

Provisional

For participants only

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International Law Commission
Seventy-second session (second part)

Provisional summary record of the 3558th meeting

Held at the Palais des Nations, Geneva, on Tuesday, 3 August 2021, at 3 p.m.

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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. Vázquez-Bermúdez
Sir Michael Wood
Mr. Zagaynov

Secretariat:

Mr. Llewellyn Secretary to the Commission

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

Draft report of the Commission on the work of its seventy-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 the draft report contained in document A/CN.4/L.946.

Paragraph 16

Mr. Park said that, for the sake of clarity, the words “the Special Rapporteur considered” should be added after “Nevertheless” at the beginning of the first sentence.

Paragraph 16, as amended, was adopted.

Paragraphs 17 to 27

Paragraphs 17 to 27 were adopted.

Paragraph 28

Mr. Tladi said that, in the last sentence, the phrase “in the view of a number of members” could be replaced with “it was noted”, as that had not been a contentious point.

Paragraph 28, as amended, was adopted.

Paragraph 29

Mr. Park proposed that, in the fourth sentence, the words “the longest-running topic” should be replaced with “one of the longest-running topics”.

Mr. Tladi said that, in the penultimate sentence, the words “by some members” should be inserted after “it was suggested”, as there had been a difference of opinion among the members on that point.

Ms. Escobar Hernández (Special Rapporteur) said that she agreed with Mr. Tladi’s proposal. To address Mr. Park’s concern, perhaps the words “in the past three quinquenniums” could be added after “before the Commission” in the fourth sentence, as it was true that there were other topics on which the Commission had spent more time.

Sir Michael Wood said that a simple solution might be to say “making it the longest-running topic currently before the Commission”.

Mr. Murphy said that he supported Sir Michael Wood’s proposal. He understood Mr. Tladi’s point, but if such an approach was taken, the addition would also have to be made in a number of other sentences with similar wording in that paragraph alone. In the penultimate sentence, the words “it was suggested” implied only that someone, or perhaps a few members, had made the suggestion, not that everyone had agreed with that position.

Mr. Tladi said that, in the past, when there had been diverging views on particularly important points, that fact had been reflected in the report.

Mr. Jalloh said that he supported the proposed addition by Mr. Park but that the proposal by Sir Michael Wood to add the word “currently” to the fourth sentence was somewhat superfluous, given that it was stated at the beginning of the sentence that “the topic had been on the current programme of work of the Commission since 2007”. He agreed with Mr. Tladi on the importance of adding the words “by some members” in the penultimate sentence.

Mr. Murphy said it was his understanding that, when a statement was formulated in the passive voice, the Commission did not typically specify who, or how many members, had made a suggestion. The passive formulation in itself conveyed the sense that not all members had been involved.

Sir Michael Wood said that, while he agreed with Mr. Murphy in principle, in practice, given the particular importance of the issue in question, he agreed with Mr. Tladi's proposal to add the words "by some members" in that instance.

Mr. Murphy said that a possible solution would be to use the active voice and rephrase the beginning of the penultimate sentence to read: "In that connection, some members suggested that".

Mr. Zagaynov said that, for the sake of consistency with the second sentence of the paragraph, the reference should be to "a number of members" rather than "some members".

The Chair said he took it that the Commission wished to adopt the amendments just proposed by Mr. Murphy and Mr. Zagaynov.

It was so decided.

Paragraph 29, as amended, was adopted.

Paragraph 30

Mr. Forteau said that the last sentence should refer to the "draft article", rather than "draft articles", as it related only to draft article 18.

Mr. Park said that, in the fifth sentence, the placement of the word "often" seemed odd; it could perhaps be moved so that the sentence would read: "The point was made that international criminal courts must exercise their jurisdiction often in reliance on States." In the penultimate sentence, the word "horizontal" before "obligations" should be in quotation marks.

Ms. Lehto said that Mr. Park's concern with regard to the fifth sentence would perhaps be addressed if that part of the sentence was reformulated to read "international criminal courts must often rely on States to exercise their jurisdiction".

