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International Law Commission

Seventy-third session (second part)

Provisional summary record of the 3593rd meeting

Held at the Palais des Nations, Geneva, on Thursday, 14 July 2022, at 10 a.m.

Contents

Present:

Chair:	Mr. Tladi
Members:	Mr. Argüello Gómez
	Mr. Cissé
	Ms. Escobar Hernández
	Mr. Forteau
	Mr. Gómez-Robledo
	Mr. Grossman Guiloff
	Mr. Hassouna
	Mr. Hmoud
	Mr. Huang
	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. Wako
	Sir Michael Wood
	Mr. Zagaynov

Secretariat:

Mr. Llewellyn	Secretary to the Commission

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

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

Report of the Drafting Committee (A/CN.4/L.970)

Mr. Park (Chair of the Drafting Committee), introducing the report of the Drafting Committee on the topic of succession of States in respect of State responsibility (A/CN.4/L.970), said that the report contained the text of 11 provisions. Given that the Commission had decided, at its 3583rd meeting, that the outcome of its work on the topic should take the form of draft guidelines rather than draft articles, the Drafting Committee had proceeded to prepare draft guidelines based on the texts referred to it by the Commission at previous sessions and to transform the provisions that the Commission had previously adopted as draft articles into draft guidelines. Accordingly, it had replaced references to "articles" with references to "guidelines" and, in some cases, had made more substantive adjustments. Because draft guidelines were intended to provide guidance to States while draft articles were cast as directions to States, the Committee had replaced the words "shall be" with "is" in draft guideline 8 (1) to reflect the descriptive nature of that provision, and had replaced the modal verb "shall", which expressed an imperative, with "should" in draft guidelines 9 (2), 10, 10 *bis* (1) and 11, thus reframing those provisions as guidance to States. The Committee had not, however, had time to thoroughly re-examine the previously adopted text and would undertake a final *toilettage* of the reformulated provisions at the conclusion of the work on first reading.

Between 11 May and 8 July 2022, the Drafting Committee had held 16 meetings to examine provisions that had been referred to it at the Commission's sixty-ninth, seventieth, seventy-first and seventy-second sessions on the basis of proposals made by the Special Rapporteur in his first (A/CN.4/708), second (A/CN.4/719), third (A/CN.4/731) and fourth (A/CN.4/743 and A/CN.4/743/Corr.1) reports. The Committee had made significant progress but, because of time constraints, had been unable to conclude its work on a complete set of draft guidelines to be considered for adoption by the Commission on first reading. Specifically, it had not yet considered a revised proposal by the Special Rapporteur for a draft guideline 15 *ter*, on reparation, or proposals for the division of the draft guidelines into parts. In light of the way in which the draft guidelines had evolved, the Special Rapporteur had decided not to pursue some of his earlier proposals, namely draft articles 3 and 4 as proposed in his first report and draft articles 2 (f), X and Y as proposed in his third report.

Four of the provisions contained in the report of the Drafting Committee – the provisions currently designated as draft guidelines 6, 10, 10 *bis* and 11 – had already been proposed by the Committee at previous sessions. The Committee had provisionally adopted what was currently draft guideline 6 in 2018, on the understanding that the text and placement of the provision would be revisited; at the current session, the Committee had decided that no modifications to that provision were necessary. The current draft guidelines 10, 10 *bis* and 11 had been included in the Drafting Committee's 2021 interim report to the Commission (A/CN.4/L.954) but, because there had been insufficient time to finish work on the corresponding commentaries, the Commission had simply taken note of them. The statement made in 2021 by the previous Chair of the Drafting Committee should be read in light of the changes that had been made to the three provisions in the process of transforming them into draft guidelines.

Draft guideline 7 *bis*, on composite acts, was based on a proposal that the Special Rapporteur had made in his fourth report in response to the Drafting Committee's discussion on draft article 7, entitled "Acts having a continuing character". Like articles 14 and 15 of the 2001 articles on responsibility of States for internationally wrongful acts, to which they were analogous, draft guidelines 7 and 7 *bis* appeared next to each other. In the interest of consistency with the Commission's previous work, the Committee had sought to track the text of article 15 of the articles on State responsibility as closely as possible and had focused on the question of when the breach resulting from a composite act occurred in various succession contexts. The draft guideline contained three paragraphs: the first dealt with composite acts performed entirely by a predecessor State, the second with composite acts performed entirely by a successor State and the third with composite acts begun by a

predecessor State and continued and completed by the successor State after the date of succession. All three paragraphs focused on composite acts that began before the date of succession and ended after that date.

Paragraph 1 made it clear that a predecessor State was responsible for internationally wrongful composite acts comprising actions or omissions attributable to it that had been performed both before and after the date of succession. In other words, the fact of State succession had no impact on the predecessor State's responsibility for a composite act the parts of which were entirely attributable to it. Although some members of the Drafting Committee had questioned the need to include that proposition in the draft guidelines because it had little to do with State succession *per se*, the Committee had decided that the paragraph provided a useful baseline rule. Furthermore, the paragraph did not address composite acts of the predecessor State that occurred entirely before or entirely after the date of succession.

