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International Law Commission

Seventy-second session (second part)

Provisional summary record of the 3559th meeting

Held at the Palais des Nations, Geneva, on Wednesday, 4 August 2021, at 10.30 a.m.

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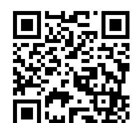

Present:

Chair:	Mr. Hmoud
Members:	Mr. Argüello Gómez
	Mr. Aurescu
	Mr. Cissé
	Ms. Escobar Hernández
	Mr. Forteau
	Ms. Galvão Teles
	Mr. Gómez-Robledo
	Mr. Grossman Guiloff
	Mr. Hassouna
	Mr. Jalloh
	Mr. Laraba
	Ms. Lehto
	Mr. Murase
	Mr. Murphy
	Mr. Nguyen
	Ms. Oral
	Mr. Ouazzani Chahdi
	Mr. Park
	Mr. Petrič
	Mr. Rajput
	Mr. Ruda Santolaria
	Mr. Saboia
	Mr. Šturma
	Mr. Tladi
	Mr. Vázquez-Bermúdez
	Sir Michael Wood
	Mr. Zagaynov

Secretariat:

Mr. Llewellyn	Secretary to the Commission

The meeting was called to order at 10.30 a.m.

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

Chapter VI. Immunity of State officials from foreign criminal jurisdiction (*continued*) (A/CN.4/L.946, A/CN.4/L.946/Add.1 and A/CN.4/L.946/Add.2)

The Chair invited the Commission to resume its consideration of the portion of chapter VI of its draft report that was contained in document A/CN.4/L.946/Add.1.

Commentary to draft article 8 ante *(Application of Part Four)* (*continued*)

Paragraph (7)

Paragraph (7) was adopted.

Paragraph (8)

Mr. Rajput said that paragraph (8) was important in that it provided a description of how the term "criminal proceeding" should be understood. However, it was not clear from the paragraph, as currently drafted, precisely which stages of a criminal proceeding were encompassed by the draft articles, owing to the vague language used in the second sentence, which stated simply that the term "criminal proceeding" covered "different types of acts that may be performed in order to determine any criminal responsibility of a State official". In its discussions, the Drafting Committee had always been clear that questions of immunity arose early in proceedings and that it was not necessary to await the indictment stage, although, in reality, decisions on the existence of criminal responsibility were generally taken at a later stage of criminal proceedings, after the indictment. He therefore wished to propose an alternative formulation for the second sentence in which the text beginning from "types of acts" was replaced with the words "steps that may be taken by the forum State in furtherance of the exercise of its criminal jurisdiction". If that text was adopted, for consistency and clarity, a small adjustment would also be needed in the third sentence, where the words "nature of such acts" should be replaced with the words "these steps".

Ms. Escobar Hernández (Special Rapporteur), noting that the need to review the use of the term "criminal proceeding" was expressly recognized in the last two sentences of paragraph (8) and that the term "exercise of criminal jurisdiction" was used subsequently in the commentary to draft article 8, said that she would be happy to adopt Mr. Rajput's suggestion.

Mr. Jalloh said he agreed that Mr. Rajput's suggestion would make the paragraph clearer. However, recalling the discussion on the meaning of "criminal proceeding" that had taken place in the Drafting Committee, he noted also that the aim had been to keep the scope of paragraph (8) as non-specific as possible. Furthermore, as the different stages of proceedings encompassed by the draft articles were specifically addressed in paragraphs (10), (11) and (12) of the commentary to draft article 8, there was no need to be more specific in the paragraph under consideration. In addition, the "exercise of criminal jurisdiction" was a different concept from that of a "criminal proceeding".

Mr. Rajput said he had formulated the language that he was proposing precisely with a view to keeping the scope of paragraph (8) as broad as possible. The text he had proposed actually referred to steps taken "in furtherance" of the exercise of a State's criminal jurisdiction, not simply to the exercise of jurisdiction, and that addition served to broaden the paragraph's scope.

Mr. Jalloh said that he did not agree with the interpretation put forward by Mr. Rajput but, owing to time constraints and given that Mr. Rajput's suggestion appeared to have the support of a majority of members, he would withdraw his objection.

Paragraph (8), as amended, was adopted.

Paragraph (9)

Mr. Park said that the mentions of paragraphs 1 and 3 of draft article 4 and of paragraphs 2 and 3 of draft article 6 contained in the penultimate sentence of paragraph (9) should be deleted, so that the text referred simply to "draft article 4" and "draft article 6", because, depending on the context, the words "current" and "former" might also be interpreted in the light of other provisions of those draft articles,

Ms. Escobar Hernández (Special Rapporteur) said that the references to specific paragraphs of the draft articles were justified because it was precisely those paragraphs that dealt with the temporal scope of, respectively, immunity *ratione personae* and immunity *ratione materiae*. Furthermore, none of the other paragraphs of the draft articles in question mentioned those elements. That said, the paragraph references were not essential and she was not opposed to their deletion.

Paragraph (9), as amended, was adopted.

Paragraph (10)

The Chair said he took it that the Commission wished to leave paragraph (10) in abeyance until the new text proposed for paragraphs (1), (2) and (3) had been circulated.

It was so decided.

Commentary to draft article 8 (Examination of immunity by the forum State)

Paragraph (1)

Paragraph (1) was adopted with a minor drafting change.

Paragraph (2)

Mr. Park said that he had some concerns about the terms "general rule" and "special rule" mentioned in the first sentence. He could accept the former but he found the latter awkward. Noting that the introductory statement by the Chair of the Drafting Committee referred to "particular situations", he proposed that that formulation should be adopted to replace the term "special rule". If his proposal was accepted, the same amendment should be made to all subsequent iterations of "special rule" in the commentary.

