

Provisional

For participants only

6 October 2021

Original: English

International Law Commission
Seventy-second session (second part)

Provisional summary record of the 3560th meeting

Held at the Palais des Nations, Geneva, on Wednesday, 4 August 2021, at 3 p.m.

Contents

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)

Chapter VII. Succession of States in respect of State responsibility

Corrections to this record should be submitted in one of the working languages. They should be set forth in a memorandum and also incorporated in a copy of the record. They should be sent *within two weeks of the date of the present document* to the English Translation Section, room E.6040, Palais des Nations, Geneva (trad_sec_eng@un.org).



Present:

Chair: Mr. Hmoud

Members: Mr. Aurescu
Mr. Cissé
Ms. Escobar Hernández
Mr. Forteau
Ms. Galvão Teles
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 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 chapter VI, paragraph 33, of its draft report (A/CN.4/L.946), which had been left in abeyance at a previous meeting.

Paragraph 33

Ms. Escobar Hernández (Special Rapporteur) proposed that paragraph 33 should read: “Several members addressed the judgment of the Appeals Chamber of the International Criminal Court in the *Jordan Referral re Al-Bashir* case. Some members noted that the judgment had been badly reasoned and controversial. Accordingly, it was suggested by these members that it was important that a ‘without prejudice’ clause should not be drafted in such a way as to endorse the judgment, adding that no link should be made between the judgment and draft article 18 in the commentary. On the contrary, some members did not agree with this characterization. A view was expressed that it was not for the Commission to sit in judgment over the Appeals Chamber in the *Al-Bashir* case ruling in relation to a legal matter that they solely has the statutory competence to address. In any event, members generally agreed that the Commission does not need and should not discuss the judgment in its work on the present topic.”

Mr. Jalloh said that, in the penultimate sentence, the word “has” should be replaced with the word “have”.

Mr. Murphy said that the words “they solely has” should be replaced with the words “the Chamber solely has”.

Sir Michael Wood said that the word “has” should be replaced with the word “had”.

Paragraph 33, as amended, was adopted.

The Chair invited the Commission to resume its consideration of those paragraphs of the portion of chapter VI of its draft report contained in document A/CN.4/L.946/Add.1 that had been left in abeyance at previous meetings.

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

Paragraph (1)

Ms. Escobar Hernández (Special Rapporteur) proposed that paragraph (1) should read: “Draft article 8 *ante* is the first of the draft articles in Part Four. Its purpose is to define the scope of application of Part Four in connection with Part Two and Part Three, which deal, respectively, with immunity *ratione personae* and immunity *ratione materiae* of State officials, current or former, from foreign criminal jurisdiction. By referring to the links between Part Four, on the one hand, and Parts Two and Three, on the other, draft article 8 *ante* takes into account the notion of balance reflected in the previous work of the Commission, which included a footnote to the titles of Part Two and Part Three indicating that ‘[t]he Commission will consider the procedural provisions and safeguards applicable to the present draft articles at its seventieth session’.”

She further proposed that footnote 2 should be moved to the end of paragraph (1), where it would be renumbered as footnote 1.

Paragraph (1), as amended, was adopted.

Paragraph (3)

Ms. Escobar Hernández (Special Rapporteur) proposed that paragraph (3) should read: “In the view of some members, the procedural guarantees and safeguards contained in Part Four applied only when immunity might exist, which seemingly was not the case with

respect to the crimes listed in draft article 7, as it was couched in absolute terms, stating that immunity *ratione materiae* ‘shall not apply in respect of the following crimes under international law’. On the contrary, several members supported a broader interpretation of the draft articles proposed by the Special Rapporteur and envisioned a role for procedural safeguards and guarantees even with respect to situations where draft article 7 was engaged.”

Paragraph (3), as amended, was adopted.

Paragraph (4)

Ms. Escobar Hernández (Special Rapporteur) said that paragraph (4) should be deleted, the text having been merged with paragraph (3). The subsequent paragraphs would be renumbered.

Paragraph (4) was deleted.