The opening words of the paragraph, "When a predecessor State continues to exist", made it explicit that the paragraph applied only to situations where the predecessor State existed after the date of succession, such as those in which a part of a State became independent while the remainder of the predecessor State continued to exist with the same legal personality. Those opening words had been preferred, because of their clarity, to the alternatives "if it continues to exist" or "that continues to exist". To show that the actions or omissions constituting the composite act must all be attributable to the predecessor State, the word "its" had been inserted before the phrase "other actions or omissions". The Committee had decided not to pursue a proposal to include two sentences in the paragraph, with the first clarifying that the paragraph addressed composite acts of the predecessor State that straddled the date of succession and the second explaining that the breach occurred when the final action or omission was performed by the predecessor State, after the date of succession. The Committee had preferred instead to use a simpler structure that was better aligned with article 15 of the articles on State responsibility. Such a two-sentence structure had not been used for any of the paragraphs of draft guideline 7 *bis*.

Paragraph 2 mirrored paragraph 1 but dealt with successor States. The paragraph made it clear that a successor State was responsible for internationally wrongful composite acts comprising actions or omissions attributable to it that had been performed both before and after the date of succession. It had been recalled that an existing State that incorporated all or part of the territory of another State was a successor State with respect to that territory. Composite acts performed by a successor State entirely after the date of succession were also within the scope of the paragraph. As had happened with paragraph 1, the need for paragraph 2 had been questioned, but the Committee had decided to retain it because it reflected a scenario that could occur in practice and because it established a baseline for paragraph 3.

Paragraph 3 dealt with situations where a composite act was started by a predecessor State before the date of succession and was continued and completed by a successor State after that date. The Drafting Committee had thoroughly discussed the substantive question of whether the successor State could be responsible for such a composite act. One scenario that had been raised had been that of a creeping expropriation begun by the predecessor State and completed by the successor State. However, it had been noted that, in such a context, the successor State's obligation to provide compensation could be explained by other theories; for example, the successor State's continued application of measures adopted by the predecessor State could be considered an action directly attributable to the successor State. In fact, in several cases concerning the successor States to the former Yugoslavia, such as *Zaklan v. Croatia*, the European Court of Human Rights had found the successor State responsible, in succession-related contexts, on the basis of that State's own actions after the date of succession. In *Gabčikovo-Nagymaros Project (Hungary/Slovakia)*, the International Court of Justice had considered that a successor State could be responsible for the conduct of the predecessor State when, by its conduct, the successor assumed the actions of the predecessor as its own. It had also been suggested in the Drafting Committee that a successor State's failure to provide compensation for a creeping expropriation would be a case of unjust enrichment rather than succession to responsibility. Scenarios had also been raised in which a series of actions begun by a predecessor State might amount to genocide or a crime against humanity only when continued by the successor State after the date of succession. On the basis of that discussion, the Committee had decided that the available State practice was too

inconsistent to enable it to draw firm conclusions as to the content of the law and that the paragraph should therefore take the form of a "without prejudice" clause. As such, the paragraph left open the question of whether a successor State could be responsible for such a composite act under international law.

The Committee had drafted paragraph 3 on the basis of a revised proposal by the Special Rapporteur providing that a breach of an international obligation "may occur through a series of actions or omissions that commences with a predecessor State and continues with the successor State". That phrasing had been intended to indicate that a successor State's responsibility for such an act was possible but not automatic. The wording "commences with the predecessor State and continues with the successor State" conveyed the notion that the composite act was a single series of actions or omissions spanning the date of succession. A more detailed formulation such as "commences with the action or omission of a predecessor State" had been considered unnecessary. The Committee had also found it unnecessary to include a separate paragraph containing a "without prejudice" clause relating to a predecessor or successor State's potential responsibility for a single internationally wrongful act, as proposed in the Special Rapporteur's fourth report. However, the title proposed by the Special Rapporteur in that report, "Composite acts", had been retained, owing to its simplicity, in preference to alternatives that tracked the title of article 15 of the articles on State responsibility or of draft guideline 7.

Draft guidelines 12 to 15 related to reparation for injury caused by internationally wrongful acts committed against predecessor States. Draft guidelines 12, 13, 14 and 15 were based on proposals made in the Special Rapporteur's third report and referred to the Drafting Committee in 2019 and proposals made during the debates in the Commission and the Drafting Committee. The proposal for draft guideline 13 *bis* had emerged during the discussion in the Drafting Committee.

Draft guideline 12, entitled "Cases of succession of States when the predecessor State continues to exist", concerned cases where a part of a State seceded to form a new or newly independent State and cases where a part of a State was ceded to another pre-existing State. The Drafting Committee had decided, on the basis of a revised proposal by the Special Rapporteur, to align the structure of draft guideline 12 with that of draft guideline 9, which addressed the same scenarios but in the context of responsibility for an internationally wrongful act performed by a predecessor State prior to the date of succession. Draft guideline 12 contained three paragraphs: the first addressed the situation of injured predecessor States that continued to exist after the date of succession; the second addressed the situation of the successor States to such predecessor States; and the third stated that the first two paragraphs were without prejudice to apportionments or other agreements between the predecessor and successor States.

In paragraph 1, the phrase "continues to be entitled to invoke", which was also used in draft guideline 9, confirmed that a predecessor State's position was not affected by the succession of States. The Committee had decided against formulations that reflected a less definitive normative stance, such as "may invoke" or "may continue to be entitled to invoke". It had decided to refer to an entitlement to invoke responsibility, rather than to a request for reparation from the responsible State, as proposed by the Special Rapporteur, because the reference to an entitlement was broader, encompassing the full content of State responsibility, and avoided the question of apportionment between the predecessor and successor States, which was addressed in paragraph 3.

