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International Law Commission
Seventy-third session (second part)

Provisional summary record of the 3607th meeting
Held at the Palais des Nations, Geneva, on Tuesday, 2 August 2022, at 3 p.m.

Contents

Present:

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

Secretariat:

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-third session (*continued*)

Chapter VI. Immunity of State officials from foreign criminal jurisdiction (*continued*) (A/CN.4/L.962 and A/CN.4/L.962/Add.1)

The Chair invited the Commission to resume its consideration of the portion of chapter VI contained in document A/CN.4/L.962/Add.1, recalling that the Special Rapporteur had circulated an informal document, in English only, showing the changes that she was proposing to the text and that portions of the text were based on commentaries that had already been provisionally adopted at a previous session.

Part One (Introduction) (*continued*)

Commentary to draft article 1 (Scope of the present draft articles) (*continued*)

Paragraph (1) (*continued*)

Mr. Forteau said that, in the last sentence, the word "dimension" might give rise to confusion. He therefore proposed replacing it with "perspective", which was the word used earlier in the paragraph.

Mr. Murphy proposed that, in the second sentence, the word "provision" should be replaced with "article" and that, in the last sentence, the phrase "to combine both dimensions into a single provision" should be replaced with "to combine both perspectives in a single draft article".

Sir Michael Wood said that, in the last sentence, he wondered whether "title" was the most appropriate word.

Ms. Escobar Hernández (Special Rapporteur) said that she accepted Mr. Forteau's and Mr. Murphy's proposals. The word "title" was correct in the last sentence. The intention was to convey the idea that both aspects of the "dual perspective" mentioned in the paragraph had been subsumed under a single title, "Scope of the present draft articles".

Paragraph (1), as amended, was adopted.

Paragraphs (2) to (18)

Paragraphs (2) to (18) were adopted with minor drafting changes.

Paragraph (19)

Sir Michael Wood, supported by **Mr. Murphy**, said that draft article 1 (3) was not as broad in scope as was suggested by paragraph (19). The paragraph should be reformulated to reflect the exact language of draft article 1 (3).

Ms. Escobar Hernández (Special Rapporteur) said that she accepted that suggestion and proposed that the paragraph should therefore be amended to read: "Paragraph 3 addresses the relationship between the present draft articles and the rights and obligations of States parties under international agreements establishing international criminal courts and tribunals as between the parties to those agreements."

Paragraph (19), as amended, was adopted.

Paragraph (20)

Ms. Escobar Hernández (Special Rapporteur) said that, as indicated in the informal document circulated in the meeting room, she was proposing that the words "under which – as a general rule – the existence of immunity for any person, whether under national or international law, irrespective of the rank of official status of a person, is not recognized" should be inserted at the end of the second sentence. She was also proposing that two new sentences should be added at the end of the paragraph, to read: "The view was expressed that the non-applicability of immunity before such tribunals, being a part of the practice of States,

indicates that there is indeed such a relationship between the present draft articles and the issue of immunity of officials. In this view, there are legal effects that must be taken into account and that may bear on the immunity of officials from foreign criminal jurisdiction at the horizontal level."

Mr. Zagaynov said that he had serious doubts regarding the Special Rapporteur's proposals. The text proposed for insertion in the second sentence was in direct contradiction with the existing text, in which it was stated that issues relating to immunity before international criminal courts and tribunals remained outside the scope of the draft articles. It would make no sense to follow that statement with a pronouncement on those very issues. The two sentences proposed for insertion at the end of the paragraph were confusing.

Ms. Escobar Hernández (Special Rapporteur) said the wording that she was proposing for insertion in the second sentence was merely a statement of fact. It served to establish a separation between the draft articles and the rules governing the legal systems applicable to international courts and tribunals. The text that she was proposing for insertion at the end of the paragraph began with the words "A view was expressed" since it reflected the view of certain members. Her proposals were based on suggestions received from members.

Mr. Murphy said that the text proposed for insertion in the second sentence was by no means a statement of fact. It was simply not the case that, as a general rule, the "existence of immunity for any person, whether under national or international law, irrespective of the rank of official status of a person" was not recognized under the legal regime in question. He did not agree that, if a Head of State, for example, travelled to another country, he or she could be arrested in that country and surrendered to an international court or tribunal. Even in the specific context of the International Criminal Court, such a statement did not reflect an informed reading of article 98 of the Rome Statute. He had been under the impression that the Special Rapporteur was not going to wade into such issues. The text proposed for insertion bore no relation to draft article 1 (3).

While he accepted that a member of the Commission could request to have a particular view reflected in the text of a commentary, it was not necessarily the case that more than one sentence should be inserted to that end. The two sentences proposed for insertion at the end of the paragraph under consideration went much further than simply reflecting an opposing view. Draft article 1 (3) stated that the draft articles did not affect the rights and obligations of States parties under international agreements establishing international criminal courts and tribunals as between the parties to those agreements. The opposing view would be that the draft articles should in fact be regarded as affecting those rights and obligations. That view could be captured in a single sentence, to read: "The view was expressed that the present draft articles should be regarded as having an effect on the rights and obligations of States parties under international agreements establishing international criminal courts and tribunals." Members should refrain from using the text of the commentaries to expound on personal theories regarding the operation of the law that went beyond the scope of the draft provisions themselves.

