

Provisional

For participants only

26 September 2022

Original: English

International Law Commission
Seventy-third session (second part)

Provisional summary record of the 3609th meeting

Held at the Palais des Nations, Geneva, on Wednesday, 3 August 2022, at 3 p.m.

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* Reissued for technical reasons on 23 February 2023.

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Present:

Chair: Mr. Tladi

Members: Mr. Argüello Gómez
Mr. Aurescu
Mr. Cissé
Ms. Escobar Hernández
Mr. Forteau
Ms. Galvão Teles
Mr. Grossman Guiloff
Mr. Hassouna
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. 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 3.05 p.m.

Draft report of the Commission on the work of its seventy-third session *(continued)*

*Chapter VI. Immunity of State officials from foreign criminal jurisdiction
(continued) (A/CN.4/L.962 and A/CN.4/L.962/Add.1)*

The Chair invited the Commission to return to the pending paragraphs of the portion of chapter VI contained in document [A/CN.4/L.962/Add.1](#), drawing attention to an informal document that the Special Rapporteur had circulated, in English only, showing the changes that she was proposing to make to the commentary to draft article 7 in the light of informal consultations held with interested members.

Part Three (Immunity ratione materiae) (continued)

Commentary to draft article 7 (Crimes under international law in respect of which immunity ratione materiae shall not apply)

Paragraph (1)

Ms. Escobar Hernández (Special Rapporteur) said she was proposing that paragraph (1) should be amended to read:

The consideration of draft article 7 has given rise to a long debate since 2016. This debate reflected the different positions held by the members of the Commission on an issue of great relevance, namely the existence or non-existence of limitations and exceptions to immunity *ratione materiae*, to which reference is made in paragraphs (9) to (12) of this commentary.

Paragraph (1), as amended, was adopted.

Paragraph (2)

Ms. Escobar Hernández (Special Rapporteur) said she was proposing that paragraph (2) should be amended to read:

During the debate on draft article 7, there also arose the issue of the need to include procedural safeguards in the draft articles, including with regard to draft article 7. That issue was linked by some members to the issue of the adoption of draft article 7. The Commission completed its work on procedural provisions and safeguards at the seventy-third session.

She was also proposing that a new footnote should be added to provide a reference to the footnote on procedural provisions and safeguards that the Commission had included in its report on the work of its sixty-ninth session ([A/72/10](#), para. 140) and that the corresponding footnote marker should be placed after the words “with regard to draft article 7” in the new text.

Mr. Murphy said that, in the first sentence of the proposed text, the words “procedural safeguards” should be replaced with “procedural provisions and safeguards” for consistency with the last sentence. He wondered whether the words “seventy-third session” in the last sentence should be replaced with “current session”.

Sir Michael Wood said that, for the benefit of readers in years to come, it would be clearer to specify the number of the session.

Paragraph (2), as amended, was adopted.

Paragraphs (3) and (4)

Ms. Escobar Hernández (Special Rapporteur) said that she was proposing that paragraphs (3) and (4) should be merged into a single paragraph, to read:

While the Commission provisionally adopted draft article 7 and the annex to which it refers by recorded vote during its sixty-ninth session, at the seventy-third session draft article 7 and the related annex were adopted without a vote. However, some members

recalled that they had voted against draft article 7 in 2017, setting out their reasons in explanations of vote, and stated that the fact that no vote had taken place in 2022 did not mean that either the law or their legal positions had in any way changed.

She was also proposing that a footnote containing a reference to the relevant paragraphs of the Commission's report on the work of its sixty-ninth session should be added and that the corresponding footnote marker should be placed after the words "during its sixty-ninth session" in the new text.

Mr. Murphy proposed that, for consistency, the words "annex to which it refers" in the first sentence should be replaced with "related annex".

Mr. Jalloh said it should be noted in the paragraph under consideration that draft article 7 had been adopted by consensus and that, in the view of some members, the law had indeed changed since 2017. He therefore proposed that, in the first sentence, the words "by consensus and" should be inserted before "without a vote" and that, at the end of the paragraph, a new sentence should be inserted, to read: "The view was expressed that the law had changed since 2017."

