Provisional

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# International Law Commission

**Seventy-third session (second part)**

**Provisional summary record of the 3610th meeting**

Held at the Palais des Nations, Geneva, on Thursday, 4 August 2022, at 10 a.m.

## Contents

***Present***:

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|---|---|
| *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:***

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

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

**Tribute to the memory of Christopher Pinto, former member of the Commission** (*continued*)

**Mr. Murase** said it was with deep sorrow that he had learned of the passing of Christopher Pinto on 21 July 2022. Mr. Pinto had served as the representative of Sri Lanka to the United Nations Committee on the Seabed and the Third United Nations Conference on the Law of the Sea, and had thus been one of the main architects of the United Nations Convention on the Law of the Sea. In spite of his many great achievements, which included serving as the Secretary-General of the Iran-United States Claims Tribunal and helping to establish the *Asian Yearbook of International Law* and the *Asian Journal of International Law*, Mr. Pinto had always demonstrated great modesty, which was a clear sign of his intellectual prowess and confidence. A great scholar and practitioner of international law, Mr. Pinto had been profoundly respected throughout Asia and the rest of the world.

**Mr. Valencia-Ospina** said that he had been deeply saddened by the news of the passing of Christopher Pinto, with whom he had maintained a close friendship for several decades. Mr. Pinto had contributed much to the United Nations Committee on the Seabed, the United Nations Conference on the Law of Treaties and the United Nations Conference on the Law of the Sea, and had been elected to the International Law Commission in 1973. Later, during his time as Chair of the Commission, Mr. Pinto had overseen the adoption of a number of texts that had gone on to form the basis of international conventions. His contribution to international law was substantial. Despite his achievements, however, Mr. Pinto had demonstrated a deep humility, which was always a clear sign of greatness in a human being. He wished to convey his deepest condolences to Mr. Pinto's family.

**Sir Michael Wood** said that Christopher Pinto had been a most eminent and learned practitioner of international law. Much of the language of Part XI of the United Nations Convention on the Law of the Sea and its annexes had come directly from Mr. Pinto's pen, as he had chaired the working group that had prepared the first drafts of those texts. The law of the sea had been an important part of Mr. Pinto's career, but he had also been much involved in other areas. Indeed, Sri Lanka had contributed greatly to international law over the years, and Mr. Pinto had played an important part in that contribution. His country, and the international law community, had lost a star.

**Mr. Murphy** said that, upon leaving the Commission in 1981, Christopher Pinto had taken up the difficult position of Secretary-General of the Iran-United States Claims Tribunal. While some had dismissed the idea of a forum committed to upholding the rule of law and resolving disputes between the United States and the Islamic Republic of Iran as fanciful and bound to fail, during Mr. Pinto's tenure, the Tribunal had not only survived; it had thrived. Overseeing the resolution of thousands of claims, Mr. Pinto's personal touch had often played a crucial role in helping lawyers from the two sides to come together. Mr. Pinto had been a remarkable, humble and kind man whose deep commitment to the rule of law had helped to facilitate the effective settlement of a great many disputes.

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

*Chapter VII. Succession of States in respect of State responsibility* (*continued*) (A/CN.4/L.963, A/CN.4/L.963/Add.1, A/CN.4/L.963/Add.2 and A/CN.4/L.963/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.2, continuing with the commentary to draft guideline 11.

*Commentary to draft guideline 11 (Dissolution of a State)* (*continued*)

*New paragraph (5)*

**Mr. Šturma** (Special Rapporteur) said that he wished to propose the insertion of a new paragraph (5), which would read: "The use of the word 'relevant' in relation to 'successor State or States' reflects the possibility that there may be successor States that do

not have an interest in addressing the injury and therefore should not necessarily be involved in negotiations on the question.” That sentence was taken from paragraph (5) of the commentary to draft guideline 14.

**Mr. Forteau**, supported by **Mr. Šturma** (Special Rapporteur), said that, in the light of the explanation provided in the proposed new paragraph, the French text of draft guideline 11 would have to be reviewed and, if necessary, revised to ensure that the word “relevant” was rendered accurately in French.

*New paragraph (5) was adopted on that understanding.*

**The Chair** said that the subsequent paragraphs of the commentary would be renumbered accordingly at a later stage. For the moment, the Commission would proceed with the adoption of the commentary based on the original numbering as contained in document A/CN.4/L.963/Add.2.

*Paragraph (5)* (*continued*)

*Paragraph (5) was adopted.*

*Paragraph (6)*

**Mr. Murphy** proposed that, in the English text, the word “to”, in the phrase “as a guide to the determination” in the second sentence, should be replaced with the word “for”.