Ms. Escobar Hernández (Special Rapporteur) said that she did not agree with that proposal because the understanding reached in the Drafting Committee was that there were two distinct rules: a general rule that was always applicable and a special rule that was applicable in specific situations. Furthermore, it would be meaningless to juxtapose the term "general rule" with the words "particular situation". Mr. Park's concern could perhaps be addressed by adding a phrase to the end of the first sentence, so that it would read "a general rule (para. 1) and a special rule (para. 2) that would be applicable to particular situations".

Paragraph (2), as amended by the Special Rapporteur, was adopted.

Paragraph (3)

Paragraph (3) was adopted.

Paragraph (4)

Mr. Forteau said that the word "presence" created ambiguity as it gave the impression that the foreign official must always be present in the foreign State's territory. He proposed the French term "*mise en cause*", which might be rendered as "questioning" in the English text, as a more suitable alternative.

Ms. Escobar Hernández (Special Rapporteur) said she agreed that the word "presence" might be misinterpreted but she was not convinced of the suitability of the term "*mise en cause*", which could also refer to an accusation or challenge in English, because it implied an assessment of the culpability of the foreign official. She suggested the term "identification", which was neutral and carried no such implications.

Sir Michael Wood said that the first sentence was perhaps unnecessary and could be deleted in its entirety, since it was obvious from the draft article that the foreign official would need to be present or at least identified. If, however, the Commission thought it necessary to retain the sentence, an alternative solution might be to begin the sentence with the words "The involvement of a foreign official is the essential requirement".

Mr. Murphy said that the problem lay in specifying exactly what triggered the obligation to examine the question of immunity. The draft article indicated that the trigger was the knowledge that "an official of another State may be affected by the exercise of its criminal jurisdiction", and it was not easy to encapsulate that requirement in a single term. Accordingly, the best solution was probably to delete the sentence, as Sir Michael Wood had suggested, and to attach the rest of the paragraph to the preceding one. The extended paragraph (3) would then begin by setting out the general rule, which included the "trigger", and would continue by explaining the terms used to define that rule.

Ms. Escobar Hernández (Special Rapporteur) said that she was opposed to the merger of paragraphs (3) and (4). Paragraph (3) defined the scope of the obligation while paragraph (4) addressed a specific issue, namely, the whole concept of what constituted a "foreign official". However, she could accept the deletion of the first sentence, which was essentially introductory.

Paragraph (4) was adopted with that amendment.

Paragraph (5)

Mr. Zagaynov said that he perceived a contradiction in the last two sentences of the paragraph. His understanding was that the acts referred to in the last sentence were the same as those referred to in the penultimate sentence but, as currently formulated, the text implied otherwise. To address that concern, he proposed that the first part of the last sentence should be deleted and the last part should be attached to the previous sentence, creating a new last sentence that read: "These acts may be of different types and are not limited to judicial acts and may include governmental, police, investigative and prosecutorial acts."

Sir Michael Wood said that he supported that suggestion. Noting that the preceding sentence contained the expression "an individual or group of individuals", he suggested that, since it would be unusual to find a group of persons criminally responsible, the sentence should be shortened so that it ended after the words "an individual".

Ms. Escobar Hernández (Special Rapporteur) said that the reference to a "group of individuals" had been included to accommodate the possibility that, at the initial stage of the exercise of criminal jurisdiction, when investigations were being carried out, several individuals might be implicated. However, a more elegant solution might be to replace the reference to "an individual or group of individuals" with the words "one or several individuals".

Paragraph (5), as amended, was adopted.

Paragraph (6)

Mr. Ouazzani Chahdi said that the first sentence of the paragraph in the French text was ambiguous and should be reviewed.

The Chair invited Mr. Ouazzani Chahdi to submit his proposed amendments to the French text of paragraph (6) to the secretariat.

Mr. Murphy, noting that the last clause of the second sentence, beginning with "in other words", contained an interpretation of what was meant by the words "may be affected" in the context of draft article 8, said that the clause seemed to be associating those words with a "direct impact on the official". He wondered whether that was the intention, given that any indirect impact on the official would also be covered by the draft article. He suggested that the clause in question should be deleted, as it appeared to set a higher standard than was actually set forth in the draft article itself.

The Chair, speaking as a member of the Commission, suggested that, as a simpler alternative, the word "direct" could be deleted.

Mr. Zagaynov said that, while he did not wish to obstruct the adoption of the paragraph, he too had some concerns about the interpretation of the word “affected” and believed that the issue should be examined more closely in the light of judicial practice and, more specifically, the judgments of the International Court of Justice in the case concerning the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* and in *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*. He had not been able to discuss that topic with the Special Rapporteur and would like to have an opportunity to do so. He suggested that the Commission should postpone the adoption of the paragraph pending further discussion of that issue.

The Chair said he took that the Commission wished to leave paragraph (6) in abeyance and to discuss the matter in more detail at the next meeting.

It was so decided.

Paragraph (7)

Mr. Forteau said that the language of the second sentence did not correspond to the jurisprudence cited in the footnote attached to that sentence. The text stated that the question of immunity should be examined “at an early stage” – “*dans les plus brefs délais*” in the French version – whereas the advisory opinion of the International Criminal Court cited in the footnote stated that questions of immunity should be decided “expeditiously”, or “*dans les meilleurs délais*”. The second sentence should therefore be amended to incorporate the language used in the jurisprudence. The language used in the penultimate sentence should also be aligned with the jurisprudence. That sentence stated that the question of immunity should be examined “immediately” but no requirement for an immediate examination was established in the relevant jurisprudence. He therefore proposed the deletion of the second part of that sentence, beginning with the word “immediately”. The last sentence should then be shortened to read: “The question of immunity should be examined ‘without delay’, a phrase already used – albeit in a different context – in articles 36 and 37 of the Vienna Convention on Consular Relations.”