Paragraph (5)

Ms. Escobar Hernández (Special Rapporteur) said that, in the first sentence, the words “agreed as a compromise to adopt” should be replaced with the word “adopted”. A second sentence, based on paragraph (10), should be added and should read: “The adoption of draft article 8 *ante* will not prejudice and is without prejudice to the adoption of any additional procedural guarantees and safeguards, including whether specific safeguards apply to draft article 7.”

Mr. Zagaynov said that the beginning of the new second sentence should be amended to read “Draft article 8 *ante* will not prejudice”, to avoid repetition of the word “adoption”, which could give rise to confusion.

Paragraph (5), as amended, was adopted.

Paragraph (10)

Ms. Escobar Hernández (Special Rapporteur) said that paragraph (10) should be deleted, since its content had been moved to paragraph (5).

Paragraph (10) was deleted.

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

Paragraph (6)

Mr. Zagaynov said that the second part of the second sentence, after the words “in this category”, should be deleted. Three new sentences should be added, which would read: “As follows from the judgments of the International Court of Justice in the case concerning the *Arrest Warrant of 11 April 2000* and in *Certain Questions of Mutual Assistance in Criminal Matters*, a particular criminal procedure measure violates immunity of a foreign official if it hampers or prevents the exercise of the functions of that person by imposing obligations upon him. For example, the commencement of a preliminary investigation or institution of criminal proceedings, not only in respect of the alleged fact of a crime but also actually against the person in question, cannot be seen as a violation of immunity if it does not impose any obligation upon that person under the national law being applied. The forum State is also able to carry out at least the initial collection of evidence for this case (to collect witness testimonies, documents, material evidence, etc.), using measures which are not binding or constraining on the foreign official.”

Paragraph (6) was left in abeyance.

Paragraph (7)

Ms. Escobar Hernández (Special Rapporteur) said that, in the fourth sentence, the word “immediately” [*de modo inmediato*] should be replaced with the words “as soon as possible” [*a la mayor brevedad posible*]. In the same sentence, the phrase “wait for a later point in time when” [*esperar a un momento ulterior en el que*] should be replaced with the phrase “wait until” [*esperar a que*]. The fifth sentence should be redrafted to read: “In order

to reinforce that idea, the phrase ‘without delay’, which appears in articles 36 and 37 of the Vienna Convention on Consular Relations, has been used” [*Para reforzar esta idea se ha empleado la expresión ‘sin dilación’, recogida en los artículos 36 y 37 de la Convención de Viena sobre Relaciones Consulares*].

Mr. Forteau said he would ensure that the French version of the paragraph was aligned with the Spanish version.

Paragraph (7), as amended, was adopted on that understanding.

Paragraph (11)

Ms. Escobar Hernández (Special Rapporteur) said that, in order to reflect the concerns raised by Mr. Murphy at a previous meeting, in the last sentence the phrase “in order to follow the terminology already used” should be replaced with the phrase “to refer to the term ‘act of authority’ used” [*para referirse a los “actos de autoridad” a los que se hace referencia*]. An additional reference to the case concerning *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)* would then be added.

Paragraph (11), as amended, was adopted.

Commentary to draft article 10 (Invocation of immunity)

Paragraph (4)

Ms. Escobar Hernández (Special Rapporteur) said that paragraph (4) should read: “The power to invoke immunity is attributed to the State of the official, though it has not been considered necessary to identify the authorities competent to take decisions relating to the invocation or the authorities competent to invoke immunity. Which are those authorities depends on the domestic law, being understood that this category includes those with responsibility for international relations under international law. However, this does not mean that immunity cannot be invoked by a person specifically mandated to do so by the State, especially in the context of criminal proceedings.”

Sir Michael Wood said that, in the second sentence, the word “it” should be inserted before the word “being”. In the third sentence, the term “criminal proceedings” should be amended to read “court proceedings”.

Ms. Escobar Hernández (Special Rapporteur) said that, when considering which categories of persons could invoke immunity, she had had in mind lawyers acting before a court. It would therefore make sense to refer to “court proceedings” rather than “criminal proceedings”.

Paragraph (4), as amended, was adopted.