Sir Michael Wood said that the second sentence would be clearer if amended to read: "As a result, issues relating to immunity before international criminal courts and tribunals are outside the scope of the present draft articles."

Mr. Forteau said that the two sentences proposed for insertion at the end of the paragraph seemed more relevant to draft article 7 than to draft article 1 (3), which was intended simply to safeguard the rights and obligations of States parties under international agreements establishing international criminal courts and tribunals. The text proposed for insertion in the second sentence could be reformulated to reflect the language of article 27 of the Rome Statute. For example, the words "under which official capacity does not bar international courts and tribunals from exercising their jurisdiction" could be inserted instead. Such wording would allow the Commission to avoid taking a position on immunity in that context while reflecting the specificities of the statutes of international courts and tribunals.

Mr. Jalloh said that he supported the Special Rapporteur's proposals. He did not agree that the text proposed for insertion in the second sentence bore no relevance to draft article 1 (3). The first half of the sentence stated that issues relating to immunity before

international criminal courts and tribunals remained outside the scope of the present draft articles, and the new text proposed for insertion at the end of the sentence addressed the legal regime that did govern such issues. The paragraph under consideration was no different from the preceding paragraphs in that regard.

He would suggest that article 27 of the Rome Statute, on irrelevance of official capacity – and not article 98, on cooperation with respect to waiver of immunity and consent to surrender – was the most relevant provision in the present context and reflected the current state of international law on the issue. Article 27 (2) of the Rome Statute stated that: "Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person." That wording was similar to the wording that the Special Rapporteur was proposing for insertion in the second sentence. That provision could be traced back to the Statute of the International Tribunal for the Former Yugoslavia and was in fact a restatement of principle 3 of the Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal. Of course, article 27 (2) of the Rome Statute was a directive to the Court, but 123 States were parties to that instrument. The Special Rapporteur was in no way attempting to undermine the agreement that had been reached in the Commission on that issue.

With regard to the two sentences proposed for insertion at the end of the paragraph, a member should be able to have his or her view reflected in the text of a first-reading commentary in the manner in which he or she had presented it. He was not aware of any rule that limited members to a single sentence. Indeed, on other occasions, entire paragraphs had been inserted to reflect opposing views. At the second-reading stage, the Commission would be able to return to the paragraph in the light of the reactions of States. He would not accept any amendments to the two sentences in question, which reflected his own position. Those two sentences captured a view that was linked to the debate that had taken place in the Commission.

Mr. Grossman Guiloff said that, at the first-reading stage, if a member held a strong view on a particular point, he or she should be allowed to have that view reflected in the text so that States could react to it before the second reading. He did not support Mr. Forteau's proposal.

Sir Michael Wood said that, if the Commission did not wish to end the sentence after the words "the scope of the present draft articles", it should bear in mind that it would be dealing with various criminal courts and tribunals and not only the International Criminal Court. In that scenario, it would be preferable to replace the words "a legal regime of their own" with "their own special rules", to end the sentence after those words and to add a footnote containing a reference to article 27 of the Rome Statute.

Ms. Escobar Hernández (Special Rapporteur) said that she could agree with the proposal that no additional text should be inserted in the second sentence and that a footnote should be added to provide an example in the form of a reference to the relevant provision of the Rome Statute, namely article 27.

Mr. Murphy said that, while he was open to the language proposed by Sir Michael Wood, the proposed reference to the Rome Statute should be general in nature, as members might disagree as to which article of that instrument was most relevant in the present context. If the Commission was in favour of the Special Rapporteur's proposal that two additional sentences should be added to the paragraph, he wished to request the addition of a further sentence, after those two sentences, to reflect his own view. That sentence would read: "Another view was expressed that such effects include immunity *ratione personae* from foreign criminal jurisdiction for the purpose of surrender to an international criminal court or tribunal."

Ms. Lehto said that she was in favour of retaining the words "a legal regime of their own" or replacing them with "a distinct legal regime". It could be argued that, since the end of the Second World War, the non-application of immunity for the most serious international crimes had become a general or customary rule, as could be seen in the jurisprudence. In that context, the inclusion of the words "special rules" would raise other questions.

Mr. Jalloh said that he had concerns about the wording proposed by Sir Michael Wood but could support the proposal put forward by Ms. Lehto. The footnote proposed by Sir Michael Wood should clearly set out the relevant references, which could not be contested. Those references were article 7 (2) of the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991; article 6 (2) of the Statute of the International Criminal Tribunal for Rwanda; article 6 (2) of the Statute of the Special Court for Sierra Leone; and article 27 (2) of the Rome Statute of the International Criminal Court. He would need time to consider the proposals that had been made in response to the Special Rapporteur's proposed addition of sentences reflecting his own view in order to ensure that his view continued to be correctly reflected.

Mr. Forteau said that he was uncomfortable with the trend that was emerging of including a sentence to reflect the views of each member. It would perhaps be simpler to refer the reader to the records of the debates that had taken place at the previous session. The drafting of paragraph (20) as a whole should perhaps be revisited, as it focused on the issue of immunities, while paragraph 3 of draft article 1 itself was focused on the rights and obligations of States parties under the agreements described therein.

The Chair said he took it that the Commission wished to leave paragraph (20) in abeyance in order to allow time for informal consultations among members.

