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International Law Commission
Seventy-third session (first part)

Provisional summary record of the 3582nd meeting
Held at the Palais des Nations, Geneva, on Tuesday, 17 May 2022, at 10 a.m.

Contents

Present:

Chair:	Sir Michael Wood (First Vice-Chair)
later:	Mr. Tladi
Members:	Mr. Argüello Gómez
	Mr. Cissé
	Ms. Escobar Hernández
	Mr. Forteau
	Ms. Galvão Teles
	Mr. Grossman Guiloff
	Mr. Hassouna
	Mr. Jalloh
	Mr. Laraba
	Ms. Lehto
	Mr. Murase
	Mr. Murphy
	Mr. Nguyen
	Ms. Oral
	Mr. Ouazzani Chahdi
	Mr. Park
	Mr. Petrič
	Mr. Rajput
	Mr. Reinisch
	Mr. Ruda Santolaria
	Mr. Saboia
	Mr. Šturma
	Mr. Valencia-Ospina
	Mr. Vázquez-Bermúdez
	Mr. Zagaynov

Secretariat:

Mr. Llewellyn	Secretary to the Commission

Sir Michael Wood (First Vice-Chair) took the Chair.

The meeting was called to order at 10 a.m.

Peremptory norms of general international law (*jus cogens*) (agenda item 4) (*continued*) (A/CN.4/747)

Report of the Drafting Committee (A/CN.4/L.967)

Mr. Park (Chair of the Drafting Committee), introducing the report of the Drafting Committee on the topic of peremptory norms of general international law (*jus cogens*) (A/CN.4/L.967), said that the report contained the texts and titles of the 23 draft conclusions, together with annex, provisionally adopted by the Drafting Committee, which recommended their adoption by the Commission on second reading.

Between 27 April and 9 May 2022, the Drafting Committee had held 13 meetings and two rounds of informal consultations on the text proposed by the Special Rapporteur in his fifth report (A/CN.4/747). It had decided to recommend that the title of the topic should be changed to "Draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*)" to reflect the scope and purpose of the draft conclusions. There had been general support in the plenary debates for that amendment, which was based on a suggestion from a State.

Part One, entitled "Introduction", comprised three draft conclusions. Draft conclusion 1, "Scope", had been retained unaltered. Draft conclusion 2, "Nature of peremptory norms of general international law (*jus cogens*)", had been numbered as draft conclusion 3 in the first-reading text, but the Committee had decided that it would be more logical to have a draft conclusion on scope followed by a draft conclusion on the nature of peremptory norms of general international law and then a draft conclusion that defined them. The Committee had considered various options for draft conclusion 2. Some members had proposed its deletion to avoid giving any impression that the draft conclusion established criteria in addition to those set out in draft conclusion 3. However, the prevailing view in the Committee, as in the plenary Commission, had been in favour of retaining the provision, on the condition that it preceded draft conclusion 3, to make it quite clear that it did not in fact establish any additional defining elements.

The reference to "fundamental values of the international community" had given rise to much debate in the plenary meetings. The Committee had taken the view that the reference should be retained, as it was central to the very concept of peremptory norms of general international law (*jus cogens*), and that the commentary should provide an explanation of what values were meant. The Committee had nonetheless tried to address members' concerns by splitting the provision into two separate sentences. The first referred to fundamental values of the international community and the second, to the universal applicability and hierarchical superiority of peremptory norms to other rules of international law. Some doubts had been expressed in the Committee about whether the adverb "hierarchically" might be confusing and whether it was already implicit in the adjective "superior". The phrase had, however, been retained because it was found in the various instruments cited in the commentary, but the order of the sentence had been reversed so that it referred first to universal applicability and then to hierarchical superiority. The Committee had considered various proposals to further distinguish the provision from the following two draft conclusions by referring in the title to the peremptory norms' characteristics, purpose or description. In the end, it had simply deleted the word "general". The title therefore read "Nature of peremptory norms of general international law (*jus cogens*)". No changes had been made to either the title or the content of draft conclusion 3, which defined peremptory norms of general international law (*jus cogens*) and tracked the text of article 53 of the 1969 Vienna Convention on the Law of Treaties. The Committee had also decided to leave it in Part One to confirm its overall applicability to the entire set of draft conclusions.

The title of Part Two, "Identification of peremptory norms of general international law (*jus cogens*)", remained the same as that adopted on first reading. That part consisted of six draft conclusions that set out the methodology for identifying those norms. The content of draft conclusion 4, which concerned the criteria for their identification, and its title had been adopted by the Committee without any amendment.

The purpose of draft conclusion 5 was to indicate that, although peremptory norms of general international law (*jus cogens*) were most commonly based on customary international law, they could have other sources, including treaty provisions and general principles of law. Paragraph 1 was the same as that adopted on first reading. In the Drafting Committee, the Special Rapporteur had abandoned the suggestion that he had made in his fifth report to replace "bases" with "sources". Although the Committee had considered making the second paragraph a "without prejudice" clause in relation to treaties and general principles of law in order to emphasize that customary international law was the primary source of peremptory norms of general international law (*jus cogens*), the idea had been rejected because such a clause might suggest that the potential role of treaties or general principles of law as bases for peremptory norms was outside the scope of the topic, whereas that had not been the prevailing view in the Commission. In paragraph 2, the Committee had considered replacing "treaty provisions" with "rules set forth in treaties", the phrase used in the conclusions on identification of customary international law, to indicate that some rules in treaties could enjoy the status of customary international law and then acquire that of *jus cogens*. It had, however, retained the term "treaty provisions", as it was broad enough to be interpreted as both reflecting and serving as a basis for a peremptory norm of general international law. The Committee had thus maintained paragraph 2 and the title of the draft conclusion, "Bases for peremptory norms of general international law (*jus cogens*)", as adopted on first reading.

Draft conclusion 6 (1) elaborated on the criterion of acceptance and recognition, which was referred to in draft conclusion 4 (b). The Committee had streamlined the text adopted on first reading by replacing the phrase "as a criterion for identifying a peremptory norm of general international law (*jus cogens*)" with an explicit reference to draft conclusion 4 (b) and the word "requirement" with "criterion". The new wording therefore confirmed that the acceptance and recognition of a norm as one with a peremptory character was different from acceptance and recognition as a norm of general international law. The Drafting Committee had considered other formulations in an attempt to make the text clearer. It had given some thought to indicating that acceptance or recognition were distinct from the conditions for the formation of rules of general international law, and even to reversing the order of the paragraphs. Finally, it had decided that greater clarity would be achieved by means of an express reference to draft conclusion 4 (b), which would also remove any need for quotation marks around the phrase "acceptance and recognition". Paragraph 2 concerned the evidence required in support of the assertion that a norm had achieved the requisite level of acceptance and recognition to be a peremptory norm of general international law. The Committee had accepted the Special Rapporteur's proposal to specify that such a norm must be accepted and recognized "by the international community of States as a whole". That was a broader requirement than the burden of proof needed in the context of dispute settlement. Paragraph 2 was a key provision and was related to draft conclusion 8, which laid down the specific forms of evidence needed to demonstrate acceptance. The Drafting Committee had also aligned the wording more closely with that of draft conclusion 4 (b) by replacing the phrase "as one from which" with "as a norm from which". The title of the draft conclusion remained unchanged.