Commentary to draft article 11 (Waiver of immunity)

Paragraph (5)

Ms. Escobar Hernández (Special Rapporteur) said that, in the second sentence, the word “general” should be replaced with the word “specific”. The last two sentences of the paragraph should be amended to read: “Which are the competent authorities for waiver immunity depends on the domestic law, being understood that this category includes those with responsibility for international relations under international law. However, this does not mean that waiver of immunity cannot be communicated by a person specifically mandated to do so by the State, especially in the context of criminal proceedings.”

Sir Michael Wood said that the amendments he had previously proposed in relation to paragraph (4) of the commentary to draft article 10 should also be applied in paragraph (5) of the commentary to draft article 11.

Mr. Grossman Guiloff said that the two new sentences proposed by the Special Rapporteur should be merged to read: “Which are the competent authorities for waiver immunity depends on the domestic law, being understood that this category includes those with responsibility for international relations under international law, as well as a person

specifically mandated to do so by the State, especially in the context of criminal proceedings.”

Ms. Escobar Hernández (Special Rapporteur) said that it would be preferable to keep the two sentences separate in order to distinguish clearly between the two categories of individuals, namely persons who had responsibility for international relations under international law and persons who had been charged with invoking or waiving immunity in specific criminal proceedings, such as lawyers engaged to defend the position of the State. The word “however” could be deleted.

Mr. Forteau said that if the words “a person” were amended to read “any other person”, the word “however” could be retained.

Paragraph (5), as amended, was adopted.

The Chair invited the Commission to begin its consideration of the portion of chapter VI of its draft report contained in document [A/CN.4/L.946/Add.2](#).

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 12 [13] (Requests for information)

Paragraph (1)

Mr. Park said that, in the last sentence, the words “should consider” should be replaced with “shall consider”.

Sir Michael Wood proposed that the words “the recognition of” in the last sentence should be deleted.

Paragraph (1), as amended, was adopted.

Paragraph (2)

Paragraph (2) was adopted.

Paragraph (3)

Sir Michael Wood proposed that, in the second sentence, the phrases “the situation is fluid and” and “depending on the circumstances of each case” should be deleted.

Paragraph (3), as amended, was adopted.

Paragraph (4)

Sir Michael Wood said that, in the first sentence, the words “form a proper judgment as to” should be replaced with “determine”. The exact meaning of “affiliation” in the phrase “affiliation with the State” was unclear; he proposed that “affiliation with” should be replaced with “position within” to clarify that the phrase referred to the official’s role within the State. Lastly, in the second sentence, the word “important” should be used instead of “essential”, since the forum State might take a decision on immunity even if it did not receive the information it had requested.

Paragraph (4), as amended, was adopted.

Paragraph (5)

Paragraph (5) was adopted.

Paragraph (6)

Mr. Rajput said that, in the fourth sentence, the indication that the State had the right to “decide what information” it wished to request was broader in meaning than the expression that the Commission had decided to use in draft article 12 (2), namely “any information that it considers relevant”. He proposed that the word “what” should be replaced with “the relevant”.

Sir Michael Wood said that he supported Mr. Rajput’s proposal. He wished to propose that the phrase “decision on immunity” in the first sentence should be amended to read “decision concerning immunity”, as the decision could cover waivers of immunity or other related issues. In his view, the third, fifth and sixth sentences of the paragraph, which contained various explanations concerning the term “relevant”, were overly complicated and completely unnecessary. He therefore proposed their deletion.

Ms. Escobar Hernández (Special Rapporteur) said that she could accept the changes in wording proposed by Mr. Rajput and Sir Michael Wood. The final two sentences of the paragraph had been inserted at the request of one member of the Commission, but she had no objection to their deletion.

Mr. Park said he agreed that those two sentences should be deleted.

Mr. Jalloh said that he wished to clarify that the third sentence was not being deleted.

The Chair said it was his understanding that only the fifth and sixth sentences were to be deleted. He took it that the Commission wished to adopt paragraph (6) on that understanding and with the changes in wording proposed by Mr. Rajput and Sir Michael Wood.

