

Provisional

For participants only

16 June 2022

Original: English

International Law Commission
Seventy-third session (first part)

Provisional summary record of the 3583rd meeting

Held at the Palais des Nations, Geneva, on Tuesday, 17 May 2022, at 3 p.m.

Contents

Succession of States in respect of State responsibility (*continued*)

Organization of the work of the session (*continued*)

Programme, procedures and working methods of the Commission and its documentation
(*continued*)

Corrections to this record should be submitted in one of the working languages. They should be set forth in a memorandum and also incorporated in a copy of the record. They should be sent *within two weeks of the date of the present document* to the English Translation Section, room E.6040, Palais des Nations, Geneva (trad_sec_eng@un.org).



Present:

<i>Chair:</i>	Mr. Tladi
<i>Members:</i>	Mr. Cissé
	Ms. Escobar Hernández
	Mr. Forteau
	Ms. Galvão Teles
	Mr. Grossman Guiloff
	Mr. Hassouna
	Mr. Hmoud
	Mr. Jalloh
	Mr. Laraba
	Ms. Lehto
	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
	Sir Michael Wood
	Mr. Zagaynov

Secretariat:

Mr. Llewellyn	Secretary to the Commission
---------------	-----------------------------

The meeting was called to order at 3 p.m.

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

Mr. Šturma (Special Rapporteur), resuming his summing-up of the debate on his fifth report on succession of States in respect of State responsibility (A/CN.4/751), said that Mr. Park, Mr. Reinisch and Sir Michael Wood had expressed doubts over whether draft articles 18 to 21, as renumbered in annex III of the report, were necessary, while Mr. Murase had said that they should be merged into a single provision on remedial measures, with the remaining content reflected in the commentaries. Mr. Murase's suggested wording for such a provision certainly merited consideration. However, he agreed with other members who had supported the idea of combining and streamlining the four draft articles, assuming that their substance remained intact. In fact, he had already prepared a proposal to that effect, which would be made available for informal consultations and, subsequently, for the work of the Drafting Committee. He had no objection to Mr. Murphy's suggestion to remove the reference to "content" from the proposed title of Part IV of the draft articles.

Mr. Cissé had requested clarification on the type of restitution envisaged in draft article 18 (1). That would depend on the nature of the internationally wrongful act committed and on the damage resulting from it. The obligation to make restitution could apply to any affected movable or immovable property.

Mr. Jalloh had argued that draft article 21, "Assurances and guarantees of non-repetition", could benefit from citations, including to the case law of regional human rights bodies, and had suggested that paragraph 2 of the provision should be clarified. He agreed and would welcome suggestions for citations to case law that could be included in the commentary.

Regarding the structure of the project, several members, including Ms. Escobar Hernández and Mr. Reinisch, had supported the division of the draft articles into four parts.

At the Commission's seventy-second session, in 2021, he had proposed deferring consideration of the crucial issue of the form of the final outcome to a later stage of the work on the topic. He had done so for good reasons. It was his sincere conviction that what mattered most was the content of the provisions put forward in his first four reports. Those provisions had all been duly referred to the Drafting Committee as draft articles, which was the traditional form of the Commission's output, in particular for topics pertaining to succession of States in various areas and responsibility of States for internationally wrongful acts. Accordingly, he had previously expressed a preference for the outcome to take the form of draft articles with commentaries. At the same time, he had expressed openness to changing the form if there were convincing reasons for doing so.

He was now of the opinion that such convincing reasons existed. He was attentive to the comments of other members and of States in the Sixth Committee. The form should reflect, to the extent possible, the content of the provisions adopted. The new language of the provisions that had been renumbered in annex III as draft articles 10, 11 and 12, which had been provisionally adopted by the Drafting Committee in 2021, had thus convinced him to propose a change of form. He was also conscious of the recent trend among States of favouring "soft law" documents over binding instruments concluded on the basis of draft articles adopted by the Commission. He therefore proposed that the form should be changed from draft articles to draft guidelines, which seemed to better reflect the language of the bulk of the provisions and the views of most States and of most members of the Commission.