Draft conclusion 7 (1) established the basic rule that it was acceptance and recognition by the international community of States as a whole that was relevant for the identification of peremptory norms of general international law (*jus cogens*). The Committee had pondered whether to retain the opening phrase "It is", which was inelegant when rendered in other official languages, but had decided to retain it as the most accurate way of conveying the intended meaning. Although it had also considered "pertinent", "essential" or "fundamental" as alternatives to "relevant", it had ultimately retained the text adopted on first reading.

The Committee had accepted the Special Rapporteur's proposal to qualify the phrase "a very large majority of States" in paragraph 2 with the words "and representative". The commentary would explain that the term implied recognition across regions and legal systems. One drafting option that had been studied had been to state that "widespread and representative acceptance and recognition by States is required for the identification". However, most Committee members had thought that "widespread and representative" might cause unnecessary confusion, as the same phrase was used in a different context in the conclusions on identification of customary international law. In paragraph 3, although the Committee had considered deleting the phrase "providing context" or reformulating it as

"providing context for assessing", it had retained the phrase as it stood because removing it could be understood to mean that the Commission had decided to enhance the role of the conduct of non-State actors. The view had been taken that some of those actors merely provided context, while others, such as the International Committee of the Red Cross, played a role in actually assessing the existence of acceptance and recognition by the international community of States as a whole. The Committee had therefore decided to retain the text adopted on first reading, on the understanding that the commentary would explain the reference to the provision of context. The title of that draft conclusion also remained unchanged.

No comments or proposals had been made with regard to draft conclusion 8 (1), which had been adopted by the Drafting Committee as it stood. In draft conclusion 8 (2), the Committee had deleted the word "Such" at the beginning of the paragraph and had added a reference to constitutional provisions as a form of evidence of acceptance and recognition that a norm of general international law was peremptory in nature. That wording was intended to convey the idea that a provision, or provisions, of a national constitution, as opposed to the entire constitution, might serve as such evidence. The Committee had also reviewed the possibility of introducing a reference to the conduct of States in relation to resolutions adopted by international organizations or at an intergovernmental conference, as had been done in the conclusions on identification of customary international law, since it was crucial to take account of such State conduct, including statements made during the process of adopting a particular resolution, or votes for and against its adoption. The Committee had wondered how best to capture the concept in the provision. One suggestion had been to insert the phrase "and conduct in relation to". In the end, the Committee had adopted the Special Rapporteur's proposal to include an all-encompassing reference to State conduct, not just conduct in the context of adoption of resolutions, by adding the phrase "and other conduct of States" at the end of the paragraph. The meaning and scope of the phrase would be discussed in the commentary, which would also make the point that some resolutions of international organizations and intergovernmental conferences might have a more normative content than others and might take different forms, such as declarations. The title of draft conclusion 8 was unaltered.

In draft conclusion 9 (1), the Committee had retained the thrust of the text adopted on first reading, which focused primarily on the decisions of international courts and tribunals. While special mention was made of the decisions of the International Court of Justice, owing to the central role it played in determining the peremptory character of norms of general international law, that reference should not be construed to exclude the case law of other international courts and tribunals that referred to *jus cogens*, such as that of the International Tribunal for the Former Yugoslavia, the European Court of Human Rights and the Inter-American Court of Human Rights. The Committee had wondered whether it was strictly necessary to include a reference to the decisions of national courts, since such decisions were mentioned in draft conclusion 8 (2). Most members of the Committee had held that a reference to the decisions of national courts in draft conclusion 9 would serve a different purpose. While in draft conclusion 8 the decisions of national courts were one form of evidence of acceptance and recognition of a peremptory norm of general international law (*jus cogens*), in draft conclusion 9, judicial decisions, including the decisions of national courts, were a subsidiary means of determining the peremptory character of norms.

The Drafting Committee had then considered whether to convey that idea in the text of draft conclusion 9 by borrowing wording from Article 38 (1) (*d*) of the Statute of the International Court of Justice and referring more generally to "judicial decisions", which would encompass decisions of both international and national courts. In the end, the Committee had thought it best to retain a distinction between the decisions of international and national courts, with regard being had to the latter when appropriate. Accordingly, it had adopted a new sentence at the end of paragraph 1, which read: "Regard may also be had, as appropriate, to decisions of national courts." The formulation of the new sentence was based on that of conclusion 13 (2) of the conclusions on identification of customary international law. The commentary would elucidate the meaning and scope of the new sentence.

Paragraph 2 referred to the works of expert bodies as a subsidiary means for the determination of the peremptory character of norms of general international law (*jus cogens*).

The Drafting Committee had considered a proposal to change the word “works”, which seemed unusual, but had decided to retain it, since the term was broad enough to cover the wide range of outputs in question. Another suggestion had been to insert the phrase “as appropriate” in paragraph 2, as had been done in paragraph 1. Most members had, however, taken the view that such an addition was unnecessary because the phrase “may also” had the same effect. The text of paragraph 2 had therefore been approved without changes to that adopted on first reading.

The title of draft conclusion 9, “Subsidiary means for the determination of the peremptory character of norms of general international law”, was the same as that adopted by the Commission on first reading.

Part Three had the same title as that adopted on first reading, namely “Legal consequences of peremptory norms of general international law (*jus cogens*)”. That part comprised ten draft conclusions, two fewer than the text adopted on first reading.

Draft conclusion 10 dealt with the general rules that applied when a treaty’s provisions conflicted with a peremptory norm of general international law (*jus cogens*). Paragraph 1 was unaltered. Paragraph 2 concerned a situation where an existing treaty conflicted with a new peremptory norm of general international law. The first sentence was based on article 64 of the 1969 Vienna Convention. The second sentence was drawn from article 71 (2) (a) of that Convention. In order to clarify the relationship between paragraph 2 and draft conclusion 11 (2), which envisaged the separability of provisions of a treaty that conflicted with a new peremptory norm of general international law (*jus cogens*), the Drafting Committee had added the new opening phrase “Subject to paragraph 2 of draft conclusion 11”, as recommended by the Special Rapporteur. The Committee had retained the title of the draft conclusion as adopted on first reading.