*Paragraph (6) was adopted with that change to the English text.*

*Paragraph (7)*

**Mr. Šturma** (Special Rapporteur) said that the reference to “the 1983 Vienna” in the second sentence should be corrected to read “the 1983 Vienna Convention on Succession of States in respect of State Property, Archives and Debts”. In the final sentence, the words “or the injury” should be inserted after the words “the internationally wrongful act”.

**Mr. Murphy** proposed that the word “indices” in the first sentence should be replaced with the word “factors”.

*Paragraph (7) was adopted with those amendments.*

*Paragraph (8)*

*Paragraph (8) was adopted.*

*Commentary to draft guideline 13 (Uniting of States)*

*New paragraph (1)*

**Mr. Park**, supported by **Mr. Šturma** (Special Rapporteur), said that, in order to make clear the distinction between draft guidelines 10 and 13, which shared the same title, he wished to propose the insertion of a new paragraph (1), which would read: “Contrary to draft guideline 10, draft guideline 13 deals with the situation where a predecessor State is an injured State by an internationally wrongful act of another State.”

*New paragraph (1) was adopted.*

**The Chair** said that the subsequent paragraphs of the commentary would be renumbered accordingly at a later stage.

*Paragraph (1)*

*Paragraph (1) was adopted.*

*Paragraph (2)*

**Mr. Murphy** said that the first sentence of the paragraph would be clearer if the phrase “an internationally wrongful act, which occurred before the date of succession of

States" was amended to read "an internationally wrongful act that occurred before the date of succession of States".

**The Chair** said he took it that the Commission wished to adopt that amendment.

*It was so decided.*

**Mr. Rajput**, supported by **Mr. Šturma** (Special Rapporteur), said that, for the sake of clarity, in the final sentence the words "that date" should be replaced with the words "the date of succession".

**Mr. Forteau** said that, as accurately stated in the first sentence of the paragraph, draft guideline 13 referred to an internationally wrongful act that had occurred before the date of succession of States; however, the injury caused by such an act could continue after the date of succession. The final sentence, as currently drafted, was perhaps too categorical in that respect.

**Mr. Petrič** said he wished to note that the date of succession could be the subject of some debate, as had happened in respect of the former Yugoslavia. In that case, a date of succession had been formally decided upon many years after the actual events as a kind of technical agreement concluded for the purpose of resolving pragmatic matters related to succession.

**Mr. Rajput** said that draft guideline 13 referred to injury that had been caused prior to the date of succession. Not clarifying that fact in paragraph (2) could lead to confusion. One possible solution would be to insert a new footnote at the end of the paragraph that would explain what was meant by "injury … before the date of succession", with a reference to relevant academic writings, such as the article "The concept of a 'continuing violation' of an international obligation: selected problems", written by Professor Joost Pauwelyn and published in the 1995 *British Year Book of International Law*. That article dealt with the difference between an injury caused by the commission of an internationally wrongful act and the continuation of the suffering caused by that injury.

**Mr. Forteau** said that a simpler solution would be to amend the final sentence of the paragraph to read: "Therefore, an injury to a predecessor State could only refer to an injury caused by an internationally wrongful act that occurred before that date." That amendment would bring the wording of the final sentence into line with that of the first sentence.

**Mr. Murphy** said that the amendments being proposed risked making the paragraph overcomplicated. The purpose of paragraph (2) was to explain why the Commission had decided not to make explicit that draft guideline 13 referred to an internationally wrongful act that had occurred before the date of succession of States; that purpose was adequately fulfilled by the first two sentences of the paragraph. Moreover, there was no real reason for uncertainty with regard to the meaning of the paragraph, since it was clear that an injury to a predecessor State did not continue when the predecessor State disappeared. If the amendment proposed by the Special Rapporteur was not acceptable to all members, the final sentence should simply be deleted.

**Mr. Jalloh** said that the proposed replacement of the words "that date" with the words "the date of succession" would render the final sentence sufficiently clear. Paragraph (2) read well and accurately reflected the discussion held on the matter in the Drafting Committee.

**The Chair** suggested that the final sentence of the paragraph should be amended along the lines proposed by the Special Rapporteur and Mr. Forteau. The amended sentence would thus read: "Therefore, an injury to a predecessor State could only refer to an injury caused by an internationally wrongful act that occurred before the date of succession."

*Paragraph (2), as amended, was adopted.*

*Paragraph (3)*

**Mr. Jalloh** proposed that, in the first sentence of the paragraph, the words "chose to use" should be replaced with the word "used" and the words "in draft guideline 13" should be inserted after the words "may invoke".