Mr. Rajput said that he did not agree with the proposal put forward by Mr. Forteau. Footnote 6 was correct; the International Court of Justice had stated that the question of immunity should be considered *in limine litis*. In the Drafting Committee, he himself had proposed that the words *in limine litis* should be used. Sir Michael Wood had then pointed out that the question should be examined even earlier than *in limine litis*. The words “examined immediately” had been included in the fourth sentence to convey that idea. The outcome of the discussions held in the Drafting Committee was accurately reflected in the text. The fourth sentence did not refer to any jurisprudence of the International Court of Justice.

Mr. Forteau said that, to his mind, if the Commission wished to retain the reference to the immediate examination of the question of immunity in the fourth sentence, it would need to remove the reference to the jurisprudence of the International Court of Justice in footnote 6, as the wording used in the paragraph did not match that used in the Court’s advisory opinion.

Mr. Murphy said that, to address the issue raised by Mr. Forteau, the Commission might consider ending the sentence after the marker for footnote 7 and beginning a new sentence with the words “The phrase is intended to emphasize”.

The Chair suggested suspending consideration of paragraph (7) to allow the Special Rapporteur to review the paragraph in the light of members’ comments.

It was so decided.

Paragraph (8)

Paragraph (8) was adopted.

Paragraph (9)

Mr. Murphy proposed replacing, in the second sentence, the words "acts that would always have a direct effect on the official of another State" with "acts that would always affect the official of another State", and "could have a negative impact on any immunity" with "could violate any immunity".

Paragraph (9), as amended, was adopted.

Paragraph (10)

Paragraph (10) was adopted.

Paragraph (11)

Mr. Murphy said that he wished to propose inserting, in the first sentence of the paragraph, a comma after "refers to acts of the competent authorities of the forum State that are directed at the official", followed by the words "that place a legal obligation on the official", in order to cover measures such as a subpoena to testify. Since, in the final sentence, the term "coercive measures" did not appear anywhere in *Arrest Warrant of 11 April 2000*, he wished to propose replacing the words "chosen in order to follow the terminology already used by the International Court of Justice" with "inspired by the reasoning of the International Court of Justice" and replacing the citation "*Arrest Warrant of 11 April 2000*" with "*Certain questions of mutual assistance in criminal matters*". Footnote 8 should make specific reference to paragraph 170 of the judgment in that case, which referred to a "constraining act of authority".

Sir Michael Wood said that it was unclear to him whether the new language "that place a legal obligation on the official", as proposed by Mr. Murphy, was meant to qualify and limit the preceding words or whether it was in fact an alternative to the preceding words.

The Chair suggested that consideration of paragraph (11) should be suspended to allow the Special Rapporteur to verify the details of the proposal made by Mr. Murphy.

It was so decided.

Paragraphs (12) and (13)

Paragraphs (12) and (13) were adopted.

Paragraph (14)

Mr. Murphy proposed ending the final sentence of the paragraph after "enjoys inviolability", as the clause "since the above-mentioned international treaties only recognize the inviolability of diplomatic agents and other State officials who enjoy immunity *ratione personae*" was inaccurate. For example, neither the Vienna Convention on Diplomatic Relations nor the Vienna Convention on Consular Relations dealt exclusively with immunity *ratione personae.*

Ms. Escobar Hernández (Special Rapporteur) said that Mr. Murphy's proposal appeared to be based on a misunderstanding: the final sentence was not saying that the treaties cited only dealt with immunity *ratione personae*, but that, in those instruments, only the inviolability of diplomatic agents and other State officials who enjoyed immunity *ratione personae* was recognized. In other words, the inviolability of persons who only enjoyed immunity *ratione materiae* was not recognized in those instruments. As the text of the paragraph had been debated at length in the Drafting Committee, she was unable to support the deletion of that clause, which she held to be accurate.

Sir Michael Wood said that he found that part of the sentence to be plainly wrong. For example, article 38 of the Vienna Convention on Diplomatic Relations provided that a diplomatic agent who was a national of the host State enjoyed only immunity from jurisdiction, and inviolability, in respect of official acts performed in the exercise of his or her functions. He supported the proposal made by Mr. Murphy.

Ms. Lehto said that she supported ending the sentence after “enjoys inviolability” and proposed adding a new sentence to read: “Notably, the above-mentioned international treaties only recognize the inviolability of diplomatic agents.” If necessary, the words “on certain conditions and other State officials who enjoy immunity *ratione personae*” could be added to the new sentence.

Ms. Escobar Hernández (Special Rapporteur) said she wished to recall that, in paragraph (14), reference was being made to the specific international treaties mentioned in paragraph (13) and in footnotes 12 and 13. By way of compromise, she proposed ending the sentence after “enjoys inviolability”, as proposed by Mr. Murphy, and beginning a new sentence to read: “Thus, the above-mentioned international treaties establish different regimes of inviolability according to the type of official” [*Así los tratados internacionales antes mencionados establecen diferentes regímenes de inviolabilidad en virtud del tipo de funcionario*].

Sir Michael Wood said that he wondered whether the simplest solution might not be to end paragraph (14) after the words “enjoys inviolability”, as there was no real need to explain why the first half of the sentence was correct.

Ms. Escobar Hernández (Special Rapporteur) said that, as there was great insistence on deleting the second half of the final sentence, in the interests of time, she was willing to go along with that proposal, although she did not fully understand the reasoning behind it.