The phrase "if the injury to it has not been made good" had been added to the end of paragraph 1 after an extensive discussion about the relationship between the injury in question and the continued entitlement of the predecessor State to invoke responsibility. It had been suggested that there were circumstances in which a predecessor State would, upon the succession of States, lose its entitlement to invoke responsibility because the injury was linked to the successor State, particularly where the successor State was a newly independent State. Although the Committee had not pursued that idea, it had discussed at length whether to refer either to the predecessor State as an "injured State" or to the continued existence of the injury after the date of succession. Paragraph 1 related to the position of an injured predecessor State and did not concern the possible invocation of responsibility by a State other than an injured State within the meaning of article 48 of the articles on State

responsibility. Drawing on other provisions of those articles, the Drafting Committee had settled on the phrasing “has not been made good” to indicate that the predecessor State was not entitled to invoke responsibility in relation to an injury for which full reparation had already been made. After extensive discussion, the Committee had decided not to reproduce the text of draft guideline 9 (1) (a), (b) and (c) as draft guideline 12 (1) (a), (b) and (c), as the Special Rapporteur had previously proposed.

Paragraph 2 of draft guideline 12, which dealt with the position of States that were successors to injured predecessor States, reflected the idea that there were circumstances in which a successor State could invoke the responsibility of a third State for an internationally wrongful act that had been committed against the predecessor State before the date of succession. The opening phrase, “In addition to paragraph 1”, clarified the relationship between paragraph 2 and paragraph 1. The Committee had noted that a wrongdoing State would not be obligated to make more than full reparation even if both a predecessor and a successor State were entitled to invoke its responsibility. The use of the phrase “in particular circumstances” in paragraph 2 mirrored its use in draft guideline 9 (2). The Committee had decided that the specific reference, in the Special Rapporteur’s earlier proposal, to a connection between the injury to the predecessor State and either the territory or the nationals that became those of the successor State was unnecessary and that the meaning of “particular circumstances” should be explained further in the commentary. The use of the phrase “entitled to invoke” paralleled its use in paragraph 1, and the word “may” showed that the entitlement was dependent on the existence of particular circumstances. Other formulations that had been considered included the phrases “may, in particular circumstances, invoke”, “is, in particular circumstances, entitled to invoke” and “may request reparation”. One member had opposed the text of the paragraph, arguing that it effectively provided for automatic succession to the right to invoke responsibility.

Paragraph 3, a “without prejudice” clause, accommodated a scenario, made possible by paragraphs 1 and 2, where both the predecessor and successor States were entitled to invoke responsibility. It was analogous to draft guideline 9 (3) and gave priority to agreements between the States concerned. Such agreements could involve, *inter alia*, the apportionment of compensation already paid to the predecessor State before the date of succession or a decision that the successor State should pursue the entire claim. The words “when implementing paragraphs 1 and 2”, which appeared in draft guideline 9 (3), had been omitted. They had been included in draft guideline 9 in response to concerns that the predecessor State and the successor State might agree not to provide reparation to an injured third State, to the detriment of that State’s rights. Such a limitation had been considered unnecessary in draft guideline 12 because, in the context of that draft guideline, the responsible State was not affected by the succession of States.

Concerning draft guideline 13, entitled “Uniting of States”, he recalled that, in 2021, the Committee had decided that a uniting or merging of States and the incorporation of one State into another State the personality of which continued after the date of succession should be treated as separate scenarios. For that reason, the Committee had adopted draft article 10 *bis* in addition to the draft article 10 originally proposed by the Special Rapporteur. The Committee had decided to take the same approach to draft guideline 13 by dealing separately with the uniting of States and the incorporation of a State in relation to reparation for injury caused by internationally wrongful acts committed against a predecessor State. Accordingly, draft guideline 13 covered unification, while draft guideline 13 *bis* dealt with the incorporation of one State into another.

Draft guideline 13 comprised a single paragraph. The first of the drafting points discussed by the Committee had been whether the text should explain that the provision referred to an internationally wrongful act that had occurred before the date of succession of States. That had been deemed unnecessary because, when unification took place, the predecessor States ceased to exist as from the date of succession. An injury to a predecessor State could therefore refer only to injury that had occurred before that date. The Committee had also discussed whether to use the phrase “may invoke” or the phrase “may be entitled to invoke”, as had been done in draft guideline 12 (2). The former phrase had been chosen since, in the context of unification, where there was only one successor State, the question of determining which State might be entitled to invoke responsibility did not arise. In draft

guideline 12, by contrast, the notion of "entitled to invoke" was linked to the idea of continuation in the first paragraph and to the idea of particular circumstances in the second. The Committee had also considered the Special Rapporteur's proposal for a second paragraph that would have made it clear that the previous paragraph applied unless the States concerned agreed otherwise. However, it had decided that no such clarification was needed in that particular guideline, as the situation in question was captured sufficiently in draft guideline 1 (2). The title of draft guideline 13 was "Uniting of States", as proposed by the Special Rapporteur.

Draft guideline 13 *bis* concerned the scenario where an injured predecessor State became part of another State, the legal personality of which continued. Like draft guideline 10 *bis*, it had two paragraphs. The Drafting Committee's deliberations had been based on a revised proposal by the Special Rapporteur in which the order of the paragraphs had been reversed. The Committee had preferred the current order to keep the provision aligned with draft guideline 10 *bis.* It had discussed whether some confusion might be created by the more extensive use of the terms "predecessor State" and "successor State" in the original version of the draft guideline. It had noted that, in accordance with the definitions provisionally adopted in draft guideline 2, the incorporated State was the predecessor State and the incorporating State was the successor State in respect of the territory incorporated. However, it had taken the view that employing the terms "injured State" and "incorporating State" would be clearer and more intuitive in that context.