**Sir Michael Wood** proposed that the word “unification” should be replaced with the words “a uniting of States”.

*Paragraph (3) was adopted with those amendments and with a minor editorial correction.*

*Commentary to draft guideline 13* bis *(Incorporation of a State into another State)*

*Paragraph (1)*

**Mr. Forteau**, supported by **Mr. Murphy**, said that there was no need to specify, in relation to the scenario in which an injured predecessor State became part of another State, that the legal personality of the other State continued, since that fact was self-evident. The words “whose legal personality continues”, at the end of the first sentence, were therefore superfluous and should be deleted.

**Mr. Jalloh** proposed that, in the final sentence, the words “and more intuitive”, after the words “it was considered clearer”, should be deleted.

**Sir Michael Wood** said that the second sentence, which read “Like its analogue in Part Two, draft guideline 10 *bis*, the provision has two paragraphs”, was a statement of the obvious and should be deleted.

*Paragraph (1) was adopted with those amendments and with a minor editorial correction.*

*Paragraph (2)*

*Paragraph (2) was adopted.*

*Paragraph (3)*

**Mr. Jalloh** proposed that the words “occurrence of” should be inserted before the word “succession” at the end of the paragraph.

*Paragraph (3), as amended, was adopted with a minor editorial change.*

*Paragraph (4)*

**Mr. Jalloh** proposed that the phrase “was an elegant and concise way” should be amended to read simply “was a concise way”.

*Paragraph (4), as amended, was adopted.*

**The Chair** invited the Commission to consider the portion of chapter VII of the draft report contained in document A/CN.4/L.963/Add.3.

*Commentary to draft guideline 6 (No effect upon attribution)*

*Paragraph (1)*

**Mr. Rajput** said that draft guideline 6 addressed the rules of attribution, not the rules of State responsibility. He proposed that the words “on attribution” should be inserted after the words “the rules of State responsibility” in the first sentence.

**Sir Michael Wood** said that draft guideline 6 did not deal with the rules of attribution in general, but rather made a very specific point. He proposed that the first and second sentences should be merged into a single sentence, which would read: “The purpose of draft guideline 6 is to clarify that an internationally wrongful act occurring before the date of succession remains attributable to the State that committed it.”

*Paragraph (1), as amended by Sir Michael Wood, was adopted.*

*Paragraph (2)*

*Paragraph (2) was adopted.*

*Paragraphs (3) and (4)*

**Mr. Rajput** said that, in the final sentence of paragraph (3), an attempt was made to clarify what the Commission meant by the term "attribution". However, the meaning of that term had already been clarified in paragraph (1), which included a reference to the articles on responsibility of States for internationally wrongful acts. The final sentence of paragraph (3), in particular its suggestion that the term "attribution" should be understood "in a broad sense", was therefore confusing. He proposed that the sentence should be deleted.

**Mr. Forteau** said that Mr. Rajput's proposed amendment would alter the meaning of paragraph (3) and of draft guideline 6. He had understood that the term "attribution" in draft guideline 6 did not have the same meaning that it had in the articles on State responsibility. Specifically, the term "attribution" in draft guideline 6 referred to the attribution of an internationally wrongful act, not the attribution of conduct.

**Mr. Jalloh** said he agreed with Mr. Forteau that it was necessary to retain the final sentence of paragraph (3), especially given that paragraph (4) continued to address the meaning of the term "attribution" in the context of draft guideline 6. One possible solution would be to keep the final sentence of paragraph (3) and make clarifying amendments to paragraph (4).

**Mr. Rajput** said that he had been planning to propose that paragraph (4) should be deleted because it cited a resolution of the Institute of International Law in which the notion of attribution was understood in a manner very different from the Commission's own understanding; that much was evident from the discussions held on the topic in the Drafting Committee, as reflected in the statement by the Chair of the Committee. The members of the Committee had never considered the notion of attribution to be broader in the context of the current topic than in the context of the articles on State responsibility. The Institute of International Law had, however, adopted such a broader understanding.

**Mr. Murphy** said that he too wished to propose that paragraph (4) should be deleted. While it was claimed in paragraph (4) that the term "attribution" in draft guideline 6 was used "in the same sense as" in article 4 of the 2015 Tallinn resolution of the Institute of International Law on State succession in matters of international responsibility, the draft guideline did not in fact reproduce the language of that article. A potential solution would be to delete both paragraph (3) and paragraph (4). Paragraphs (1) and (2) were sufficient to explain the purpose of and justification for the draft guideline.