It was so decided.

Paragraph (21)

Paragraph (21) was adopted with a minor drafting change.

Paragraph (22)

Ms. Escobar Hernández (Special Rapporteur) said that the portion of the second sentence that read "has been drafted as a 'without prejudice' clause" should be deleted because there continued to be discussion as to whether paragraph 3 of draft article 1 was indeed such a clause. The words "modelled on paragraph 2, in order to" should also be deleted. Since the third sentence, as worded in the draft report, could be interpreted to suggest that she was attempting to place international criminal courts and tribunals at the centre of the commentaries, that wording should be deleted and replaced with the following: "In so doing, the Commission does not ignore the important role that international criminal courts and tribunals are playing in international law." In the final sentence, the formulation "At the same time, the Commission has precluded the possibility that" should be replaced with "In any event, given their legal nature, the Commission is aware that", and the word "not" should be inserted before the words "be interpreted".

Mr. Forteau said that, in the second sentence, the phrase "a long debate" should be changed to "a substantial debate". The last sentence of paragraph (22) was perhaps unnecessary and, in the light of Article 103 of the Charter of the United Nations, not entirely correct in the context of international criminal tribunals created by the Security Council.

Mr. Jalloh said that it had been noted during the discussions of the working group on commentaries that the amount of explanation of the Commission's discussions that was contained in the text gave the impression of a divided Commission. The Commission had, however, generally done very well in reaching consensus. He was not in favour of using language, such as "a substantial debate", that would amplify the suggestion of division. If the word "debate" had to be qualified, the word "some" should be used rather than "substantial". An account of the Commission's discussions did not need to be provided on every point. Otherwise, he supported the text proposed by the Special Rapporteur.

Sir Michael Wood said that he agreed with Mr. Jalloh's comment. Indeed, the entire paragraph seemed largely unnecessary. Anyone interested in the compromise and positions described in the first sentence could refer to the records of the relevant meetings. He proposed that the words "After a long debate" should simply be deleted.

Mr. Grossman Guiloff said that, in the second sentence, the word "debate" should be unqualified and language such as "considering all the issues involved" should be inserted

between the words “the Commission” and “concluded”. The language used by the Commission would have an impact, and it should take care to ensure that its text could not be used for purposes for which it had not been intended.

Ms. Escobar Hernández (Special Rapporteur) said that she would not be in favour of deleting paragraph (22) entirely. If the Commission did not want to refer to the debates that had taken place, the first sentence and the phrase “After a long debate” in the second sentence could be deleted. The final sentence could be deleted to respond to Mr. Forteau’s concerns. Paragraph (22) would then read:

> The Commission concluded that an express reference to the issue of international criminal tribunals was necessary in draft article 1, concerning the scope of the draft articles. Paragraph 3 emphasizes the separation and independence of the draft articles and the special legal regimes applicable to international criminal courts and tribunals. In so doing, the Commission does not ignore the important role that international criminal courts and tribunals are playing in international law.

Paragraph (22), as amended, was adopted.

Paragraph (23)

Ms. Escobar Hernández (Special Rapporteur) said that, in the first sentence, the words “as between the parties to those agreements” should be inserted immediately before the closing quotation marks to reflect the wording of article 26 of the United Nations Convention on Jurisdictional Immunities of States and Their Property. In the second sentence, the formulation “the issues implicit in paragraph 3 of draft article 1” should be replaced with “the connection between these draft articles and international criminal courts and tribunals” to clarify the meaning of the sentence.

Mr. Forteau said that the Special Rapporteur’s proposed use of the word “connection” would lead to an inconsistency with the reference in paragraph (22) to “the separation and independence of the draft articles and the special legal regimes applicable to international criminal courts and tribunals”. If the Special Rapporteur’s proposal was accepted, the word “relationship” should be used instead of “connection”, as it was more neutral, and the words “reflecting and” should be deleted from the second sentence.

Paragraph (23), as amended, was adopted.

Paragraph (24)

Sir Michael Wood said that, in the first sentence, the words “that may derive from” should be replaced with the word “under”, the word used in paragraph 3 of draft article 1.

Paragraph (24), as amended, was adopted.

Paragraph (25)

Ms. Escobar Hernández (Special Rapporteur) said that, in the first sentence, the expression “‘without prejudice’ clause” should be replaced with “paragraph 3 of draft article 1”; in the third sentence, the clause “whether these agreements are concluded between States or between States and international organizations” should be inserted after the phrase “the constituent instrument of each international criminal tribunal”; and, in the final sentence, the words “adopted under Chapter VII of the Charter” should be inserted after “Security Council resolutions”, the word “often” should be inserted between the words “have” and “been created” and the word “including” should be inserted before the phrase “as a result”.

Paragraph (25), as amended, was adopted.

Paragraph (26)

Mr. Forteau said that the use of the expression “as a rule” in the second sentence suggested that there could be exceptions to the principle of privity to treaties. The expression should therefore be replaced with “as a matter of treaty law”.

Sir Michael Wood said that Mr. Forteau made a good point. To address it, the expression "as a rule" should simply be deleted. The purpose of the final sentence was unclear to him, and he would propose that it should also be deleted.