In respect of draft conclusion 11, the Drafting Committee had considered whether, in paragraph 1, the qualifier “existing” should be inserted before the phrase “peremptory norm of general international law (*jus cogens*)” but had decided against the addition. It had also considered whether it was strictly necessary to refer to the treaty’s being void “in whole”, but had decided to retain “in whole” in order to provide a clear contrast with paragraph 2. The text of paragraph 1 had thus been adopted without modification. The Committee had considered several suggestions for modifications to the chapeau of paragraph 2, the text of which was based on article 44 (3) of the 1969 Vienna Convention. One option considered had been to reformulate the text to read: “Where particular provisions of a treaty come into conflict with a new peremptory norm of general international law (*jus cogens*), a party may invoke the termination solely of those provisions if:”. Another possibility had been the addition of a final clause that read “in which case those provisions terminate, but not the treaty as a whole”. The suggested changes had been intended to convey more clearly the point that, when the three conditions set out in subparagraphs 2 (a) to (c) were met, only the conflicting provisions would terminate, not the treaty as a whole. Ultimately, the Committee had adopted a new proposal by the Special Rapporteur that clarified the legal effect of the paragraph by reformulating the chapeau to read: “A treaty which is in conflict with a new peremptory norm of general international law (*jus cogens*) becomes void and terminates in whole, unless:”. The title of draft conclusion 11 had been adopted without change.

In draft conclusion 12, paragraph 1 had been adopted without change. In respect of paragraph 2, which concerned the consequences of the termination of a treaty owing to the emergence of a new *jus cogens* norm and was based on article 71 (2) (b) of the 1969 Vienna Convention, the Committee had proceeded largely on the basis of the first-reading text. The key issue considered had been whether to add the phrase “of the parties” after the words “right, obligation or legal situation”. Concerns had been raised as to whether the addition, which constituted a departure from the formula used in the Vienna Convention, might inadvertently narrow the scope of the provision, but the consensus view had been that it would provide useful clarification. The commentary would explain that the rights and obligations of “the parties” included the rights and obligations of third parties arising as a consequence of the treaty’s performance. The title of draft conclusion 12 adopted on first reading had been retained.

Draft conclusion 13, concerning the question of the legal effect of reservations to treaties on peremptory norms of general international law, mirrored the wording of guideline 4.4.3 of the Commission's Guide to Practice on Reservations to Treaties. After considering a suggestion that, in paragraph 1, "binding" should be replaced with "peremptory" to indicate that the reservation would not affect the peremptory nature of the norm, the Committee had decided to retain the word "binding" on the grounds that it more clearly captured the notion that a reservation entered in the circumstances envisaged in draft conclusion 13 would also not affect the *jus cogens* norm outside the treaty. Paragraph 1 had therefore been adopted without change, as had paragraph 2 and the title of draft conclusion 13.

Turning to draft conclusion 14, he recalled that the Special Rapporteur, in summing up the debate on the fifth report, had proposed that, in paragraph 1, the phrase "if it conflicts" should be replaced with "if it would conflict". The Drafting Committee had accepted that proposal, which avoided the repetition of the words "come into", as in the proposed wording in the fifth report. After considering whether the formulation might create a risk of precluding the modification of existing peremptory norms of general international law or the emergence of new ones, and discussing possible alternative formulations, the Committee had opted to retain the wording proposed by the Special Rapporteur on the grounds that the interplay between the two sentences of paragraph 1 amply addressed that concern. The commentary would emphasize that the use of the word "would" in the first sentence was intended to preclude the emergence of a new customary rule that was contrary to such a norm, while the second sentence, which was formulated as a "without prejudice" clause, expressly addressed the situation where an emerging rule of customary international law that had the character of *jus cogens* superseded an earlier *jus cogens* norm.

In respect of draft conclusion 14 (2), it had been suggested that the words "not of a peremptory character" could be deleted. However, for the sake of clarity and to prevent overlap with paragraph 1, the Committee had decided to retain the phrase. The possibility of addressing the applicability of the *lex posterior* rule in the text of that paragraph had also been discussed, but the Committee had decided not to do so on the understanding, which would be reflected in the commentary, that paragraph 2 did not, strictly speaking, deal with the question of modification of an existing rule of customary international law. Paragraph 3 had also been adopted without changes. The Committee had rejected a suggestion that the non-applicability of the persistent objector rule should be expressly confined to "rules of customary international law that have the character of peremptory norms of general international law (*jus cogens*)"; as it was understood that the rule could arise only in the context of the emergence of rules of customary international law, such clarification was unnecessary in the text of the draft conclusion. Instead, the commentary would confirm that paragraph 3 envisaged the emergence of rules of customary international law having the status of peremptory norms of general international law. The Committee had pondered whether the title of draft conclusion 14 adequately captured the content of all three paragraphs, particularly paragraph 3, and had considered "Rules of customary international law in relation with peremptory norms of general international law (*jus cogens*)" as a possible alternative formulation. However, it had rejected that wording as being too broad and had decided to retain the title adopted on first reading.

The Drafting Committee had adopted the texts and titles of both draft conclusion 15 and draft conclusion 16 without modifications.

In draft conclusion 17, the wording of paragraph 1 had been adjusted to clarify that the provision referred to obligations *erga omnes* "in relation to which" all States had a legal interest. The new formulation better conveyed the notion that the concept of "legal interest" could take multiple forms. That point would be expanded on in the commentary, which would explain, *inter alia* through references to decisions of the International Court of Justice, that sometimes the interest lay not in a right or an obligation *per se*, but in the protection of the right or the fulfilment of the obligation. The phrase "in relation to" was intended to place the focus of the provision on States' interest in another State's compliance with an obligation or protection of a right. Paragraph 2, which dealt with the responsibility of States, had been adopted without modification, but the commentary would also address, in more general terms, the applicability of the entire set of draft conclusions to international organizations. The title of draft conclusion 17 had also been adopted without change.

The Drafting Committee had adopted both the title and text of draft conclusion 18 without modifications or further comments.

In relation to draft conclusion 19, the key question dealt with by the Drafting Committee was whether the provision should continue to be limited to particular consequences of "serious" breaches of peremptory norms of general international law. Some members had taken the view, which was shared by certain States, that all breaches of peremptory norms of general international law were *prima facie* serious and that the distinction between serious and non-serious breaches was not always evident. Furthermore, the use of the qualifier "serious" could be interpreted as recognition of a hierarchy among *jus cogens* norms. The Committee had nonetheless decided to retain the focus of draft conclusion 19 on "serious" breaches, in line with articles 40 and 41 of the 2001 articles on responsibility of States for internationally wrongful acts. Its reasoning was that, while all breaches of peremptory norms of general international law had consequences, such as the duties of cessation and reparation, there were certain specific obligations, such as the obligation for States to cooperate to bring the breach to an end and the obligation of non-recognition, that arose only in respect of breaches deemed "serious" within the meaning of paragraph 3. The text of paragraph 3 was also based on the articles on State responsibility and had likewise been adopted without any change to the first-reading text. The Committee's intention was that, while certain breaches of a peremptory norm of general international law could be considered severe, the use of the qualifier "serious" should preclude the need for a subjective evaluation of the severity of the breach. Instead, it provided a legal basis on which to distinguish breaches that did not necessarily require the cooperation of other States under paragraphs 1 and 2 from those that did. An explanation of how such criteria should be interpreted, including the interlinkage with the interpretation of "gross" and "systematic" conduct, would be provided in the commentary.

