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International Law Commission

Seventy-second session (first part)

Provisional summary record of the 3530th meeting

Held at the Palais des Nations, Geneva, on Thursday, 3 June 2021, at 3 p.m.

Contents

Present:

Chair:	Mr. Hmoud
Members:	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. Valencia-Ospina
	Sir Michael Wood
	Mr. Zagaynov

Secretariat:

Mr. Llewellyn	Secretary to the Commission

The meeting was called to order at 3.05 p.m.

Tribute to the memory of James Crawford, former member of the Commission

The Chair said that he had received the sad news that James Crawford, a member of the Commission from 1992 to 2001, had died earlier that week. As a former member of the Commission, Mr. Crawford was perhaps best known for his work as Special Rapporteur for the topic "State responsibility"; under his guidance, the Commission had adopted the articles on responsibility of States for internationally wrongful acts. After leaving the Commission, Mr. Crawford had continued to pursue a successful career as a practitioner of international law and had gone on to serve as a judge at the International Court of Justice.

At the invitation of the Chair, the members of the Commission observed a minute of silence.

Provisional application of treaties (agenda item 4) (*continued*) (A/CN.4/737 and A/CN.4/738)

Report of the Drafting Committee (A/CN.4/L.952)

Ms. Galvão Teles (Chair of the Drafting Committee) said that the report of the Drafting Committee on the topic "Provisional application of treaties" (A/CN.4/L.952) contained the texts and titles of the 12 draft guidelines on provisional application of treaties adopted by the Drafting Committee on second reading during the first part of the current session.

The Drafting Committee had held five meetings and one round of informal consultations on the topic between 17 and 21 May 2021. It had worked on the basis of a revised proposal prepared by the Special Rapporteur to take into account the comments and suggestions made during the plenary debate on his sixth report (A/CN.4/738). The Drafting Committee had held two further meetings on the topic, on 1 and 2 June 2021, at which it had considered the draft model clauses proposed by the Special Rapporteur in his sixth report. Regrettably, for lack of time, the Drafting Committee would not be able to present the outcome of those last two meetings to the Commission until the second part of the current session. Only then would the Commission be invited to consider and adopt the entire set of draft guidelines and draft model clauses on second reading.

Turning to draft guideline 1, she said that the Drafting Committee had replaced the phrase "by States and international organizations", which the Special Rapporteur, in his sixth report, had proposed to insert at the end of the sentence, with "by States or by international organizations". That modification was intended to make clear that the scope of the draft guidelines was not limited to treaties concluded between States, between States and international organizations, or between international organizations; it also included treaties that States or international organizations applied provisionally in relation to other subjects of international law. The Drafting Committee had emphasized that, as amended, draft guideline 1 had added value as a stand-alone provision and should not be merged with draft guideline 2.

The Drafting Committee had also considered whether to replace the word "treaties" with "a treaty or a part of a treaty" and the words "by States and international organizations" with "by a State or by an international organization" to align the provision with the subsequent draft guidelines. However, it had decided that the plural forms should be retained for consistency with the title of the draft guidelines as a whole.

The title of draft guideline 1 remained the same as the one adopted on first reading, namely "Scope".

With regard to draft guideline 2, following the plenary debate, the Special Rapporteur had proposed that the words "other rules of international law" should be replaced with "any other relevant rules of international law". That phrase was intended to refer, *inter alia*, to the rules contained in the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, which had yet to enter into force. The Drafting Committee had settled on the formulation "other relevant rules of

international law", since the word "any" might imply, wrongly, that there were no other relevant rules of international law.

The title of the draft guideline, "Purpose", remained unchanged.

Draft guideline 3 reflected the general rule established in article 25 (1) of the 1969 Vienna Convention on the Law of Treaties. The text adopted on first reading had included the expression "States or international organizations concerned", instead of the term "negotiating States" found in article 25 (1) (b) of the Vienna Convention, to reflect the fact that, in practice, treaties were sometimes provisionally applied by States or international organizations that had not participated in the negotiation of those treaties. Following the plenary debate, the Special Rapporteur had proposed that the phrase "between the States or international organizations concerned" should be replaced with "by all States or international organizations assuming rights and obligations pursuant to its provisional application". The Drafting Committee had decided that the wording proposed by the Special Rapporteur did not fully allow for the possibility that some States or international organizations might continue to provisionally apply a treaty even after its entry into force for others. It had been suggested that, to clarify the temporal scope of provisional application, draft guideline 5 could be broadened to include commencement and termination of provisional application through entry into force. The Drafting Committee had also discussed whether the reference to "States or international organizations" should be omitted entirely.

The Drafting Committee had ultimately decided to retain the phrase "between the States or international organizations concerned", which, as would be explained in the commentaries, more clearly reflected the fact that, after the entry into force of the treaty itself, provisional application might continue for those States or international organizations for which the treaty had not yet entered into force. The commentaries would also make clear that an agreement on provisional application applied only to those States or international organizations that had assumed rights and obligations thereunder.

The Drafting Committee had made only two changes to the text of draft guideline 3, both of which were intended to ensure closer alignment with article 25 (1) of the 1969 Vienna Convention: the words "may be" had been replaced with "is" and the words "provisionally applied" had been replaced with "applied provisionally".

The title of the draft guideline remained "General rule".

Regarding draft guideline 4, following a proposal by the Special Rapporteur, the Drafting Committee had added the words "between the States or international organizations concerned" before the word "through" in the chapeau in order to specify the subjects of international law that could agree to provisional application by the means described in subparagraphs (a) and (b).

The Drafting Committee had made no changes to subparagraph (a) but had decided to split subparagraph (b) into a chapeau and two further subparagraphs to draw a clearer distinction between institutional means or arrangements, on the one hand, and declarations by individual States or international organizations, which were a rarely used means in practice, on the other. The wording of the chapeau of subparagraph (b), "any other means or arrangements, including", had been retained from the text adopted on first reading, although the possibility of replacing the word "including" with "such as" or "such as but not limited to" had been considered. To ensure the appropriate degree of inclusiveness and flexibility, the Drafting Committee had also kept the word "arrangements" in the plural in the English text, while acknowledging that "*arrangement*", the singular form, would be used in the French text. The Drafting Committee had refrained from connecting subparagraph (b) (i) and subparagraph (b) (ii) with the word "or" in order to further emphasize that the forms of agreement described in that subparagraph were not exhaustive.