It was so decided.

Paragraph (6) was adopted with those amendments.

Paragraphs (7) and (8)

Paragraphs (7) and (8) were adopted.

Paragraph (9)

Mr. Park said that, in the fifth sentence, the word “customary” should be inserted before “international law” so that the passage would read “Such an obligation, however, does not exist in customary international law”.

Sir Michael Wood said that, while he would usually be in favour of referring to customary international law, he could not support Mr. Park’s proposal because the sentence went on to specify an exception in respect of specific obligations laid down in treaties, not to mention the fact that general principles of law might also come into play.

Mr. Jalloh said that he did not support the addition of the word “customary”.

Mr. Park said his point was that the obligation might exist in treaty law but did not exist generally in international law. Perhaps the word “general” could be inserted rather than “customary”.

Ms. Escobar Hernández (Special Rapporteur) said that she had no objection to the insertion of the word “general” in the English text if other members agreed. No change needed to be made to the Spanish version.

Mr. Ouazzani Chahdi said that he understood Mr. Park’s concern. In his view, the sentence would need to be supplemented with information in a new footnote if the original wording proposed by the Special Rapporteur was retained. His own proposal would be to simply delete the entire phrase, which, in the French text, ran from the words “*or, il n’existe pas en droit international d’obligation*” to “*dans d’autres instruments*”.

Mr. Forteau said that the simplest solution would be to end the sentence after “international law”.

Ms. Escobar Hernández (Special Rapporteur) said that, given the content of the preceding sentence of paragraph (9), the Commission might appear to be implicitly accepting that an obligation to provide the requested information did exist if the current sentence was deleted. The alternative – deleting everything in that sentence after “international law” – was inadvisable, since the general assertion made in that phrase needed to be followed by the statement that there were exceptions. Regarding Mr. Ouazzani Chahdi’s request for a new footnote, she wished to point out that footnote 2 in the same paragraph already referred to her seventh report on immunity of State officials from foreign criminal jurisdiction (A/CN.4/729), which detailed the instruments under which the response mechanism fell. She would be grateful if the members of the Commission could agree to adopt the text as originally proposed unless there was a major issue. To her mind, the issue had triggered sufficient debate within the Drafting Committee to warrant its inclusion in the text.

Mr. Rajput said that Sir Michael Wood’s explanation had been clear and convincing. The reference to international law, rather than customary international law, was correct; other principles of treaty law and treaties with either express or implied references to the obligation might be applicable. In his view, the Special Rapporteur’s original wording should be left unchanged.

The Chair said he took it that the Commission wished to adopt paragraph (9) without amendment, retaining the formulation originally proposed by the Special Rapporteur.

It was so decided.

Paragraph (9) was adopted.

Paragraph (10)

Paragraph (10) was adopted.

Paragraph (11)

Sir Michael Wood said that, in his view, the explanation of what was meant by “shall consider ... in good faith” was unnecessary. He wished to propose that the final sentence of the paragraph, if not the entire paragraph, should be deleted.

Mr. Jalloh said that, to his mind, the explanation was warranted; the issue of good faith was a recurring one for the States concerned and he could not agree to delete the whole sentence. He nevertheless agreed that it was rather unclear. He wished to propose that the sentence should end after the word “result”, so that it would read: “The expression ‘shall consider ... in good faith’ thus reflects an obligation of conduct and not an obligation of result.” The rest of the sentence should be deleted.

Mr. Rajput said that, while he understood the reasons for the proposals made by Sir Michael Wood and Mr. Jalloh, he was of the view that the Special Rapporteur’s original formulation was an appropriate expression of something that, although somewhat obvious, did need to be explained. In his view, the second half of the sentence merely elaborated on the first. He was in favour of adopting the proposed text unchanged.

Mr. Forteau, supported by **Mr. Park**, said that he could accept Sir Michael Wood’s proposal; failing that, he could agree with Mr. Jalloh’s formulation. He feared that the second half of the sentence did not accurately reflect the text of draft article 12 (4). The former referred to an “obligation not to ignore the request for information”, whereas the latter referred, in much stronger terms, to an obligation to “consider any request for information in good faith”.