Mr. Jalloh said that he did not oppose the amendment proposed by Mr. Forteau. He did, however, oppose the proposal to delete the final sentence. That sentence allowed for the possibility that circumstances could exist that would cause a State to be bound by an agreement establishing a particular international court or tribunal even if the State was not a party to the agreement. Such circumstances could arise if, for example, the Security Council created a tribunal under Chapter VII of the Charter, or if a regional institution, such as the African Union, exercised its power to take decisions that would be binding on its members.

Mr. Murphy said that he did not oppose the amendment proposed by Mr. Forteau. He did not understand the need for the final sentence. If it related to Security Council resolutions or resolutions of other international organizations, that should perhaps be stated in the text. However, it would then seem to address an issue that did not arise with respect to paragraph 3, which dealt with the rights and obligations of States under international agreements establishing international criminal courts and tribunals and nothing more. Furthermore, there was a risk that a broad reading of that sentence could undermine paragraph 2 of the draft article, which, quite importantly, preserved rights and obligations under other regimes. If the final sentence had to be retained, the first word, "This", should be replaced with "Paragraph 3" and the words "by the Security Council or other international organizations" should be inserted immediately after the word "imposed". The sentence should end immediately after the words "upon States".

Mr. Grossman Guiloff said that he found paragraph (26) as a whole to be problematic. The paragraph suggested that the legal regimes applicable to international criminal tribunals were special because they applied only as between the parties to the agreements establishing a particular international court or tribunal, but there was nothing special in that. On the contrary, a legal regime would be special if it applied to persons or entities who were not parties to the underlying agreement. It would be preferable for the first sentence to indicate that paragraph 3 ended with the phrase "as between the parties to those agreements" because legal regimes applied only to the parties to the relevant agreements and for the second and third sentences to be deleted. The Commission needed to take a closer look at the paragraph.

The Chair suggested that the Commission could simply add the phrase "to be consistent with general treaty rules" to the end of first sentence.

Mr. Forteau said that he agreed with the point made by Mr. Grossman Guiloff. The second sentence could be reformulated to read: "The intention here is to highlight that the legal regimes applicable to international criminal tribunals apply as a matter of treaty law only as between the parties to the agreement establishing a particular international court or tribunal."

Ms. Escobar Hernández (Special Rapporteur) said that she could accept Mr. Forteau's proposed reformulation of the second sentence and Mr. Murphy's proposal to replace "This" with "Paragraph 3". She would prefer not to delete the last sentence, which had been included in the paragraph because rules of international law did exist by virtue of which obligations could be imposed on States beyond what was set out in a treaty establishing an international court or tribunal. As a measure of caution, however, the sentence limited itself to saying that the Commission was taking no position with respect to such obligations, and the reference to "other rules of international law" could also be limited by inserting the words "binding upon such States" after it. The phrase "by the Security Council or other international organizations", which Mr. Murphy had proposed, was too restrictive, because obligations could also arise from, for example, customary rules of international law. The Commission could consider expanding the proposed formulation to "by the Security Council or other international organizations or by virtue of any other applicable rule of international law".

The Chair, noting that there did not appear to be consensus on the proposed language, said he took it that the Commission wished to leave paragraph (26) in abeyance to allow time for informal consultations among members.

It was so decided.

Commentary to draft article 2 (Definitions)

Paragraph (1)

Mr. Park said that further information should be provided in the final sentence as to why the definitions referred to had not been included in draft article 2. He proposed that the explanation should be borrowed from the statement of the Chair of the Drafting Committee and the words "and given the diversity of definitions and practices under different legal systems and traditions" should be inserted after the phrase "in its previous work".

Sir Michael Wood said that he did not support Mr. Park's proposal because the explanation provided applied only to the expressions "criminal jurisdiction" and "exercise of criminal jurisdiction". The Commission should not suggest that the definitions of "immunity" and "inviolability" varied depending on national legal systems. The second sentence, which distracted the reader from the main point of the paragraph, should be moved into a footnote.

Mr. Forteau said that both the second and third sentences should be moved into a footnote. In the third sentence, the words "and in universal conventions on immunities" should be inserted after the phrase "in its previous work", because the primary reason behind the Drafting Committee's decision not to define the terms in question had been the absence of such definitions in those conventions.

Ms. Escobar Hernández (Special Rapporteur) said that footnote 28, which currently followed the mention of her second report in the sentence beginning "The Commission", would be moved to the end of the first sentence. The sentences beginning "The Commission" and "However", which appeared as the second and third sentences in paragraph (1) of the draft report, would, as amended by Mr. Forteau, be moved to footnote 28. The reference to her second report that already appeared in footnote 28 would then be placed after the first sentence in that footnote.

Paragraph (1), as amended, was adopted.

Paragraphs (2) to (8)

Paragraphs (2) to (8) were adopted.

Paragraph (9)

Mr. Huang said that the Special Rapporteur's failure to distinguish between criminal and civil jurisdiction in paragraph (9) posed a problem which would affect the quality of the whole report and damage the Commission's reputation. During the informal consultations on chapter VI of the draft report, he had made it clear that the cases cited in the commentary must meet certain basic criteria, the first of which was relevance to the subject matter, namely the immunity of State officials from foreign criminal jurisdiction. However, several of the cases listed in footnotes 31 and 60 had been heard by civil courts and had nothing to do with criminal responsibility. They should therefore be deleted. He presumed that they had been cited because the Special Rapporteur's research assistants had unfortunately failed to comprehend the essential difference between criminal and civil proceedings, thereby reducing the weight of evidence in support of exceptions to the immunity of State officials from foreign criminal jurisdiction. The cases cited must be valid, objective and impartial and not selective or quoted out of context.