**Mr. Forteau** said that the deletion of paragraphs (3) and (4) would constitute a substantive change that would completely transform the meaning of draft guideline 6. Perhaps the Chair of the Drafting Committee could provide an explanation of the Committee's understanding of the purpose of the draft guideline.

**Mr. Jalloh** said that the inclusion of paragraph (3) was necessary in order to clarify the meaning of the term "attribution" in the context of draft guideline 6. Paragraph (4), however, was somewhat confusing. He would not be opposed to its deletion.

**Mr. Šturma** (Special Rapporteur) said that, in drafting the commentary, he had relied heavily on the statement by the Chair of the Drafting Committee. Thus, the commentary did not reflect his own personal research or convictions but rather the debates that had taken place in the Drafting Committee, including the discussion on the question of attribution. He was therefore of the view that paragraph (3) should be kept as it was. As a compromise, he was willing to agree to the deletion of paragraph (4), since it referred to the findings of a body other than the Commission.

**Sir Michael Wood** said that the first sentence of paragraph (3) was quite unclear, particularly the phrase "should not be conflated with", which should perhaps be replaced with the phrase "is distinct from". Paragraph (3) attempted to make it clear that the attribution to a State of an internationally wrongful act, as referred to in draft guideline 6, was distinct from the notion of the attribution of conduct, as referred to in article 2 (a) of the articles on State responsibility. The notion of attribution of conduct was well understood; equally, the notion of "attribution to a State of an internationally wrongful act" was a clear concept. The two notions were indeed distinct, but they were closely associated with one another, since the

latter referred to the attribution to a State of conduct that constituted an internationally wrongful act.

**Mr. Šturma** (Special Rapporteur) said that the word "conflated" should be replaced with the word "equated". Article 2 (a) of the articles on State responsibility referred specifically to the attribution of conduct to a State; draft guideline 6 clarified that an internationally wrongful act attributed to a particular State could not be attributed to another State, such as a successor State. The question of attribution was thus addressed from a different perspective, albeit one that still had its basis in conduct.

**Mr. Forteau**, supported by **Mr. Rajput**, said that he was now convinced that both paragraph (3) and paragraph (4) should be deleted. Even with the amendment to the first sentence proposed by the Special Rapporteur, the paragraphs appeared to suggest the existence of additional rules of attribution that were different from the normal rules of attribution under the law of international responsibility, which was not what the Commission intended to convey through draft guideline 6.

**Mr. Park**, speaking as Chair of the Drafting Committee, said that the Committee had not discussed the question of attribution at the current session. The matter had been discussed by the Drafting Committee in 2018, at the Commission's seventieth session. In order to know what had been said on the matter in the Committee, members should consult the interim report delivered by the Chair of the Committee at that session.

**Mr. Jalloh** said that he had been the Chair of the Drafting Committee at the seventieth session. In his interim report on the topic at the Commission's 3443rd meeting, he had noted that, in its discussion of the use of the term "attribution" in draft guideline 6, which at the time had been called draft article 6, the Drafting Committee had discussed the possible use of alternative terms such as "imputation". He would not enter into details, since the Commission was pressed for time. For that same reason, he was willing to support Mr. Forteau's proposal that both paragraph (3) and paragraph (4) should be deleted.

**Mr. Šturma** (Special Rapporteur) proposed that consideration of paragraph (3) should be deferred, so that he could produce a reformulated version of the paragraph that would address members' concerns.

**The Chair** said he took it that the Commission wished to suspend its consideration of paragraph (3) to allow the Special Rapporteur to submit a revised proposal, and to delete paragraph (4).

*Paragraph (3) was left in abeyance.*

*Paragraph (4) was deleted.*

*Commentary to draft guideline 12 (Cases of succession of States when the predecessor State continues to exist)*

*Paragraphs (1) and (2)*

*Paragraphs (1) and (2) were adopted.*

*Paragraph (3)*

**Mr. Jalloh** said that the final clause of the penultimate sentence of the paragraph, which currently read "encompassing the full content of State responsibility", should be amended to make it clear that not only reparation, but also other forms of State responsibility, could be invoked.

**Mr. Šturma** (Special Rapporteur) proposed that the phrase "encompassing the full content of State responsibility" should be amended to read "encompassing not only reparation but also other obligations arising from the commission of an internationally wrongful act". The phrase "other obligations" referred mainly to cessation and guarantees of non-repetition.