During the debate in the Sixth Committee in 2021, some delegations had expressed views in line with his original approach of proposing draft articles. Denmark, on behalf of the Nordic countries, had said that draft articles were consistent with the Commission's earlier work on State responsibility and State succession, but that the form of the outcome was not of major importance; what counted was having a well-drafted and balanced set of provisions that would be useful in practice. Portugal had also been open-minded with regard to the form of the outcome. Some delegations, such as that of New Zealand, had agreed that the Commission should decide on the most appropriate outcome for the topic at a later stage. The United Kingdom had indicated that it remained open-minded as to what outputs might

best assist States, while Slovakia had maintained that draft articles would be the most appropriate form. Sierra Leone and Egypt had expressed doubts over the outcome of the topic and had asked the Commission to provide clarification in that respect. The United States of America had said that draft guidelines or draft principles might be a more appropriate outcome, given the substance of the initial draft articles considered by the Commission. Austria, Brazil, China, India, Israel and Italy had also expressed a preference for draft guidelines. Poland had argued that draft conclusions, with model clauses in an annex, would be more useful. The Russian Federation had expressed the view that draft articles were not the optimal form for recommendations to States on the subject of succession and that there were other, more appropriate forms, such as model provisions. Algeria had suggested that the Commission should consider giving its work the form of conclusions. Only one delegation, that of the Netherlands, had stated that the final outcome could be a study, report or analysis.

In the Commission's plenary debate, draft guidelines had been supported by Mr. Hassouna, Mr. Jalloh, Mr. Petrič and Mr. Rajput, and had been accepted as one possible outcome by Ms. Oral, Mr. Park and Sir Michael Wood. Mr. Cissé and Mr. Murase had expressed a wish to refer the draft articles to the Drafting Committee and to complete the work on them on first reading at the current session. Mr. Reinisch had indicated his support for draft conclusions or draft guidelines. In general, the Commission should not take decisions to change the form of its outcomes too quickly or without serious grounds. However, as he had explained, there were now at least three strong arguments in favour of such a change.

Taking into account the views expressed by States and by members of the Commission, in addition to the textual changes made to the draft articles by the Drafting Committee, he believed that the most appropriate form would be draft guidelines with commentaries. That would make it possible to build on the work done to date by the Commission and, in particular, the Drafting Committee, including in respect of the commentaries. Since all the draft articles were pending before the Drafting Committee or could be referred to it, the Committee would be able to make the changes needed to adopt a set of draft guidelines on first reading. While the task was perhaps ambitious and difficult, it was not impossible. The Drafting Committee as constituted for the topic, which had begun its work the previous week, was a relatively small but efficient setting for achieving tangible results, provided that sufficient time was allocated to that end. As Special Rapporteur, he would do his utmost to facilitate the Drafting Committee's work, including by prioritizing and streamlining some of the draft provisions.

He wished to recall that he had proposed holding informal consultations in his summing-up of the debate on his fourth report. Unfortunately, no time had been allocated for such consultations during the Commission's seventy-second session. However, he had been engaging in informal, ongoing and fluid consultations with members of the Drafting Committee at the current session. Despite the Commission's busy programme of work, he had already circulated two informal papers setting out possible amendments to draft articles 6 and 14 to 16, as renumbered in annex III of his fifth report, which were being considered by the Drafting Committee. He would prepare another proposal regarding the draft articles referred to the Committee in 2021. He stood ready to hold informal consultations on any provision and on the draft commentaries. However, such consultations should not affect the ongoing work of the Drafting Committee.

The last and most difficult issue that he wished to address was that of "future work", which had two different meanings. As he pointed out in paragraph 89 of his fifth report, future work on the topic *stricto sensu* – in other words, beyond 2022 – would be the responsibility of the Commission in its new composition. However, he wished to make clear his position regarding the short-term future; in other words, what the Commission could and should do during the current session, which would admittedly have an impact on the future work in the strict sense of the term.

Mr. Murphy had put forward the interesting idea of establishing a working group to take the draft provisions from the Drafting Committee and conclude the work on the topic in its entirety at the current session. Several members, including Sir Michael Wood, had said

that the suggestion merited consideration, while others had agreed with his own proposal to complete the first reading. Mr. Jalloh had indicated that he kept an open mind on the issue.

He personally agreed that the suggestion merited consideration, which was precisely what he had given it before preparing his summing-up of the debate, including the conclusion on future work. The result of that consideration was that he did not support the suggestion, which consisted of two elements, namely a working group as a method of work and a report as a final product, both of which had serious shortcomings in terms of both principle and practice.