On the basis of a proposal by the Special Rapporteur, the Drafting Committee had added the words "decision or other act" after "resolution" in subparagraph (b) (i). That addition was consistent with similar provisions that the Commission had drafted in the context of its work on other topics, such as article 2 (b) of the articles on the responsibility of international organizations and draft conclusion 16 of the draft conclusions on peremptory norms of general international law (*jus cogens*), as adopted on first reading.

Moreover, the Drafting Committee had added the words “in accordance with the rules of such organization or conference, reflecting the agreement of the States or international organizations concerned”. That amendment had originated in a proposal made by the Special Rapporteur, in his sixth report, to add the words “if such resolution has not been opposed by the State concerned”. After the plenary debate, the Special Rapporteur had revised the proposed wording to read “subject to the rules of the international organization or of the intergovernmental conference concerned”. At the outset, the Drafting Committee had discussed whether an explicit reference to the rules of the organization was necessary, as it was obvious that any resolution, decision or other act of an organization would have been adopted in accordance with its rules. The decision to include such a reference had been motivated by the fact that the objective of the draft guidelines was to provide guidance to States and international organizations. The Drafting Committee had modified the Special Rapporteur’s revised proposal by replacing the words “subject to” with “in accordance with” and adding the phrase “reflecting the agreement of the States or international organizations concerned” at the end. The gerund “reflecting”, which tied the agreement more closely to the phrase “resolution, decision or other act”, had been chosen instead of “which reflect” in view of the concerns expressed by States and international organizations regarding the importance of consent. The Drafting Committee had considered the possibility of adding the word “direct” or “express” to qualify “agreement” but had decided that such nuances should instead be explained in the commentary.

Subparagraph (b) (ii) retained the second part of the text of subparagraph (b) as adopted on first reading. The Drafting Committee had decided against a proposal to move the phrase “reflecting the agreement of the States or international organizations concerned” from subparagraph (b) (i) to the chapeau of the subparagraph, since acceptance by the other States or international organizations concerned was already referred to in subparagraph (b) (ii). Moreover, in the chapeau of draft guideline 4, reference was made to provisional application “agreed between the States or international organizations concerned”. The Drafting Committee had reiterated that subparagraph (b) (ii) did not cover “unilateral” declarations by States, which could give rise to legal effects regardless of their acceptance by other States or international organizations. The provisional application of a treaty or a part of a treaty, by contrast, presupposed an agreement between States or international organizations that it would have legal effect.

The Drafting Committee had also considered whether other, more common forms of agreement on provisional application, such as an exchange of notes or notification by the depositary of a multilateral treaty, should be explicitly mentioned in a new subparagraph (b) (iii). It had decided that the commentary should explain that, in many cases, an exchange of notes constituted a separate treaty and was thus covered by subparagraph (a). Situations in which an exchange of notes did not constitute a separate treaty and depositary notifications of provisional application would be covered by the phrase “any other means or arrangements” in the chapeau of subparagraph (b). Support for that approach could be found in the commentary to draft article 22 of the 1966 draft articles on the law of treaties.

The title of the draft guideline remained “Form of agreement”.

Regarding draft guideline 5, following a proposal made by the Special Rapporteur in response to suggestions received from States, the Drafting Committee had deleted the words “pending its entry into force between the States or international organizations concerned”, which could already be found in the general rule set out in draft guideline 3. The Special Rapporteur had also proposed that the words “without prejudice to what is provided for under article 24, paragraph 4, of the Vienna Convention on the Law of Treaties and any other relevant rules of international law” should be added at the end of the draft guideline. Article 24 (4) of the Vienna Convention provided that treaty provisions regulating matters arising necessarily before the entry into force of the treaty, such as those concerning the authentication of its text or the functions of the depositary, applied from the time of the adoption of its text. Such provisions thus applied automatically, without the need for agreement on their provisional application. The Drafting Committee had decided that, while some of the elements listed in article 24 (4) of the Vienna Convention could be relevant for provisional application, any such relevance should be explained in the commentary.

The Drafting Committee had decided to shorten the title of draft guideline 5 as adopted on first reading to "Commencement", to align it with the titles of other draft guidelines.

Draft guideline 6, which concerned the legal effect of provisional application, was focused mainly on the legal effect of the treaty or a part of the treaty that was being provisionally applied rather than on the legal effect of the agreement to provisionally apply the treaty or a part of the treaty. The Drafting Committee had made two changes to the text adopted on first reading. First, following a proposal by the Special Rapporteur that had received widespread support in the plenary and was based on comments received from States, the phrase "as if the treaty were in force" had been deleted. Throughout the Commission's work on the topic, divergent views had been expressed as to whether provisional application had legal effects and the extent to which those effects were the same as those of entry into force. As was clear from the comments and observations received in relation to the text of the draft guideline as adopted on first reading, an explanation in the commentaries would not be sufficient to reconcile those views. The Drafting Committee had emphasized that the deletion of the phrase in question should not be understood as having any implications for the application of the rules of the 1969 Vienna Convention that were not covered by the draft guidelines. The objective of the draft guidelines was to identify those elements of the Vienna Convention that might be relevant for provisional application, which was regulated mainly by article 25. The Drafting Committee had discussed the possibility of adding a draft guideline stating that the draft guidelines were without prejudice to the application of other rules of the law of treaties, but had decided that the commentaries were the appropriate place for such a statement. Second, the word "unless" had been replaced with "except to the extent that" to avoid giving the impression that provisional application might not have any legal effect at all and to reflect an appropriate degree of flexibility.

The Drafting Committee had also added a second sentence to the draft guideline, which read: "Such treaty or part of a treaty that is being applied provisionally must be performed in good faith." That sentence was based on a proposal by the Special Rapporteur for a new paragraph setting out the good faith obligation established in article 26 of the 1969 Vienna Convention. In the plenary, it had been suggested that the phrase "a legally binding obligation to apply the treaty or a part thereof" could be replaced with a reference to the obligation to perform the provisionally applied treaty in good faith. However, the discussion in the Drafting Committee had made clear that article 26 of the Vienna Convention referred to two distinct legal effects. The first corresponded to the first sentence of draft guideline 6, namely the binding obligation produced by provisional application. The second was the obligation under which a treaty in force "must be performed in good faith". After considering other options, the Drafting Committee had decided to add a second sentence to the draft guideline as a way of setting out the two legal effects clearly. The two sentences were linked by the word "Such", which implied that both legal effects pertained to the same treaty.