Mr. Rajput said that Ms. Lehto's proposed reformulation would add clarity to the fifth sentence. In the penultimate sentence, perhaps the words "by some members" should be added after "It was also noted" in order to give a more accurate representation of the debate.

Mr. Jalloh said that he supported the proposal by Ms. Lehto and was not opposed to Mr. Rajput's proposed addition to the penultimate sentence. It might be useful to amend that sentence to be more specific, by stating that "the Security Council, acting under Chapter VII, had created".

The Chair said he took it that the Commission wished to adopt the amendments proposed by Mr. Park, Ms. Lehto, Mr. Rajput and Mr. Jalloh.

It was so decided.

Paragraph 30, as amended, was adopted.

Paragraph 31

Paragraph 31 was adopted.

Paragraph 32

Mr. Rajput said that he would like to know whether the eighth sentence – "A number of members emphasized that, while States could agree in their relations with each other not to recognize immunities, those States could not extend those rules to States not parties to the treaty" – was a generic reference to all treaties or a specific reference to the Rome Statute of the International Criminal Court.

Mr. Forteau said that, in the eighth sentence, the words "to the treaty" could be replaced with "to their agreement".

Ms. Escobar Hernández (Special Rapporteur) said that the eighth sentence related not only to the Rome Statute but also to other instruments that produced a reciprocal waiver of immunity between two or more States. She therefore had no objection to Mr. Forteau's proposal.

Mr. Rajput said he was not convinced that “agreement” was the correct word in that context, as a “treaty” was traditionally understood to mean an agreement plus certain formalities.

Sir Michael Wood said that perhaps the simplest formulation might be “while States could agree in their relations with each other not to recognize immunities, those States could not extend those rules to third States”.

Mr. Zagaynov said that, although he fully supported the original formulation put forward by the Special Rapporteur, he was not opposed to the proposal made by Sir Michael Wood. However, if that wording was accepted, it should refer to “other States” rather than “third States”.

Paragraph 32, as amended, was adopted.

Paragraph 33

Mr. Tladi proposed that, after the first sentence, a new sentence should be inserted, which would read: “Some members expressed the view that the proposed draft article 18 could be read as an endorsement of that judgment.” The original second sentence would then be amended to read: “These members believed that the judgment had been poorly reasoned and controversial.”

Mr. Jalloh said that, in his view, Mr. Tladi’s proposal would pose difficulties for some members, himself included. In order to better reflect the balance of views in the debate, his own proposal would be to add the words “while a number of other members disagreed with that characterization” after “controversial” at the end of the second sentence.

Sir Michael Wood, supported by **Mr. Grossman Guiloff**, proposed that the adoption of paragraph 33 should be deferred in order to give those members with a direct interest in the matter time to confer.

Ms. Escobar Hernández (Special Rapporteur) said she agreed that informal consultations on the paragraph were required in order to better reflect the balance of views in the debate.

Paragraph 33 was left in abeyance.

Paragraph 34

Mr. Tladi, referring to the seventh sentence, said that it was not standard practice for the Commission to indicate that a proposal had been made by “one member”. He therefore proposed that the words “One member proposed” should be replaced with “A view was expressed that”.

Mr. Forteau said that, as the proposal referred to in that sentence involved specific wording, the indication that it had been made by one member made sense.

Ms. Oral, supported by **Mr. Vázquez-Bermúdez**, **Sir Michael Wood** and **Mr. Jalloh**, suggested that, as a compromise, the text should be amended to read “A proposal was made to refine the text to read”.

Paragraph 34, as amended, was adopted.

Paragraph 35

Sir Michael Wood said that the third sentence should be placed between the first and second sentences.

Paragraph 35, as amended, was adopted.

Paragraphs 36 to 38

Paragraphs 36 to 38 were adopted.