Paragraph (14), as amended by Mr. Murphy, was adopted.

Commentary to draft article 9 (Notification of the State of the official)

Paragraph (1)

Mr. Park proposed deleting the word “other” from “that other State’s officials” at the end of the paragraph.

Ms. Escobar Hernández (Special Rapporteur) said that the change proposed by Mr. Park only affected the English version of the text.

Paragraph (1) was adopted with that amendment to the English text.

Paragraph (2)

Mr. Park proposed replacing, in the last sentence, the words “third State” with “another State” to avoid confusion.

Paragraph (2), as amended, was adopted.

Paragraph (3)

Mr. Murphy said he found the second sentence of the paragraph, “This is explained by the fact that this Convention is the only treaty in this category that considers immunity from jurisdiction on the basis of immunity *ratione materiae*”, to be superfluous and incorrect for reasons similar to those advanced in connection with paragraph (14) of the commentary to draft article 8. He wished to propose deleting that sentence in its entirety.

Mr. Forteau said that he supported the proposal put forward by Mr. Murphy, as he found the sentence to be very speculative.

Ms. Escobar Hernández (Special Rapporteur) said that, before commenting on the proposed deletion, she would like to hear why Mr. Murphy found the sentence to be superfluous and incorrect and why Mr. Forteau considered it to be speculative.

Mr. Murphy said that, for example, article 38 (1) of the Vienna Convention on Diplomatic Relations mentioned how diplomatic agents who were nationals of the receiving State did not enjoy immunity *ratione personae* but rather what could be regarded as immunity *ratione materiae*. The purpose of any inquiry launched into an act carried out by such agents would be to establish whether the act in question had been performed as part of their official functions. For that reason, it struck him as incorrect to say that the Vienna Convention on

Consular Relations was the only treaty that considered immunity from jurisdiction on the basis of immunity *ratione materiae*.

Ms. Escobar Hernández (Special Rapporteur) said that the problem perhaps related to how the sentence had been formulated. She was not saying that only the Vienna Convention on Consular Relations addressed the issue of immunity from jurisdiction on the basis of immunity *ratione materiae*. She was fully aware that the Vienna Convention on Diplomatic Relations, the Convention on Special Missions and the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character all also dealt with that issue. However, the Vienna Convention on Consular Relations was different in that it did not consider immunity from jurisdiction on the basis of immunity *ratione personae*. In other words, it established immunity from jurisdiction on the basis of immunity *ratione materiae*. It could also be said that it considered immunity from jurisdiction only on the basis of immunity *ratione materiae*. The last part of the sentence could therefore be amended to read "considers immunity from jurisdiction only on the basis of immunity *ratione materiae*" [*contempla la inmunidad de jurisdicción exclusivamente desde un enfoque básico de inmunidad* ratione materiae].

Mr. Šturma proposed replacing the word "only" in "only on the basis of immunity *ratione materiae*" with "exclusively".

Mr. Petrič said that, while he was grateful to the Special Rapporteur for her useful explanation, he too found the sentence to be superfluous and to contribute little to the better understanding of the problem. He supported deleting the sentence, as, in some places, the commentaries to the draft articles were already quite complicated on account of the difficulty of the topic. To his mind, the commentary should be kept as simple as possible as a courtesy to the future users of the draft articles.

Mr. Forteau said that he found the sentence to be speculative because, in his view, before stating that the Vienna Convention on Consular Relations was the only treaty in that category that considered immunity from jurisdiction on the basis of immunity *ratione materiae*, the Commission would need to check all other treaties, bilateral agreements, status-of-forces agreements and regional multilateral agreements to confirm that that was indeed the case. He agreed that the sentence added little value to the commentary.

Mr. Murphy said that he did not understand the purpose or the intended meaning of the sentence and was thus unsure as to whether it was correct. Although there were numerous treaties that allowed for immunity *ratione materiae*, they did not contain notification provisions. He wondered whether the Commission was trying to say that the obligation for the forum State to notify the State of the official of its intention to exercise criminal jurisdiction over that official applied if the treaty concerned only provided for immunity *ratione materiae* and that that obligation did not apply if the treaty provided for both immunity *ratione personae* and immunity *ratione materiae*. He would welcome clarification on that point.

Ms. Escobar Hernández (Special Rapporteur) said that she found Mr. Forteau's assertion that, to be able to include the sentence in question, it would be necessary to analyse, one-by-one, all the treaties that might refer to immunity difficult to understand, since the argument contained in the sentence was based on treaties that the Commission had been analysing systematically over the years in connection with the topics on its agenda. The sentence was not referring to treaties that had never been analysed before. However, she agreed with Mr. Petrič that the sentence did not perhaps add much value and might cause confusion. She could accept its deletion on the understanding that she continued to maintain that the information contained in it was correct.

Sir Michael Wood said that the Special Rapporteur might also consider deleting the third sentence of the paragraph, "Therefore, since the exercise of criminal jurisdiction is possible in certain circumstances, it establishes the obligation of notification as a safeguard for immunity", since it followed on from the second sentence.

The Chair said he took it that the Commission wished to adopt paragraph (3) of the commentary to draft article 9, as amended by Mr. Murphy and Sir Michael Wood.

Paragraph (3), as amended, was adopted.

Paragraph (4)

Mr. Murphy, supported by **Mr. Zagaynov**, said it had been his understanding that the Commission regarded the draft article on examination, not the draft article on notification, as the first of the procedural safeguards set out in Part Four of the draft articles. He therefore wished to propose replacing, in the third sentence, the words "the first" with "one" so that the text would read: "The Commission therefore regards notification as one of the procedural safeguards set out in Part Four of the draft articles."