The title of the draft guideline had been shortened to "Legal effect" to ensure consistency with the titles of other draft guidelines. The Special Rapporteur had proposed the addition of the words "and *pacta sunt servanda*" at the end of the title, but the Drafting Committee had noted that the principle of *pacta sunt servanda* was already implied. The Drafting Committee had decided to retain the singular form "Legal effect" in line with the titles of the other draft guidelines, on the understanding that the use of that form could imply a combination of legal effects.

At the first-reading stage, the inclusion of draft guideline 7, on reservations, had proved somewhat controversial. At that time the Drafting Committee had decided to include draft guideline 7 in order to seek the views of States and international organizations on the provision and to receive information on their relevant practice. On the basis of the comments and observations received, the Drafting Committee had now concluded that the retention of a draft guideline on reservations was justified. While the Commission was not aware of any significant practice in that regard, States and international organizations had seemed to be generally in favour of the provision. The Drafting Committee had agreed on an approach that would at least leave open the possibility that parties could formulate reservations to a provisionally applied treaty.

Following the plenary debate, the Special Rapporteur had proposed a text stating that the draft guidelines did not "preclude the possibility for a State or an international

organization to formulate, when agreeing to the provisional application of a treaty or part of a treaty, a reservation", which had been intended to signal that reservations relating to the provisional application of a treaty were not prohibited. Given the complexities involved in making reservations to a treaty, however, the Drafting Committee had instead recast the provision as a "without prejudice" clause, on the understanding that the points raised by States and international organizations in their comments, and by members of the Commission in the plenary discussion, would be addressed in the commentaries. Reference would also be made in the commentaries to the distinction between bilateral and multilateral treaties.

The title of the draft guideline remained the same as the one adopted on first reading, namely "Reservations".

Draft guideline 8 concerned the responsibility of a State or international organization for the breach of an obligation arising under a treaty or a part of a treaty. The Drafting Committee had made only one, non-substantive change to the text adopted on first reading, which had been generally supported by States and in the Commission: the words "provisionally applied" had been replaced with "applied provisionally" for closer alignment with draft guidelines 3 and 6. The title of the draft guideline remained "Responsibility for breach".

Draft guideline 9 had undergone significant changes on second reading. The Drafting Committee had deleted paragraph 3 of the text adopted on first reading and had added two new paragraphs.

The Drafting Committee had not modified the text of paragraph 1 as adopted on first reading, which elaborated on the phrase "pending its entry into force" found in article 25 (1) of the 1969 Vienna Convention. That text had been widely supported in the Commission. Paragraphs 2 and 3 of the draft guideline had been developed on the basis of a proposal made by the Special Rapporteur, in his sixth report, to replace the phrase "of its intention not to become a party to the treaty" with the broader phrase "irrespective of the reason for such termination". That proposal had been based on the fact that there were cases, in the practice of States and international organizations, in which the provisional application of a treaty had been terminated for reasons other than an intention not to become a party to the treaty. Nevertheless, the Drafting Committee had been concerned about deleting the reference to that intention, which was important for the stability of treaty relations and could also be found in article 25 (2) of the 1969 Vienna Convention. For that reason, a proposal to replace the phrase "Unless the treaty otherwise provides or it is otherwise agreed" with "Unless a different intention appears", which was based on articles 28 and 29 of the Vienna Convention, had been discussed. However, the Drafting Committee had rejected both of those proposals on the ground that they diverged too significantly from the text of article 25 (2).

Furthermore, the Drafting Committee had acknowledged that, in practice, examples could be found of the termination of provisional application by a State or international organization that still intended to become a party to the treaty. To reflect that practice in paragraph 2, the Drafting Committee had considered alternatives to the Special Rapporteur's proposal, such as adding "or otherwise" or "for any other reason" after "of its intention not to become a party to the treaty". It had also been suggested that the text should provide that a State or international organization had a general obligation to notify the other States or international organizations that applied a treaty provisionally of the termination of provisional application, "including of its intention not to become a party to the treaty" or "which may include" such an intention. However, the Drafting Committee had been concerned that such additions would represent too great a departure from the wording of article 25 (2) of the Vienna Convention. It had also noted that a general obligation to provide notification of the termination of provisional application would limit the flexibility of that mechanism.

To maintain the flexibility inherent in article 25 (2) of the 1969 Vienna Convention while also recognizing other reasons for the termination of provisional application, the Drafting Committee had taken a two-pronged approach. First, it had decided largely to retain the text of paragraph 2 as adopted on first reading. While that text followed the wording of the Vienna Convention almost verbatim, the Drafting Committee's new version referred to the States or international organizations "concerned" rather than to those "between which the

treaty or a part of a treaty is being applied provisionally". The phrase "States or international organizations concerned" was used in draft guideline 3, where it replaced the term "negotiating States" found in article 25 (1) (b) of the Vienna Convention. In the context of draft guideline 9, the reference to "States or international organizations concerned" included the States and international organizations between which a treaty or a part of a treaty was being provisionally applied. With multilateral treaties in mind, the Drafting Committee had decided to broaden the scope of article 25 (2) of the Vienna Convention to include all States and international organizations that might be concerned by the termination of the provisional application of a treaty through a notification that a State or international organization no longer intended to become a party to the treaty. Second, on the basis of a revised proposal by the Special Rapporteur, the Drafting Committee had adopted a new paragraph 3, which dealt with other grounds for termination. The opening phrase of paragraph 3, "Unless the treaty otherwise provides or it is otherwise agreed", mirrored paragraph 2. The words "may invoke" gave the State or international organization the option of invoking grounds for the termination of provisional application other than the intention not to become a party to the treaty, while also conveying the need for justification. If such grounds were invoked, the State or international organization would be required, as indicated by the use of the word "shall", to notify the other States or international organizations concerned. The phrase "other States or international organizations concerned" had the same meaning as in paragraph 2.

Following a suggestion made in the plenary, which had been inspired by article 56 (2) of the 1969 Vienna Convention, the Special Rapporteur had proposed that the text should specify that notification of the termination of provisional application should be provided "within a reasonable period", in order to ensure greater legal certainty. While article 56 (2) of the 1969 Vienna Convention stipulated a period of at least 12 months' notice, the Special Rapporteur's proposal, which was based on wording found in article 29 of the 1978 Vienna Convention on Succession of States in Respect of Treaties, would allow for flexibility in view of the varying circumstances in which a treaty might be provisionally applied. After discussing the possibility of adding the words "as appropriate" after "within a reasonable period", the Drafting Committee had concluded that the stipulation of a general notification deadline for all kinds of provisionally applied treaties was not feasible. Instead, the commentaries would explain that, in some situations, the termination of the provisional application of a treaty might warrant sufficient advance notice, while in others, the immediate termination of provisional application was possible, although not desirable.