While in both cases the successor or incorporating State could invoke the responsibility of the wrongdoing State, the Drafting Committee had consciously used two different verbs in the two paragraphs to reflect the specific features of each situation. In paragraph 1, where the ability of the incorporating State to invoke the responsibility of the wrongdoing State began only on the date of succession, the phrase "may invoke" had been used, since there could be no mistake as to which State could invoke responsibility after the date of succession, because the predecessor State had ceased to exist. In paragraph 2, where the incorporating State's entitlement to invoke responsibility ran as from its injury prior to the date of succession, the word "continues" was used to reflect the notion, mentioned earlier in relation to draft guideline 12, that a pre-existing entitlement was unaffected by succession. A suggestion had been made that, in order to capture the idea of continuation, the word "thereafter" could be included, but the Drafting Committee had considered that the context made paragraph 2 perfectly clear without it.

The term "wrongdoing State" at the end of both paragraphs and in draft guideline 14 had been borrowed from the commentary to the 2001 articles on State responsibility. The commentary to the draft guidelines would explain that, although the Committee had wondered whether the term should be avoided, as it did not appear in the text of the 2001 articles themselves, it had decided that, in the draft guidelines, the term would elegantly and succinctly capture the idea of the State that was responsible for the internationally wrongful act. The title of draft guideline 13 *bis*, "Incorporation of a State into another State", mirrored that of draft guideline 10 *bis*.

Draft guideline 14 concerned the dissolution of a State. Like draft guideline 11, it followed the wording used in article 18 of the 1983 Vienna Convention on Succession of States in respect of State Property, Archives and Debts, namely "[w]hen a State … dissolves and ceases to exist and the parts of the territory of the predecessor State form two or more successor States". Very similar wording could be found in article 22 of the Commission's articles on nationality of natural persons in relation to the succession of States and in the work of the Institute of International Law. The only change made had been to insert the phrase "that has been injured by an internationally wrongful act" between the words "State" and "dissolves", although that did not change the definition of a dissolution but only served to indicate the scenario in which the draft guideline applied.

Draft guideline 14 comprised two paragraphs. The first dealt with the possible entitlement of one or more successor States to invoke the responsibility of the wrongdoing State for an act against the predecessor State, while the second emphasized the importance of agreement between the wrongdoing State and the successor State or States in the context of a dissolution. In paragraph 1, the phrase "may, in particular circumstances, be entitled to invoke" echoed similar wording in draft guideline 12 (2). The Committee had chosen that

language, in preference to the earlier proposal “may invoke”, because it reflected the idea that one or more but not necessarily all successor States would be entitled to invoke responsibility and that the identification of the State or States in question might depend on a number of factors. That notion would be explained in the commentary. Some members of the Drafting Committee had taken the view that the question of agreement was closely related to the subject matter of the draft guideline, in particular when it came to identifying the successor State or States entitled to invoke responsibility. Paragraph 2 therefore addressed that concern by emphasizing the role of agreements in avoiding overlapping claims in the complex situation created by the dissolution of a State.

The text of paragraph 2 was inspired by that of draft guideline 11. As the commentary would explain, the use of the word “relevant” in relation to “successor State or States” again reflected the possibility that there might be successor States that should not necessarily be involved in any negotiations, because they did not have an interest in addressing the injury. The final sentence was similar to its analogue in draft guideline 11 and set out the criteria for determining which successor States were relevant and had a more justified claim in relation to the injury. Those criteria elucidated the meaning of the phrase “particular circumstances” in paragraph 1. The emphasis on agreement was consistent with the overall thrust of the draft guidelines as reflected in draft guideline 1 (2), namely that agreements between the States concerned had priority. The Drafting Committee had considered a proposal for a third paragraph which would have served as a “without prejudice” clause with respect to any question of apportionment between the successor States *inter se*. It had ultimately decided that such a clause was unnecessary because the issue of agreements between successor States was covered by paragraph 2. The title of the provision proposed by the Special Rapporteur in his third report, “Dissolution of States”, had been changed to “Dissolution of a State” to align it with the title used in the Commission’s prior work, including draft guideline 11.

When considering draft guideline 15, the Committee had noted that, in the past, in particular in article 5 (2) of the Commission’s 2006 articles on diplomatic protection, it had been made clear that an exception to the general requirement of continuous nationality applied to persons whose nationality had been changed by a succession of States. The Drafting Committee had tried but failed to draft a detailed provision covering that matter and had resorted to a saving clause that confirmed its intention not to depart from the Commission’s previous position, as embodied not only in the 2006 articles but also in its 1999 articles on nationality of natural persons in relation to the succession of States. That point would be explained in the commentary. The Committee had initially considered a specific reference to the rules on the nationality of claims but had decided that the latter were adequately covered by the phrase “rules of diplomatic protection”. It had discussed whether the content of draft guideline 15 should become a third paragraph of draft guideline 1, since it also defined the substantive scope of the draft guidelines. The Committee had decided that the question should be considered during the *toilettage* at the end of the first reading. The title of draft guideline 15 was “Diplomatic protection”, as proposed by the Special Rapporteur in his third report. After some discussion the Committee had decided that it was unnecessary to provide a more precise title to reflect the fact that the provision was a saving clause.