Mr. Rajput said that he wished to propose deleting, in the final sentence, the words "Although notification may be closely related to the holding of consultations between the forum State and the State of the official", because notification was not necessarily associated with consultation all the time. In the new sentence, which would begin "The concepts of 'notification' and 'consultation' should not be confused", the word "confused" should be replaced with "conflated", which was more accurate.

Paragraph (4), as amended, was adopted.

Paragraph (5)

Paragraph (5) was adopted.

Paragraph (6)

Mr. Forteau, supported by **Mr. Murphy**, said that, in the Drafting Committee, several members had repeatedly emphasized that draft article 9 was not in line with existing practice, since, as explained further in the commentary, it forbade the adoption of urgent measures without prior notification to the State of the official. He wished to emphasize that point in the plenary, since it had not been made in the statements by the Chair of the Drafting Committee.

Paragraph (6) was adopted.

Paragraph (7)

Paragraph (7) was adopted.

Paragraph (8)

Mr. Murphy said that the use of the word "recommendation" in the first sentence seemed inappropriate in view of the fact that the words "States shall" were used in the second sentence of draft article 9 (1). He proposed that the words "is a recommendation addressed to States" in that sentence should be replaced with "uses the word 'appropriate'".

Mr. Park, supported by **Sir Michael Wood**, said that another way of addressing Mr. Murphy's concern would be simply to delete the words "a recommendation".

Ms. Escobar Hernández (Special Rapporteur) said that she preferred Mr. Park's suggestion.

Paragraph (8), as amended, was adopted.

Paragraph (9)

Paragraph (9) was adopted.

Paragraph (10)

Mr. Forteau proposed replacing the words "interim measures" in the seventh sentence with "coercive measures".

Paragraph (10), as amended, was adopted.

Paragraphs (11) to (15)

Paragraphs (11) to (15) were adopted.

Paragraph (16)

Mr. Zagaynov said that it would be useful to add the Minsk and Chişinău Conventions on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters to the list of instruments provided in the paragraph. Both instruments had been widely applied at the regional level.

Paragraph (16), as amended, was adopted.

Paragraphs (17) to (19)

Paragraphs (17) to (19) were adopted.

Commentary to draft article 10 (Invocation of immunity)

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

Paragraph (4)

Mr. Forteau said he was not sure that the content of the third and fourth sentences was well founded. For example, did the heads of diplomatic missions necessarily have competence in respect of all foreign representatives? It seemed to him that the question of who was competent to invoke immunity was determined essentially by domestic law. He would be in favour of deleting those two sentences.

Mr. Murphy said that a comparison of the commentary to draft article 10 with the commentary to draft article 11 showed that the competence to invoke immunity was being defined much more strictly than was the competence to waive immunity. It seemed that the Commission was making it more difficult to invoke immunity than to waive it.

The paragraph under consideration seemed to suggest, strongly, that only the *troika* could invoke immunity. The fourth sentence, according to which immunity could be invoked by another person "in certain circumstances", seemed to imply that a special rule would have to be found in such circumstances. If the third and fourth sentences were to be retained, it would be preferable, for the sake of balance, to delete the words "in certain circumstances" and "in the strict sense" in the fourth sentence. Nevertheless, those deletions would not fully resolve the problem.

Ms. Escobar Hernández (Special Rapporteur) said that the fourth sentence was intended to reflect the debate that had taken place both in the Drafting Committee and in the plenary regarding the question of whether the official himself or herself could request immunity. As a compromise, she proposed that, in the third sentence, the words "and heads of diplomatic missions" should be deleted and that, in the fourth, the words "in certain circumstances" and "in the strict sense" should be deleted. The invocation of immunity by heads of diplomatic missions was addressed in sufficient detail in her eighth report. The last words of the fourth sentence, "before the courts", had been included in response to another point made in the Drafting Committee, namely, that immunity could be invoked directly by counsel hired to do so by the State of the official.

Sir Michael Wood said that he agreed with Mr. Forteau's proposal that the third and fourth sentences should be deleted. He would in fact be in favour of deleting the entire paragraph. He agreed with Mr. Petrič's earlier point that the commentaries went into far too much detail. They were not helpful. As Mr. Murphy had noted, the Commission was imposing more conditions in some parts of the commentaries than in others.

The assertion made in the second sentence was wrong: the competent authorities might in fact be determined by the courts of the forum State, which might have a view as to whether immunity had been properly waived. That very question was being considered in cases currently before the English courts. He saw no reason to retain paragraph (4), as the key point, namely, that the right to invoke immunity rested with the State of the official, was made in paragraph (3).

Mr. Saboia said that he did not support the Special Rapporteur's proposal to delete only the reference to the heads of diplomatic missions. In practice, immunity was often invoked by an ambassador, acting on instructions from his or her Government.

The Chair, speaking as a member of the Commission, said that an ambassador's competence to invoke immunity depended on his or her letter of credence and whether he or she had full authority to represent the State. However, it could be argued that the matter had become customary.

Mr. Jalloh said that the purpose of the Commission's commentaries was to explain the corresponding draft provisions. The Commission's current practice was to indicate at the beginning of the commentaries that they should be read together with the corresponding draft provisions. The commentaries under consideration were detailed because the Special Rapporteur was trying to reflect the discussions that had taken place in the Drafting Committee and in the plenary. In that regard, he did not agree that they were in any way unusual.