A new paragraph 4 had been added to draft guideline 9 to confirm that, in principle, the termination of the provisional application of a treaty would not affect any right, obligation or legal situation created through the execution of such provisional application prior to its termination. The wording was based on the proposal contained in the Special Rapporteur's sixth report; in view of the support expressed by States, international organizations and Commission members, the Drafting Committee had made only minor adjustments, to align the text more closely with that of article 70 (1) (b) of the 1969 Vienna Convention. In particular, the phrase "that may arise from" had been replaced with "created through the execution of".

The Drafting Committee had decided to delete the version of paragraph 3 that had been adopted on first reading. The paragraph had contained a "without prejudice" clause, but the Drafting Committee had been concerned about the fact that the reference to part V, section 3, of the 1969 Vienna Convention was not set in the more general context provided in part V of the Convention, including with regard to issues such as peremptory norms of general international law (*jus cogens*). In view of the wording of the new paragraph 3, the Drafting Committee had thought it best to avoid creating the impression that the termination of provisional application needed to follow all the procedural steps stipulated in the Convention for treaties that were already in force.

In view of the changes made, the title of draft guideline 9 had been shortened to read "Termination".

As there had been general support from the Commission members for the text of draft guideline 10 as adopted on first reading, it had been left unchanged. The Drafting Committee had decided against a suggestion to shorten the title by deleting "and observance of provisionally applied treaties" because the title would then have read simply "Internal law of

States and rules of international organizations", and those subjects were also dealt with in the subsequent draft guidelines. The title of draft guideline 10 was thus "Internal law of States, rules of international organizations and observance of provisionally applied treaties".

The Drafting Committee had not made any changes to either the text or the title of draft guideline 11 as adopted on first reading.

In draft guideline 12, the Drafting Committee had decided, on the basis of a proposal by the Special Rapporteur, to use the plural terms "States" and "international organizations", as an agreement presupposed at least two parties. The Drafting Committee had considered a proposal to shorten the title of the draft guideline, but had ultimately decided only to change the word "and" to "or" in the phrase "internal law of States or rules of international organizations".

Pointing out that the report of the Drafting Committee was interim in nature, pending the finalization of the draft model clauses, she recommended that the Commission members should only take note of the 12 draft guidelines adopted by the Committee. They would have the opportunity to consider the adoption of the draft guidelines during the second part of the session, after the Drafting Committee's next report on the topic had been introduced.

Mr. Gómez-Robledo (Special Rapporteur) said that if the Commission was to complete the second reading of the draft guidelines during its current session, which was a priority, the Drafting Committee would need to hold additional meetings during the second part of the session. Informal consultations during the intersessional period would also be useful.

The Chair said he took it that the Commission wished to take note of the report of the Drafting Committee on the provisional application of treaties (A/CN.4/L.952).

It was so decided.

Immunity of State officials from foreign criminal jurisdiction (agenda item 3) (*continued*) (A/CN.4/739)

Report of the Drafting Committee (A/CN.4/L.940 and A/CN.4/L.953)

Ms. Galvão Teles (Chair of the Drafting Committee) said that the report of the Drafting Committee on the topic "Immunity of State officials from foreign criminal jurisdiction" (A/CN.4/L.953) contained the texts and titles of draft articles 8 to 11 as provisionally adopted by the Drafting Committee thus far at the current session. The Drafting Committee had held 12 meetings on the topic between 27 April and 31 May 2021. Its work had been greatly facilitated by the informal consultations conducted by the Special Rapporteur both before and during the Commission's session, which had helped to deepen the members' understanding of the issues to be addressed.

The Drafting Committee had continued its consideration of draft articles 8 to 16, as proposed in the Special Rapporteur's seventh report (A/CN.4/729) and contained in annex III of the eighth report (A/CN.4/739). Those draft articles had been referred to the Drafting Committee in 2019, taking into account a series of revised proposals made by the Special Rapporteur on the basis of comments made by members in the plenary. The Drafting Committee had also had before it the draft provisions on definitions, which had originally been proposed in the Special Rapporteur's second report (A/CN.4/661) and had been referred to the Drafting Committee in 2013. Furthermore, at the Commission's 3528th meeting, the members had referred draft articles 17 and 18, as proposed in the eighth report, to the Drafting Committee.

The Drafting Committee had completed and provisionally adopted draft articles 8 to 11, which, together with draft article 8 *ante* (A/CN.4/L.940), of which the Commission had taken note in 2019, were contained in part four of the draft articles, on questions concerning procedural provisions and safeguards. The Drafting Committee had noted that, on completion of the first reading, the order of the draft articles and the consistency of the expressions used in them would need to be reviewed.

The purpose of draft article 8, on the examination of immunity by the forum State, was to draw attention to the obligation of the competent authorities of the forum State to

examine whether an official of another State might enjoy immunity in relation to the exercise of criminal jurisdiction by the forum State. Such examination was closely related to but distinct from the determination of immunity, which came at a later stage and would be addressed in a separate draft article.

Regarding the wording of paragraph 1, the Drafting Committee had agreed that the competent authorities should act swiftly upon becoming aware that a person who was an official of another State might enjoy immunity from foreign criminal jurisdiction. The importance of examining the matter without delay was guided by the advisory opinion of the International Court of Justice on the *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, in which the Court stated that questions of immunity were "preliminary issues which must be expeditiously decided *in limine litis*".

To better capture the temporal element of immediacy, the Drafting Committee had reversed the syntax of the initial proposal and, at the beginning of the sentence, had replaced "as soon as" with "when". The words "are aware" in the original proposal had been replaced with "become aware". It had also been specified that the competent authorities should examine the question of immunity "without delay", a phrase used in articles 36 and 37 of the Vienna Convention on Consular Relations. In the context of the draft article, the term "competent authorities" referred to any authorities of the forum State, including police, prosecutors and judges, who, when involved in the exercise of criminal jurisdiction in a given case, became aware that questions of immunity could be triggered.