Ms. Escobar Hernández (Special Rapporteur) said that the issue of good faith had been the subject of a long and involved debate in the Drafting Committee and thus needed to be addressed in the commentary. That said, she could agree with Mr. Jalloh’s proposal to end the sentence after the word “result”.

Paragraph (11), as amended, was adopted.

Paragraph (12)

Sir Michael Wood said that paragraph (12) was problematic in that it reintroduced a matter that the Drafting Committee had expressly decided to avoid, namely the grounds for declining to provide information. In his opinion, the Commission's previous explanation regarding the obligation to consider requests "in good faith" rendered paragraph (12) unnecessary; he therefore proposed that the paragraph should be deleted.

Mr. Park said that he would prefer to maintain the paragraph, which reflected the views of certain members, including himself, as expressed during the debate in the Drafting Committee.

Mr. Murphy, recalling that the Drafting Committee had found that, in the context of paragraph (12), there was no outright obligation to provide information but there was an obligation to consider requests for information in good faith, said that, by listing specific grounds that would justify a refusal to provide information, the Commission was suggesting that the information had to be provided unless one of the grounds listed was invoked. As that was not the intent of the draft article, the paragraph should be either deleted or redrafted to make clear that a refusal to provide information could be based on any grounds, so long as the request was considered in good faith.

Mr. Jalloh said that, while he agreed with Mr. Park that paragraph (12) usefully represented the various views expressed in the Drafting Committee, it was perhaps overly detailed. He wondered whether the language of the statement on the topic by the Chair of the Drafting Committee could be used to make clear that, while there was an obligation to consider requests for information in good faith, there was in fact no obligation to provide information. Specifically, he proposed that the phrase "and that a State can refuse in good faith to provide information for any number of reasons" should be added at the end of paragraph (11), as just amended.

Mr. Forteau said that he shared the concerns expressed about paragraph (12), in which, moreover, the examples given did not appear to be relevant to the topic; indeed, the details introduced confusion rather than clarity. While the debates in the Drafting Committee were useful in helping the Commission reach decisions, the language of the Committee Chair's statements was not necessarily apt for use in the Commission's commentary to draft articles. He proposed that the first two sentences of the paragraph should be retained, and the rest of the paragraph deleted.

Ms. Escobar Hernández (Special Rapporteur), noting that the examples given in paragraph (12) had been included at the request of a member of the Drafting Committee to complement the reference to the concept of consideration of requests in good faith, said that the paragraph made clear that decisions to decline requests for information should not be merely discretionary or arbitrary. She did not agree that the examples provided were not relevant to the topic at hand; on the contrary, they were all closely linked to the concept of immunity. Nevertheless, she would not object to the deletion of the second part of the paragraph, as proposed by Mr. Forteau, starting from the words "However, for indicative purposes only".

Mr. Park proposed that the first two sentences of the paragraph should be retained and that the rest of the paragraph should be included in a new footnote.

Ms. Escobar Hernández (Special Rapporteur) said that she would prepare a revised version of the paragraph for consideration and adoption at a subsequent meeting.

Paragraph (12) was left in abeyance.

Paragraph (13)

Paragraph (13) was adopted.

Paragraph (14)

Sir Michael Wood said that paragraph (14) should be deleted, as the commentary should focus on what was included in the draft articles, not on what the Commission had

decided not to include. Moreover, States were likely to be puzzled by the second sentence, which indicated the subject of future discussions.

Ms. Escobar Hernández (Special Rapporteur) said that the content of paragraph (14) was related to that of paragraph 6 of the draft article as originally proposed, which had been deleted by the Drafting Committee on the understanding that it would be revisited in connection with the draft article on the determination of immunity. It was not, in her view, an unusual paragraph, and she would prefer to retain it, unless the majority of the members felt otherwise.

The Chair, noting that the matter would, in any event, be considered at the Commission's seventy-third session, suggested that the paragraph should be deleted.

It was so decided.