Paragraph 39

Mr. Park said that it was unclear whether, in the second sentence, the reference to “draft article 15 of the draft articles on prevention and punishment of crimes against humanity” was correct. It was his understanding that, while the term “draft articles” should still be used in the title of that text, the titles of the individual articles themselves should no longer be preceded by the word “draft”.

Mr. Llewellyn (Secretary to the Commission) said that, although past practice had been inconsistent, articles usually remained in draft form until they had been annexed to a General Assembly resolution.

Mr. Jalloh said that the individual draft conclusions on peremptory norms of general international law (*jus cogens*), which were also mentioned in paragraph 39, still retained the designation “draft”. For the sake of consistency within the paragraph, the same designation should be used for the individual draft articles on prevention and punishment of crimes against humanity.

Mr. Murphy said that, while there were arguments that could be advanced in support of removing the designation “draft” from the title “draft conclusions on peremptory norms of general international law (*jus cogens*)”, in the paragraph under discussion it would be better to maintain consistency.

The Chair said he took it that the members wished to retain the formulation “draft article 15 of the draft articles on prevention and punishment of crimes against humanity”.

It was so decided.

Paragraph 39 was adopted.

Paragraphs 40 to 43

Paragraphs 40 to 43 were adopted.

Paragraph 44

Mr. Forteau said that, in the third sentence, the phrase “suspension of proceedings pending dispute resolution” should be amended to read “suspension of domestic proceedings pending inter-State dispute resolution”. At the end of the eighth sentence, the phrase “ordering the suspension of domestic proceedings” should be added.

Mr. Park said that, in the fourth sentence, the meaning of the phrase “extremely deferential” should be more closely aligned in the English and French versions of the text.

Mr. Rajput, supported by **Mr. Forteau**, said that the word “extremely” should be deleted.

Mr. Murphy said that the word “extremely” could be replaced with the word “overly”. In the third sentence, the words “One member noted” should be amended in line with the decision that had been taken with regard to the same issue in paragraph 34.

Sir Michael Wood said that it would be preferable to replace the word “extremely” with the word “particularly”.

Paragraph 44, as amended, was adopted.

Paragraph 45

Mr. Forteau said that, in the first sentence, the words “obligations to accept dispute settlement” should be replaced with the words “compromissory clauses”.

Paragraph 45, as amended, was adopted.

Paragraph 46

Paragraph 46 was adopted.

Paragraph 47

Mr. Jalloh said that, in the second sentence, the meaning of the word “formality” was unclear.

Mr. Forteau said that the word “formality” should be replaced with the word “form”.

Paragraph 47, as amended, was adopted.

3. *Concluding remarks of the Special Rapporteur*

Paragraph 48

Paragraph 48 was adopted.

Paragraph 49

Mr. Forteau, supported by **Ms. Escobar Hernández** (Special Rapporteur) and **Sir Michael Wood**, said that, in the penultimate sentence, the meaning of the phrase “over the previous two quinquennia” was unclear.

Mr. Vázquez-Bermúdez said that the phrase should be replaced with the words “during the current and last quinquenniums”.

Paragraph 49, as amended, was adopted.

Paragraphs 50 and 51

Paragraphs 50 and 51 were adopted.

Paragraph 52

Mr. Murphy said that he had been surprised to read, in the last sentence of the paragraph, the formulation “allow the Commission to resolve the confusion in the debate on immunity before national criminal courts and international criminal tribunals”. It had been his understanding that the Commission had agreed not to attempt to resolve that confusion.

Ms. Escobar Hernández (Special Rapporteur) said that the idea could be better expressed by the phrase “allow the Commission to avoid the confusion that exists in the debate on immunity before national criminal courts and international criminal tribunals”.

Sir Michael Wood proposed the wording “allow the Commission to avoid entering into the debate on immunity between national criminal courts and international criminal tribunals”.

Mr. Murphy, supported by **Ms. Escobar Hernández** (Special Rapporteur), said that national criminal courts and international criminal tribunals were not engaged in a debate “between” themselves; rather, the debate concerned the way in which immunity operated “before” the two different jurisdictions.