For example, the *Tibet* case listed in footnote 119 had been brought by members of Spanish non-governmental organizations who supported Tibetan independence and who had sued the then President of China in a Spanish court on the grounds that he had violated the human rights of Tibetans. It was a typical case of the abuse of universal criminal jurisdiction, and had caused a diplomatic dispute between China and Spain. The case had been resolved when the Government of Spain had introduced legislative amendments which had ultimately led to the dismissal of the case by the Supreme Court and the Constitutional Court. The Spanish Government had not endorsed the exercise of criminal jurisdiction by Spanish courts over foreign leaders and in 2009 had amended Organic Act 6/1985 on the Judiciary

accordingly. In 2014, the Spanish Parliament had then passed Organic Act 1/2014 modifying Organic Act 6/1985, which expressly stated that the exercise of universal criminal jurisdiction was subject to the condition that the offender or the victim had Spanish nationality or had his or her habitual residence in Spain at the time of the offence. Hence the exercise of universal criminal jurisdiction by Spanish courts had been restricted and the case in point actually proved that national leaders did enjoy immunity from criminal jurisdiction in Spain. He therefore urged the deletion of the *Tibet* case and similar cases from the footnotes.

The Chair, speaking as a member of the Commission, said that he personally had been against the conflation of civil and criminal proceedings to prove the existence of exceptions to the immunity of State officials, but the Commission had decided that it was appropriate to mention cases heard by both civil and criminal courts.

Mr. Forteau said that the meaning of the Special Rapporteur's proposed addition of the words "criminal or civil" in the first sentence might be made clearer by speaking of "national and international case law regarding immunity from criminal jurisdiction and, to the extent that it may be relevant, from civil jurisdiction". He was against including a reference to the spouse of a Head of State, as it was unclear how a spouse or common-law spouse could be deemed a representative of State who enjoyed immunity.

Sir Michael Wood said that the reference to the "the director of Scotland Yard" should be altered to "a police director" in the last sentence.

Mr. Murphy said the reference to a spouse of a Head of State had simply been an attempt to capture the issue addressed in *Rukmini S. Kline et al. v. Yasuyuki Kaneko et al*. Both that case and the reference to a spouse of a Head of State could be deleted, but all the cases related to a Head of State should be retained.

Mr. Huang said he wished to know what was meant by the verb "appeared" in the first sentence.

Ms. Escobar Hernández (Special Rapporteur) said that "appeared" might not be the best choice of word: "have been mentioned" would be closer to the original Spanish.

The paragraph concerned various State officials who, in that capacity, had been named in cases brought before international or national courts in either civil or criminal proceedings. It was therefore relevant to include the appropriate citations in the footnote. She wished to reassure Mr. Huang that all the members of the Commission were committed to ensuring a high-quality report that would reflect well on the Commission. Of course, her assistants had helped her to find pertinent cases, but she had reviewed all the documentation. She suggested that the *Tibet* case should be considered when the paragraph of the commentary in question was discussed. It could not be deemed a *casus belli* with regard to the whole draft commentary.

She accepted the proposal made by Mr. Forteau to delete the reference to *Rukmini S. Kline et al. v. Yasuyuki Kaneko et al*., as well as Sir Michael Wood's suggestion to refer to "a police director".

Mr. Huang said that the *Wei Ye, Hao Wang, Does, A, B, C, D, E, F and others similarly situated v. Jiang Zemin and Falun Gong Control Office (A.K.A. Office 6/10)* case should be deleted from footnote 31 as it was not a criminal case involving immunity and it had been dismissed by the court.

Ms. Escobar Hernández (Special Rapporteur) said that she did not agree to the deletion of the *Wei Ye* case, because paragraph (9) did not concern the question of whether or not immunity had been recognized, but whether a given individual in a particular post had been named, in his or her capacity as a State official, in a national court case, as had happened in that instance.

Mr. Grossman Guiloff said that the Italian court case concerning "Operation Condor" should be included in the list in footnote 31, as it had established the responsibility of a former President of a country for the murder of hundreds of Latin Americans. In view of the explanation provided by the Special Rapporteur, all civil and criminal cases involving State officials should be listed as a statement of fact.

Sir Michael Wood said that paragraph (9) merely referred to the types of State official who had been mentioned or referred to in the case law. The footnote was so long that it would be a good idea to shorten it, provided that enough suitable examples were retained. It would be unwise to add to it. He would have no problem with the deletion of the *Wei Ye* case, because there were many others that were relevant. The list simply provided examples; its purpose was not to prove a legal point.

Mr. Huang said that if all the cases cited in footnote 31 were supposed to relate to the main sentence of paragraph (9), concerning the immunity of State officials who had been mentioned or referred to in national and international case law, the *Wei Ye* case was out of place because it had nothing to do with criminal proceedings. The footnote was too long and moreover it was selective. Why had the Special Rapporteur chosen a political case to which a State had strong objections? The Falun Gong movement was prohibited by Chinese law and none of the more than 100 cases in support of it which had been brought before courts all over the world had been successful.