Regarding paragraph (4), the Special Rapporteur had already shown great flexibility in trying to address the concerns expressed by Mr. Forteau, Mr. Murphy and Sir Michael Wood. It would be regrettable if the Commission decided to delete the last two sentences. With regard to the third sentence, it was not controversial to affirm that, in certain circumstances, the officials who had the competence to invoke immunity included the Head of State, the Head of Government, the Minister for Foreign Affairs and the heads of diplomatic missions. The fourth sentence covered a scenario that had been discussed at length in the Drafting Committee, namely, the possibility that the official who had attracted the interest of the authorities might have the competence to invoke immunity.

Ms. Escobar Hernández (Special Rapporteur) said that, with regard to Sir Michael Wood's comments about the cases currently before the English courts, it should be noted that relevant practice varied significantly from State to State. She would be prepared to delete the list of competent authorities provided in the paragraph. However, the paragraph needed to make three key points: first, the primacy of the principle of State self-organization and therefore of domestic law; second, the fact that some State organs had responsibility for international relations under international law and could not be denied the competence to invoke immunity; and, third, the possibility that immunity could be invoked by a person who was not a State official but who had been specifically mandated to do so by the State in the context of criminal proceedings in a foreign State.

She proposed that the paragraph as a whole should be amended to read:

"The power to invoke immunity is attributed to the State of the official, though it has not been considered necessary to identify the authorities competent to take decisions relating to the invocation or the authorities competent to invoke immunity. Which are those authorities will depend on the domestic law and, in any case, this competence will rest with those with responsibility for international relations under international law. As the relevant treaties do not address this issue, the competent authorities for this purpose will be those determined by domestic law under the principle of State self-organization. However, this does not mean that immunity cannot be invoked by a person specifically mandated to do so by the State, especially in the context of criminal proceedings." [*La potestad para invocar la inmunidad se predica del Estado del funcionario, sin que se haya considerado necesario identificar las autoridades que tienen competencia para tomar las decisiones referidas a la invocación ni las autoridades que tienen competencia para invocar la inmunidad. Quienes sean estas autoridades dependerá del derecho interno del Estado y, en todo caso, dicha competencia les corresponderá a los órganos del Estado encargados de las relaciones internacionales. No obstante, ello no impide que pueda invocar la inmunidad una persona a la que el Estado otorga un mandato específico a tal fin, especialmente en el contexto de un procedimiento penal.*]

Sir Michael Wood said that he would prefer to see the text in writing before it was adopted. He did not like the phrase "the principle of State self-organization", which was not a principle that he had ever heard of before.

The Chair said he took it that the Commission wished to leave paragraph (4) in abeyance, pending the preparation of a new text in the light of the discussion.

It was so decided.

Paragraph (5)

Paragraph (5) was adopted.

Paragraph (6)

Mr. Murphy said that, in the fourth sentence, the Commission seemed to be taking a definitive view that invocation of immunity did not result in a suspension of criminal proceedings. However, it was stated in paragraph (1) of the commentary that draft article 10 did not deal with the effects of invocation. He seemed to remember that, in the Drafting Committee, it had been proposed that the matter of suspension would be addressed in a later draft article. He would therefore be in favour of deleting that sentence.

Ms. Escobar Hernández (Special Rapporteur) said that the fourth sentence dealt with a separate question, namely, the possible consequences of the invocation of immunity at a later stage. Nevertheless, to address Mr. Murphy’s concern, she was prepared to delete that sentence on the understanding that the Commission would return to the matter when it considered the determination of immunity.

Paragraph (6), as amended, was adopted on that understanding.

Paragraphs (7) and (8)

Paragraphs (7) and (8) were adopted.

Paragraph (9)

Mr. Murphy said that paragraphs (9) to (11), which concerned the form in which immunity was to be invoked, were minimalist in comparison to the corresponding paragraphs of the commentary to draft article 11, which concerned the form in which immunity was to be waived. Once again, there seemed to be an imbalance in the commentaries between invocation of immunity and waiver of immunity. For example, according to paragraph (10) of the commentary to draft article 11, nothing prevented the waiver from being formulated by means of a “*note verbale*, letter or other non-diplomatic written communication”. He hoped that, at a later stage, the Special Rapporteur would revisit the commentaries to draft articles 10 and 11 to ensure that they were better balanced.

Ms. Escobar Hernández (Special Rapporteur) said that invocation of immunity and waiver of immunity had been dealt with in different ways by the Drafting Committee. In addition, the two processes were set out in different ways in the international instruments that had been used as models. She therefore believed that the Commission should proceed with the adoption of the relevant paragraphs, bearing in mind that questions of balance could be considered in greater detail at a later stage, including in the light of the reactions of States at the second-reading stage. In any case, it was not always possible to ensure that the commentaries to different draft provisions were well balanced in terms of the number and length of their constituent paragraphs.

Sir Michael Wood said that the commentaries were intended to help users of the corresponding draft provisions. Although it was sometimes agreed in the Drafting Committee that a particular point would be made in the commentaries, the purpose of the commentaries was not to explain the process by which the Drafting Committee had produced a draft provision but to explain the draft provision that it had produced. There was no need for a good deal of the detail that could be found in the commentaries under consideration.

Paragraph (9) was adopted.

Paragraphs (10) to (12)

Paragraphs (10) to (12) were adopted.

Paragraph (13)

Mr. Rajput said that, according to the third sentence of the paragraph, draft article 10 (4) reflected the "spirit of draft article 10 (5), as proposed by the Special Rapporteur in her seventh report". Those words seemed to imply that, in order to understand draft article 10 (4), it was necessary to refer back to the Special Rapporteur's seventh report, and that subsequent developments in the Drafting Committee were irrelevant. That was certainly not the impression that the Commission wished to give. He proposed that the entire sentence should be deleted.

Mr. Forteau said that he agreed with Mr. Rajput's proposal. The implementation of that proposal would make it necessary to replace the word "provision" in the following sentence with "paragraph".