The Drafting Committee had discussed at length the use of the word "consider" in paragraph 1. Members had noted that the word in English did not convey the full meaning of "*considerar*" in Spanish, which implied that the competent authorities would take the necessary steps to ascertain whether or not a case involved the immunity of a foreign official. A number of possible alternatives in English, such as "give due consideration", "duly consider" and "evaluate", or the inclusion of an explicit link with the draft article on the determination of immunity, as proposed by the Special Rapporteur in her seventh report, had been discussed. A proposal to state that the competent authorities "shall consider the question of immunity without delay in order to determine its applicability" had not found enough support. It had finally been decided that the word "examine" should be used in the English version, with the other language versions using the most appropriate term. In that regard, it had been pointed out that "consider" and "examine" had the same meaning in Arabic.

To standardize the terminology used in the draft articles, the Drafting Committee had replaced the term "foreign official" with "official of another State" and the term "criminal proceeding" with the broader formulation "exercise of criminal jurisdiction". The term "criminal jurisdiction" would be defined in draft article 2 (b), which was still under consideration by the Drafting Committee.

Paragraph 2 was a safeguard clause in relation to paragraph 1, containing two subparagraphs that addressed two particular situations related to examination. The Drafting Committee had decided to merge the Special Rapporteur's proposed paragraphs 2 and 3 under a common chapeau, as they both covered specific situations that were without prejudice to the general rule contained in paragraph 1. Several possible formulations for linking the two paragraphs, including "In addition to paragraph 1", "Subject to paragraph 1", "In particular", "In any case" and "In any event", had been considered. The phrase "Without prejudice to paragraph 1", with the addition of the word "always", had been deemed the best way of relating the specific provisions in paragraph 2 to the more general rule in paragraph 1. The sentence structure of the chapeau of paragraph 2 was aligned with that of paragraph 1, with "the competent authorities" forming the subject of the sentence. It had been deemed unnecessary to include the words "in the following circumstances" at the end of the chapeau to introduce the subparagraphs.

The Drafting Committee had discussed in great detail the timing of the forum State's examination of the question of immunity, which was addressed in subparagraph (a). The Special Rapporteur had proposed that "as a preliminary question" should be added before the wording proposed in her seventh report, "at an early stage of the proceeding". The Drafting Committee had looked at the differences between legal systems and cultures and had

considered the term “indictment” to be too specific to particular legal systems. It had also discussed proposals to refer simply to the “commencement of the prosecution phase” or to replace the reference to “the indictment of the official and the commencement of the prosecution phase” with “official charges are filed”. A proposal to state only that the question of immunity should be examined at the earliest stage possible had not found support because it would have reduced the added value of paragraph 2 in relation to paragraph 1. The wording finally agreed on, “before initiating criminal proceedings”, was intended to capture a moment at which the competent authorities of the forum State should undertake such an examination if none had been undertaken previously; it did not mean that the question of immunity should not be examined until just before the initiation of criminal proceedings, if appropriate, as was made clear by the general rule in paragraph 1. The term “criminal proceedings” had been preferred over “criminal process” because it was broad enough to cover different legal systems.

Subparagraph (b) was focused on coercive measures, irrespective of whether criminal proceedings had been initiated; there was thus no need for a conjunction, either “and” or “or”, to link it to subparagraph (a). The commentaries would make clear that the subparagraphs covered distinct situations. The use of the term “coercive measures” was based on references to “coercive measures” and “measures of constraint” in the relevant case law of the International Court of Justice, notably the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* case and the *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)* case. The Drafting Committee had nevertheless discussed whether the qualifier “coercive”, as proposed by the Special Rapporteur, should be omitted, but the terms “measures” or “any measure” were considered to be too broad. As coercive measures were specific to each particular legal system, the commentaries would explain that the term referred to measures that limited or constrained foreign officials in the exercise of their rights. Examples of coercive measures, such as arrest, detention, search of documents and accommodation, requests that a foreign official should serve as a witness and extradition requests, would also be provided.

The Drafting Committee had considered using the terms “adopting” or “ordering the adoption of” in relation to “coercive measures” in the first part of subparagraph (b), but had decided that the more generic “taking” was broader and avoided any formal legal implications. The wording “the performance of his or her functions” in the Special Rapporteur’s original proposal, which reflected the language of the pertinent International Court of Justice case law, had been intended to ensure a balance between the forum State’s exercise of sovereignty in criminal matters, on the one hand, and certain procedural guarantees related to the immunity of foreign officials, on the other. However, since it would be difficult to examine whether coercive measures would affect an official’s performance of his or her functions, that phrase had been replaced with the more general wording “that may affect an official of another State”. The provision was intended only to specify the actions to be taken by the competent authorities with regard to the question of immunity and did not prejudice the subsequent determination of immunity.

Regarding the second part of subparagraph (b), the Drafting Committee had considered that immunity and inviolability were separate but interrelated concepts, as immunity concerned the legal protection that certain officials enjoyed from the exercise of jurisdiction by judges and courts of another State, while personal inviolability related to the physical protection of an official from, for example, arrest and detention. It had been suggested that inviolability should be defined more generally in a separate provision, but discussion on that point had been deferred to a later stage in the work of the Drafting Committee. A reference to inviolability had been added to subparagraph (b) because it overlapped with immunity when coercive measures that warranted an examination of a foreign official’s immunity might also affect his or her inviolability. The inclusion of “any” before “inviolability” was meant to signify that not all foreign officials necessarily enjoyed inviolability in all circumstances. The verb “enjoy” was taken from the language of the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations, where it was used in relation to inviolability; it was also consistent with the terminology generally used in the draft articles with regard to immunity. The phrase “under international law” had been added to indicate the applicable legal regime.

The title of draft article 8, “Examination of immunity by the forum State”, reflected the change of terminology, from “consider” to “examine”, that had been made in the English version of the draft article.

Concerning draft article 9, which addressed notification of the State of the official following examination of the question of immunity, the Drafting Committee had considered the suggestion that “notifications” should be replaced with “consultations”, as the latter was a less finite and formal process for informing the State of the official of a possible exercise of criminal jurisdiction that might affect the official’s immunity. It had nonetheless decided that the notification procedure set out in draft article 9 was an essential procedural safeguard that might trigger other steps, such as the invocation or waiver of immunity by the State of the official. It had also recalled that the Special Rapporteur, in her seventh report, had proposed a separate provision, yet to be considered by the Drafting Committee, on consultations between the forum State and the State of the official regarding the determination of immunity.

The Drafting Committee had been of the view that the proposed wording of paragraph 1, indicating that the authorities of the State of the official should be notified when there was sufficient information to conclude that a foreign official could be subject to the criminal jurisdiction of the forum State, was not sufficiently clear. Concern had also been expressed that premature notification of the State of the official could hamper the investigation of the case. The wording of paragraph 1 had therefore been aligned with the temporal standard stipulated in draft article 8 (2) (a) and (b).

