

Provisional

**For participants only**

26 September 2022

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**International Law Commission**  
**Seventy-third session (second part)**

**Provisional summary record of the 3608th meeting**

Held at the Palais des Nations, Geneva, on Wednesday, 3 August 2022, at 10 a.m.

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***Present:***

*Chair:* Mr. Tladi  
*Members:* Mr. Argüello Gómez  
Mr. Aurescu  
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 10 a.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 chapter VI of its draft report, as contained in document [A/CN.4/L.962/Add.1](#), beginning with the commentary to Part Three of the draft articles.

*Commentary to Part Three (Immunity ratione materiae)*

*Paragraph (1)*

**Mr. Forteau** said that, if the Commission qualified immunity *ratione materiae* as the “general” legal regime governing immunity, as it did in the final sentence of paragraph (1), it risked sparking a debate over the nature of the “general” and the “special” regimes. Since such a debate would be best avoided, he suggested that the final sentence should be deleted.

*Paragraph (1), as amended, was adopted.*

*Paragraph (2)*

**Ms. Escobar Hernández** (Special Rapporteur) proposed that, in the fourth sentence, the words “a limitation or” should be inserted before “exception” and the word “alleged” should be inserted before “commission”.

*Paragraph (2), as amended, was adopted.*

*Paragraph (3)*

*Paragraph (3) was adopted with minor drafting changes.*

*Commentary to draft article 5 (Persons enjoying immunity ratione materiae)*

*Paragraphs (1) to (3)*

*Paragraphs (1) to (3) were adopted.*

*Paragraph (4)*

**Mr. Forteau** said that the text of footnote 103 should refer to paragraph (15), not paragraph (12), of the commentary to draft article 4.

**The Chair** said that the reference would be checked and the paragraph number would be amended if necessary.

*Paragraph (4) was adopted on that understanding.*

*Paragraphs (5) and (6)*

*Paragraphs (5) and (6) were adopted.*

*Commentary to draft article 6 (Scope of immunity ratione materiae)*

*Paragraphs (1) to (4)*

*Paragraphs (1) to (4) were adopted.*

*Paragraph (5)*

**Ms. Escobar Hernández** (Special Rapporteur) proposed that the words “limitations or” should be inserted before “exceptions”.

*Paragraph (5), as amended, was adopted.*

*Paragraphs (6) to (9)*

*Paragraphs (6) to (9) were adopted.*

*Paragraph (10)*

**Ms. Escobar Hernández** (Special Rapporteur) proposed that the final sentence should be simplified to read: “The Commission considers that the ‘without prejudice’ clause simply acknowledges the application of the rules concerning immunity *ratione materiae* to a former Head of State, Head of Government or Minister for Foreign Affairs.”

*Paragraph (10), as amended, was adopted.*

*Paragraphs (11) to (13)*

*Paragraphs (11) to (13) were adopted.*

*Paragraph (14)*

**Ms. Escobar Hernández** (Special Rapporteur) said that the first sentence had been simplified. She had deleted the first part, beginning “Although”, in its entirety so that the sentence now began “The Commission ultimately decided to retain”.

*Paragraph (14), as amended, was adopted.*

*Paragraph (15)*

*Paragraph (15) was adopted.*

*Commentary to draft article 7 (Crimes under international law in respect of which immunity ratione materiae shall not apply)*

**Ms. Escobar Hernández** (Special Rapporteur) said that, since she was still engaged in informal consultations with several members who had differing positions concerning the commentary to draft article 7, she proposed that the consideration and adoption of that commentary should be left in abeyance until a consensus had been reached.

**The Chair** said he took it that the Commission agreed to postpone its consideration of the commentary to draft article 7.

*It was so decided.*

*Commentary to Part Four (Procedural provisions and safeguards)*

*Paragraphs (1) and (2)*

*Paragraphs (1) and (2) were adopted.*

*Paragraph (3)*

*Paragraph (3) was adopted with minor drafting changes.*

*Paragraph (4)*

**Mr. Murphy** said that, at the end of the first sentence, the word “allegedly” should be inserted before “been committed”.