The Chair invited the Commission to resume its consideration of those paragraphs of the portion of chapter VI of its draft report contained in document [A/CN.4/L.946](#) that had been left in abeyance at previous meetings.

Paragraph 8 (continued)

Paragraph 8 was adopted, subject to its completion by the secretariat.

Paragraph 62 (continued)

Mr. Forteau, recalling that the Commission had agreed, at its sixty-ninth session, to include a footnote to the titles of part two and part three of the draft articles, said that the footnote was missing, at least in the French and English versions of the document.

Ms. Escobar Hernández (Special Rapporteur) said that the footnote mentioned by Mr. Forteau was also missing in the Spanish version. The footnote should be retained, because it had been adopted together with the draft articles and also because it was mentioned in paragraph (1) of the commentary to draft article 8 *ante*.

The Chair suggested that, since the content of the footnote was procedural in nature and no longer relevant, it could be removed.

Mr. Rajput said that there were certain outstanding issues regarding the placement of the footnote in question. While he would not object to its removal in paragraph 62, the footnote would need to be reinserted prior to the Commission's consideration of the topic at its seventy-third session.

The Chair said he took it that the Commission wished to retain the footnote.

It was so decided.

Paragraph 62, as amended, was adopted.

Chapter VII. Succession of States in respect of State responsibility (A/CN.4/L.947 and A/CN.4/L.947/Add.1)

The Chair invited the Commission to consider chapter VII, sections A and B, of its draft report ([A/CN.4/L.947](#)).

Sections A and B of chapter VII were adopted, subject to the completion of paragraphs 9 and 10 by the secretariat.

The Chair invited the Commission to consider chapter VII, section C, of its draft report ([A/CN.4/L.947/Add.1](#)).

C. Text of the draft articles on succession of States in respect of State responsibility provisionally adopted so far by the Commission

1. Text of the draft articles

Paragraph 1

Paragraph 1 was adopted.

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

Commentary to draft article 7 (Acts having a continuing character)

Paragraph (1)

Mr. Šturma (Special Rapporteur) said that the phrase “that are commenced by a predecessor State before the date of succession and that continue thereafter by the successor State” should be inserted at the end of the first sentence, after the words “continuing character”. The second sentence should be deleted. In the third sentence, the first word, “Thus”, should be deleted, and the final two words “was essential” should be replaced with “was considered essential”. The last sentence should be deleted, as it was not the practice of the Commission to refer to draft articles that had only been provisionally adopted by the Drafting Committee.

Mr. Rajput said that he was not convinced by the proposed new formulation in the first sentence – “acts ... that are commenced by a predecessor State” – as it gave the impression that the draft article addressed only actions and not omissions. He therefore wished to propose that the sentence should be reworded to read: “Draft article 7 seeks to address the question of succession of State responsibility in respect of acts having a continuing character.” The second sentence should then read: “This needed to be addressed because acts having a continuing character may continue to occur after State succession.” The changes proposed by the Special Rapporteur did not capture the idea of the continuing character of the acts. He did, however, support the proposal to delete the last sentence.

Mr. Park said that he also preferred the original formulation of the paragraph, although he agreed that the final sentence should be deleted.

Mr. Murphy said that he supported the Special Rapporteur’s proposed new formulation. The wording of the beginning of the second sentence in the original text – “This needed to be addressed” – was rather peculiar, and the sentence essentially repeated what was stated in the first sentence. Mr. Rajput’s proposal to insert the words “succession of” before “State responsibility” in the first sentence could be considered, although there might be differences of opinion as to whether there was a “succession” or simply a continuation, since that sentence dealt only with the predecessor State and not the successor State. To his mind, there was no succession to State responsibility; it started with the predecessor State and continued to rest on the predecessor State after the date of succession.

Mr. Šturma (Special Rapporteur) said that, in his view, his proposed new version of the text was clearer than the original. While it would be possible to use the formulation “succession of State responsibility” proposed by Mr. Rajput, the question of succession did not, strictly speaking, seem to arise in that context, which concerned the continuing character of acts by the predecessor State and therefore reflected the hypothesis of continuity. In his view, the term “acts” covered both actions and omissions.