The Chair, speaking as a member of the Commission, said that he did not support Mr. Jalloh's second proposal. Those members who had voted for draft article 7 in 2017 had believed that it had reflected the law at the time.

Mr. Rajput said that the new text proposed by the Special Rapporteur represented a good balance. It would make no sense to claim that draft article 7 had been adopted by consensus while simultaneously noting that the legal positions of the members who had voted against it in 2017 had not changed in the intervening years. Although a vote had not taken place at the current session, there remained serious differences of opinion among members. It would be preferable to avoid revisiting the issues that had been raised in 2017. It was sufficient simply to state the fact that draft article had been adopted at the current session without a vote. Such a statement in no way undermined the position of those who had supported the provision. Indeed, the very fact that draft article 7 had been adopted was evidence of that support.

Mr. Huang said that he was prepared to accept the finely balanced text that the Special Rapporteur was proposing.

Sir Michael Wood said that he could accept the text that the Special Rapporteur was proposing. While draft article 7 had been adopted without a vote, it would not be acceptable to state that it had been adopted by consensus. Members did not agree as to whether that draft article reflected *lex lata*, *lex ferenda* or entirely new law and, in the latter case, whether it was acceptable or not acceptable as new law. In his view, it was not acceptable.

Mr. Park said that, although he had voted in favour of draft article 7 in 2017, he supported the compromise text that the Special Rapporteur was now proposing.

Ms. Oral said that she supported Mr. Jalloh's proposals. In the new text of the commentary proposed by the Special Rapporteur, a great deal of emphasis was placed on the views of members who had not supported draft article 7. For greater balance, it should be made clear that other members continued to support that draft article.

The Chair, speaking as a member of the Commission, said that it was already implicit that other members of the Commission supported draft article 7. That was why it had been adopted. It might in fact undermine the position of the majority to include a statement of the kind proposed by Ms. Oral.

Mr. Jalloh said that he withdrew his proposals. Nevertheless, it was not entirely accurate to state that the text was finely balanced, since the minority view was more than adequately reflected.

Mr. Petrič said that the text proposed by the Special Rapporteur represented a good compromise.

Ms. Lehto said that she, too, supported the text proposed by the Special Rapporteur, although it would have been helpful to have recognized in the text that some progress had been made since 2017. In her view, that progress was linked to the fact that the Commission

had adopted a robust set of procedural provisions and safeguards. However, to facilitate the adoption of the paragraph, she would not propose any amendments.

Paragraphs (3) and (4), as amended, were adopted.

The Chair said that, in view of the merger of paragraphs (3) and (4), the subsequent paragraphs of the document would be renumbered in the final text.

Paragraph (5)

Ms. Escobar Hernández (Special Rapporteur) said that paragraph (5) served to explain the substantive content of the commentary. She proposed that the paragraph should be amended to read:

This commentary reproduces, with minor updates, the commentary adopted in 2017. Following the well-established practice of the Commission when adopting draft articles on first reading, it seeks to capture the different positions held by the members of the Commission when draft article 7 and the related annex were provisionally adopted.

Paragraph (5), as amended, was adopted.

Paragraphs (6) to (9)

Paragraphs (6) to (9) were adopted.

Paragraph (10)

Ms. Escobar Hernández (Special Rapporteur) said that, as agreed through informal consultations, she was proposing various amendments to footnote 119. She was proposing that, in the sentence beginning with the words “Meanwhile, the National High Court of Spain”, the word “tried” should be replaced with “addressed the situations of”; that, in the sentence beginning with the words “Similarly, in the *Tibet* case”, the name of the then President of China should be deleted; and that, immediately after that sentence, a new sentence should be inserted, to read: “After the modification of the *Ley Orgánica del Poder Judicial* (Act for the Judiciary) the case was set aside.” She was also proposing that three sentences should be added at the end of the footnote to provide references to the recent conviction by a court in Koblenz, Germany, of a former high-ranking Syrian official for crimes against humanity and to two judgments recently delivered by Italian courts in the context of the so-called “Operation Condor”.