*Paragraph (3), as amended, was adopted.*

*Paragraph (4)*

**Mr. Murphy** proposed that, in the second sentence, the words “considered including” should be replaced with the words “chose this phrase rather than”. In the third sentence, the words “relates to” should be amended to read “relates only to”.

*Paragraph (4), as amended, was adopted.*

*Paragraph (5)*

**Mr. Murphy** proposed that, in the second sentence, the phrase “an internationally wrongful act, against the predecessor State, that occurred” should be amended to read “an internationally wrongful act that it committed against the predecessor State”.

*Paragraph (5), as amended, was adopted.*

*Paragraph (6)*

**Mr. Jalloh** proposed that a new sentence should be inserted after the third sentence. The new sentence would read: “This is consistent with State practice.” In what was currently the fourth sentence, the words “can be mentioned” should be replaced with the words “is a good example”. In the fifth sentence, the words “from South Africa” should be inserted after the words “independence of Namibia”.

**Mr. Murphy** said that the case of Namibia and its right to claim reparation upon its independence from South Africa was not a good example. Paragraph (6) addressed situations of succession in which the successor State rather than the predecessor State was entitled to pursue a claim relating to an injury caused by a third State before the date of succession. The example of Namibia, however, involved a former colonial entity’s entitlement to bring claims against the former colonial Power. That was a totally different scenario. He therefore proposed that the final three sentences, including the reference to Namibia, should be deleted.

**Mr. Jalloh** said that the case of Namibia was relevant, since paragraph (6) dealt with the question of “particular circumstances”. However, he did not hold a strong opinion in that regard and was open to withdrawing his proposed amendment to the fourth sentence.

**Mr. Rajput** said that, while he was sympathetic to Mr. Jalloh’s view, he agreed with Mr. Murphy insofar as the case of Namibia was not a situation that involved three parties. He proposed that the final three sentences should be deleted and that, in the place of the current footnote 7, a new footnote should be inserted that reproduced the contents of paragraph 35 and footnote 40 of the Special Rapporteur’s fifth report on succession of States in respect of State responsibility (A/CN.4/751), which referred to the case of the secession of Pakistan from India with regard to the 1946 Agreement on Reparation from Germany.

**Mr. Forteau** said that, hypothetically speaking, both a former colonial Power and a newly independent State could invoke the responsibility of a wrongdoing State, for example, in the case of a violation *erga omnes*. He therefore proposed that the third sentence should be amended to read: “It would be odd if a newly independent State would not be entitled to invoke the responsibility of a wrongdoing State for injury affecting its territory or population before it became independent.” That language better reflected the meaning of paragraph 2 of draft guideline 12, the focus of which was on the successor State and not the predecessor State.

**Mr. Šturma** (Special Rapporteur) said that, although he agreed that the case of the secession of Pakistan from India provided a good alternative example, he was not in favour of deleting the last three sentences, as proposed by Mr. Rajput; the case of Namibia was also relevant, and the footnotes provided links to useful additional information. He agreed that some reformulation along the lines proposed by Mr. Forteau was needed.

**Sir Michael Wood** said that, as he had not read the documents referenced in the footnotes and was thus unsure of the relevance of the case of Namibia, he was in favour of replacing that example with a footnote reference, as proposed by Mr. Rajput, to the case of the secession of Pakistan from India, as all members were familiar with that case and it was known to be relevant.

**The Chair** said there appeared to be a consensus that the last three sentences of paragraph (6) should be deleted and that a footnote referring to the case of the secession of Pakistan from India should be added at the end of the new final sentence, which would be amended as proposed by Mr. Forteau.

*Paragraph (6), as amended, was adopted.*

*Paragraphs (7) and (8)*

*Paragraphs (7) and (8) were adopted.*

*Commentary to draft guideline 14 (Dissolution of a State)*

*Paragraph (1)*

**Mr. Murphy** proposed that, in the interests of clarity, the words "in circumstances where the predecessor State was injured prior to the date of succession, but does not continue to exist after that date" should be added at the end of the first sentence.

**Mr. Forteau** pointed out that the second sentence of the paragraph referred to Part Two of the draft guidelines and that, to his knowledge, the guidelines had not yet been divided up into parts. All such references should therefore be removed.

*Paragraph (1), as amended, was adopted.*

*Paragraph (2)*

**Mr. Murphy** proposed that, in the second sentence, the words "pursuing an" should be added before "agreement".

*Paragraph (2) was adopted with that change.*

*Paragraph (3)*

**Mr. Murphy** proposed that, in the second sentence, the word "necessarily" should be inserted between "not" and "all".

**Sir Michael Wood** said that the proposed addition would be better placed between "will" and "be" so that the phrase read "not all successor States will necessarily be entitled".