Paragraph (1), as amended by the Special Rapporteur, was adopted.

Paragraph (2)

Mr. Šturma (Special Rapporteur) proposed that the paragraph should be amended to read: “Draft article 7 should be understood within the context of the 2001 articles on responsibility of States for internationally wrongful acts, which address acts having a continuing character.”

Mr. Rajput said that, while he had no objection to the Special Rapporteur’s proposed revisions to paragraph (2), he wondered whether the content of that paragraph was even necessary, given that the same point was made in paragraph (3). He therefore proposed that paragraph (2) should be replaced with the final sentence of paragraph (3).

Mr. Šturma (Special Rapporteur) said that, although he saw some merit in Mr. Rajput’s proposal, it would not be as straightforward as it might seem. Moving the final sentence of paragraph (3) to paragraph (2) would necessitate a number of other changes.

Furthermore, even if the existing paragraph (2) was deleted, footnotes 1 and 2 would still need to be maintained, which might complicate matters further.

Mr. Rajput said he agreed that the Commission might not have sufficient time to make such changes.

Mr. Murphy said that, in his view, it would be more appropriate for footnote 2 to refer to article 14 of the articles on State responsibility rather than to paragraph (5) of the commentary thereto.

Mr. Šturma (Special Rapporteur) said that perhaps the footnote could include references to both article 14 itself and paragraph (5) of the commentary.

Mr. Ouazzani Chahdi said that the word “*ibid.*” should be moved to the beginning of footnote 2 to make it immediately clear that the reference was to the articles on State responsibility themselves.

Paragraph (2), as amended, was adopted.

Paragraph (3)

Mr. Šturma (Special Rapporteur) said that, in the first sentence, the words “State succession” should be replaced with “succession of States”. The word “State” should be added at the end of the second sentence, after “predecessor”, and the words “this Commission, in” should be deleted from the third sentence.

Paragraph (3), as amended, was adopted.

Paragraph (4)

Mr. Šturma (Special Rapporteur) said that, at the beginning of the first sentence, the word “This” should be replaced with “The first sentence”, for the sake of clarity. He also wished to propose that the second sentence should be reformulated to read: “It states that the international responsibility of the successor State also extends to the act of the predecessor States only if and to the extent that the successor State acknowledges and adopts the act of the predecessor State as its own.” That wording more faithfully reproduced the content of draft article 7. At the end of the paragraph, he proposed the addition of a new sentence and footnote concerning the well-known *Lighthouses* arbitration between France and Greece. The Commission had already referred to that case in its commentary to article 11 of the articles on State responsibility.

Mr. Forteau said it was his understanding that the *Lighthouses* arbitration concerned debts rather than international responsibility. The Special Rapporteur should therefore check that reference carefully before the paragraph was adopted.

Mr. Zagaynov, referring to the first sentence concerning the general rule in the case of succession, said that, as he recalled, there had been a long discussion as to whether that general rule existed. To his mind, the first sentence of the draft article referred to certain rules that were applied to a specific category of succession. He therefore did not consider the reference to the “general rule” in the first sentence of paragraph (4) to be appropriate. In order to avoid confusion, perhaps the first part of that sentence – “The first sentence being the general rule in the case of succession” – could be deleted.

Mr. Šturma (Special Rapporteur) said that there were two ways in which Mr. Zagaynov’s concern could be addressed: either the word “even” could be added before “in the case of succession” or the words “in the case of succession” could be deleted entirely. As to Mr. Forteau’s point, he could check the reference to the *Lighthouses* arbitration and present a revised version of the text for adoption at the Commission’s next meeting.

Mr. Jalloh said he agreed that the Special Rapporteur should review the reference to the *Lighthouses* arbitration, which did add value to the text. The newly proposed footnote made reference to paragraph (6) of the commentary to article 11 of the articles on State responsibility, but the reference should be to paragraph (3).

Mr. Ouazzani Chahdi said that, in his view, the new sentence concerning the *Lighthouses* arbitration which the Special Rapporteur proposed to insert in the body of the paragraph could be moved to the footnote.