It was important for the Commission to be consistent and transparent in its work. Accordingly, any decision on such a significant change of working method should not be sudden or surprising. The Commission's work on the topic to date had been based on his reports, which had always been in line with the programme of future work and had been submitted and issued on time. The proposed draft articles had been referred to and considered by the Drafting Committee. There had thus been nothing to suggest that the Commission would change its working method at the current stage. As he had already mentioned, only one State had recommended a report as a final product. Had that been the intended outcome prior to the preparation of his fifth report, he would have drafted the report very differently, rather than preparing draft provisions for adoption on first reading.

However, Mr. Murphy's suggestion also had a practical dimension, embodied by the working group that could provide an alternative path to the adoption of a final report at the current session. He had seriously explored that possibility and had examined the Commission's practice in respect of topics whose consideration had involved a working group and/or a report. He had also discussed the feasibility of the suggestion with the secretariat, before concluding that the establishment of a working group would not be an easier and faster way of completing the work on the topic than adopting a set of draft provisions on first reading through the Drafting Committee. On the contrary, it would not lead to a comprehensive, substantive report that would do justice to the topic and to all the work carried out to date.

A closer look at two precedents provided little justification for Mr. Murphy's suggestion. The topics "Fragmentation of international law: difficulties arising from the diversification and expansion of international law" and "The most-favoured-nation clause (Part Two)" had each been completed with an important substantive study and report, but the method of work, namely a study group, had been chosen from the outset. Moreover, the two Study Groups had been given adequate time to complete their work: five and nine years, respectively. Other examples included the Working Group on the topic "Unilateral acts of States", which, having been established in 1997, had not completed an outcome until 2006. Lastly, the Working Group on the topic "Obligation to extradite or prosecute (*aut dedere aut judicare*)" had been established in 2012, in the absence of a special rapporteur and with no member of the Commission ready to assume that responsibility. Even though the final report on the topic was not of the same nature and quality as the other examples that he had mentioned, it had not been finalized until 2014.

Based on those examples, his inevitable conclusion was that, despite the best intentions of other members who supported Mr. Murphy's suggestion, a working group would not complete its work in 2022. At the end of the quinquennium, he and several other members would leave the Commission. The new members who would replace them would certainly need time to familiarize themselves with the Commission's methods of work and the topics left over from the current quinquennium. It was therefore unlikely that a working group, even if re-established in 2023, would complete its work before 2024 or 2025 at the earliest.

In sum, Mr. Murphy's suggestion would be less likely to produce a positive outcome in 2022 than the traditional method whereby work in the Drafting Committee led to the adoption of draft provisions on first reading. He partly agreed with Mr. Murphy that if the topic was given priority, it could be completed faster, but there were other competing topics. However, recent developments in the work of the Drafting Committee on the topic "Protection of the environment in relation to armed conflicts" provided some grounds for optimism. The possible early conclusion of the Commission's second reading of the draft

provisions on that topic and on the topic “Peremptory norms of general international law (*jus cogens*)” opened the door for the Commission to finalize its first reading of the draft provisions on two other topics. The Commission should not feel forced to sacrifice one topic in favour of another. Rather, it should demonstrate a spirit of cooperation and good faith in dealing with the provisions that remained pending before the Drafting Committee.

Conversely, he would welcome the establishment of a working group to assist him in drafting the commentaries to draft articles or draft guidelines. That was why he had reiterated his commitment to the Commission’s work on the topic and had made practical proposals to facilitate the work of the Drafting Committee. However, for all the reasons that he had set out, if a majority of members decided to establish a working group with a mandate to remove the draft articles from the Drafting Committee and conclude the topic with a report, he could not take part. His final recommendation was that the Commission should change the form of the outcome from draft articles to draft guidelines and instruct the Drafting Committee to continue its work on the provisions referred to it, taking into account all the comments made in the plenary debate and the practical additions that he had proposed to streamline the work.

The Chair asked whether the Commission wished to proceed on the basis of the Special Rapporteur’s recommendation.

Mr. Murphy, thanking the Special Rapporteur for his summing-up, said that the decision to change the form of the outcome was a significant one, with unclear implications for the work of the Drafting Committee. Consequently, it merited further discussion among interested members of the Commission, either in the Drafting Committee or in the context of informal consultations, with the aim of clarifying what such draft guidelines would entail or whether a different outcome would be preferable.