Paragraph 52, as amended, was adopted.

Paragraphs 53 to 61

Paragraphs 53 to 61 were adopted.

The Chair invited the Commission to consider the portion of chapter VI contained in document [A/CN.4/L.946/Add.1](#).

- C. *Text of the draft articles on immunity of State officials from foreign criminal jurisdiction provisionally adopted so far by the Commission*
2. *Text of the draft articles and commentaries thereto provisionally adopted by the Commission at its seventy-second session*

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

Mr. Forteau said that the heading “Part Four” should be inserted above the heading “Draft article 8 *ante*”.

Paragraph (1)

Mr. Murphy said that the last sentence of paragraph (3) should be moved to become the third sentence of paragraph (1). The beginning of the sentence should be redrafted to read “It is recalled that the Commission included a footnote to the titles of Part Two and Part Three”.

Sir Michael Wood said that the second sentence of paragraph (1), which described the purpose of draft article 8 *ante* as being “to define the scope of Part Four in relation to Part Two and Part Three”, was unclear. In order to better reflect the Commission’s debate concerning part four, a new sentence should be added to paragraph (1) indicating that draft article 8 *ante* was intended to make clear that part four related only to those criminal proceedings against current or former foreign State officials that fell within the scope of part two and part three.

Mr. Forteau said that, in the first sentence of paragraph (1), the words “entitled ‘Procedural provisions and safeguards’” should be deleted, given that the Commission had not yet adopted a title for part four.

Mr. Tladi said that there did not appear to be any substantive reason to include the new sentence proposed by Sir Michael Wood. Given that part one did not refer to any criminal proceedings, it was unnecessary to specify that part four related only to criminal proceedings falling within the scope of part two and part three.

Ms. Escobar Hernández (Special Rapporteur) said that, since the Commission had yet to adopt a title for part four, she agreed that any reference to the proposed title of that part should be deleted at the current stage.

She was of the view that Sir Michael Wood’s concern regarding the scope of part four was already covered in the second sentence of paragraph (1). Nevertheless, she proposed that the sentence should be amended slightly to clarify that the purpose of draft article 8 *ante* was to define the scope of part four, particularly in relation to part two and part three, which dealt respectively with immunity *ratione personae* and immunity *ratione materiae*. She would caution against the insertion of the term “criminal proceedings”, for the reasons outlined in paragraph (8) of the commentary to draft article 8 *ante*. Lastly, Mr. Murphy’s proposal to move the last sentence of paragraph (3) to paragraph (1) struck her as problematic, as it would affect the order of ideas in the commentary. She wondered whether additional language at the end of paragraph (1), explaining that the Commission, at its sixty-ninth session, had already clearly indicated the relationship of part four to parts two and three by adopting the footnote referred to in paragraph (3), would be acceptable.

Mr. Forteau said that, while he understood the concern raised by Sir Michael Wood, he was of the view that paragraph (1) should remain unchanged.

Sir Michael Wood said that he wondered whether aligning the English text more closely with the Spanish version might make the sentence clearer. The words “application of” should be added after “scope of” so that the beginning of the sentence would read “Its purpose is to define the scope of application of Part Four”. Draft article 8 *ante* made two important points: the first was that part four covered both current and former officials; the second was that it covered former officials only when there was a question of immunity, which was when parts two and three came into play. It might be useful to include a clear statement to that effect at some point in the commentary. For the moment, the addition of

“application of” would clarify the text, as would the additional sentence proposed by the Special Rapporteur.

Mr. Murphy said that, to his mind, the last sentence of paragraph (3), which concerned the Commission’s decision to include the footnote to the titles of part two and part three, did not chime with the theme of the rest of that paragraph, which outlined the view held by some members of the Commission, himself included, that none of the procedural provisions and safeguards set out in part four would be applicable in relation to draft article 7. That was why he was proposing that the sentence should be moved to paragraph (1). It seemed more logical to mention the footnote earlier in the commentary, as that would explain the background to the decision to adopt draft article 8 *ante*.