Mr. Vázquez-Bermúdez said that he tended to agree with Sir Michael Wood that the list was not supposed to be exhaustive. Its sole purpose was to be illustrative and to provide a number of examples.

Mr. Grossman Guiloff, agreeing that the lists in paragraph (9) and footnote 31 were not exhaustive, suggested that criteria were needed to determine which cases should be included. For him, it was important that cases relating to Operation Condor should be among them, for a number of reasons: it had concerned a former Head of State and other high officials; the notorious international crimes it involved, including hundreds of killings, were becoming increasingly relevant with time; and there had been related judicial decisions invoking exceptions to immunity *ratione materiae*. The Special Rapporteur should prepare a list of criteria to identify cases illustrating each category of State official listed in paragraph (9), with due regard for geographical balance and impartiality, and select cases for inclusion in the footnote accordingly. The text of the paragraph made it clear that the examples given were intended to be purely objective and illustrative.

Ms. Oral said it should be emphasized that paragraph (9) described the various categories of State official as having been mentioned in case law, not as having appeared before the courts. She hoped that that clarification would allay the concerns expressed by Mr. Huang. It was not unusual for such a lengthy footnote to feature in the Commission's outputs; if anything, the extensive list of examples served to deflect attention from individual cases that members might be uncomfortable about including. Shortening the list would heighten the focus on the remaining cases, as well as implying a potentially political decision on the part of the Special Rapporteur.

The Chair expressed the view that even the Commission's debate would serve to bring such issues to prominence, rather than to distract attention from them.

Sir Michael Wood suggested that the references provided could be restructured to reflect the list given in the body of paragraph (9), with separate footnotes for each category of State official and at least one example for each.

Mr. Saboia said that there seemed to have been a trend towards longer footnotes in the Commission's recent work. While he was not always convinced of their usefulness, they certainly reflected significant research. Mr. Grossman Guiloff's suggestion of establishing criteria for the selection of cases was not without merit but would be prohibitively time-consuming and complex at the present stage of work on the topic.

Mr. Forteau said that if the inclusion of a particular case was problematic for objective reasons, it should be deleted. He suggested that the case to which Mr. Huang had expressed an objection should be examined carefully before the Commission's next meeting so as to determine how closely it related to the point being made in paragraph (9).

Ms. Escobar Hernández (Special Rapporteur), while expressing surprise at the apparent desire to change the Commission's established methodology at such a late stage of the work on the topic, when significant portions of the commentary text before the Commission had already been considered and provisionally adopted, said that she had no objection to re-examining particular cases to ensure that their inclusion was appropriate;

however, she was not inclined to review every case individually for what amounted to political reasons. It was certainly not her intention to damage the reputation of China, or indeed any other country. The case in question was one among many. If her assessment of its value as an illustrative example proved incorrect, she would willingly delete it from the list. There had been no political motivation behind its inclusion; it simply served to reflect judicial practice. With regard to the length of footnote 31, it was not uncommon to see numerous and long footnotes in legal writings, including those of the Commission; she saw no need to restructure it. She suggested that the text of paragraph (9) should be adopted on the understanding that a final decision on whether to include the case in question in the footnote would be taken in due course.

The Chair, observing that the time did not yet appear ripe to adopt the paragraph, requested the Special Rapporteur to re-examine the case, in consultation with interested members, with a view to the Commission taking a decision at its next meeting. In terms of procedure, while it was true that much of the text had been adopted provisionally at previous sessions, it must nonetheless be formally adopted as part of the Commission's report to the General Assembly. He took it that the Commission agreed to leave the paragraph in abeyance.

It was so decided.

Paragraph (10)

Ms. Escobar Hernández (Special Rapporteur) said that the words "other provisions of" should be deleted from the last sentence.

Paragraph (10), as amended, was adopted.

Paragraph (11)

Ms. Escobar Hernández (Special Rapporteur) said that, in the last sentence, the words "both requirements" should be changed to "both the requirements of 'representing the State' and of 'exercising State functions'".

Paragraph (11), as amended, was adopted.

Paragraph (12)

Ms. Escobar Hernández (Special Rapporteur) said that the phrase "'who represents'", in the first sentence, should be expanded to read "'who represents the State'".

Paragraph (12), as amended, was adopted.

Paragraph (13)

Ms. Escobar Hernández (Special Rapporteur) said that the beginning of the first sentence should be amended to begin: "The phrase 'exercises State functions' must be understood …"

Paragraph (13), as amended, was adopted.

Paragraph (14)

Paragraph (14) was adopted.

Paragraph (15)

Mr. Murphy, referring to the words "the majority of Commission members" in the third sentence, sought clarification as to whether a corresponding minority view had existed and, if so, whether it should be reflected in the text.

Mr. Forteau recalled that the Commission had discussed, in that context, whether private contractors, such as the Blackwater company that had operated in Iraq, were *de facto* State officials.

Paragraph (15) was adopted.

Paragraph (16)

Ms. Escobar Hernández (Special Rapporteur) said that, in the first sentence, the words "within his or her State" should be added after "the hierarchical position occupied by the individual".

Paragraph (16), as amended, was adopted.

Paragraph (17)

Paragraph (17) was adopted.