*Paragraph (3), as amended, was adopted.*

*Paragraph (4)*

*Paragraph (4) was adopted.*

*Paragraph (5)*

**Mr. Murphy**, noting that the Special Rapporteur had previously moved the second sentence to the commentary to draft guideline 11, proposed that the sentence in question should be replaced with a shortened version that read: "The use of the word 'relevant' is for the same reason as indicated in paragraph (5) of the commentary to draft guideline 11." In addition, in the fourth sentence, the word "and" should be replaced with a semicolon, followed by the word "it", so that the phrase read "its analogue in draft guideline 11; it provides".

**Sir Michael Wood** said that the meaning of the word "analogue" was unclear. He wondered whether it could be replaced with a more specific term.

**Mr. Šturma** (Special Rapporteur) suggested the word "counterpart" as an alternative.

**Sir Michael Wood** said that it would be better to specify precisely which sentence the word "analogue" referred to.

**The Chair**, speaking as a member of the Commission, proposed that "analogue" should be replaced with "final sentence".

*Paragraph (5), as amended, was adopted.*

*Paragraph (6)*

**Mr. Park**, noting that paragraph (6) recounted the drafting history of draft guideline 14, said that such a description was unnecessary and the paragraph should be deleted.

*Paragraph (6) was deleted.*

*Commentary to draft guideline 15 (Diplomatic protection)*

*Paragraphs (1) to (3)*

*Paragraphs (1) to (3) were adopted.*

*Paragraph (4)*

**Mr. Murphy** proposed that, in the second sentence, the word "issue" should be inserted after "this".

*Paragraph (4), as amended, was adopted.*

*Paragraph (5)*

**Mr. Murphy** said that, in the second sentence, for clarification, the words "in article 5 of the articles on diplomatic protection" should be inserted after "second condition".

**Mr. Ouazzani Chahdi** said that, in the second part of the first sentence, the word "typically" should be replaced with "in fact" [*précisément*].

**Sir Michael Wood** said that, even with the addition proposed by Mr. Murphy, the language used in the second sentence was somewhat odd. Was the Commission commenting on a decision taken some two decades previously or making a statement that was relevant to the current topic? If the sentence was considered necessary, its opening should be adjusted to read "The second condition in article 5 of the articles on diplomatic protection limits exceptions".

**Mr. Murphy** pointed out that, in paragraph (4) of the commentary to draft guideline 15, the Commission commented extensively on its prior work on the articles on diplomatic protection, specifically citing the commentary to article 5 of those articles, which described the conditions in question. Since paragraph (5) picked up on those comments, he believed the current language was clear.

**The Chair** noted that there were thus two options for paragraph (5): either the simpler option proposed by Sir Michael Wood or the longer alternative proposed by Mr. Murphy, which retained the original structure but with a small addition.

**Mr. Šturma** (Special Rapporteur), noting that the substance was the same in either case, said that he tended to favour the simpler solution proposed by Sir Michael Wood.

*Paragraph (5), as amended by Sir Michael Wood, was adopted.*

*Commentary to draft guideline 15* bis *(Cessation and non-repetition)*

*Paragraph (1)*

*Paragraph (1) was adopted.*

*Paragraph (2)*

**Mr. Murphy** said that the second sentence would be improved by the insertion of the words "the obligation breached" at the end.

*Paragraph (2), as amended, was adopted.*

*Paragraph (3)*

*Paragraph (3) was adopted with minor editorial corrections.*

*Paragraph (4)*

**Mr. Jalloh** said that, in the first sentence, the reference to "article 30" was potentially confusing; the specification "of the 2001 articles on responsibility of States for internationally wrongful acts" should be added at the end of the sentence.

*Paragraph (4) was adopted with that addition.*

*Paragraph (5)*

*Paragraph (5) was adopted.*

*Paragraph (6)*

**Mr. Forteau** said that the word "Otherwise" at the start of the last sentence was ambiguous and should be replaced with "In addition".

*Paragraph (6), as amended, was adopted.*

**The Chair** invited the Commission to resume its consideration of paragraph (3) of the commentary to draft guideline 6.

**Mr. Šturma** (Special Rapporteur) said that, as a compromise, he proposed that the paragraph should be redrafted to read: "While the term 'attribution' in this draft guideline comes from the concept of attribution of conduct addressed in article 2, subparagraph (a), and in chapter II of the articles on responsibility of States for internationally wrongful acts, it does not refer to the term 'attribution of conduct' as such. Instead, the Commission opted for the formulation 'attribution … of an internationally wrongful act' to emphasize that, in the context of succession of States, an internationally wrongful act as a whole remains attributable to the State that committed that act before the date of succession."