The text of paragraph 4 adopted on first reading referred to the consequences of a "serious" breach. However, although the Drafting Committee had opted to retain the qualifier "serious" in paragraphs 1 to 3, in the case of paragraph 4 it had decided to delete it. That decision had arisen out of a new proposal by the Special Rapporteur whereby paragraph 4 would have been removed entirely and replaced with a general saving clause, to be inserted as a second paragraph in draft conclusion 22, that would expressly state that the draft conclusions did not address the consequences arising from other breaches of peremptory norms of general international law. The prevailing view in the Committee was that the new paragraph proposed for draft conclusion 22 was unnecessary and that it was possible to convey the idea simply by referring, in paragraph 4, to the other consequences of "any" breach of a peremptory norm of general international law, not just a "serious" breach. Thus, while paragraphs 1 and 2 addressed the particular consequences of serious breaches and the associated obligations for States, paragraph 4 served as a reminder that the general rules regarding the consequences of breaches of an obligation applied to all breaches of peremptory norms of general international law, including breaches not considered "serious" within the meaning of paragraph 3. The Drafting Committee had considered possible alternative formulations for the title of draft conclusion 19, including a proposal that the qualifier "particular" should be deleted in the light of the broad scope of paragraph 4, but had been unable to agree on a new formulation and had thus retained the title adopted on first reading.

Turning to Part Four of the draft conclusions, which was entitled "General provisions", as in the first-reading version, he wished to make two general comments. Firstly, he wished to recall that, on first reading, only draft conclusion 22, containing the general "without prejudice" clause, and draft conclusion 23, containing the non-exhaustive list of peremptory norms, had been included in Part Four. However, the Drafting Committee had decided on second reading that draft conclusion 20, on interpretation and application, and draft conclusion 21, concerning the recommended procedure for claims of invalidity, would be more suitably located in Part Four, given their general nature, than in Part Three, which was focused on the legal consequences of *jus cogens* norms. Secondly, he wished to place on record that the Special Rapporteur had initially proposed a different order for the draft conclusions contained in Part Four, in which the current draft conclusion 21 had been placed after the current draft conclusion 22. However, the Drafting Committee had preferred to revert to the order adopted on first reading.

The Drafting Committee had adopted the text of draft conclusion 20, concerning interpretation and application of other norms in a manner consistent with peremptory norms of general international law (*jus cogens*), without change. Its decision to locate draft conclusion 20 at the beginning of Part Four, immediately before the provision concerning the recommended procedure, was intended to signal that it was preferable, in general, to seek to avoid a conflict by first applying the rule of interpretation established therein before resorting to the recommended procedure. The Drafting Committee had considered alternative formulations for the title of draft conclusion 20, including the addition of the words "to be" before the word "consistent". However, it had concluded that the existing formulation clearly described the content of the draft conclusion and had thus proceeded to adopt the title without modification.

With regard to draft conclusion 21, he first wished to note that the Special Rapporteur had suggested in his fifth report that the text should refer to "other entities" as well as to "other States", but had not included such a reference in his revised proposal for the draft conclusion. It would therefore be necessary to clarify in the commentary that draft conclusion 21 applied also to other actors, including international organizations.

The text of paragraph 1 of draft conclusion 21 largely tracked the first-reading version except that, because the title of the draft conclusion had been changed to "Recommended procedure", as proposed by the Special Rapporteur, the original opening phrase "It is recommended that" was no longer necessary and had thus been removed. The Drafting Committee had considered alternative ways of referring to the States that would need to be notified in the event of the recommended procedure's application. In the case of a peremptory norm of general international law contained in a treaty, the States concerned would be the parties to the treaty; if the norm in question was based on a rule of customary international law or a general principle of law, that would not be the case. The Committee had concluded that the alternative formulations considered, such as "all States", "other States" and "all other States", were too broad and would give rise to practical difficulties when it came to implementation. Accordingly, "other States concerned" remained the most appropriate formulation and had been maintained. The reference to the invalidity or termination of "a rule" conflicting with a peremptory norm of general international law (*jus cogens*) had also been a subject of discussion. The issue was whether, in the event of a conflict, what would be invalidated or terminated would not be the rule of international law but rather the treaty conflicting with the peremptory norm. The Drafting Committee's understanding was that the term "rule" was intended to be broad enough to encompass both a treaty and a rule of international law contained therein. The text of paragraph 2 of the draft conclusion was largely the same as the first-reading version, apart from a minor refinement.

Paragraph 3 constituted a merger of paragraphs 3 and 4 as adopted on first reading. The beginning of the opening sentence had been amended to read "If, however, any State concerned raises an objection, the States concerned", so as to align the text more closely with article 65 (3) of the 1969 Vienna Convention. Acting on a proposal by the Special Rapporteur, the Drafting Committee had included, after the phrase "submit the matter to the International Court of Justice", the words "or to some other procedure entailing binding decisions". The Committee's view was that non-binding or alternative dispute settlement mechanisms could be covered by the first sentence of the paragraph, which referred to "the means indicated in Article 33 of the Charter of the United Nations". Accordingly, the paragraph envisaged a sequence of alternative means of resolving a potential dispute, moving from non-binding to binding.

Paragraph 4 was a slightly amended version of paragraph 5 as adopted on first reading. The Drafting Committee had maintained the sequence of the three elements referred to in the "without prejudice" clause. However, it had not supported the Special Rapporteur's proposal that the phrase "jurisdiction of the International Court of Justice" should be changed to "jurisdiction and procedure of the International Court of Justice", taking the view that a reference to "procedure" would not add clarity. Some alternatives had been considered, such as "the relevant rules concerning the International Court of Justice". In the end, the Committee had opted to refer only to the jurisdiction of the Court, but the phrase "the relevant rules concerning the jurisdiction of the International Court of Justice" should be understood

broadly as encompassing all the rules applicable to the Court, not only those at the jurisdictional phase of proceedings.

The saving clause contained in the new paragraph 6 proposed in the Special Rapporteur's fifth report, concerning other dispute settlement mechanisms applicable in the relations between the parties, had not featured in the revised proposal that the Special Rapporteur had submitted to the Drafting Committee as a consequence of the view expressed during the plenary debate that the clause was not strictly necessary. The Committee had adopted the revised title of the draft conclusion, "Recommended procedure", as proposed by the Special Rapporteur.