Paragraph (18)

Mr. Forteau suggested that the last sentence of the paragraph should be deleted, unless the intention was to invite the views of States on the issue it covered.

Ms. Escobar Hernández (Special Rapporteur) said that she had anticipated a possible debate among Member States in the Sixth Committee concerning the term "State official", among other points; however, she had no objection to deleting the sentence.

Paragraph (18), as amended, was adopted.

Paragraph (19)

Paragraph (19) was adopted.

Paragraph (20)

Mr. Murphy suggested that, in the last sentence, the words "governed by the articles cited in the preceding paragraph" should be changed to "governed by the rules indicated in the articles cited in the preceding paragraph".

Sir Michael Wood said that it might be simpler to alter the word "governed" to "covered".

Paragraph (20), as amended by Sir Michael Wood, was adopted.

Paragraph (21)

Paragraph (21) was adopted.

Paragraph (22)

Ms. Escobar Hernández (Special Rapporteur) said that the second and third sentences of the paragraph should be deleted. In the seventh sentence, "in articles 6, 7 and 8" should be altered to "in articles 6, 7, 8 and 8 *bis*". The ninth sentence should be amended to read: "The term 'act' has also been used in international treaties that define conduct that may give rise to criminal responsibility."

Mr. Forteau, noting that the term "international treaties" appeared in paragraph (22) but that "treaties" was used alone elsewhere in the text, and expressing the view that treaties were, by definition, international, suggested that the terminology should be standardized throughout the commentary.

Ms. Escobar Hernández (Special Rapporteur) agreed with that suggestion and requested the Secretariat to make the relevant changes.

Paragraph (22), as amended, was adopted.

Paragraphs (23) and (24)

Paragraphs (23) and (24) were adopted.

Paragraph (25)

Ms. Escobar Hernández (Special Rapporteur) said that, in addition to inserting additional citations to United States case law in footnotes 41 and 42, the following text should be added at the end of footnote 41:

> It is noted that, prior to *Samantar v. Yousuf*, 560 U.S. 305 (2010), many US courts analysed immunity of foreign officials in civil cases by reference to the Foreign Sovereign Immunities Act. In *Samantar*, the United States Supreme Court held that immunity of foreign State officials was not governed by the Foreign Sovereign Immunities Act but, rather, by common law. However, previous decisions in which United States courts analysed immunity by reference to the Foreign Sovereign Immunities Act continue to offer valuable insight into the scope of such immunity, as the reasoning on which they are based remains cogent.

Paragraph (25) was adopted with amendments to footnotes 41 and 42.

Paragraph (26)

Paragraph (26) was adopted.

Paragraph (27)

Ms. Escobar Hernández (Special Rapporteur) said that, at the end of the final sentence, the words “in draft article 2 (b)” should be added.

Paragraph (27), as amended, was adopted.

Paragraphs (28) to (30)

Paragraphs (28) to (30) were adopted.

Paragraph (31)

Ms. Escobar Hernández (Special Rapporteur) said that, in addition to inserting additional citations to United States case law in footnotes 45 and 46, the words “hiring of contract killers” in footnote 52 should be changed to “contracting of ‘thugs’”; and after “a religious group”, the words “resulting in murders and excessive violence” should be inserted before the closing parenthesis.

Paragraph (31) was adopted with amendments to footnotes 45, 46 and 52.

Paragraph (32)

Ms. Escobar Hernández (Special Rapporteur) said that the beginning of the third sentence should be amended to read: “Courts have considered …”

Paragraph (32), as amended, was adopted.

Paragraph (33)

Ms. Escobar Hernández (Special Rapporteur) said that Mr. Murphy had drawn her attention to certain issues of substance relating to the United States case law cited in paragraph (33) and the footnotes thereto; various amendments to the text were needed to take account of those comments and eliminate some repetition. The first two sentences of the paragraph should be amended to read: “In a number of cases, national courts have concluded that the act in question exceeded the limits of official functions, or functions of the State. For example, in a case related to the assassination of a political opponent, a court has indicated that ‘conduct designed to result in the assassination of an individual’ is not a ‘discretional act’ of State covered by immunity.” The last sentence of the paragraph should be deleted, as should footnote 57. In footnote 56, the reference should be changed to *Letelier v. Republic of Chile*, with the appropriate citation. In footnote 60, the references to *Doe v. Zodillo Ponce de León* and *Jean-Juste v. Duvalier* should be deleted; certain citations to the United States case law referenced should also be added.

Mr. Forteau expressed doubt as to how a "discretional act" of a State could be covered by immunity and suggested that the term should be deleted, so that the phrase in question would read "is not an act of State covered by immunity".

Sir Michael Wood, expressing support for that suggestion, said that the phrase could be altered to read "is not an act covered by immunity".

Mr. Murphy expressed appreciation to the Special Rapporteur for re-examining the cases to which he had drawn her attention and welcomed her suggested amendments.

Paragraph (33), as amended, was adopted.

Paragraphs (34) and (35)

Paragraphs (34) and (35) were adopted.

*General commentary to Part Two (*Immunity ratione personae*)*

Paragraph (1)

Ms. Escobar Hernández (Special Rapporteur) said that, in the first sentence, the words "the institution of" and "in the abstract" should be deleted, the word "legal" inserted between "single" and "category", and the word "categories" altered to "types". In the last sentence, the word "different" should be deleted.