The Special Rapporteur had submitted revised versions of draft guidelines 15 *bis* and 15 *ter* based on the debate in plenary meetings, with a view to streamlining the original four draft articles on reparation contained in his fourth report (A/CN.4/743 and Corr.1). The two provisions would have formed a separate part of the draft guidelines entitled “Forms of obligations arising from State responsibility in the context of succession of States”. The Committee had first discussed whether or not to make that addition. It had, however, noted that in 2015 the Institute of International Law had not addressed obligations arising from responsibility in its resolution entitled “Succession of States in Matters of International Responsibility”. The suggestion had been made that the draft guidelines could simply provide that the articles on State responsibility applied *mutatis mutandis* in cases of succession of States or could include a “without prejudice” clause to the same effect.

Owing to time constraints, the Committee had considered and adopted only draft guideline 15 *bis*. It would resume consideration of draft guideline 15 *ter* in 2023. Another provision, on the continued duty of performance, had also been proposed in the Drafting Committee. However, some members had deemed such a provision unnecessary because, in

their view, the continued duty of performance was a consequence of the underlying primary obligation, rather than a secondary obligation derived from the law of State responsibility.

Draft guideline 15 *bis* comprised two paragraphs similar in structure to article 30 of the articles on State responsibility. Paragraph 1 concerned the situation of a predecessor State that was responsible for an internationally wrongful act that had occurred before the date of succession. The phrase "and that continues to exist after the date of succession" highlighted the fact that it would apply only to predecessor States that were not extinguished upon succession, without necessarily implying that the act in question needed to be of a continuing nature in order to fall within the scope of that paragraph.

Paragraph 2 covered two main scenarios. As originally proposed, paragraph 2 related only to the position of a successor State that was responsible for an internationally wrongful act. However, its scope had been broadened to encompass a predecessor State responsible for a composite act committed prior to the date of succession and then completed thereafter. That possibility was covered at the beginning of the paragraph by a generic reference to "[a] State" and a cross reference to draft guideline 7 *bis,* paragraph 1. For the sake of conciseness, the Committee had preferred that solution over the alternative of having a separate paragraph for each scenario. The Committee's discussion of how to word the *chapeau* of that paragraph had culminated in a decision to mirror that of paragraph 1 as far as possible. One proposal, to refer generally to "[a] State that is responsible for an internationally wrongful act", had been rejected on the grounds that it was too broad, given the scope of the draft guidelines. Another suggestion had been to refer to "continuing and composite acts". In order to link the paragraph to the topic of succession in a clear, concise manner, the Committee had decided to insert a cross reference to both draft guideline 7 and draft guideline 7 *bis*, paragraphs 1 and 2. Subparagraphs (a) and (b) of paragraphs 1 and 2 were identical to their counterparts in article 30 of the articles on State responsibility. They provided for the obligation of a State to cease an internationally wrongful act if the latter had a continuing character and to offer appropriate assurances and guarantees of non-repetition, if circumstances so required, in the situations referred to in the *chapeaux* of the two paragraphs. The Committee had also been of the opinion that the term "act" should be understood to refer to both actions and omissions. The title of the draft guideline, which echoed that of article 30, was "Cessation and non-repetition".

He recommended that the Commission should provisionally adopt draft guidelines 6, 7 *bis*, 10, 10 *bis*, 11, 12, 13, 13 *bis*, 14, 15 and 15 *bis* as contained in the report of the Drafting Committee. The Special Rapporteur had submitted commentaries for those draft guidelines, which would be considered by the Commission at the current session. The Commission was requested to take note of revised draft guidelines 1, 2, 5, 7, 8 and 9. The Special Rapporteur had also provided commentaries for those draft guidelines on an informal basis to assist the Commission in its future work on the topic. The entire set of draft guidelines formulated to date was annexed to his written statement, which would be posted on the Commission's website.

Mr. Jalloh said that, although he had been a member of the Drafting Committee for the topic of succession of States in respect of State responsibility, he had dissociated himself from its recommendation on the topic. When the decision had been taken, he had reserved his position, as he did not agree with the procedure recommended by the majority of the Committee, for several reasons, especially in relation to the manner in which the work on the topic would be reported in the annual report to the General Assembly. First, he recalled the proposal made by the Special Rapporteur in the Drafting Committee that, in its report to the General Assembly on the work of its seventy-third session, the Commission should provide a thorough explanation of how it had arrived at the decision to change the final form of its output from draft articles to draft guidelines, since that decision, which he supported, had significant implications. As matters stood, although the change in the form of the Commission's output on the topic had been addressed by the Drafting Committee, including through revisions to some of the previously adopted draft articles now restyled as draft guidelines, that change was not clear owing to the manner in which it was to be presented. He had the impression that guidelines were less familiar to States than draft articles. It was thus important that the Commission should explain what it meant by the term "draft guidelines" as opposed to "draft articles". He understood the former to be a set of

recommendations to States that were not necessarily binding, depending on the nature of each provision.