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

It was so decided.

Paragraph (4) was left in abeyance.

Paragraph (5)

Mr. Šturma (Special Rapporteur) said that paragraph (5) should be deleted. The first sentence was mostly a repetition of what was stated in the previous paragraph, while the second sentence referred to draft articles that had been only provisionally adopted by the Drafting Committee. In that connection, he sincerely hoped that the Commission would adopt draft article 6 at its next session in order to enable him to draft a proper commentary.

Paragraph (5) was deleted.

Commentary to draft article 8 (Attribution of conduct of an insurrectional or other movement)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

Mr. Šturma (Special Rapporteur) said that the word “prevails” rather than “succeeds” should be used in the first sentence, and “closely follows” rather than “mimics” in the second.

Mr. Rajput proposed that the last sentence should be deleted, as it was unnecessary and seemed to suggest that the Commission was making its own qualitative assessment.

Paragraph (2), as amended, was adopted.

Paragraph (3)

Mr. Šturma (Special Rapporteur) said that the second sentence should be amended to read: “That paragraph is modelled closely on article 10, paragraph 3, of the 2001 articles, but with reference to a ‘predecessor State’ in order to contextualize the provision in terms of succession of States”. In the final sentence, the reference should be to “articles 4 to 11” rather than “articles 4 to 9”.

Mr. Rajput said that the word “improperly” near the end of the first sentence should be deleted. If a State failed to prevent a violation of human rights, it incurred responsibility; there was no need to prove that it had acted improperly.

Paragraph (3), as amended, was adopted.

Commentary to draft article 9 (Cases of succession of States when the predecessor State continues to exist)

Paragraph (1)

Mr. Šturma (Special Rapporteur) said that, as originally drafted, the paragraph seemed to emphasize the possible transfer of obligations, whereas paragraph 1 of draft article 9 dealt with the usual scenario of continuity, while paragraph 2 addressed “particular circumstances”. In order to better reflect the structure of the draft article, the first sentence of paragraph (1) should be amended to read: “Draft article 9 addresses the retention of obligations by the predecessor State arising from the commission of an internationally wrongful act by the predecessor State, when the predecessor State continues to exist after the date of the succession of States, as well as the possibility of an agreement between the

successor State and the injured State.” In the second sentence, the words “These would occur” should be replaced with “Such succession could occur”.

Paragraph (1), as amended, was adopted.

Paragraph (2)

Mr. Šturma (Special Rapporteur) said that the second sentence, which referred to a “temporal element”, should be deleted. The third sentence should begin with the words “As such” rather than “This means that” and the words “as the entitlement remains thereafter” at the end of the sentence should be deleted.

Mr. Zagaynov said that he had a concern similar to the one he had expressed earlier in connection with the commentary to draft article 7, about the use of the term “general rule” in the first sentence. He did not see the need to introduce such a concept, given that, in any case, exceptional circumstances were referred to later in the text.

Mr. Šturma (Special Rapporteur) said that perhaps the simplest solution would be to delete the word “general” before “rule” in the first sentence.

Paragraph (2), as amended, was adopted.

Paragraph (3)

Mr. Šturma (Special Rapporteur) said that the first sentence should begin with the words “The text draws upon” rather than “The Commission also re-emphasizes the applicability of”, and the words “This also means that” at the beginning of the last sentence should be replaced with “Further”.

Mr. Rajput said that the statement “This formulation is broader than liability, or an entitlement to reparations” in the first part of the second sentence was problematic, as it did not fit into the framework of State responsibility. He therefore proposed that the phrase should simply be deleted and that the rest of the second sentence should be moved to the end of the first sentence.

Mr. Murphy said that perhaps Mr. Rajput’s concern could be addressed if the words “is broader than liability, or an entitlement to reparations, as it” in the second sentence were deleted.

Mr. Šturma (Special Rapporteur) said he agreed that the second sentence should read: “This formulation encompasses all rules on the responsibility of States for internationally wrongful acts.”

Paragraph (3), as amended, was adopted.

The meeting rose at 6 p.m.