Mr. Murphy said that paragraph (10) was the first in a sequence of paragraphs in which the opposing sides of the debate were captured. Footnote 119 provided references in support of the majority view, whereas footnote 122, associated with paragraph (13), provided references in support of the minority view. When updating those two footnotes, it was important to preserve a balance between them.

Mr. Huang said that he would be grateful if the Special Rapporteur could confirm that her proposals relating to the *Tibet* case were part of a package of compromise proposals.

Ms. Escobar Hernández (Special Rapporteur) said that her proposals relating to the *Tibet* case were indeed part of a package of compromise proposals, which also included a proposal that, in footnote 31, associated with paragraph (9) of the commentary to draft article 2, the reference to the judgment of the United States Court of Appeals for the Seventh Circuit in *Wei Ye, Hao Wang, Does, A, B, C, D, E, F and others similarly situated v. Jiang Zemin and Falun Gong Control Office (A.K.A. Office 6/10)* should be deleted.

Mr. Huang said that he agreed with the Special Rapporteur’s proposals regarding footnote 119. In addition, he proposed that, in the sentence beginning with the words “Meanwhile, the National High Court of Spain”, the word “alleged” should be inserted before “international crimes” and that, in the new sentence proposed for insertion by the Special Rapporteur, the word “Nevertheless” should be inserted at the very beginning and the word “ultimately” before “set aside”.

Sir Michael Wood said that, while he appreciated that some members wished to update footnote 119, it seemed strange to single out only two further cases because, since 2017, senior courts had delivered several other judgments in which they had held that there were no exceptions to the immunity of State officials to foreign criminal jurisdiction

Mr. Zagaynov said that he supported Mr. Huang's statement that the references to various cases cited in the footnotes to the commentary required very careful consideration in order to ensure that they were relevant and appropriate. The Commission must try to ensure that footnotes 119 and 122 provided a balanced selection of cases that supported members' opposing positions.

Mr. Murphy said that the purpose of footnote 119 was to indicate why a majority of members thought that there was a trend towards limiting the applicability of immunity from jurisdiction *ratione materiae* in respect of certain types of behaviour that constituted crimes under international law. The purpose of footnote 122 sought to explain why a minority held that there was no such trend. As the two footnotes complemented one another, he suggested that they should be adopted simultaneously, or that the adoption of paragraph (10) should be suspended until agreement had been reached on footnote 122.

Mr. Forteau said that the Commission had already adopted paragraph (4), which stated that the commentary reproduced, with minor updates, the commentary adopted in 2017. He was unsure whether the suggested updates were really minor ones. Normally, commentary would be adopted after the text proposed by the Special Rapporteur in the draft report had been discussed in a plenary meeting. The Commission was currently proceeding in a different manner, with members adding examples without the other members having any opportunity to examine them in detail to see whether they were worth including. He was dubious about the inclusion of any reference to the judgment of the French Court of Cassation of January 2021, as it could be interpreted in different ways. He would therefore be in favour of retaining the text adopted in 2017, without any updating of the footnotes.

Mr. Grossman Guiloff said that in all his years as a member of the Commission, he had never been confronted with any "package deals". Making one amendment dependent on another did not do justice to the subject. Each footnote should be judged on its own merits.

Mr. Rajput said that he agreed with Mr. Grossman Guiloff and with Mr. Forteau's suggestion that the Commission should abide by the text adopted in 2017.

Ms. Escobar Hernández (Special Rapporteur) said that she agreed with the two insertions proposed by Mr. Huang. Although paragraph (4) spoke of minor updates to the commentary adopted in 2017, some new cases were of special relevance. That was true of the judgment of the Federal Court of Justice of Germany of 28 January 2021. The reference to it should therefore be retained in the footnotes. On the other hand, it might be prudent not to mention the judgments of the court in Koblenz, the Italian courts' decisions with regard to Operation Condor or the judgment of the French Court of Cassation of January 2021, as the Commission had not had enough time to scrutinize them.

Mr. Grossman Guiloff said he was surprised that the Special Rapporteur saw no reason to include a reference the Italian courts' decisions with regard to Operation Condor, which was a very important case that should receive the attention it deserved.