His second, substantive reason for disagreeing with the Committee was that the Special Rapporteur had also proposed that all the commentary adopted to date should be included in the relevant chapter of the Commission's annual report. The Special Rapporteur had informed the Drafting Committee that he had prepared commentaries to 11 draft guidelines. It was true that the Committee had not completed its consideration of all the draft guidelines before the conclusion of its meetings on the topic and, as the Chair of the Committee had said, draft guideline 15 *ter* remained pending until 2023. Nonetheless, what had been accomplished at the Commission's current session was to the credit of the Drafting Committee and the Special Rapporteur, in that it represented the most progress made on the topic in a single year and should really have been given priority in the first part of the session as a first-reading topic. Rather than hiding the work done on the topic by merely annexing it to the Committee Chair's statement on the website, as the Committee Chair had suggested, the Commission should devote a substantive chapter to the topic in its report on the seventy-third session, to capture all the provisions adopted so far. That would mean presenting all the texts that had been adopted to date on the topic, at the Commission's current and prior sessions, in a single place so that States could refer to them. Nothing prevented the Commission from reporting to States in that manner. A compilation, in one place, of all the draft guidelines and commentaries thereto adopted between 2017 and 2022 would be a more transparent and less confusing means of showing States what had been accomplished so far and would promote transparency and a better understanding of the Commission's work on the topic. It was indeed regrettable that the Commission had been unable to complete its first reading of all the draft guidelines and the commentaries thereto, since that meant that States might not have an opportunity to comment on them until 2023, depending on what was decided in respect of the way forward on the topic. It was critical for States to be able to understand the current status of the work if the Commission was to avoid negative feedback.

He failed to understand why some members of the Drafting Committee had been hesitant to accept, or had even opposed outright, the idea of presenting the full set of draft guidelines and commentaries in the manner that he and the Special Rapporteur were proposing. After all, the six draft guidelines adopted in previous years and the commentaries thereto had been provisionally adopted by the Commission. Moreover, it was for the Commission, not the Drafting Committee for the topic, which was small and hardly representative of the Commission membership, to decide what action to take on the topic at the current session. He shared the Special Rapporteur's concern that merely annexing the text of the provisions adopted so far to the Committee Chair's statement – which, unlike the Commission's annual report, was not a Commission document setting out its institutional position – would not provide the Sixth Committee with a clear picture of all the work that had actually been done on the topic, especially as such statements were hard to find on the Commission's website. The Special Rapporteur's fifth report (A/CN.4/751) had required an extensive annex to explain the various stages reached in respect of the draft articles, which had become draft guidelines. Busy diplomats on the Sixth Committee, who had to analyse and debate many reports, might well be confused if they did not receive a clear presentation of the status of the provisions on the topic.

A further concern was that the statement by the Chair of the Drafting Committee was produced only in English, since it was a report by that member alone, whereas the annual report of the Commission to the General Assembly was published in all six official languages of the United Nations and was therefore accessible to a wider audience. In addition, multilingualism and the principle of the equality of all official languages would be promoted if the entirety of the Commission's work on the topic was reflected in its official report to States.

Lastly, the inclusion, in the annual report, of a substantive chapter containing a summary of the debate at the current session, all the draft guidelines and commentaries adopted so far and the newly drafted guidelines and commentaries would ensure greater transparency. He understood why some members might be uncomfortable with that proposal,

but such a decision was within the Commission's competence. Proceeding in that manner would have the added advantage of eliciting State feedback that could be used to help the Commission to decide on the way forward on the topic in 2023.

He therefore strongly supported the Special Rapporteur's proposal to present all the draft guidelines and all the draft commentaries available on the topic to States in the Commission's annual report, even if that meant issuing a second limited-distribution document containing the six draft guidelines and commentaries adopted at previous sessions. He understood that the secretariat would be able to assist in ensuring that such a limited-distribution document would be circulated in time for the adoption of the report by the end of the current session.

Mr. Murase, expressing full support for Mr. Jalloh's remarks, asked how much time the Drafting Committee would have needed to finalize draft guideline 15 *ter*. It would be unfortunate not to complete a first reading of the draft guidelines at the current session, and every effort should be made to do so. Further work would be needed on the text as a whole: the fact that some of the draft guidelines had identical titles could prove confusing.

The Chair said that, even if the Drafting Committee had had time to complete its work, there would have been insufficient time for the resulting documents to be translated and edited. The textual issue that Mr. Murase had highlighted could be considered when the Commission adopted the relevant chapter of its annual report to the General Assembly.

Ms. Oral said that she supported Mr. Jalloh's request and the reasoning behind it. While it was not unusual for a topic to be carried over from one quinquennium to the next and for a new special rapporteur to be appointed, it was important for the Commission to respect the work of the current Special Rapporteur and the Drafting Committee and to ensure transparency by reflecting the outcome of that work in its annual report.

Ms. Escobar Hernández, expressing full support for Mr. Jalloh's proposal and echoing the points made by Mr. Murase and Ms. Oral, said that the unfortunate situation in which the Commission found itself was partly a matter of prioritization. The Working Group on methods of work should consider the issue carefully. It was greatly to be regretted that, with only one draft guideline left to adopt, the Drafting Committee had been unable to finish its work and that, as a consequence, the first reading would not be completed before the end of the quinquennium, when the Special Rapporteur's term as a Commission member would come to a close. The obstacles to which the Chair had referred were not negligible, but had they really been insurmountable?

In her years as a member of the Commission, she had observed a degree of unfairness in how different topics were handled. The Special Rapporteur on succession of States in respect of State responsibility had worked valiantly to prepare commentaries to the draft guidelines and adapt them to the latest changes, and it was fitting that all the draft guidelines adopted so far, with commentaries, should be included in the Commission's report to the General Assembly. It was not simply a matter of being reasonable and transparent, but of ensuring a just and equitable approach in the Commission's work.