Mr. Jalloh, expressing his support for the inclusion of “application of” and the language proposed by the Special Rapporteur, said that the concern raised by Sir Michael Wood regarding former officials was adequately addressed in paragraphs (5) and (8) of the commentary. He was inclined to agree with Mr. Murphy’s proposal to move the last sentence of paragraph (3) to become the third sentence of paragraph (1).

The Chair suggested that, as several amendments had been proposed, paragraph (1) should be left in abeyance to give the Commission time to arrive at a consolidated text.

It was so decided.

Paragraph (2)

Mr. Tladi said that, in the second sentence, he would prefer wording that was more in keeping with the way in which differences of opinion among members of the Commission had been reflected in previous commentaries, as the current wording suggested that there was something behind the disagreements referred to. Moreover, the same issue was also addressed in paragraph (7), whereas it should be dealt with in only one place in the commentary. If the reference was retained in paragraph (2), the sentence should simply state that a view had been expressed that the procedural provisions and safeguards were particularly relevant to draft article 7.

Mr. Park, referring to paragraphs (3) and (4), said that it was strange for a commentary to include so much background information on the Commission’s discussions. For that reason, he proposed that a footnote marker should be inserted at the end of paragraph (2) and that paragraphs (3) and (4) should be moved to the footnote.

Mr. Murphy said that he did not support Mr. Park’s proposal. To his mind, paragraphs (3) and (4) usefully captured the differences of opinion that had given rise to draft article 8 *ante* in the first place. The Special Rapporteur had attempted to summarize, in paragraph (3), the view that he and other members had held; in paragraph (4), the opposing view held by other members; and in paragraph (5), the compromise that had been reached, which had been to adopt draft article 8 *ante*. That was a useful way of explaining to the Sixth Committee why draft article 8 *ante* even existed, since it had not been part of the original proposal. With regard to Mr. Tladi’s proposal, he was of the view that paragraph (2) was a nice lead-in to paragraphs (3) and (4) and should therefore be left unchanged.

Mr. Saboia, supported by **Mr. Ruda Santolaria**, said he agreed that paragraph (2) was a good reflection of the discussions held in 2019 and of the reason why draft article 8 *ante* had been necessary. It also provided a useful introduction to the rest of the commentary.

Mr. Tladi said that he would withdraw his proposal.

Sir Michael Wood said that he would have preferred to delete paragraphs (3) and (4) altogether. Regarding the “differences of interpretation” referred to in paragraph (2), he suggested that the wording used in paragraph (5) of the English text, which referred to a “divergence of views”, should also be used in paragraph (2).

Ms. Escobar Hernández (Special Rapporteur) said she agreed with Sir Michael Wood that the wording of paragraph (2) should be harmonized with that of paragraph (5). In the Spanish text, the words “*interpretaciones distintas por parte de*” should therefore be replaced with “*divergencias de opiniones entre*”. The same language, “*divergencias de opiniones*”, should also replace “*discrepancia*” in paragraph (5).

Mr. Grossman Guiloff said that “*divergencia*” and “*discrepancia*” were synonyms in Spanish. He had no objection to the change proposed by the Special Rapporteur, but it made no difference to the Spanish text, since the words were interchangeable.

Ms. Oral said that she wondered whether the second sentence of paragraph (2) should begin with the words “There were”, rather than “There have nonetheless been”, since that wording might give the impression that the differences or divergences of opinion among members of the Commission had not been resolved.

Ms. Escobar Hernández (Special Rapporteur) said that the corresponding words in the Spanish text were in the past tense.

Paragraph (2), as amended, was adopted.

Paragraph (3)

Mr. Park said that he wished to reiterate his proposal to place paragraph (3) in a footnote to paragraph (2). He would not be inclined to delete paragraph (3) entirely, as Sir Michael Wood had proposed, since it provided useful background information.