Paragraph (13), as amended, was adopted.

Commentary to draft article 11 (Waiver of immunity)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

Mr. Murphy said that footnote 42 contained a reference to only one of the provisions of the Foreign Sovereign Immunities Act of 1976 that concerned waiver of immunity. There were in fact several others. He would provide further information to the secretariat so that the necessary information could be added to the reference.

Paragraph (2) was adopted on that understanding.

Paragraph (3)

Mr. Zagaynov said that the word "any" in the first sentence seemed out of place. There could be obstacles to the exercise of jurisdiction that had nothing to do with immunity. He therefore proposed replacing the words "any obstacle" with "relevant obstacles".

Mr. Murphy said that another solution would be to replace the word "any" with "this". On a separate point, he proposed that the word "categorically" in the last sentence should be deleted, since its meaning was unclear.

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

Paragraph (4)

Paragraph (4) was adopted.

Paragraph (5)

Mr. Murphy said that the second sentence would be clearer if the phrase "in a general manner" was replaced with "in a specific manner".

Ms. Escobar Hernández (Special Rapporteur) said that, with "in a general manner", she had intended to express the idea that, in general, neither the conventions nor the national laws referred to dealt with the issue in question. However, she did not oppose Mr. Murphy's proposal to replace the phrase with "in a specific manner", which could prevent confusion.

Mr. Forteau said that the portion of paragraph (5) that included references to the principle of State self-organization and the competence to communicate waivers should be aligned with the wording of paragraph (4) of the commentary to draft article 10, which had been left in abeyance, once the Commission agreed on that wording.

Paragraph (5), as amended, was adopted on that understanding.

Paragraphs (6) and (7)

Paragraphs (6) and (7) were adopted.

Paragraph (8)

Mr. Forteau said that, as it was odd to say that a proposal had been deleted, the second sentence should instead state that the Special Rapporteur's proposal had not been accepted.

Paragraph (8), as amended, was adopted.

Paragraph (9)

Mr. Forteau said that it was unwise for the Commission to include paragraph (9) in the commentary. The paragraph fell outside the scope of the draft articles, as draft article 1 (2) excluded treaty-based rules, and seemed more relevant to draft article 7 than to draft article 11. However, as the paragraph reflected decisions reached by the Commission at sessions during which he had not been a member, he would not insist on the point.

Paragraph (9) was adopted.

Paragraphs (10) to (13)

Paragraphs (10) to (13) were adopted.

Paragraph (14)

Sir Michael Wood said that, in the last sentence, the word "intense" should be deleted. The Commission did not normally qualify its debates in such a way.

Mr. Jalloh said that, as the word "debate" seemed to require some qualifier, the word "intense" should be replaced with "some".

Paragraph (14), as amended by Mr. Jalloh, was adopted.

Paragraph (15)

Mr. Park said that paragraph (15) and the following two paragraphs should be deleted for reasons similar to those discussed by the Commission in relation to draft article 8 *ante*. Paragraphs (15), (16) and (17) were quite detailed and merely discussed the debate that had taken place in the Drafting Committee.

Sir Michael Wood said that, while he understood Mr. Park's position, it would be helpful to give States a sense of the debate, since paragraph (18) would ask for their views on the inclusion of the notion of irrevocability. In the first sentence of paragraph (15), the phrase "the possibility of defining exceptions to irrevocability" should be replaced with the broader formulation "possible exceptions to irrevocability". In the last sentence, the phrase "a change of government or" should be deleted because it would take a very exceptional change of government to warrant an exception to the general rule set out in the paragraph.

Mr. Jalloh said that he also understood Mr. Park's position but, like Mr. Wood, thought it would be helpful to retain the paragraphs in question. He supported Mr. Wood's proposal to delete the phrase "a change of government".

Mr. Rajput said that the reference to a change of government needed to be retained, as not all changes of government would necessarily entail a change of legal system. It was clear that the changes of government referred to were those that resulted in a lack of respect for the right to a fair trial, as indicated by the last clause of the sentence.

Ms. Escobar Hernández (Special Rapporteur) said she agreed that the phrase "possible exceptions", proposed by Sir Michael Wood, was preferable to the formulation "the possibility of defining exceptions". It would be helpful to hear members' views on whether the phrase "change of government" should be retained or deleted.

Mr. Jalloh said that the Commission would be entering into a sensitive political area if it included the reference to a change of government. There had been intense debates in the Commission on judgments of European and, to some extent, North American courts regarding the right to a fair trial in the context of the transfer to an African State of individuals who were allegedly officials of that State, a matter that had eventually been resolved when the Government of that State had taken steps to accommodate fair trial rights to a certain

degree. The issue of how a Government was viewed internationally in terms of its respect of the right to a fair trial was a very sensitive one. If Mr. Rajput would not agree to the deletion of the phrase “a change of government”, then he would suggest that no examples – neither “a change of government” nor “a change of legal system” – should be given.

Mr. Petrič said that, in practice, a change of government could have an impact on a waiver of immunity, as it could, for example, result in the suspension of necessary processes. The broader context of the Commission’s discussion was that immunity should not be waived easily. He doubted that the inclusion of the phrase “a change of government” would have political implications, since it would appear in the commentary and not in the draft article. Mr. Rajput’s position was therefore a reasonable one. He would not, however, oppose the deletion of the phrase.

Given that the waiver of immunity was largely a matter between a State and its officials, while immunity was primarily a matter between States, the amount of coverage given to waiver of immunity in the commentaries seemed disproportionate. While he would not support the deletion of text at the current stage, as States should be given a chance to react to the text, the Commission should reconsider the balance between its coverage of the invocation of immunity and its coverage of the waiver of immunity at the first-reading stage.