Mr. Murphy said that the linkage between the judgments of the German Federal Court of Justice and the French Court of Cassation in January 2021 would no longer be apparent if no mention were made of the French decision in the footnotes.

Mr. Jalloh said that he endorsed Mr. Grossman Guiloff's statement about package deals. If further case law had been proposed by the Special Rapporteur, it should not be rejected out of hand, even if that meant allowing more time to have a look at it.

Paragraph (10) and footnote 119 were left in abeyance.

Paragraphs (11) and (12)

Paragraphs (11) and (12) were adopted.

Paragraph (13)

Paragraph (13) and footnote 122 were left in abeyance.

Paragraphs (14) to (20)

Paragraphs (14) to (20) were adopted.

Paragraph (21)

Mr. Forteau said that footnote 135 should refer to chapter IV of the report and not to the text adopted on second reading by the Drafting Committee.

Paragraph (21) was adopted with that amendment to the footnote.

Paragraph (22)

Mr. Jalloh said that since 2017 there had been a number of significant developments in case law concerning the crime of aggression which should be reflected in that paragraph at the second-reading stage.

Paragraph (22) was adopted.

Paragraphs (23) to (33)

Paragraphs (23) to (33) were adopted.

The Chair invited the Commission to resume its consideration of a number of paragraphs that had been left in abeyance at previous meetings.

*Part One (Introduction) (continued)**Commentary to draft article 1 (Scope of the present draft articles) (continued)**Paragraph (20) (continued)*

Ms. Escobar Hernández (Special Rapporteur) proposed, following informal consultations with interested members, that the paragraph should end at the words “a legal regime of their own”. There would be no footnotes, and the additions previously suggested would not be included.

Paragraph (20), as amended, was adopted.

Mr. Jalloh, expressing appreciation to the Special Rapporteur for finding a way forward, said that he had not stood in the way of the decision of the Drafting Committee to include paragraph 3 in draft article 1 but considered that the Commission had not reached the correct legal position in that regard. In particular, the Commission had not taken into account the recent jurisprudence of international criminal tribunals, especially the International Criminal Court. In his view, the practice of States – which were responsible for creating international courts and tribunals and waiving the immunities of their officials for the purposes of investigations and prosecutions of the most serious crimes of concern to the international community as a whole – indicated that there were indeed some legal effects that should be taken into account at the national level for the parties to such treaties and, where applicable, under customary international law, since they carried implications for the ability of States to exercise their jurisdiction over foreign officials for such crimes. He hoped that the Commission would revisit the issue at a later stage of its work on the topic.

Paragraph (26) (continued)

Ms. Escobar Hernández (Special Rapporteur) said that, having consulted other members of the Commission, she wished to propose amending the paragraph to read:

Paragraph 3 ends with the phrase “as between the parties to those agreements”. The intention here is to highlight that conventional legal regimes applicable to international criminal tribunals, as a matter of treaty law, apply only as between the parties to the agreement establishing a particular international criminal court or

tribunal. This term does not, however, imply any statement whatsoever in relation to any other obligation that can be imposed upon States under international law, in particular by the Security Council or any other international organization.

Paragraph (26), as amended, was adopted.

Commentary to draft article 2 (Definitions) (continued)

Paragraph (9) (continued)

Ms. Escobar Hernández (Special Rapporteur) said that, following the Commission's debates at previous meetings, she had reviewed the *Wei Ye* case, which had been included as a reference in footnote 31. While it was true that it concerned a former President of China, it focused mainly on considering the suggestion of immunity made to the court by the administration and whether a particular legal summons could be served against the former President. Bearing in mind that no member of the Commission had objected to deleting the reference to the case; that several members had emphasized the illustrative nature of the list; that some had questioned the relevance of the case to the point being made; and that footnote 31 already included a significant amount of United States case law, she had no objection to deleting the reference to that particular case.

Paragraph (9), as amended, was adopted.