The phrase “that may affect an official of another State” referred only to those officials who might enjoy immunity. Concerned that its meaning could be interpreted too broadly, the Drafting Committee had considered amending it, by adding “who may be entitled to” or “who may enjoy immunity in respect of those proceedings”, but had decided against such an amendment, to avoid raising the question of whether additional special procedural safeguards would be necessary to protect officials who might not be entitled to immunity under the exceptions set out in draft article 7. Recalling that draft article 8 *ante* clearly provided that part four of the draft articles applied to parts two and three, the Drafting Committee had decided against the proposed amendment on the understanding that the commentaries would explain that a reference to an official of another State was limited to those officials who might enjoy immunity in accordance with the draft articles.

The Drafting Committee had decided to retain the phrase “of that circumstance” at the end of the first sentence of paragraph 1 in order to establish a clear link with the first part of the sentence. On a proposal by the Special Rapporteur, the words “For that purpose” at the beginning of the second sentence of paragraph 1 had been deleted. The Drafting Committee had also decided to allow States flexibility in establishing the necessary procedures by omitting the stipulation that such procedures should be established “in their domestic law”. Flexibility was also reflected in the phrase “shall consider establishing”, which took account of the fact that some States might already have appropriate notification procedures in place. The commentaries would make clear that States should establish such procedures only if necessary.

Paragraph 2 provided guidance on the elements to be included in the notification required under paragraph 1. The discussion in the Drafting Committee had focused on finding a balance between, on the one hand, giving the forum State sufficient discretion in exercising its criminal jurisdiction and, on the other hand, providing the State of the official with the information it needed in order to consider invoking or waiving immunity. In particular, the Drafting Committee had discussed whether the provision should specify a minimum threshold of information to be included in the notification. Considering the differences between legal systems, some members of the Drafting Committee had argued that it was not possible to specify such a threshold and that paragraph 2 should be deleted. An alternative suggestion had been made, to the effect that paragraph 2 should not list any specific elements of a notification and should stipulate only that the notification “shall, as far as possible, include sufficient information to ensure that the State of the official is in a position to consider the question of immunity” and that it “may, as appropriate, be updated from time to time”. Other members had emphasized that the notification requirement under paragraph 1 made it necessary for the Commission to provide further guidance to States and that paragraph 2 was

thus a crucial part of the notification procedure stipulated in the draft article. It had also been suggested that the paragraph should include a reference to the legal provisions that served as a basis for the taking of coercive measures or the exercise of criminal jurisdiction by the forum State.

Paragraph 2, as adopted by the Drafting Committee, represented a compromise between the different positions. It was largely based on the initial proposal in the Special Rapporteur's seventh report. After considering other options, the Drafting Committee had added the adverb "*inter alia*" to provide the forum State with flexibility on the content of the notification, depending on the circumstances and stage of the criminal case.

Regarding the different elements of a notification listed in paragraph 2, the Drafting Committee had agreed that the "identity of the official" was an essential part of the notification. While the Special Rapporteur's initial proposal had referred to "acts of the official that may be subject to the exercise of criminal jurisdiction", the Drafting Committee had preferred the wording "grounds for the exercise of criminal jurisdiction". Concern had been expressed that the term "grounds" might not be sufficiently clear across legal systems, and the term had been adopted on the understanding that the commentaries would explain that "grounds" could refer to legal or factual bases for the taking of coercive measures or the exercise of criminal jurisdiction. The phrase "the competent authority to exercise jurisdiction" was a simplified version of the Special Rapporteur's proposed wording "authority that, in accordance with the law of the forum State, is competent to exercise such jurisdiction". It was understood that the singular "authority" could also refer to several "authorities" of the forum State.

Paragraph 3 dealt with the means of communication that could be used to notify the State of the official. Having considered comments made in the plenary debate and in the Drafting Committee, the Special Rapporteur had revised her initial proposal to put more emphasis on diplomatic channels, which were often the primary means of communication between States on questions of immunity. The term "diplomatic channel" had been changed to the plural to align it with the formulation used in article 22 (1) (c) (i) of the United Nations Convention on Jurisdictional Immunities of States and Their Property and the annex to the draft articles on prevention and punishment of crimes against humanity.

The phrase "or through any other means of communication accepted for that purpose by the States concerned" was based on a revised proposal made by the Special Rapporteur. The Drafting Committee had added "for that purpose" to specify that not all means of communication were appropriate for notifying the State of the official as set out in paragraphs 1 and 2 of draft article 9.

Paragraph 3 further stated that such other means of communication "may include those provided for in applicable international cooperation and mutual legal assistance treaties". In the Special Rapporteur's initial proposal, international cooperation and mutual legal assistance treaties had been set out as alternatives at the same level as "any means of communication". The Drafting Committee had questioned whether the reference to such treaties was too broad and unspecific, and the concern had again been raised that the notification might not be communicated through the appropriate channels in the State of the official. Nonetheless, it had recognized that such treaties could be useful in some circumstances and had therefore retained the reference, while narrowing it down by adding the adjective "applicable" to the Special Rapporteur's proposal. Moreover, means of communication included in such treaties were considered a subcategory of "other means of communication accepted for that purpose by the States concerned". As stated in paragraph 3, those other means "may include those provided for" in international cooperation and mutual legal assistance treaties. The commentaries would provide further details on the relevant treaties and make clear that draft article 9 did not establish requirements for States regarding means of communication in addition to those that already existed in the applicable treaties.

In discussing the relevant diplomatic practice, the Drafting Committee had also considered adding the requirement that the notification should be made "in writing" to prevent abuse of the notification procedure. Paragraph 3 had been adopted on the understanding that the commentaries would explain that notifications should preferably be

made in writing but could exceptionally be made orally. It had been noted that an initial informal notification could be followed by a formal written notification.

The title of draft article 9 was “Notification of the State of the official”, as in the Special Rapporteur’s original proposal. The suggestion to reformulate it as “Notification to the State of the official” could be looked at during the final review of the text.

Turning to draft article 10, on invocation of immunity, she said that the Special Rapporteur’s original proposal had consisted of six paragraphs. The text proposed by the Drafting Committee now contained four paragraphs, which pertained to the information to be provided by the State of the official to the forum State in relation to the immunity being invoked.