The Chair urged members to maintain a distinction between the questions of what to do with the provisions adopted at previous sessions and why the first reading had not been completed, which was a matter beyond the Commission's control. The Commission generated a considerable volume of work for the translation and editing services, which also handled work for other bodies, and resources were limited.

Mr. Petrič, noting that, despite the excellent work of the Chair of the Drafting Committee, significant time pressure had affected the work of both the Committee and the Commission, said that he supported Mr. Jalloh's proposal and Mr. Murase's comment regarding the titles of some of the draft guidelines.

Mr. Murphy said that Mr. Jalloh's suggestion would involve a departure from the Commission's practice: it was not customary to resubmit material to the Sixth Committee in the middle of the work on a topic, not least because repeatedly asking Member States to discuss reworked versions of draft provisions and commentaries that they had already considered would represent an additional burden. The usual practice was to submit small sets of draft provisions and commentaries to the Sixth Committee only once, and to take its

comments into account thereafter; not until an entire set of draft provisions and commentaries had been adopted on first reading would they be forwarded again to the Sixth Committee for debate.

The fact that it would not be possible to complete a first reading at the current session was no reflection on the dedicated efforts of either the Special Rapporteur or the Drafting Committee. In addition to draft guideline 15 *ter*, a number of other elements, such as titles of individual provisions and headings for the various parts of the set of draft guidelines, remained to be finalized. There was no reason why the first reading could not be completed at the Commission's next session; the Special Rapporteur had generously agreed to provide informal commentary at that stage. The Commission should adopt the draft guidelines set out in the report of the Drafting Committee (A/CN.4/L.970) and move on.

Ms. Lehto said that the Commission was not in the middle of its work on the topic but nearing the end. She supported Mr. Jalloh's proposal, as presenting all the work done during the quinquennium as a whole would benefit not only States in the Sixth Committee but also incoming members of the Commission.

Mr. Gómez-Robledo expressed unreserved support for Mr. Jalloh's proposal and the comments made by Ms. Escobar Hernández and Ms. Oral. When the topic for which he had served as Special Rapporteur had been completed on second reading, at the Commission's seventy-second session, he had emphasized the need for special rapporteurs to be given full support, out of respect not only for them and their work but for the Commission itself. He suggested that new members of the Commission should be briefed, at the start of their terms, on the Commission and its working methods, both formal and informal, the constraints under which the secretariat operated, and so forth, with a view to avoiding similar situations in the future.

Mr. Rajput, echoing Ms. Lehto's comments, said that the situation was extremely unusual, with only one draft guideline remaining for the Drafting Committee to agree on. While that in itself did not necessarily justify a change to the Commission's usual practice, the fact that the nature of the outcome of the project had also been fundamentally altered suggested the need to clarify the situation in the Commission's annual report to explain the apparent mismatch between material adopted at the current session and that adopted at previous sessions, which could be confusing for States. The Special Rapporteur should be given the opportunity to report on all work done on the topic during his tenure, without suggesting that the full set of draft guidelines had been adopted on first reading.

Mr. Cissé said that every effort should be made to complete the first reading at the current session. As an exceptional measure, given the exceptional circumstances, the Commission might agree to work with the English versions of the documents, pending receipt of translations into the other five official languages.

Mr. Park (Chair of the Drafting Committee), noting that the reasons why the Drafting Committee had been unable to finish its work had been explained by the Chair of the Commission, said that the issue of identical titles for some draft guidelines would be addressed when agreement was reached on all the provisions. Dividing them into parts under separate headings and ensuring overall coherence in the set of draft guidelines would be the final stage of the Drafting Committee's work.

Mr. Forteau said that the principles of transparency and multilingualism were paramount, but that practicalities must be taken into account. He noted that it had not been possible to complete work on the draft guidelines with a view to adoption on first reading at the current session. Concerning the annual report, he suggested that the Commission should follow its usual practice of first recalling the texts adopted at previous sessions and then presenting, in a separate section of the relevant chapter, the new texts adopted at the current session. The Commission could also include a more detailed introduction than usual to explain the situation and indicate what remained to be done. In addition, it could insert footnote references to commentaries previously adopted, as had been done in 1996 when the then draft articles on State responsibility had been adopted on first reading at the Commission's forty-eighth session.

Sir Michael Wood said that Mr. Forteau's proposal pointed to a way forward. The Commission's priority at the current meeting should be to adopt the report of the Drafting Committee. A separate question was how the Commission's work on the topic so far would be reflected in its annual report. In the light of Mr. Forteau's proposal, one possibility would be for interested members to hold consultations on the proposed introductory paragraph and on which parts of the text should be reproduced in the report and which should be referred to in footnotes. The plenary Commission could then discuss the matter when it considered the relevant chapter of the report.

However, for the reasons given by Mr. Murphy, he did not support Mr. Jalloh's proposal, which, as far as he understood it, would represent a clear departure from the Commission's normal procedure. Of course, nothing prevented the Commission from opting for such a departure, but it would have to either explain why the topic under consideration was special or include full texts for every topic in every report. Far from being helpful or transparent, such a method of presentation would confuse States and, in addition, lead to a significant increase in the length of the Commission's reports.

Had the Drafting Committee not devoted three or four meetings to draft guideline 15, it might have been able to complete its work on draft guideline 15 *ter*. However, it would still have needed to carry out various other tasks, such as dividing the draft guidelines into parts and supplying headings. In any event, completing the first reading at the following session should be straightforward.