Part Four (Procedural provisions and safeguards) (continued)

Commentary to draft article 15 (Transfer of the criminal proceedings) (continued)

Paragraph (12) (continued)

Ms. Escobar Hernández (Special Rapporteur) said that, having consulted Mr. Forteau, she wished to propose that the final sentence of the paragraph should be amended to read: "The phrase 'submit the case ... for the purpose of prosecution' has similarly to be interpreted in a substantive manner and with the ultimate purpose in mind."

Paragraph (12), as amended, was adopted.

The meeting was suspended at 4.35 p.m. and resumed at 4.50 p.m.

Part Three (Immunity ratione materiae) (continued)

Commentary to draft article 7 (Crimes under international law in respect of which immunity ratione materiae shall not apply) (continued)

Paragraphs (10) and (13) (continued)

Ms. Escobar Hernández (Special Rapporteur) said that, having consulted various members of the Commission informally, she had various further amendments to propose to the text of footnotes 119 and 122, placed in paragraphs (10) and (13), respectively. In footnote 119, it had been suggested that reference should be made to a Koblenz court judgment of 13 January 2022; however, she suggested that neither that case nor two recent Italian judgments relating to Operation Condor should be mentioned. Footnote 119 would therefore end after the reference "*Journal of International Criminal Justice*, vol. 19, No. 3 (July 2021), pp. 697–716". In footnote 122, mention would be made of a German Federal Court of Justice decision of 28 January 2021, but no reference would be included to the decision of the French Court of Cassation in Appeal No. 20-80.511.

Mr. Petrič asked exactly why the references were not to be included. Given the importance of the Commission's work, especially on the topic of immunity, with its obvious implications for States, a clear understanding of the reasoning behind such decisions was vital.

Ms. Escobar Hernández (Special Rapporteur) said that there had been insufficient time for members to consider the cases, which had not been referred to in earlier versions of the commentary, and for the relevant documents to be issued in all six languages.

Mr. Petrič said that, if the cases supported the legal arguments being made, they should be mentioned nonetheless. However, given the time constraints, he would not insist on their inclusion.

Mr. Rajput echoed that view. Case law formed much of the basis of the Commission's methodology and conclusions; deciding not to include potentially important references because of a lack of time to have the documents translated gave cause for concern. The decision of the French Court of Cassation, in particular, was of great importance, assuming that it had been correctly interpreted.

Mr. Forteau said that the decision in question referred to a number of relevant issues, including exceptions to and conditions for immunity; however, to reflect them properly was beyond the scope of the remainder of the Commission's session. They could instead be considered when the commentary was adopted on second reading. He therefore supported the Special Rapporteur's proposals.

Paragraphs (10) and (13), as amended, were adopted.

Sir Michael Wood said that he respectfully disagreed with Mr. Forteau's view of the decision of the French Court of Cassation, which he considered to be very important; he nevertheless welcomed the Commission's decision to adopt the paragraphs.

The Chair invited the Commission to resume its consideration of the portion of chapter VI of its draft report contained in document [A/CN.4/L.962](#).

Paragraph 8

The Chair said that the number and date of the meeting referred to in paragraph 8 would be added by the secretariat in due course.

On that understanding, paragraph 8 was adopted.

Chapter VI of the draft report as a whole, as amended, was adopted.

Ms. Escobar Hernández (Special Rapporteur), welcoming the adoption of the draft articles and commentary thereto on first reading, expressed sincere appreciation to all those who had made it possible. During her ten years as a member of the Commission, the help and support of her fellow members, particularly the various chairs of the Drafting Committee, the secretariat, her assistants and the library staff had proved invaluable. It had been a pleasure and a privilege to serve on the Commission.

Chapter VII. Succession of States in respect of State responsibility (continued)
([A/CN.4/L.963](#) and [A/CN.4/L.963/Add.1–Add.3](#))

The Chair invited the Commission to resume its consideration of the portion of chapter VII of its draft report contained in document [A/CN.4/L.963/Add.1](#).