Sir Michael Wood said that, to address Mr. Rajput’s concerns, the formulation “such as a change of government or a change of legal system, that could result in” could be replaced with “such as either a change of government or a change in the legal system that results in”, with the comma after “legal system” being deleted. The change of government referred to in the sentence would then be one that resulted in a situation where the right to a fair trial was no longer guaranteed. The word “of” should be changed to “in” because there did not necessarily have to be a complete change of legal system.

Mr. Forteau said that Mr. Wood’s proposal corresponded to the language used in the statement of the Chair of the Drafting Committee. However, the comma after “legal system” had to be retained because the clause that referred to a situation where the right to a fair trial was no longer guaranteed qualified not only “a change of government” and “a change of legal system” but also “exceptional circumstances”. In the last sentence of paragraph (15), the phrase “supervening circumstances” should be replaced with “exceptional circumstances”, the phrase used in that statement.

Ms. Lehto said that it had always been her understanding that the clause that referred to a situation where the right to a fair trial could be compromised qualified both “a change of government” and “a change of legal system”. If Mr. Wood’s proposal made that clearer, she fully supported it.

Mr. Jalloh said that he agreed with Ms. Lehto and could support the formulation proposed by Sir Michael Wood. He also agreed with Mr. Forteau that “supervening” should be replaced with “exceptional”. He wished to note that, while he was aware that there could be consequences for officials in the context of a change of government, his concern had been that it could seem that the Commission was excluding other types of circumstances that could arise if it adopted a formulation that identified two examples. Given the concerns that African States had been raising for almost 30 years regarding the treatment of African officials by courts of certain States in certain parts of the world, the Commission should proceed very cautiously.

Mr. Grossman Guiloff said that he agreed with Ms. Lehto, and supported Sir Michael Wood’s proposal as modified by Mr. Forteau.

The Chair said that there appeared to be a consensus emerging on the following amendments: the replacement of “the possibility of defining exceptions to irrevocability” with “possible exceptions to irrevocability”; the replacement of “such as a change of government or a change of legal system, that could result in” with “such as either a change of government or a change in the legal system that results in”; and the replacement of “supervening circumstances” with “exceptional circumstances”.

Paragraph (15) was adopted with those amendments.

Paragraph (16)

Mr. Murphy said that, in the second sentence, the word “non-retroactivity” should be replaced with “revocation”.

After a discussion in which **Sir Michael Wood**, **Mr. Forteau** and **Mr. Jalloh** took part, **Ms. Escobar Hernández** (Special Rapporteur) said she agreed that the word “non-retroactivity” should be replaced with “irrevocability”, the term used in footnote 56.

Sir Michael Wood said that footnote 56 began with the words “On the question of the irrevocability of waivers of immunity …, see”. He wished to know whether the pieces of legislation then cited did indeed deal with the irrevocability of waivers of immunity or simply with waivers of immunity.

Mr. Murphy said that the citation in footnote 56 of the United States Foreign Sovereign Immunities Act was correct, although it could be made more precise by replacing “sect. 1605 (a)” with “sect. 1605 (a) (1)”.

Ms. Escobar Hernández (Special Rapporteur) said that she would verify that all the references provided dealt with the irrevocability of waivers of immunity and inform the secretariat of any errors she found.

Paragraph (16), as amended, was adopted on that understanding.

Paragraph (17)

Sir Michael Wood said that paragraph (17) should be deleted, since it largely repeated arguments already made in paragraphs (15) and (16).

Mr. Jalloh said that he would prefer to keep the paragraph. However, if it was deleted, he proposed that the last sentence should be retained, as it provided for the emergence of various types of circumstances and addressed the concerns that he had raised with respect to paragraph (15). If only that sentence was retained, it would require some reformulation and a footnote would need to be added.

Mr. Forteau said that, in the particular case at hand, it was helpful to have a detailed paragraph. In her introductory statement, the Chair of the Drafting Committee had indicated that the Committee had reached an understanding that the commentary would clearly reflect the debate in the Committee, particularly with respect to exceptions.

Ms. Escobar Hernández (Special Rapporteur) said that the paragraphs in question had been included in the commentary because of the understanding reached in the Drafting Committee referred to by Mr. Forteau. Points were discussed in paragraph (17) that were not raised elsewhere. For example, the last sentence, which Mr. Jalloh had referred to, addressed situations where it would not have been possible to make an express waiver at an earlier time. The paragraph also referred to one member’s argument that a waiver of immunity could be described as a unilateral act of a State and was therefore subject to principle 10 of the Commission’s Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations. She would therefore prefer to retain the paragraph, although she was not opposed to simplifying it.

Sir Michael Wood said that the paragraph could be shortened by deleting the sentence in which it was stated that one member of the Commission had pointed out that a waiver of immunity was a unilateral act of the State within the meaning of the Guiding Principles, and by deleting the accompanying footnote, footnote 58. The assertion itself was highly questionable and it was unusual to draw attention to the position of one member.

Mr. Jalloh proposed that the formulation “one member of the Commission pointed out that, in the final analysis” should be replaced with “the view was expressed that”.

Paragraph (17), as amended by Mr. Jalloh, was adopted.

Paragraph (18)

Mr. Rajput said that he found the formulation of the paragraph rather non-committal. He suggested that the words “provide any comments they may wish to make” should be replaced with “provide guidance on this matter”.

Ms. Escobar Hernández (Special Rapporteur) said that, if the aim was to simplify the formulation, the words “they may wish to make” could simply be deleted at the end of the paragraph.

Paragraph (18), as amended by the Special Rapporteur, was adopted.

The meeting rose at 1 p.m.