Paragraph 1 provided a general statement concerning the right of a State to invoke immunity, and the timing of such invocation. It replaced the original paragraphs 1 and 2, with the aim of clarifying the right of the State of the official to invoke immunity and indicating when and on the basis of what circumstances it could do so. The word “may” served to indicate that the State of the official had the choice, but not the obligation, to invoke immunity. Moreover, that right belonged to the State rather than to the official. The language “becomes aware” followed that of draft article 9, on notification, and could refer either to having been notified by the forum State or to becoming aware by other means. The phrase “could be or is being exercised” was intended to reflect the fact that immunity could be invoked at any stage of criminal proceedings in a broad sense and that, in some cases, proceedings might have begun before immunity was invoked. It had been understood that the paragraph should not imply that the forum State would be prevented from exercising jurisdiction or initiating criminal proceedings until it received a response from the State of the official with respect to notification. It had also been understood that the commentary would explain that invocation of immunity would not prevent criminal proceedings from advancing once jurisdiction had been established. The commentary would need to strike a careful balance between the rights of the forum State and those of the State of the official in that regard.

The expression “as soon as possible” had been chosen to provide a degree of certainty regarding the timing of invocation of immunity, highlighting the fact that the early invocation of immunity would be in the interest of the State of the official, while also acknowledging that immunity could nonetheless be invoked at any time. It had been understood that there was no obligation to invoke immunity at the start of possible criminal proceedings. The Drafting Committee had also considered the phrase “in a reasonable time” in that context, but had preferred the formulation “as soon as possible” because it allowed for greater flexibility and did not raise questions as to what constituted a “reasonable” time, with the attendant possible consequences resulting from not invoking immunity within such a reasonable time.

The Drafting Committee had replaced the wording “forum State” with “another State”, which was more neutral and also appeared in draft article 1 (1). In addition, it reflected the fact that criminal jurisdiction and proceedings were merely a possibility at the stage where a person was detained, for example. Thus, whether another State would become a forum State would only become clear at a later stage.

Paragraph 2 described the manner in which immunity should be invoked. The Drafting Committee had deleted the words “and clearly”, as they were unnecessary, since the subsequent language specified how the invocation could be clear, and the commentary could also refer to the elements required for clarity.

The Drafting Committee had chosen to add the words “and the position held by” the official, since the other State in which the criminal jurisdiction could be or was being exercised would need to know the official’s position in order to determine immunity. It had been noted that the official’s “position” could refer to his or her title, rank, and level, such as, for example, a Head of State, a Minister for Foreign Affairs or a legal adviser. The provision also reflected the fact that the term “officials” included higher-ranking officials, junior officials and any officials representing or exercising the functions of the State.

The previous wording “the type of immunity being invoked” had been replaced with the more general wording “the grounds on which immunity is invoked”, since it seemed more important, at that stage of events, for a State to specify clearly the grounds on which invocation of immunity was based rather than the type of immunity. That formulation also mirrored the language of draft article 9 (2), which referred to “the grounds for the exercise of criminal jurisdiction”. The commentary could explain elements relating to the type of immunity, namely whether immunity was *ratione materiae* or *ratione personae*, and could clarify that the inclusion of that information was optional and could also be inferred, for example, from the official’s position and the grounds of immunity. Some members had said that the commentary should explain what information the State was expected to provide when indicating the grounds, noting that such grounds could include not only the type of immunity but also, with respect to immunity *ratione materiae*, those acts of the official that were regarded as official ones by the State of the official.

Paragraph 3 dealt with the means by which the invocation of immunity should be provided, and was analogous to draft article 9 (3). In comparison to that paragraph, certain changes had been introduced. First, the mention of invocation through diplomatic channels had been moved to the first part of the paragraph, since in practice it was the invocation that was material, rather than its notification through diplomatic channels. That means of communication had been placed at the beginning to highlight the common use of that method to communicate invocation. The other means, such as international cooperation and mutual legal assistance treaties, might be of varying relevance to different States.

Second, the Drafting Committee had used the word “may” instead of “shall”, which was used in draft article 9, to reflect the understanding that States had flexibility and that immunity could be invoked in court, as well as through diplomatic channels. The commentary would also explain that immunity was sometimes invoked by other means, including before judicial organs. It had been noted that some States’ courts did not accept such communications from the executive branch in order to maintain a separation of powers.

Paragraph 4 concerned the obligation of the authorities receiving the invocation to inform any other relevant authorities of the invocation of immunity. The Special Rapporteur’s original proposal had been shortened and simplified to reflect various concerns expressed by members, including the concern that it delved too much into the internal functioning of the State and the determination of immunity referred to in draft article 13. The Special Rapporteur had said that the paragraph was intended to stress that the invocation of immunity had to be communicated in order for it to have practical effect and that the competent bodies of a forum State determining the application of immunity needed to take action as soon as they became aware of the invocation of immunity, so as to avoid potential problems. It had also been noted that the primary purpose was to ensure that, if the information was initially received by authorities not concerned with immunity, it would be conveyed to the appropriate authorities immediately. The provision allowed States to use their discretion with respect to the details of how their competent authorities dealt with the invocation of immunity. Views had diverged in particular on whether the paragraph concerned itself excessively with the internal organization of State affairs or whether it instead helpfully safeguarded the rights of the State of the official.

One reservation that had been expressed about the paragraph was that it might allow a State to escape its obligation to respond to an invocation by engaging in back-and-forth communications between different authorities, none of which would meaningfully take action on the invocation. Other members, however, had considered that the paragraph would counter precisely such a situation by entailing an obligation for authorities to inform the competent authorities that immunity had been invoked so that they could take a decision as soon as possible. It had also been requested that the commentary should clarify which authorities were concerned and should specify that the paragraph concerned only authorities of the forum State, particularly those that would be involved in the determination of immunity.

Paragraph 6 of the Special Rapporteur’s original proposal, to the effect that the organs that were competent to determine immunity should decide *proprio motu* on its application in respect of State officials who enjoyed immunity *ratione personae*, irrespective of whether the State of the official invoked immunity, had been withdrawn on the understanding that the

matters raised therein could conceivably be addressed in relation to draft article 13, on determination, which the Drafting Committee would deal with at a later stage.

The title of draft article 10 was “Invocation of immunity”, as originally proposed by the Special Rapporteur.

The Special Rapporteur’s original proposal for draft article 11, on waiver of immunity, had consisted of six paragraphs. The text as amended by the Drafting Committee, on the basis of several revised proposals prepared by the Special Rapporteur, now contained five paragraphs touching on different elements of waivers of immunity.