B. Consideration of the topic at the present session (continued)

Paragraph 1

Mr. Šturma (Special Rapporteur) said that, in order to take account of comments made and concerns expressed at the Commission's previous meeting, he wished to propose various amendments to paragraph 1. The second sentence should be amended to read: "As a result of the change of form of the outcome, the Commission also took note of draft articles 1, 2, 5, 7, 8 and 9 as revised by the Drafting Committee to be draft guidelines." A footnote containing the text of the draft guidelines would be inserted after that sentence, with introductory text reading: "For ease of reference, the previously adopted draft articles revised to the form of draft guidelines are reproduced below. The numbering reflects the omission of draft articles 3 and 4, proposed by the Special Rapporteur in his first report (2017) and pending in the Drafting Committee until 2022." In the last sentence of the paragraph, the word "revised" should be inserted before "commentaries".

Paragraph 1, as amended, was adopted.

Paragraph 2

Paragraph 2 was adopted, subject to its completion by the secretariat.

- C. *Text of the draft articles on succession of States in respect of State responsibility provisionally adopted by the Commission at its previous sessions*

Paragraph 4

Mr. Šturma (Special Rapporteur) said that, in the title of section C, the word “previous” should be altered to “seventy-first and seventy-second”.

Mr. Forteau suggested that a sentence indicating that the commentary should be read in the light of the decision to recast the provisions as draft guidelines, rather than draft articles, should be included in all footnotes relating to the commentary.

Mr. Šturma (Special Rapporteur) said that such a sentence had been included only where textual amendments had been made to more than just the title of a particular provision; however, he had no objection to harmonizing the footnotes as suggested by Mr. Forteau.

Paragraph 4, as amended, was adopted with a minor editorial change, along with the amendment to the title of section C.

- D. *Text of the draft guidelines on succession of States in respect of State responsibility provisionally adopted by the Commission at its seventy-third session*

Paragraph 5

Paragraph 5 was adopted.

The Chair invited the Commission to consider the portion of chapter VII of its draft report contained in document [A/CN.4/L.963/Add.2](#).

2. *Text of the draft guidelines and commentaries thereto provisionally adopted by the Commission at its seventy-third session*

Paragraph 1

Commentary to draft guideline 7 bis (Composite acts)

Paragraph (1)

Sir Michael Wood said that to simplify the first sentence, the words “Like their analogues, articles 14 and 15 of” should be replaced with phrase “Following the structure of”.

Mr. Murphy said that the reference to the 2001 articles would be too broad if articles 14 and 15 were not mentioned. The first clause of the first sentence should therefore read “Following the structure of articles 14 and 15 of the 2001 articles on responsibility of States for internationally wrongful acts”.

Paragraph (1), as amended, was adopted.

Paragraph (2)

Sir Michael Wood said that the first sentence should be reworded to read “The draft guideline has three paragraphs”.

Paragraph (2), as amended, was adopted.

Paragraph (3)

Mr. Murphy said that, in the second sentence, the expression “internationally wrongful composite acts” should be replaced with “an internationally wrongful composite act”; in the third sentence, the word “parts” should be changed to “components”; and, in the final sentence, the expression “composite acts” should be replaced with “a composite act”

and the word “occur” should be changed to “occurs”. He thought it would be useful to use the singular “act” when talking about a composite act of a State with multiple components to it.

Paragraph (3), as amended, was adopted.

Paragraph (4)

Paragraph (4) was adopted.

Paragraph (5)

Sir Michael Wood said that the phrase “on the basis of a proposal made in the Drafting Committee” should be deleted, as it was unusual to have such an explanation in a commentary.

Mr. Murphy said that he supported Sir Michael Wood’s proposal. In the second sentence, the plural reference to “internationally wrongful composite acts” should be replaced with a reference to “an internationally wrongful act”, in the singular.

Sir Michael Wood said that to be consistent, the words “Composite acts” should be changed to “A composite act” in the final sentence. In addition, the end of that sentence should be reformulated to read “within the scope of this paragraph” instead of “within the scope of the paragraph’s terms”.

Paragraph (5), as amended, was adopted.

Paragraph (6)

Paragraph (6) was adopted with a minor editorial change.