Mr. Jalloh said he could find no evidence that his proposal represented a departure from the Commission's practice. As other members had noted, the Commission's work on the topic was at an advanced stage. The decision to shift the form of the output from draft articles to draft guidelines had not been without consequences. Nevertheless, the Drafting Committee had already made the necessary changes to the draft provisions that had already been provisionally adopted. Moreover, the Special Rapporteur was prepared to make the necessary changes to the commentaries to those draft provisions.

He was grateful to those members who had made constructive suggestions regarding the way forward. Mr. Forteau's proposal was especially attractive. For reasons of transparency, the question should be decided by the plenary Commission. As the discussion had shown, many members supported the basic idea that, given the specificities of the topic, and in the interest of clarity, the Commission's report should include all its work on the topic so far. That would help States to understand the progress of the work on the topic.

The Chair said that, as the Commission's practice was varied, and examples could always be found to support a given position, the focus at the current meeting should be on trying to find a way forward.

Mr. Hmoud said that Mr. Forteau's proposal seemed to offer a good solution. The Commission should provide a transparent explanation of how its work on the topic had progressed. He would like to know what would happen to the draft provisions that had already been provisionally adopted and the commentaries thereto.

Mr. Ouazzani Chahdi said that he wondered whether the Commission had ever faced a similar situation at the end of a quinquennium and, if so, what solution had been found. It should be recalled that the current session had been exceptionally granted by the General Assembly to enable the Commission to complete its work.

Mr. Šturma (Special Rapporteur) said that, over the years, the Drafting Committee had made great progress on the topic in spite of a number of objective constraints, including insufficient meeting time. Although it would not be possible to complete a first reading at the current session, the Drafting Committee had managed to adopt all but one of the draft guidelines and had decided to change the form of all the draft provisions that had already been provisionally adopted from draft articles to draft guidelines. Regrettably, owing to lack of time, it had not been possible either to renumber the draft guidelines or to supply a heading for each part.

He agreed that, in the interests of clarity, transparency and the principle of multilingualism, and in order to present a good outcome to States in the Sixth Committee, it was important to ensure that the Commission's work on the topic so far was properly reflected in its report. He had already submitted commentaries to the draft guidelines contained in the Drafting Committee report under consideration and, if the Commission so wished, could make minor adjustments to the commentaries previously adopted.

If it would not be possible to include, in the Commission's annual report, all the draft provisions that had been provisionally adopted and the commentaries thereto, Mr. Forteau's proposal would represent a good compromise and would provide as much clarity and transparency as possible under the circumstances, while also ensuring that the outcome of the Commission's work on the topic was available in all six official languages.

Mr. Forteau said that the Commission had faced the same situation in the context of its work on the topic "Unilateral acts of States". The approach that it had adopted was explained in its annual reports of 2004, 2005 and 2006. That situation had occurred again in 2012 and 2013 in the context of its work on the topic "The obligation to extradite or prosecute (*aut dedere aut judicare*)", and the Commission had provided a very transparent explanation of the shift in the outcome of its work from draft articles to something else. The explanations provided in the relevant reports could serve as models for an introductory paragraph of the kind that he had proposed.

The Chair asked whether the Commission could accept Mr. Forteau's proposal, namely that the relevant chapter of the report should include an introductory section in which the Commission explained its work on the topic so far and, in footnotes, provided references to the commentaries previously adopted.

Mr. Rajput said that it was unclear how the changes made by the Special Rapporteur to the commentaries previously adopted would be reflected in the report. The question of how best to present the Commission's work on the topic should be decided by the plenary Commission and not through informal consultations.

The Chair said that the Commission could deal with such matters when it adopted the relevant chapter of its annual report. At the current meeting, the aim was to reach a decision in principle so that the Drafting Committee report under consideration could be adopted.

Mr. Jalloh said that it would make more sense if all the draft provisions that had been provisionally adopted and the commentaries thereto were reproduced in the relevant chapter of the Commission's annual report. It would be made clear to readers that the text had not been adopted on first reading.

Mr. Llewellyn (Secretary to the Commission) said that, during the second part of each session, the editors and translators in the Languages Service worked on the various chapters of the Commission's report. As that represented a heavy workload, it was highly unusual for the Commission to complete a first reading and submit commentaries during the second part of a session. The Languages Service had indicated that the draft guidelines and commentaries thereto could not be processed unless they were received early during the second part. The Special Rapporteur had managed to submit the commentaries to the draft guidelines under consideration in good time, but it was unlikely that the Languages Service would be able to process commentaries to a further six draft provisions if they were submitted at the current stage. With regard to the presentation of the chapter, the secretariat would follow the Commission's decision.

Mr. Šturma (Special Rapporteur) said that very few changes had been made to the draft provisions that had already been provisionally adopted by the Commission. However, if it was not possible to amend the commentaries previously adopted at the current stage, a reference of the kind proposed by Mr. Forteau could be a solution. The changes made to the commentaries previously adopted could be described in the footnotes.

The Chair said he took it that the Commission supported Mr. Forteau's proposal.

It was so decided.

The Chair said he took it that the Commission wished to adopt the text of draft guidelines 6, 7 *bis*, 10, 10 *bis*, 11, 12, 13, 13 *bis*, 14, 15 and 15 *bis*, as contained in document A/CN.4/L.970, and to take note of draft guidelines 1, 2, 5, 7, 8 and 9.

It was so decided.

The meeting rose at 12.30 p.m.