Mr. Petrič said that it would be regrettable if the Commission’s work on the topic was left without a conclusion, even if only an interim one. There seemed to be general agreement that a “softer” product such as draft guidelines would be more appropriate, and the Special Rapporteur had indicated that he could accept such a change. It might be best if, at the next meeting of the Drafting Committee for the topic, the Special Rapporteur could set out his ideas on the way forward. By offering some kind of conclusion at the current stage, the Commission would be able to give a clearer sense of the direction that should be taken in the future.

Mr. Rajput said that he agreed with the approach proposed by the Special Rapporteur, which reflected comments repeatedly made by several States to the effect that guidance on the topic would be preferable to the articulation of prescriptive norms. Changing the form of the project to draft guidelines would entail a change in the character, not just the title, of the set of draft provisions. Presenting them as draft articles would imply that their content represented either codification or progressive development, whereas “draft guidelines” suggested a soft law instrument. It would be helpful if the Special Rapporteur could provide further guidance as to how the Commission should proceed, given the limited time available.

Sir Michael Wood said that changing the form of the project to draft guidelines, as the Special Rapporteur had suggested, would go some way towards addressing the concerns expressed by States and members of the Commission and would reflect the actual content of the draft provisions as they were currently developing. That decision should be taken before further discussions were held, whether in the Drafting Committee or in informal consultations. One of the options suggested during the debate had been that, rather than producing a set of draft provisions for adoption on first reading, which would imply the need for a second reading under the guidance of a new special rapporteur, the Commission should instead produce a final report setting out the substance of its work on the topic. The Commission had taken a similar approach in its work on the topic “Obligation to extradite or prosecute (*aut dedere aut judicare*)”. However, the Special Rapporteur had made clear that he rejected that suggestion.

The various possible ways forward had yet to be discussed. If the Commission decided not to produce a final report on the topic, it should make clear in its annual report that the option of doing so had been on the table and that it was for the Commission in its new composition to decide how to proceed. In other words, the Commission should refrain from

taking any decision that presupposed the appointment of a new special rapporteur in the next quinquennium. His strong preference was to have that discussion without delay. Part of the time set aside for the next Drafting Committee meeting on the topic could be used for informal consultations chaired by the Special Rapporteur. If no decision to change direction was reached in those consultations, the Drafting Committee would continue to work on the provisions as draft guidelines rather than draft articles. The Drafting Committee might struggle to complete its work on the topic in the time allocated, but additional meeting time might become available in the light of the progress made on other topics. In any event, the Commission's debate on the form to be given to its final product on the topic should be reflected in its annual report.

Mr. Park said that the question of the most appropriate form for the outcome of the Commission's work on the topic was a difficult one. He supported Sir Michael Wood's suggestion regarding informal consultations, following which the Commission would have to take a decision. The Drafting Committee needed specific guidance on how to proceed.

Mr. Forteau said that in his view the Commission was in a position to take a decision at the current meeting. The plenary debate had taken place, arguments had been advanced and members had set out their views clearly. He was in favour of referring the draft provisions to the Drafting Committee in accordance with what the Special Rapporteur had suggested. If that was not possible, he was not opposed to holding further discussions, subject to two important caveats. First, if those discussions took place as informal consultations, they should involve all members of the Commission and not only those who were members of the Drafting Committee for the topic. Second, it would be preferable for the discussions to be held in a plenary meeting to ensure transparency *vis-à-vis* the end users of the Commission's work.

Mr. Ouazzani Chahdi said that the outcome of any informal consultations should be put before the plenary Commission for a decision. It was for the plenary to decide whether draft provisions should be referred to the Drafting Committee.

Mr. Jalloh said that he wished to express his solidarity with the Special Rapporteur. He had been a member of the Drafting Committee for the topic ever since he had joined the Commission and had long been concerned about the lack of progress. He was in favour of changing the form of the project from draft articles to draft guidelines, as the Special Rapporteur had proposed; his preference would be to take a decision to that effect at the current meeting. As several States had noted, the nature of the topic lent itself less to draft articles than to a softer outcome. He could see merit in the idea of holding informal consultations to discuss the way forward; those consultations should involve the wider membership of the Commission.