Paragraph (7)

Mr. Forteau said that he wished to know whether the case concerning the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* had in fact involved composite acts. If it had not, it was perhaps not relevant to draft guideline 7 *bis*.

Mr. Šturma (Special Rapporteur) said that, although there had been no specific discussion of composite acts in the case, the sequence of actions and omissions by the Czechoslovakian and then Slovak authorities could be interpreted as constituting a composite act.

Mr. Rajput said that, at the time that the International Court of Justice had issued its judgment in the case, the concept of composite acts had not yet been established, as the Commission had not yet adopted on second reading the articles on State responsibility. The judgment had, however, hinted at that concept. It was therefore appropriate to refer to the case in paragraph (7).

Mr. Jalloh said that the Special Rapporteur should replace the words “*Genocide case*” with a more specific reference to the case in question.

The Chair said he took it that the Special Rapporteur would make that replacement.

Paragraph (7) was adopted on that understanding.

Paragraph (8)

Mr. Rajput said that, for ease of reading, the formulation “Since the available State practice, in light of its inconsistency” should be replaced with “The inconsistent State practice”.

Sir Michael Wood said that he supported Mr. Rajput’s proposal. In addition, the following phrase should be amended to read “did not allow a firm conclusion to be drawn as to the content of the law”.

In the second sentence, the words “As such, it” should be replaced with “Paragraph 3”, and the words “is possible” should be replaced with “exists”. It was clear that the type of

responsibility referred to was possible; whether it existed was another matter, and one that the Commission was leaving open.

The Chair said that, in light of the amendments proposed by Mr. Rajput and Sir Michael Wood, the first sentence should be split in two, after the words “the content of the law”, and the word “therefore” should be inserted before “decided”.

Mr. Šturma (Special Rapporteur) said that, as he understood it, the first sentence of paragraph (8), as amended, would read “The inconsistency of the available State practice did not allow a firm conclusion to be drawn as to the content of the law.”

Paragraph (8), as amended, was adopted.

Commentary to draft guideline 10 (Uniting of States)

Paragraph (1)

Sir Michael Wood said that he wondered whether the reference to “the predecessor State” should not be in the plural, as by definition there would be two or more such States.

Mr. Šturma (Special Rapporteur) said that the plural would indeed be more logical.

Paragraph (1), as amended, was adopted.

Paragraph (2)

Mr. Murphy said that, in the first sentence, the phrase “In its earlier work” should be changed to “In some of its earlier work”, and in the second sentence, the words “example of” should be replaced with “approach in”. In addition, a third sentence should be added, reading “Draft guideline 10 addresses merger, while draft guideline 11 addresses incorporation”.

Mr. Rajput said that he supported Mr. Murphy’s suggestions. The Special Rapporteur should also prepare a footnote to the first sentence with citations for the earlier work referred to in that sentence.

The Chair said he took it the Special Rapporteur would insert that footnote.

Paragraph (2), as amended, was adopted on that understanding.

Paragraph (3)

Mr. Rajput said that, in the second sentence, the word “new” should be replaced with “successor”. In addition, the second, third and fourth sentences of paragraph (4) should be added to the end of paragraph (3). In that case, the first sentence of paragraph (3) would say that the provision was not to be interpreted as a rule of automatic succession; the second sentence would say that States could not evade their international responsibility; and the third sentence would say that the Commission had sought to balance the two positions. The Commission was neither supporting automatic succession nor was it supporting the possibility that States could simply evade international responsibility. The first sentence of paragraph (4) should be deleted, as it would be preferable for the Commission to avoid the controversy surrounding the “clean slate” rule.

Mr. Murphy said that the second sentence of paragraph (3) should be deleted because it did not address the content of the draft guideline. The first sentence of paragraph (4) should then be moved to the end of paragraph (3), with the words “In contrast” replaced with “At the same time” and the article “a” inserted before the word “remedy”. The remaining sentences of paragraph (4) should remain in paragraph (4). Paragraph (4) would then address what the Commission had done, while paragraph (3) would focus on what the provision was not. It would be useful to have the two concepts of automatic succession and a “clean slate” together in paragraph (3) because they represented the “bookends” of the Commission’s discussion on the issue.