Paragraph 1 contained a general statement regarding waiver of immunity. The slightly revised formulation reflected that of article 32 (1) of the Vienna Convention on Diplomatic Relations. The paragraph had been adopted on the understanding that the language might still undergo further amendments pertaining to stylistic consistency in the English version.

Paragraph 2 concerned the form of waivers. Its formulation also reflected that of the Vienna Convention on Diplomatic Relations, article 32 (2) of which provided that “waiver must always be express”. The Drafting Committee had elected to add “in writing”, inspired by the wording of article 45 (2) of the Vienna Convention on Consular Relations. The paragraph also mirrored some aspects of draft article 10 (2). One of its objectives was to provide for a careful analysis of the elements of the waiver involved. Some members had considered that it should also include elements helpful to the assessment of the acts for which immunity might be waived, since immunity could be waived for certain acts of an official but not for others. However, other members had questioned the need to mention the acts or other specific elements in the paragraph, considering that such details were better left to the discretion of States. The previous language indicating that the waiver should “mention the official whose immunity is being waived and, where applicable, the acts to which the waiver pertains” had therefore been deleted. It had additionally been noted that specifying the relevant acts at that stage might prove challenging, at least if the waiver must also be expeditious. However, the commentaries should address those elements.

Paragraph 3 followed, *mutatis mutandis*, the language on communication in draft articles 9 (3) and 10 (3). The paragraph was intended to allow as much flexibility as possible for States to decide on how the waiver was to be communicated. The verb “communicate”, which reflected the language of article 45 of the Vienna Convention on Consular Relations, had been substituted for “effectuate”.

Paragraph 4 paralleled draft article 10 (4). It provided that any communication received from the State of the official regarding the waiver of immunity must be transferred internally to any other competent authorities. The language of the paragraph had been simplified to harmonize the text with the previous draft articles, namely draft article 10.

The Special Rapporteur’s proposed paragraph 4, concerning the possibility that a waiver could be deduced from an international treaty, had been deleted. Some members had considered it important to reflect the fact that there could be an express waiver in a treaty. However, the paragraph had ultimately been seen as unnecessary, since the treaty would presumably already contain the relevant information. One view that had been expressed was that the paragraph reflected an attempt to encapsulate a rather complicated debate regarding the deduction of immunity, with which relevant courts had also wrestled, as in the *Pinochet* (No. 3) case that had come before the United Kingdom House of Lords. Another view was that the paragraph could have reflected the fact that the draft article was without prejudice to the question of whether a waiver could be implicit in a treaty. The Drafting Committee had decided, however, that the issue could be referred to in the commentaries. That idea had been opposed by some members, since the draft articles no longer contained any provision on the subject. The Special Rapporteur had stated that she would include in the commentaries a reference to the debate regarding the inclusion or exclusion of the paragraph.

Paragraph 5 concerned the irrevocability of waivers of immunity and was meant to indicate that a waiver might lack validity and be misused if it could be revoked at any stage. The debate in the Drafting Committee had been extensive and, in some respects, divided with regard to the paragraph. Members had generally agreed that the text as it stood reflected a general rule manifesting the good faith principle and conveying the need to preserve legal

certainty, but also that there could be some exceptions to that rule. Some members would have preferred to delete the paragraph altogether, since the law on the irrevocability of waivers had not been substantially codified in treaties or conclusively established by other sources, as there was also a paucity of State practice on the matter. The Commission's commentary to draft article 30 of the 1958 draft articles on diplomatic intercourse and immunities, which stated that it "goes without saying that proceedings, in whatever court or courts, are regarded as an indivisible whole, and that immunity cannot be invoked on appeal if an express or implied waiver was given in the court of first instance", had been interpreted in diverse ways by some members. Other members had preferred to include an explicit reference to exceptions in the paragraph, such as by beginning the paragraph with "save in exceptional circumstances", as used in the Convention on the Rights of the Child, or "in principle", as contained in article 8 of the Vienna Convention on Diplomatic Relations. That would acknowledge the existence of possible exceptional circumstances, such as a change of government or a change in the legal system resulting in a situation where due process was no longer guaranteed. It had also been noted that the commentary could draw on the wording "a fundamental change in the circumstances", from principle 10 (c) of the Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, as a basis for the revocation of a waiver.

Several members had considered that the paragraph should be put before the Sixth Committee for State input, since the Commission's normal practice, when it encountered disagreement on first reading, was to explain the different views in the commentary and thereby invite comments from States. A compromise had been reached to adopt the paragraph as it stood, on the understanding that the commentary would clearly reflect the debate that had taken place in the Drafting Committee, particularly with respect to exceptions. It had been requested that the commentary should elaborate on specific exceptional situations in which, for example, new relevant facts were discovered or an exceptional or fundamental change occurred, such as with regard to the human rights situation of a potential forum State, in order to clarify that the possibility of revoking a waiver should not be precluded in such circumstances.

The title of draft article 11, "Waiver of immunity", remained unchanged.

Lastly, she wished to turn to the proposal made by Mr. Murphy, in the discussion of draft article 10, on invocation, to add a new paragraph that would read: "The authorities before which the immunity has been invoked shall suspend any coercive measure until a determination has been made under draft article 13 as to whether immunity applies. Measures whose suspension would likely preclude a subsequent criminal proceeding against the official may remain in place." The Drafting Committee had decided not to include the proposal in draft article 10 but to consider it in the course of its work, as it raised important issues of substance concerning procedural provisions and safeguards. From a procedural standpoint, some members had taken the view that the proposal should be considered after draft article 10, which related to invocation of immunity, while others had said that it should be discussed together with draft articles 13, 14 and 17. In the end, the Drafting Committee had decided to consider the proposal, now named draft article X, at a later stage.

In conclusion, she said she hoped that the Commission would adopt draft articles 8 to 11, as set out in document A/CN.4/L.953, and draft article 8 *ante*, as set out in document A/CN.4/L.940.

The Chair recalled that, at its seventy-first session, the Commission had simply taken note of draft article 8 *ante*, for lack of time. In order to enable the Special Rapporteur to proceed with the preparation of the corresponding commentaries for adoption at the current session, he invited the Commission to adopt the texts and titles of draft article 8 *ante* (A/CN.4/L.940) and draft articles 8 to 11 (A/CN.4/L.953).

Draft article 8 ante *and draft articles 8 to 11 were adopted.*

The meeting rose at 4.55 p.m.