of which Namibia, as a successor State, had inherited particular rights and obligations, including the right to claim compensation.

In chapter III (B) of the report, "Cases of succession of States where the predecessor State ceases to exist", the Special Rapporteur also considered situations in which existing agreements had played a decisive role in settling claims. Those agreements confirmed the fact of succession and dealt with issues concerning the transfer of certain rights and obligations to the successor State. Such cases included the International Court of Justice judgment in *Gabčíkovo–Nagymaros Project*, the findings of the United Nations Compensation Commission in reviewing claims for reparation submitted by the Czech Republic, and the 2001 Agreement on Succession Issues concluded among the successor States to the former Yugoslavia.

The cases cited in the report thus confirmed that the relevant State practice was diverse. The Commission would have to examine the specific features of each of those cases if it wished to understand them from the point of view of succession, and they were unlikely to form a basis from which any general rules could be inferred. Moreover, the report showed clearly that international agreements played a primary role in settling questions of succession of States in respect of State responsibility.

The section of the report on diplomatic protection was instructive and interesting, but he agreed with several other members of the Commission who were not convinced that the consideration of diplomatic protection in the context of the draft articles was either appropriate or necessary. Draft article 15 was a more or less verbatim reproduction of parts of article 5, on continuous nationality of a natural person, and article 10, on continuous nationality of a corporation, of the Commission's articles on diplomatic protection. However, as Mr. Murphy had noted, the Special Rapporteur had reproduced only selected elements. Ms. Oral had raised the issue of "nationality shopping" in that context. It should be recalled that, at the time of the Commission's work on the articles on diplomatic protection, the exception to the general rule of continuous nationality had been regarded as an innovation and had given rise to mixed reactions from States. If the Commission decided

to retain draft article 15, it should reproduce the relevant provisions of the articles on diplomatic protection as fully and accurately as possible.

In his view, draft articles 12, 13 and 14 should be considered alongside the draft articles already referred to the Drafting Committee. Draft article 12, for example, was linked to draft article 9, which had recently been introduced by the Special Rapporteur in the Drafting Committee. He wished to comment on them together. As he had already noted, the rights and obligations of a State that continued to exist were governed by the rules of customary international law on State responsibility. For that reason, he doubted the need for the language contained in paragraph 1 of each of those two draft articles, particularly as a number of the other provisions proposed by the Special Rapporteur were aimed at the progressive development of international law.

Unlike Mr. Rajput, he remained of the view that the approach under which the transfer of rights to successor States was considered separately from the transfer of obligations was not entirely successful. There was, for example, a clear mismatch between draft article 12 (2) and draft article 9 (2), as currently formulated. Regrettably, unlike some of the other draft articles, that pair of draft articles did not include any reference to the role of agreements between States. In his view, such a reference was both logical and necessary.

Draft article 12 (3), which addressed compensation between the predecessor State and the successor State, raised a number of questions. In particular, it was not clear whether the paragraph referred to a situation in which States distributed among themselves compensation received from a third State for an internationally wrongful act or one in which compensation was due for an internationally wrongful act committed by the predecessor State in the territory of a successor State that had seceded from it. A similar point could be made in relation to draft article 9 (3).

Lastly, a number of members of the Commission and delegations in the Sixth Committee had commented on the final form that the Commission's work on the topic should take. In view of the consensus regarding the primary role of agreements in relation to succession of States, it would be entirely logical for the output of the Commission's work on the topic to take the form of guiding principles or model clauses, as had been suggested. Another option that seemed to him to have merit was the form of an analytical report. Such outputs describing the general defining features of existing agreements on succession could be used as a basis by States and other interested parties.

With regard to the pace of work, the Commission should take the time it needed in order to consider the topic, which was highly complex.

He supported the referral of the proposed draft articles to the Drafting Committee with a view to facilitating a comprehensive examination of matters of succession in respect of rights and obligations.

The meeting rose at 12.55 p.m.