Mr. Šturma (Special Rapporteur) said that, in light of the lengthy exchange of views that had already taken place and the clear proposal that he had put forward, there was no reason not to take a decision on the matter immediately. He would not object to holding informal consultations, but any proposal that emerged from those consultations, which might involve only a small group of members, would in effect bind the Commission as a whole. That would be a distinct departure from the Commission's methods of work and even the rules of procedure of the General Assembly.

If the Commission decided to change the form of the project from draft articles to draft guidelines, informal consultations could be held as suggested, although the Commission should not use up too much of the Drafting Committee's precious time. If the Commission did not take that decision at the current meeting, it would not be able to do so until the next plenary meeting, which might not be held for some time.

He saw no reason why the current debate could not be reflected in the Commission's annual report, as some members had suggested. Although the Commission's traditional practice, when adopting draft provisions on first reading, was not to include a summary of the debate, the secretariat could nevertheless prepare a short summary reflecting the different views that had been expressed.

The Chair said he took it that the Commission wished to decide in principle to change the outcome of its work on the topic from draft articles to draft guidelines; to invite the

Drafting Committee to continue its work on the draft provisions; and to invite the Special Rapporteur to hold informal consultations on the way forward, on the understanding that, if no agreement emerged, the decision to produce a set of draft guidelines would stand and the Drafting Committee would proceed on that basis.

It was so decided.

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

Ms. Galvão Teles (Co-Chair of the Study Group on sea-level rise in relation to international law) said that, in addition to Mr. Aurescu, Mr. Cissé, Ms. Oral and Mr. Ruda Santolaria, who were the other Co-Chairs, the Study Group on sea-level rise in relation to international law was composed of Mr. Argüello Gómez, Ms. Escobar Hernández, Mr. Forteau, Mr. Grossman Guiloff, Mr. Hassouna, Mr. Hmoud, Mr. Jalloh, Mr. Laraba, Ms. Lehto, Mr. Murase, Mr. Murphy, Mr. Nguyen, Mr. Ouazzani Chahdi, Mr. Park, Mr. Rajput, Mr. Reinisch, Mr. Saboia, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Sir Michael Wood and Mr. Zagaynov, together with Mr. Šturma (Rapporteur), *ex officio*.

Programme, procedures and working methods of the Commission and its documentation (agenda item 8) (*continued*)

The Chair said that, in the light of the consensus that had emerged from consultations, the Bureau was proposing that three new topics should be included in the Commission's programme of work and that a Special Rapporteur should be appointed for each of them.

The Bureau was proposing that the topic "Settlement of international disputes to which international organizations are parties" should be included and that Mr. Reinisch should be appointed as Special Rapporteur. As stated in the 2016 syllabus on the topic (A/71/10, annex A, para. 3), it would be "for future decision whether certain disputes of a private law character, such as those arising under a contract or out of a tortious act by or against an international organization, might also be covered". The Special Rapporteur and the Commission would presumably take that into account, considering the importance of such disputes for the functioning of international organizations in practice.

The Bureau was also proposing that the topic "Prevention and repression of piracy and armed robbery at sea" should be included and that Mr. Cissé should be appointed as Special Rapporteur.

The Bureau was further proposing that the topic "Subsidiary means for the determination of rules of international law" should be included and that Mr. Jalloh should be appointed as Special Rapporteur.

He took it that the Commission agreed with those proposals.

It was so decided.

Mr. Jalloh said that it was a great honour to be appointed as Special Rapporteur for the topic "Subsidiary means for the determination of rules of international law", which was rooted in Article 38 (1) (d) of the Statute of the International Court of Justice and whose consideration by the Commission had been strongly supported by many States in the Sixth Committee. He stood ready to engage in an exchange of views with all States to enable the Commission to make progress on the formulation of draft conclusions on the topic.

The Commission's decision to add three new topics to its programme of work, which had been made possible by the successful completion of its work on four topics at the seventy-second and seventy-third sessions alone, would help ensure continuity from the current quinquennium to the next. It would also enable the Commission to continue to fulfil the responsibility entrusted to it by the General Assembly, namely to assist States with the progressive development and codification of international law.

The Chair said that the newly appointed Special Rapporteurs were requested to produce initial reports for their respective topics for consideration at the Commission's seventy-fourth session.

The meeting rose at 4.05 p.m.