Mr. Murphy said that, as he had already stated, he rather liked the way in which paragraph (3) captured the Commission’s discussions; he thus did not wish to move it to a footnote. He nevertheless wished to propose that the end of the first sentence, after the words “paragraph 1 of the draft article appear to”, should be amended to read “pre-empt the examination, invocation and determination of immunity in that context; in other words, so long as the forum State alleges one of the listed crimes, then *ipso facto* no immunity exists”. To better reflect the concerns that he and other members had expressed during the 2019 discussions, the word “applicable” in the second sentence should be replaced with “relevant” and that sentence – and the paragraph – should end after the words “draft article 7”. As he had already indicated, the third and final sentence should be moved to paragraph (1).

Ms. Escobar Hernández (Special Rapporteur) said that she had attempted to reflect the differing views expressed by the Commission in 2019, which had given rise to draft article 8 *ante*, in a balanced manner. Indeed, balance had been the driving force behind that entire process, for which reason she did not wish to delete the second half of the second sentence after “draft article 7”. She hoped that Mr. Murphy would reconsider his proposals, in particular his proposed deletion of the text after “draft article 7”, which included the third and final sentence of the paragraph and the footnote marker. A decision had not yet been made regarding paragraph (1), which was where Mr. Murphy wished to move that third sentence and footnote marker. Thus, a decision to delete that sentence would have an impact on paragraph (1) and the reference in footnote 2.

The meeting was suspended at 5.05 p.m. and resumed at 5.25 p.m.

Ms. Escobar Hernández (Special Rapporteur) said that, following informal consultations, she wished to propose that paragraphs (3) and (4) should be replaced with entirely new wording, to be based on the interim report of the Chair of the Drafting Committee at the Commission’s seventy-first session, so as to better reflect the diverse views expressed in the Commission’s discussion of draft article 8 *ante*.

Mr. Forteau, noting that statements by Chairs of the Drafting Committee were not always straightforward, given that they sought to achieve a compromise among diverse views, said that he would appreciate receiving the new language of paragraphs (3) and (4) in writing before those paragraphs were taken up for consideration and adoption.

Ms. Escobar Hernández (Special Rapporteur) said that she would circulate the two paragraphs in writing before they were taken up at a subsequent meeting.

Paragraphs (3) and (4) were left in abeyance.

Paragraph (5)

Mr. Murphy, noting that some members had been of the opinion that draft article 8 *ante* did not resolve the divergence of views referred to at the beginning of paragraph (5),

proposed that a new sentence should be added at the end of the paragraph, to read: “A view was expressed, however, that this compromise did not resolve the underlying problem.”

Mr. Forteau said that, if Mr. Murphy’s proposal was accepted, it would no longer make sense to state, in the first sentence of the paragraph, that the Commission had reached a compromise. The words “as a compromise” would thus need to be deleted.

Mr. Šturma said that it was accurate to state that a compromise had been reached by the Commission. He did not see that the text added any value by delving so deeply into the drafting history of a single provision, especially since the Commission’s debate had already been reflected in the reports of the Commission and of the Drafting Committee.

Ms. Oral said that, while she shared the views expressed by Mr. Šturma, she would suggest, if Mr. Murphy felt strongly about his proposal, that the word “Nonetheless” should be added at the beginning of the proposed additional sentence.

Ms. Escobar Hernández (Special Rapporteur) said that she did not agree with the proposal made by Mr. Murphy. The Chair of the Drafting Committee, at the Commission’s seventy-first session, had stated that “even though some members sought such a specific reference, the Drafting Committee has settled on a general and neutral formulation in respect to whether immunity applied or did not apply under any of the provisions of the draft articles”. The fact that draft article 8 *ante* had been adopted as a compromise was therefore clear. The statement by the Chair of the Drafting Committee that the adoption of draft article 8 *ante* would not prejudice, and was without prejudice to, the adoption of any additional procedural guarantees and safeguards, including whether specific safeguards applied to draft article 7, was reflected nearly verbatim in paragraph (10) of the commentary to draft article 8 *ante*. She was therefore also of the opinion that the debate in the Drafting Committee was sufficiently reflected in the commentary.