Noting that the Drafting Committee had adopted the text of draft conclusion 22 without modification, he said that he nonetheless wished to recall his remarks concerning draft conclusion 19, namely that the Committee had not accepted the Special Rapporteur's proposal to add a new paragraph relating to the consequences arising from breaches of peremptory norms of general international law (*jus cogens*) other than "serious" breaches, as the idea was sufficiently captured in draft conclusion 19 (4), following the deletion of the word "serious". Regarding the title of draft conclusion 22, the Committee had considered other, shorter alternatives, such as "Consequences of specific peremptory norms of general international law (*jus cogens*)"; however, that formulation had been considered imprecise, as it suggested that the draft conclusion would address consequences, which was not the case. Thus, the Committee had decided to maintain the title as adopted on first reading.

Regarding draft conclusion 23 and the annex containing a non-exhaustive list of peremptory norms of general international law, the choice before the Drafting Committee had been either to retain the draft conclusion, the annex and the corresponding commentary with only minor changes, or to delete all three in their entirety. The sense in the Committee had been that any attempt at a *via media* by which either the list in the annex or the commentary were further expanded would essentially imply, at the current stage, the deletion of draft conclusion 23 and the annex. Some members had favoured the deletion of the draft conclusion and the annex; it had been suggested that the list of norms could be moved to the commentary, together with an explanation of how the Commission had drawn up such a list, consistent with the manner in which certain such norms had been referred to in the commentary to the 2001 articles on responsibility of States for internationally wrongful acts. Other members had been of the view that, even if the scope of the current project was not, strictly speaking, the identification of peremptory norms, the Commission had in fact identified and listed some such norms in its previous work and some States had welcomed the inclusion of the annex in the text adopted on first reading. The prevailing view within the Drafting Committee had been that the text should be maintained as adopted on first reading, on the understanding that the commentary would more clearly explain that the list consisted of *jus cogens* norms that had been identified by the Commission in its previous work. The commentary would also clarify that the list did not reflect a new or separate exercise of identification following the methodology in the draft conclusions and that it was without prejudice to the identification of other peremptory norms in other contexts or in the future. The Drafting Committee had considered alternative titles for the draft conclusion, including "Non-exhaustive list of *jus cogens* norms identified by the International Law Commission", but had ultimately decided to maintain the title as adopted on first reading.

The Drafting Committee recommended that the Commission should adopt the draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*), as contained in the Committee's report.

The Chair invited the Commission to adopt each draft conclusion and the draft annex in turn.

Draft conclusions 1 to 23 and draft annex

Draft conclusions 1 to 23 and the draft annex were adopted.

Title of the draft conclusions

The title of the draft conclusions was adopted.

The Chair said he took it that the Commission wished to adopt, as a whole, on second reading, the texts and titles of the draft conclusions and draft annex on identification and legal consequences of peremptory norms of general international law (*jus cogens*), as contained in document A/CN.4/L.967.

It was so decided.

Mr. Tladi (Special Rapporteur) said that he wished to express his gratitude to the past and current Chairs of the Drafting Committee and to the Commission members who had contributed to the work on the topic over the years. He also wished to thank the secretariat, in particular the Secretary to the Commission, and the Library of the United Nations Office at Geneva for their excellent support to the Commission. He looked forward to presenting the Commission with the revised draft commentary to the draft conclusions on the topic, with a view to its adoption on second reading at the second part of the current session. While many would criticize the draft conclusions as going too far and asserting rules where none existed, others would suggest that the Commission had not gone far enough. He believed that neither argument was correct, and the very fact that both arguments could be made was a testament to that.

The meeting was suspended at 11.50 and resumed at 12.05 p.m.

Mr. Tladi took the Chair.

Succession of States in respect of State responsibility (agenda item 5) (*continued*) (A/CN.4/751)

Mr. Reinisch, after congratulating the Special Rapporteur on his fifth report on the topic (A/CN.4/751), said that the fact that discussion and adoption of the draft articles had been divided over multiple sessions spanning a three-year period had complicated the debate not only in the Sixth Committee, but also in the Commission. He deplored the fact that only 40 States had commented on the Commission's work on the topic at the seventy-sixth session of the General Assembly; the weak response seemed to indicate that the topic was not a high priority for States. In light of the comments made by States and the radically different views they had expressed regarding the "clean slate" approach versus the automatic succession approach, a decision as to the form of the final outcome of the Commission's work on the topic should not be postponed. The majority of the responding States had expressed a preference for a "softer" outcome, such as draft guidelines or draft conclusions, rather than draft articles, undoubtedly because of the difficulty of finding sufficient State practice to support the idea that the draft articles codified customary rules. Such a preference was appropriate also in view of the generally subsidiary nature of the draft articles. He himself would welcome draft guidelines as a more appropriate outcome than draft articles.

Regarding the first of the general conclusions outlined by the Special Rapporteur in chapter I (B) of the report, with respect to the subsidiary nature of the draft articles and the primacy of agreements, the reference to agreements between the "States concerned" applied, *inter alia*, to successor States and third States that might have claims relating to unlawful acts of a predecessor State. Depending on their degree of political influence and power, such third States might be able to induce weak successor States to accept responsibility for acts committed by a predecessor State. One could equally envisage the situation in reverse. Thus, the innocuous-seeming "subsidiary nature" of the draft articles might be seriously deficient, given that an agreement between the States concerned might ultimately be a question of raw power.

The Special Rapporteur's second general conclusion, regarding consistency with previous work of the Commission, appeared to be a truism, at least as far as terminology was concerned, although the Commission had, in some cases, improved the terminology used over time. Preserving consistency in substance, on the other hand, was riskier because it could lead the Commission to draw parallels between succession to State debts and succession to State responsibility that were simply non-existent and were inappropriate in relation to issues of responsibility.

The third general conclusion, relating to the importance of the concepts of equity and equitable proportion or distribution of rights and obligations, seemed to suggest that, where

existing legal rules did not provide that a successor State should succeed to the consequences of a predecessor State's responsibility, some equitable corrections might be called for. That was in line with the Special Rapporteur's proposed approach of amending the non-succession rule through progressive development towards partial succession for equitable reasons. However, the concept of unjust enrichment, to which the Special Rapporteur also referred, was a far more suitable legal basis for the premise that in some situations successor States, without legally succeeding to the responsibility of a predecessor State, could be under an obligation to provide reparation or compensation in order to avoid being unjustly enriched as a result of a situation stemming from the commission of an unlawful act by the predecessor State. The concept of unjust enrichment might be most important when addressing issues of State succession to State responsibility.

While he agreed with the Special Rapporteur's fourth general conclusion that the rare occurrence of succession of States did not, by itself, exclude the possibility of progressive development of international law, he had some doubts with regard to its codification. The rarity of State practice in that regard might not rule out the existence of custom, but it certainly made such custom much more difficult to ascertain.

The Special Rapporteur's fifth general conclusion, concerning the non-conclusiveness of State practice regarding either the clean slate principle or the principle of automatic succession as a general rule, provided yet more support for the suggestion that the Commission's final outcome on the topic should take the form of draft conclusions or draft guidelines rather than draft articles.