**Mr. Rajput** said that the explanation provided in the proposed new second sentence satisfied his concerns but that he was still not comfortable with the expansion of the scope of the term "attribution" implicit in the first sentence.

**Mr. Jalloh** said that the proposed new text represented a good compromise. The Special Rapporteur had clearly explained the meaning of the term "attribution" in the context of responsibility and in the light of the concerns raised by members.

**Mr. Forteau** said that he was still uncomfortable with the expression "does not refer to" in the first sentence. That language could be erroneously taken to imply that the term "attribution" should be understood within the meaning of a regime or rule of attribution other than that established in the articles on State responsibility. The text should be further simplified to remove that implication.

**Mr. Šturma** (Special Rapporteur) said that the paragraph did not concern differing concepts of attribution. Its purpose was simply to explain the choice of language used in the draft guideline and, more specifically, why the Commission had opted to use the formulation "attribution … of an internationally wrongful act" instead of "attribution of conduct". He wondered whether simplifying the end of the first sentence to read "it does not refer to 'conduct' as such" would allay the concerns raised.

**The Chair** suggested that the adoption of paragraph (3) should be postponed and that a copy of the reformulated text should be circulated to members.

*It was so decided.*

*Chapter VIII. General principles of law* (*continued*) (A/CN.4/L.964, A/CN.4/L.964/Add.1 and A/CN.4/L.964/Add.2)

**The Chair** invited the Commission to resume its consideration of chapter VIII of its draft report, beginning with the portion of the chapter contained in document A/CN.4/L.964.

*A. Introduction*

*Paragraphs 1 to 4*

*Paragraphs 1 to 4 were adopted.*

*B. Consideration of the topic at the present session*

*Paragraphs 5 to 7*

*Paragraphs 5 to 7 were adopted.*

*Paragraph 8*

**Mr. Vázquez-Bermúdez** (Special Rapporteur) said that, in the first sentence, the words "draft conclusions" should be replaced with "the consolidated text of draft conclusions 1 to 11" and that a footnote containing the consolidated text should be added at the end. The second sentence should be updated to state that the Commission had provisionally adopted draft conclusions 3, 6, 7, 8, 9, 10 and 11. The rest of the missing information would be inserted by the secretariat in due course.

*Paragraph 8, as amended, was adopted on that understanding.*

*1. Introduction by the Special Rapporteur of the third report*

*Paragraphs 9 to 15*

*Paragraphs 9 to 15 were adopted.*

*2. Summary of the debate*

*(a) General comments*

*Paragraphs 16 to 21*

*Paragraphs 16 to 21 were adopted.*

*(b) Draft conclusion 6*

*Paragraph 22*

*Paragraph 22 was adopted with a minor drafting change.*

*Paragraphs 23 and 24*

*Paragraphs 23 and 24 were adopted.*

*(c) Draft conclusion 7*

*Paragraphs 25 to 29*

**Mr. Forteau** said that it was not the Commission's usual practice to summarize the debate in the sections of its annual report that contained draft texts with commentaries and that paragraphs 25 to 29 should therefore be deleted.

**Mr. Vázquez-Bermúdez** (Special Rapporteur), supported by **Mr. Jalloh**, **Mr. Saboia** and **Mr. Ruda Santolaria**, said that, while that was indeed the usual practice, exceptions were sometimes called for and examples of departures from practice could be found in previous reports. In the case at hand, it would be very useful for States parties to have an overview of all the different points that had been raised in the debate.

**Mr. Forteau** said that he would be interested in seeing examples of such departures from practice. He was concerned that the inclusion of a summary of the debate would set a dangerous precedent that might cause problems for the Commission's work on future topics. The correct place for explanations of any differences of opinion was in the commentaries to

the draft conclusions; summarizing those differences in a separate text amounted to a duplication of effort that could be confusing for States.

**The Chair**, speaking as a member of the Commission, said that, while he was sympathetic to the views of those who wished to retain the summary, from an institutional perspective he shared Mr. Forteau's concerns. Furthermore, the argument that including a summary of the debate made it possible to share useful information with States that might otherwise be excluded applied equally to other draft conclusions.

**Sir Michael Wood**, expressing support for Mr. Forteau's argument, proposed that paragraph 25 should be retained and that a reference to the relevant summary record and the relevant commentary should be added for those readers who wished to learn more about the specifics of the debate. Paragraphs 26 to 29 could then be deleted.