Mr. Jalloh, noting his support for the statements made by Mr. Šturma and the Special Rapporteur, said that draft article 8 *ante* did indeed represent a delicate compromise. He hoped that Mr. Murphy would not insist on his proposed addition, which would effectively undermine the first sentence of the paragraph.

Mr. Grossman Guiloff said that the content of Mr. Murphy’s proposal was not being called into question. On the contrary, the diverse views on the matter were already known and sufficiently reflected; there was, therefore, no need for the proposed addition to paragraph (5).

Mr. Saboia said that he supported the statements made by Mr. Šturma and the Special Rapporteur.

Sir Michael Wood said that the real problem was that the commentary focused too heavily on the debates of the Drafting Committee, rather than on the draft articles themselves. Generally speaking, the commentary was far too long. However, draft article 8 *ante* clearly had not provided a solution to the problem posed by draft article 7. Therefore, he supported the amendment proposed by Mr. Murphy. It was not acceptable, moreover, for other members to claim that it was not acceptable to have that view expressed.

Mr. Gómez-Robledo said that, in seeking to find wording that satisfied the Commission as a whole, the Special Rapporteur had quite understandably referred to the statements made by the Chair of the Drafting Committee. To his recollection, such statements had never been called into question, at least since he had been a member of the Commission. Statements by the Chair of the Drafting Committee, which were very carefully drafted and vetted, provided an overview of the Committee’s in-depth discussion of a topic. To attempt to amend the statement made by the Chair of the Committee on the subject of draft article 8 *ante* would only complicate matters. Noting his support for the views expressed by Mr. Jalloh, he suggested that informal consultations should be held on the paragraph.

Ms. Escobar Hernández (Special Rapporteur) said that she would further examine the language in the statement by the Chair of the Drafting Committee in order to find wording that would be acceptable to all the members.

Paragraph (5) was left in abeyance.

Paragraph (6)

Sir Michael Wood suggested that, in the penultimate sentence, the word “normative” was superfluous and should be deleted. Referring to the clause in the second sentence that began “which is the subject of draft article 13”, he said that he wondered whether explicit references to pending issues and decisions yet to be taken by the Commission should in fact be included in the commentary, unless the Special Rapporteur planned to remove such references before the commentaries were adopted on first reading. The numbering and content of such references could change and any such reference in a way pre-empted the Commission’s debate on the subject in question. He therefore proposed that the end of the second sentence, beginning with the words “which is the subject of draft article 13”, should be deleted.

Ms. Escobar Hernández (Special Rapporteur) said that she did indeed plan to remove such references prior to the adoption of the commentaries on first reading. That type of reference was, however, not unusual in other, similar contexts, and was intended to ensure transparency in the Commission’s work, especially for States. The proposal on the word “normative” seemed to concern a matter of style. The use of that word was not new, as the word was in fact used in language already adopted in relation to draft articles 4, 5 and 6. She would, however, be willing to accept its deletion if the majority of the members desired it. Lastly, she proposed that, in the first sentence, the words “the inclusion of” should be deleted, for stylistic reasons.

Mr. Grossman Guiloff said that he did not agree with the deletion of the word “normative”, which gave a specific meaning to the word “elements” that followed. If “normative” was not deemed satisfactory, then an alternative should be proposed. He suggested that the word “legal” [*jurídicos*] might be acceptable.

Sir Michael Wood said that he was prepared to withdraw his proposal to delete the word “normative”.

Mr. Rajput said that he had supported Sir Michael Wood’s proposal to delete the word “normative”. If the word remained, the text might appear to suggest that some elements in draft articles 4, 5 and 6 were normative and relevant and some were not. He would, however, defer to the Special Rapporteur’s views on the matter.

Mr. Petrič said that he supported the deletion of the word “normative”.

The Chair said he took it that the Commission wished to adopt paragraph (6) as originally drafted.

It was so decided.

Paragraph (6) was adopted.

The meeting rose at 6.05 p.m.