In chapter III (A) of the report, concerning situations where there was a plurality of injured successor States, the Special Rapporteur endorsed the practice of the United Nations Compensation Commission in dealing with the claims of Czechoslovakia against Iraq (para. 34). It appeared that that practice could be very instructive, but it was not clear whether the Special Rapporteur believed that such practice supported paragraph 1 of the draft article on dissolution of States, which was renumbered as draft article 16 in annex III of the report. What was clear, however, was that the rather opaque practice of the Compensation Commission, which did not make its reasoning publicly available, did not support any rule of automatic succession of successor States. It was uncertain whether that practice could provide any guidance on whether all or only some successor States, and if so which ones, should be entitled to claim reparation.

The practice regarding the separation of Pakistan from India, mentioned in paragraph 35 of the report, should be treated with caution. He did not agree with the Special Rapporteur's conclusion that it had been "accepted that not only India but also Pakistan could claim reparation from Germany". The allocation of a share of the German reparations had obviously been agreed upon between India and Pakistan, as well as other States entitled to reparation under the Potsdam Agreement. Thus, it was part of the reparation paid to the continuing State of India that had subsequently been allocated to Pakistan and there had been, in his view, no direct claim by Pakistan against Germany; the Protocol attached to the Paris Agreement of 14 January 1946 on Reparation from Germany, on the Establishment of an Inter-Allied Reparation Agency and on the Restitution of Monetary Gold corroborated that interpretation.

After formulating, in paragraph 36, the proposition that each injured successor State could separately invoke the responsibility of a State that had committed an internationally wrongful act, the Special Rapporteur went on to discuss equitable criteria concerning the division of rights and obligations in the sense of property and debts, as reflected in the 1983 Vienna Convention on Succession of States in respect of State Property, Archives and Debts, the opinions of the Arbitration Commission of the International Conference on the Former Yugoslavia and the 2001 Agreement on Succession Issues. However, none of those instruments dealt with claims for reparations invoking State responsibility; they only concerned property, assets, debts and the like. He was therefore very sceptical about the Special Rapporteur's assertion, in paragraph 40 of the report, that the criteria set out in those instruments were relevant for the apportionment of reparations among the injured successor States. It was difficult to agree with the Special Rapporteur's conclusion that the responsible State could not refuse a claim by one successor State simply because of a plurality of injured States, on the grounds that such a refusal would be contrary to article 46 of the 2001 articles

on State responsibility. Article 46, however, was premised on the continued existence of the injured State and the State that had committed the internationally wrongful act. It was silent on questions of State succession and thus did not provide a basis for such an inference.

In paragraph 45 of the report, the Special Rapporteur explained that the break-up of the Soviet Union presented a special case that excluded, in principle, shared responsibility, because the Russian Federation acted as a continuator State, and that a 2002 Austrian Supreme Court decision confirmed that interpretation. The case thus had nothing to contribute to the issue of plurality of successor States, as it was premised on the continuation theory. However, the same Supreme Court decision stated that, according to the rules of international law, there was no State succession to personal rights and obligations in the field of State responsibility. It thus concluded that, when a State ceased to exist, its international responsibility for any wrongful conduct was also extinguished.

At first glance, the dissolution of the Socialist Federal Republic of Yugoslavia might thus appear more pertinent with respect to questions surrounding a plurality of successor States. However, even in that instance, there seemed to be little case law that was directly relevant.

He agreed with the overall conclusion drawn by the Special Rapporteur on situations where there was a plurality of responsible successor States, to the effect that "the practice and, in particular, the case law of the European Court of Human Rights point rather to the separate responsibility of one State, either predecessor (continuator) or successor". Moreover, regarding the Special Rapporteur's claim that "Even if more than one continuator or successor State bears some obligations arising from an internationally wrongful act, each of them is obliged to make reparation only for injury resulting from its own act, or that of the predecessor State, to which it has a special link", he fully agreed that a State was only obliged to make reparation for injuries arising from its own act, a scenario that was covered by draft article 5 and reflected the existing rules on State responsibility. However, with respect to the second part of the sentence, there was insufficient case law to substantiate the assertion that the responsibility of a successor State could be based solely on a perceived "special link" to an act of the predecessor State. Rather, the cases discussed in the report concerned successor States that had, in some manner, acknowledged and adopted the act of the predecessor State as their own, a situation that was already covered by draft article 5.

He also agreed with the Special Rapporteur's conclusion that cases involving continuing or composite acts by a plurality of States could be resolved on the basis of the general rules of State responsibility and did not need to be addressed differently under the topic of succession of States in respect of State responsibility.

He supported the Special Rapporteur's proposal to consolidate and, where necessary, restructure the draft articles prepared thus far, and welcomed the inclusion of the text of the amended draft articles as a whole in annex III. The division of the draft articles into four parts was very useful. However, a number of the current draft articles, especially those in Part IV, needed to be redrafted or deleted, since they were already covered by the general rules of State responsibility, as codified in the Commission's 2001 articles on State responsibility. He wished to reiterate that draft guidelines or draft conclusions would be a more suitable outcome than draft articles.

Ms. Escobar Hernández said that she wished to thank the Special Rapporteur for his fifth report, which was clear and well founded. He had not limited himself to considering the final substantive matter that had been left pending in 2021, namely the question of what would become of the obligation to provide reparation and the right to claim it when there was a plurality of successor States that could be regarded as responsible States or injured States; he had also made contributions that, in her view, would greatly facilitate the Commission's efforts to complete its work on the topic before the term of office of the current members expired.

On that substantive matter, she could only share the conclusion reached by the Special Rapporteur that the existence of a plurality of successor States in no way altered the rules already laid down in the Commission's 2001 articles on responsibility of States for internationally wrongful acts, particularly with regard to the attribution, invocation and reparation of a wrongful act. On the contrary, the position of each successor State in the

relationship of responsibility created by the wrongful act would depend exclusively on the rules on the attribution of the wrongful act, in the case of the responsible State, and the rules on the invocation of the wrongful act and the right to reparation, in the case of the injured State.

While the existence of a plurality of States further complicated the application of those rules, which were not straightforward to begin with, that fact did not modify the basic elements contained in the 2001 articles or justify the inclusion of an *ad hoc* draft article under the current topic. The same could be said of the consequences of a plurality of successor States in cases of composite or continuing acts, which had already been given due consideration by the Special Rapporteur and were reflected in draft articles 5 and 6, as renumbered in annex III of the report.

She could not fully agree with the views expressed by some members on the Special Rapporteur's examination of the concept of "shared responsibility" and of the guiding principles on shared responsibility in international law, which had been prepared by a group of international lawyers. While the guiding principles did not address the issue from the perspective of State succession, the examination of those principles and of the concept of shared responsibility had the added value of helping to distinguish between that category of responsibility and the scenario where several successor States could be simultaneously responsible, in whole or in part, for a wrongful act attributed to the predecessor State. From a conceptual standpoint, the consideration given to the "shared responsibility" theory was clarifying and not superfluous. It was a testament to the Special Rapporteur's intellectual rigour that he had addressed that issue even though he could have saved himself the additional effort of doing so.