**Mr. Vázquez-Bermúdez** (Special Rapporteur) said that he would accept the decision of the Commission but, in his view, either section 2 (c) should be retained in full or the entire section should be deleted.

**Mr. Jalloh** said that, while he fully agreed that past practice and the institutional perspective as well as the nature of the topic should be taken into account, the Commission should err on the side of transparency. The question of whether such a summary of the debate should be included was an issue that should be addressed in future discussions on the Commission's methods of work. In the case at hand, he thought it would be useful, in view of the brevity of the commentary to draft conclusion 7, to provide the Sixth Committee with an explanation of how the Commission had arrived at its decisions. Much of the content of paragraphs 26 to 29 could easily be transposed into that commentary, as advocated by Mr. Forteau. In view of the importance of draft conclusion 7, it was essential that the essence of the debate should be adequately captured, whichever solution was ultimately adopted, in order to prevent any misunderstanding when the topic was presented in the Sixth Committee.

**Mr. Rajput** pointed out, as an example of a previous departure from practice, that the Commission had included a summary of the debate in chapter VII, on immunity of State officials from foreign criminal jurisdiction, of its report on the work of its sixty-ninth session (A/72/10).

**Mr. Park** proposed that, in paragraph 25, the text included in parentheses should be adjusted to read "identification of general principles of law that may be formed within the international legal system".

**Ms. Galvão Teles** said that, while she understood Mr. Forteau's point, it would be too difficult at that stage to transpose the summary of the debate into the commentary. She was therefore in favour of Sir Michael Wood's proposal that a footnote referring readers to the relevant summary record and commentary should be added to paragraph 25 and that paragraphs 26 to 29 should be deleted.

**Mr. Ouazzani Chahdi** said that he, too, supported Sir Michael Wood's proposal. He also supported Mr. Park's proposed amendment to paragraph 25.

**Mr. Forteau** said that it would be difficult to adjust paragraph 25 as proposed, since it referred to what had been said during the plenary debate, not during the subsequent discussion in the Drafting Committee. He was also opposed to the addition of a footnote; if such a footnote was included in paragraph 25, would a corresponding footnote be included in paragraph 30, on draft conclusions 10 and 12, and in paragraph 36, on draft conclusions 13 and 14, as well? If the Commission decided that the summary of the debate should be retained, it should be retained in full, even though he was strongly opposed to that overall approach. He wished to reiterate that the root of the problem was that the commentary to draft conclusion 7 was far too short; a more exhaustive commentary would have eliminated the need for a summary of the debate and the current disagreement would not have arisen.

**Mr. Vázquez-Bermúdez** (Special Rapporteur), responding to a question from **the Chair**, said that, in view of the problems to which the inclusion of a summary of the debate might give rise in the future, he would be prepared to accept the solution proposed by Sir Michael Wood if the Commission wished to proceed in that manner.

**Mr. Murphy** said that, since the section of the report that contained the summary of the debate actually began at paragraph 16, excising the discussion recounted in paragraphs 26 to 29 would result in a misrepresentation. It was therefore important to add the proposed footnote to paragraph 25.

**Mr. Jalloh** said that he shared Mr. Forteau's concern regarding the brevity of the commentary to draft conclusion 7. In view of Mr. Rajput's example of a previous departure from practice and the importance of accurately reflecting the debate, the full text proposed by the Special Rapporteur should be retained, subject to any drafting adjustments that might be required, and the issues that had arisen should be addressed in a separate future discussion about the Commission's methods of work.

**Mr. Forteau** said that, in the past, when the Commission had held a plenary debate and had adopted the corresponding texts and commentaries during the same session, it had never included a summary of the debate in its report on the work of that session. If the Commission departed from that practice and included both a summary of the debate and the commentary in its report, it would have to do so systematically in future for all draft outputs adopted at every session.

**The Chair** said that he tended to agree with Mr. Forteau, recalling that, in the example cited by Mr. Rajput, the debate had not been concluded during the session and it was for that reason that a summary had been included in the annual report.

**Mr. Šturma** said he too recalled that there had been very specific reasons for that departure from practice. The best way forward in the current situation would be for the Special Rapporteur to develop the commentary further. However, if that was not possible, the divergent views expressed in the debate, which had been particularly rich, should be incorporated in some way in the text under consideration.

**Mr. Ouazzani Chahdi** said it would be useful if the secretariat could provide other examples of occasions on which the Commission had departed from past practice in that regard.

*The meeting rose at 1 p.m.*