Paragraph (1), as amended, was adopted.

Paragraph (2)

Paragraph (2) was deleted.

Paragraph (3)

Paragraph (3) was adopted.

Paragraph (4)

Sir Michael Wood suggest that the words "that apply" should be changed to "applicable".

Paragraph (4), as amended, was adopted.

Commentary to draft article 3 (Persons enjoying immunity ratione personae*)*

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

Paragraph (4)

Ms. Escobar Hernández (Special Rapporteur) said that the citation for *Lafontant v. Aristide* in footnote 67 would be completed.

Paragraph (4) was adopted on that understanding.

Paragraph (5)

Paragraph (5) was adopted.

Paragraph (6)

Mr. Forteau, drawing attention to the last sentence of footnote 73, asked whether the sentence referred to therein was to be found in the Arabic, Chinese and Russian versions of the commentary in question.

The Chair said that the Secretariat would be entrusted with ensuring the sentence was included in all language versions.

Paragraph (6) was adopted on that understanding.

Paragraph (7)

Paragraph (7) was adopted.

Paragraph (8)

Ms. Escobar Hernández (Special Rapporteur) said that, in the fourth sentence, the words "Most members" should be altered to "Members generally"; in the sixth sentence, the words "On the other hand" should be changed to "However"; and the seventh sentence should be amended to begin: "One of those members nevertheless said …"

Mr. Murphy suggested that, in the last sentence, the words "that official" should be changed to "ministers for foreign affairs".

Paragraph (8), as amended, was adopted.

Paragraphs (9) and (10)

Paragraphs (9) and (10) were adopted.

Paragraph (11)

Mr. Murphy suggested that, in the first sentence, the words "has also looked into" should be altered to "also considered".

Paragraph (11), as amended, was adopted.

Paragraph (12)

Paragraph (12) was adopted.

Paragraph (13)

Ms. Escobar Hernández (Special Rapporteur) said that a reference to *Weixum et al. v. Xilai* would be added in footnote 84; amendments would also be made to clarify that Mr. Bo Xilai's immunity had been recognized by the United States executive branch, not a court. In footnote 85, the reference to *I.T. Consultants, Inc. v. The Islamic Republic of Pakistan* would be removed; additional explanations would be included regarding the *Fotso v. Republic of Cameroon* case.

Paragraph (13) was adopted on that understanding, with amendments to footnotes 84 and 85.

Paragraphs (14) to (16)

Paragraphs (14) to (16) were adopted.

Commentary to draft article 4 (Scope of immunity ratione personae*)*

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

Ms. Escobar Hernández (Special Rapporteur) said that, in footnote 93, the reference to *United States of America v. Noriega* would be removed; the words "*ratione personae*" would be inserted between "no longer enjoyed immunity" and "since his abdication"; and the reference to the *Pinochet* case would be moved to the end of the footnote and introduced with the remark that it was "in the context of criminal cases".

Paragraph (3) was adopted with those amendments to footnote 93.

Paragraphs (4) to (6)

Paragraphs (4) to (6) were adopted.

Paragraph (7)

Ms. Escobar Hernández (Special Rapporteur) said that the words “limitation or” should be inserted between “any” and “exception applicable”.

Paragraph (7), as amended, was adopted.

Paragraphs (8) to (10)

Paragraphs (8) to (10) were adopted.

Paragraph (11)

Ms. Escobar Hernández (Special Rapporteur) said that, in the fourth sentence, the words “of a third State” should be altered to “of a foreign State”.

Mr. Forteau said that the words “the sovereign equality of the State” should be corrected to “the sovereign equality of States” in the second sentence of paragraph (11) and throughout the report.

Paragraph (11), as amended, was adopted with minor drafting changes.

Paragraph (12)

Ms. Escobar Hernández (Special Rapporteur) said that, towards the end of the first sentence, the word “criminal” should be added between “foreign” and “jurisdiction”.

Paragraph (12), as amended, was adopted.

Paragraph (13)

Paragraph (13) was adopted with a minor drafting change.

Paragraph (14)

Ms. Escobar Hernández (Special Rapporteur) said that the words “when the Head of State, Head of Government or Minister for Foreign Affairs leaves office” and “Consequently, immunity *ratione personae* no longer exists” should be deleted from the second and third sentences, respectively, and the two sentences joined together.

Paragraph (14), as amended, was adopted.

Paragraph (15)

Ms. Escobar Hernández (Special Rapporteur) said that, in the fourth sentence, the phrase “leaves open the possibility that immunity *ratione materiae* might apply to acts carried out in an official capacity and during their term of office by” should be changed to “acknowledges the application of the rules concerning immunity *ratione materiae* to a”, and the following nouns should be made singular; and the words “when the rules governing that category of immunity make this possible” should be deleted.

Paragraph (15), as amended, was adopted.

Mr. Huang expressed serious concern about how the Commission was proceeding with the adoption of its report. Working on the basis of an informal document available only in English was intolerable. If the document could not be produced in all six official languages, discussion of the topic should be postponed, if necessary until the Commission’s next session.

The Chair emphasized that the informal document provided by the Special Rapporteur was intended purely to assist the Commission in adopting the portion of its report contained in document A/CN.4/L.962/Add.1.

The meeting rose at 6 p.m.