As the Special Rapporteur had rightly pointed out, the procedure that the Commission had followed in dealing with the topic had largely influenced the results achieved. The procedural problems mentioned by the Special Rapporteur, such as the fact that the topic had always been considered during the second part of each session, the consequent adoption of draft articles during the intersessional period and the reduced number of Drafting Committee meetings allocated to the topic, while quite real, were not exclusive to the topic at hand. However, it could not be denied that those circumstances, together with the issues that had arisen during the substantive debate on the Special Rapporteur's proposals, had influenced the course of the Commission's work, with the result that a significant number of draft articles were still awaiting consideration by the Drafting Committee. Moreover, the fact that some draft articles had been identified by a letter rather than a number might have made it difficult for States to correctly understand the draft articles as a whole.

She therefore appreciated the fact that the Special Rapporteur had simply and clearly described the evolution of Commission's previous work in part one of the report and had set out the consolidated and renumbered draft articles in annex III. In her opinion, the structure of the consolidated draft articles was appropriate and set out systematically the issues to be included in the final product to be adopted by the Commission. The division of the draft articles into four parts made the product as a whole easier to understand. She also concurred with the deletion of former draft articles 3 and 4 and with the proposal to simplify draft articles 18 to 21, which were still awaiting consideration by the Drafting Committee.

In any case, the consolidated and renumbered draft articles in annex III had greatly assisted the Commission's work at the current session. As the Special Rapporteur had rightly pointed out, it was neither for him nor for the current Commission members to take a decision on the future programme of work for the topic. On the contrary, it would be for the Commission in its new composition to decide, in 2023, on the direction it wished to take in the next quinquennium.

Against that backdrop, she understood why the Special Rapporteur had set the objective of having the Commission adopt the draft articles on first reading during the current session, since it was his last session as a Commission member. She herself was in a similar situation. While some members of the Commission had made alternative proposals in what was clearly a constructive spirit, her view was that the Special Rapporteur should decide on the path that the Commission should take in dealing with the topic for the rest of the current session. She therefore fully supported his proposal that the Commission should attempt to

finish its first reading of the draft articles at the current session, and stood ready to support any other proposals that he might put forward.

She wished to conclude by expressing her gratitude to Mr. Šturma for the great contribution he had made to the work of the Commission during his two five-year terms. His diligence, knowledge of international law and willingness to perform any task assigned to him did him great credit. Without his efforts and wise leadership, the Commission would not have reached the current stage in its work on succession of States in respect of State responsibility. She hoped that, in 2022, the Commission would be able to accomplish the objective set by the Special Rapporteur, namely the adoption of the draft articles on first reading.

Ms. Oral said that she wished to pay tribute to the Special Rapporteur for his diligent work on the topic and for his fifth report. She also wished to commend him for his flexibility and openness to the suggestions of members throughout the work on the topic.

Sir Michael Wood had noted that the topic lay at the interface of some of the most challenging areas of international law: State responsibility and State succession. It was indeed an intellectually challenging topic that, as others had remarked, was characterized by limited State practice. Of course, that factor alone did not negate its importance or stand as a reason for not addressing it.

While the Special Rapporteur had expressed the hope that, during the final session of the quinquennium, the proposals pending in the Drafting Committee would be finalized and the Commission would adopt all the draft articles on first reading, he had also acknowledged that doing so would be no mean feat, as only a small number of the draft articles had been provisionally adopted thus far.

She was less concerned about the limited time available than about the form that the final product would take. As the Commission entered the final phase of its work on the topic, she wondered whether it should be preparing draft articles on rules that were subsidiary to the general rule of succession of States by agreement, as reflected in draft article 1 (2). In her view, the draft articles were more in the nature of recommendations or guidelines. She therefore questioned the viability of continuing to prepare draft articles on a series of subsidiary rules that were likely to have limited future applicability. She wished to encourage the Special Rapporteur to consider alternative options, including the one proposed by Mr. Murphy, who had suggested that the Commission should adopt a more flexible format such as a report containing analysis and recommendations, as had been done, for example, in 2014 for the final report on the topic "The obligation to extradite or prosecute (*aut dedere aut judicare*)". She believed that there was merit in that proposal, especially if it would allow the Special Rapporteur to complete his work so that the Commission could preserve it and use it in the future. However, she would, of course, support the views and wishes of the Special Rapporteur, who had devoted much time and effort to the topic and had contributed greatly to the Commission's work over the last decade.

Mr. Šturma (Special Rapporteur), summing up the debate on the topic "Succession of States in respect of State responsibility", said that he wished to thank all the Commission members who had taken part in what had been an interesting, if sometimes challenging, discussion and who had provided feedback on his fifth report and general approach to the topic. The recommendations that he would make at the end of his statement would reflect not only his own preferences but also a serious evaluation and presentation of objective arguments.

Most of the general comments made had concerned the discussion, in the report, of the issue of plurality of States and the concept of "shared responsibility". The majority of members who had addressed the matter had agreed that there was no need for provisions on the plurality of States. Mr. Rajput, in particular, had noted that the omission of such provisions would be conducive to the Commission's adopting the draft articles on first reading in 2022. However, some members considered that there should be a separate provision on plurality that was in line with article 7 of the resolution on succession of States in matters of international responsibility adopted by the Institute of International Law in 2015. Mr. Park had said he agreed that there was no need for a specific draft article, but had proposed including a reference to that provision to avoid implying a rule of automatic

succession. His own view, however, was that article 7 of that resolution actually tended to confirm the existence of a rule of automatic succession. Although he had considered the possibility of including such a draft article, he had finally decided against it. To avoid the appearance of implying, through the provisions on plurality of States, that there was a rule of automatic succession, he would have needed to draft a provision that differed from article 7 of the Institute's resolution. He agreed with Sir Michael Wood that it could be instructive to compare the Commission's output with the work of the Institute.

Other considerations that had led him to omit such a draft article were related to the content of several other draft articles that had been submitted to or already adopted by the Drafting Committee, which included the idea of negotiations and agreements and the equitable apportionment of rights and obligations of the successor States. However, he agreed with Mr. Murase that situations involving a plurality of States could be discussed in the commentary. He partly agreed and partly disagreed with Mr. Rajput, who considered that it was incorrect to make a connection between agreements and decisions, on the one hand, and plurality of States, on the other, as plurality was dealt with in procedural provisions for the invocation of responsibility and not in a substantive provision. He shared that view, as indicated in the report, in which he noted that "as a matter of invocation, which merely begins a process of negotiation or judicial settlement of a dispute, the injured State should be able to rely, *mutatis mutandis*, on the rule codified in article 47 (Plurality of responsible States) of the articles on responsibility of States for internationally wrongful acts". In other words, he did not claim that articles 46 and 47 were substantive provisions and therefore wished to refute any allegation that the report implied an "absolute" or "automatic" succession. On the contrary, paragraph 17 made it clear that State practice did not support either the clean slate principle or the principle of automatic succession as a general rule.