Paragraph (3), as amended by Mr. Murphy, was adopted.

Paragraph (4)

The Chair said that, following the amendments made to paragraph (3), paragraph (4) would now begin with the words “The Commission sought to balance”.

Paragraph (4), as amended, was adopted with a minor editorial change.

Paragraph (5)

Mr. Forteau said that the beginning of paragraph (5) was problematic for two reasons. First, it referred to an “obligation”, while the draft guideline itself used the word “should”. Second, it referred to a “*pactum de negotiando*”, while what the draft guideline set out was a *pactum de contrahendo*. In other words, the objective was to conclude an agreement, not simply to negotiate. The paragraph could be simplified by replacing the first two sentences with the following: “The provision should be understood as meaning that the States concerned should negotiate in good faith with a view to concluding an agreement.” The third sentence should be deleted.

Mr. Murphy said that, in the sentence beginning “As the Permanent Court of International Justice stated”, the phrase “first of all” was superfluous and should be deleted.

Paragraph (5) as amended, was adopted.

*Commentary to draft guideline 10 bis (Incorporation of a State into another State)**Paragraphs (1) and (2)*

Paragraphs (1) and (2) were adopted.

Paragraph (3)

Mr. Murphy said that he would appreciate clarification from the Special Rapporteur as to what was meant by the words “was also raised” in the final sentence.

Mr. Rajput said that he wished to know why the Special Rapporteur had used the expression “to seek agreement” in the first sentence, as it seemed to suggest that an agreement was being forced.

Mr. Šturma (Special Rapporteur) said that the use of the expression “to seek agreement” did not seem problematic to him, given that the Commission had just referred in the commentary to the need to negotiate in good faith in a similar context. Furthermore, to seek agreement was not the same thing as to reach agreement. In the final sentence, the word “raised” could be replaced with a word such as “recalled”.

The Chair suggested that Mr. Rajput’s concern could be addressed by replacing “to seek agreement” with “to pursue an agreement”.

Sir Michael Wood said that, in the first sentence, “As per” should be replaced with “Under”, and in the final sentence, “the obligation to perform negotiations” should be replaced with “the obligation to negotiate”.

Mr. Forteau said that the verb “raised” could not be replaced with “recalled” because, given the structure of the sentence, the word would also apply to the consideration of claims made by private individuals mentioned at the end of the sentence. As that was not something that had previously been mentioned, it could not now be recalled. The phrase “was also raised” should be replaced instead with “is also relevant here”.

Paragraph (3), as amended, was adopted.

Paragraph (4)

Paragraph (4) was adopted.

Paragraph (5)

Mr. Murphy said that paragraph (5) should be deleted because it was neither necessary nor helpful. It was true that the phrase “is not affected by” appeared in article 3 of

the articles on State responsibility, but in every other respect that article was completely irrelevant to the issue at hand.

The Chair said he took it that the Commission wished to delete paragraph (5).

It was so decided.

Commentary to draft guideline 11 (Dissolution of a State)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

Mr. Rajput said that the reference to the “1983 Vienna Convention” should be replaced with the full name of the convention.

Paragraph (2) was adopted on that understanding.

Paragraph (3)

Paragraph (3) was adopted.

Paragraph (4)

Mr. Forteau said that the last sentence of draft guideline 11 referred to a “territorial link” without specifying what that link was to. The last sentence of paragraph (4) then referred to a connection with the injury, while the last sentence of paragraph (7) referred to a link to the wrongful act. In both paragraph (4) and paragraph (7), the reference should be to “the wrongful act or the injury”. In the final sentence of paragraph (4), the words “the wrongful act or” should therefore be inserted before “the injury”.

Paragraph (4), as amended, was adopted.

Paragraph (5)

Mr. Murphy said that the Commission should consider whether it would like to explain the meaning of the phrase “the relevant successor State or States”, used in draft guideline 11, in the commentary to that draft guideline.

The Chair said he took it the Commission wished to continue its consideration of paragraph (5) at its next meeting.

It was so decided.

The meeting rose at 6 p.m.