Mr. Rajput had also said that, contrary to what was stated in paragraphs 31 to 33 of the report, the Commission had not in fact accepted the view that the right to reparation was not affected by territorial modifications. While it was true that the need for attribution could not be ignored, a succession of States involving an injured State or States had no impact on the attribution of conduct to the responsible State, which remained unaffected by the succession. He hoped that Mr. Rajput was not claiming that attribution, and the responsibility of the wrongdoer, disappeared simply because the State that was the victim of the internationally wrongful act was succeeded by another State.

While he agreed with Mr. Rajput and others that domestic laws, such as the Act on the Responsibility of the Republic of Croatia for Damage Caused in the former Socialist Federal Republic of Yugoslavia for which the former Socialist Federal Republic of Yugoslavia was responsible, were voluntary acts, the same could be said of any legislative act of a sovereign State. He saw no reason why they should not be cited as State practice, particularly since members had repeatedly called for more examples of such practice. The report did not claim that they were an expression of a State's legal conviction that it was fulfilling an obligation under international law. Nevertheless, such acts represented State practice and were driven by the social need to address, in the context of succession of States, the injury for which the predecessor State was responsible. That was also true of the Act on the Rehabilitation of Victims of Political Repression adopted by the Russian Federation, which was addressed in paragraph 45 in the context of a decision by the Austrian Supreme Court and which had generated interesting comments from members. His interpretation and conclusion with regard to that judicial decision, which he had been grateful to receive from the Government of Austria, were based not just on the decision itself but also on the original Russian text of the Act adopted by the Russian Federation as a continuator State, which he had duly consulted.

He agreed with Mr. Jalloh that it should be made clear that the Commission did not intend to rewrite or deviate from the general rules on State responsibility. He had made that point in the fifth report and the decision not to include a draft article on plurality of States had also been driven by such considerations. He likewise agreed with Mr. Hassouna that more reference could be made to other outputs previously adopted by the Commission. Several members had expressed the view that not enough attention was paid to the experiences of African countries. He had neither overlooked nor underestimated the contribution of Africa to the topic in general. While some African examples had been cited

in previous reports, the focus on plurality of States and shared responsibility in the fifth report had provided little opportunity for the inclusion of such examples. Most recent cases of succession of States in Africa seemed to concern property and debts.

With regard to the specific comments made on individual draft articles, he welcomed members' views on the usefulness, wording and placement of the draft articles presented in previous reports and on the changes proposed in the fifth report. He fully agreed with Sir Michael Wood that the Commission's first priority was to complete its work on the texts of the draft provisions, regardless of whether they were ultimately presented as draft articles, draft guidelines or some other outcome.

Mr. Al-Marri had referred to the fact that, under draft article 1 (2), the draft articles gave priority to agreements concluded between the States concerned. Draft article 1 (2) had been supported by most members of the Commission and many States. In fact, it was one of the provisions that had made it possible to overcome divergent views and was conducive to the completion of the draft articles on first reading. Mr. Al-Marri's comment perhaps referred to the fact that the provisions had been proposed as draft articles. If that was the case, the final proposal to be made on the form of the outcome might allay any concerns.

Mr. Jalloh had stated that the Special Rapporteur's recommendation to consider adding a definition of the term "States concerned" to draft article 2 should be taken under advisement. However, several members believed that there was no need for such a definition. On balance, Mr. Hassouna supported the inclusion of a definition of the term "States concerned" and had suggested introducing the notion of a "third State" to avoid confusion in the terminology used. Those terms were defined in the Commission's 1999 articles on nationality of natural persons in relation to the succession of States, which was why he was in favour of adding to the definitions in draft article 2. However, he also recognized the argument that such definitions were not included in the 1983 Vienna Convention on Succession of States in respect of State Property, Archives and Debts or the 1978 Vienna Convention on Succession of States in respect of Treaties. He wished to suggest that the issue should be dealt with by the Drafting Committee at a later stage. If the majority of members decided against the addition of new definitions, he could explain the terms in the relevant commentary.

Most members supported the deletion of former draft article 3. The same members, with the exception of Mr. Park and Mr. Reinisch, also supported the deletion of former draft article 4, "Unilateral declaration by a successor State". Those two members had suggested that the issue of unilateral declarations should be addressed either in the text of the draft articles or in the general commentary. No substantive comments had been made in relation to the draft article on the cases of succession covered by the draft articles, which had been renumbered as draft article 3 in annex III of the report. While Mr. Jalloh had expressed support for draft article 6, "Composite acts", Sir Michael Wood did not see the need for that provision. It might be advisable to allow the Drafting Committee to complete its discussions on that draft article. Moreover, the new wording of paragraph 1 proposed the previous week and the drafting changes in other paragraphs would minimize the risk of appearing to rewrite the law on State responsibility.

Draft articles 8 and 13, which dealt with the scope of Part II and the scope of Part III, respectively, had been supported by several members. At any rate, those draft articles belonged to the group of technical provisions that could perhaps be considered by the Drafting Committee at a later stage.

Concerning draft articles 14, 15 and 16, while he generally agreed with Mr. Jalloh that the work of Professor Marcelo Kohen and the Institute of International Law could enrich the Commission's work on those draft articles, he wished to inform members that he had just prepared amendments to those provisions for informal consultation and further discussion by the Drafting Committee. Those three draft articles should have high priority and be discussed by the Drafting Committee immediately after it had considered draft article 6.

As for draft article 17, "Diplomatic protection", Mr. Hassouna had suggested adding another paragraph to explain how a claim in exercise of diplomatic protection initiated by a third State against the predecessor State would continue against the successor State if the predecessor State no longer existed. That useful proposal merited careful consideration. The

Drafting Committee could discuss a new provision to the effect that a claim in exercise of diplomatic protection initiated by a third State, or the State of nationality of a victim, against a predecessor State could continue against the successor State having the most direct connection with the victim. Mr. Hassouna's question concerning a plurality of successor States could be answered by such a provision. The related commentary could also explain that "the most direct connection" referred to the territory where a wrongful act had taken place or to the devolution of authority from organs of the predecessor State to organs of the successor State.

Mr. Hassouna's suggestion to add a new paragraph to draft article 17 to reflect article 8 of the Commission's 2006 articles on diplomatic protection, thus extending the exercise of diplomatic protection by the successor State in respect of refugees and stateless persons who had been lawfully resident in the predecessor State at the date of injury, was the most challenging. Mr. Hassouna had also proposed, as an alternative, that a reference to article 8 could be included in the commentary. While the proposal had merit, there was a risk that it could overcomplicate the draft article. The general "without prejudice" clause in paragraph 3, which referred to any "rules of diplomatic protection", might address Mr. Hassouna's concerns.

The meeting rose at 1 p.m.