**Ms. Escobar Hernández** (Special Rapporteur) said that the Commission had discussed the standard of proof required for the adoption of a decision on immunity previously, when considering the commentary to draft article (14), on determination of immunity. As a result of that discussion, the Commission had decided that the word “allegedly” should not be included in the formulation, since it was clear from the context that the text was referring to crimes that had not yet been proven. While she was not opposed to the addition of the word, further adjustments would be required subsequently if the change was made, to harmonize the language across the commentaries.

**Mr. Forteau** said that he was in favour of the proposed amendment, since it added an important nuance. However, to circumvent the need for that change, the reference to crimes that “have been committed” could be deleted, with the final part of the sentence being adjusted to read “draft article 7, which concerns limitations or exceptions to the application of immunity *ratione materiae* in relation to the crimes under international law listed in that draft article”.

**Ms. Escobar Hernández** (Special Rapporteur) said that she could accept that proposal with one small change: the words “which concerns” should be replaced with “which refers to”.

*Paragraph (4), as amended, was adopted.*

*Paragraph (5)*

*Paragraph (5) was adopted.*

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

*Paragraphs (1) and (2)*

*Paragraphs (1) and (2) were adopted.*

*Paragraph (3)*

*Paragraph (3) was adopted with a minor drafting change.*

*Paragraph (4)*

**Ms. Escobar Hernández** (Special Rapporteur) said that, in the first sentence, she had made a small adjustment for harmonization purposes, replacing “a foreign State official” with “an official of another State”.

**Mr. Forteau** asked whether the last sentence of paragraph (4) had been drawn from the commentary to what had been draft article 8 *ante*, which had been adopted before the procedural provisions and safeguards had been specified, or whether it was a “without prejudice” clause that had been added since the provisional adoption of the original commentary. If the former was the case, the sentence should be deleted.

**Ms. Escobar Hernández** (Special Rapporteur) said that the sentence had indeed been included in the original commentary provisionally adopted in 2021. The sentence should be retained nonetheless, since it referred to the additional procedural guarantees and safeguards that were addressed in draft article 14.

**Mr. Forteau** said that, if the sentence was retained, the words “the adoption of” should at least be deleted.

**Mr. Murphy** said his understanding was that the sentence in question had been intended to serve as a placeholder for the Commission’s future work on safeguards and that, since that work was now complete, the sentence was no longer needed.

**The Chair**, speaking as a member of the Commission, said that, although the sentence might not be essential, its retention would do no harm.

**Ms. Escobar Hernández** (Special Rapporteur) said that she preferred to maintain the sentence, with the amendment suggested by Mr. Forteau.

*Paragraph (4), as amended, was adopted.*

*Paragraph (5)*

**Ms. Escobar Hernández** (Special Rapporteur) said that, in the penultimate sentence, the words “limitations and” should be inserted before “exceptions”.

*Paragraph (5), as amended, was adopted.*

*Paragraphs (6) to (8)*

*Paragraphs (6) to (8) were adopted.*

*Commentary to draft article 9 (Examination of immunity by the forum State)*

*Paragraphs (1) to (14)*

*Paragraphs (1) to (14) were adopted.*

*Commentary to draft article 10 (Notification to the State of the official)*

**Mr. Forteau** said that he wished to reiterate the concerns that he had raised in respect of draft article 10, and in particular paragraph (6) of the commentary thereto, at the Commission's 3559th meeting. The draft article was not in line with existing practice and jurisprudence, according to which no notification requirement was imposed on the forum State, as confirmed in paragraph 196 of the International Court of Justice judgment in *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*.

*Paragraphs (1) to (19)*

*Paragraphs (1) to (19) were adopted.*

*Commentary to draft article 11 (Invocation of immunity)*

*Paragraphs (1) to (3)*

*Paragraphs (1) to (3) were adopted.*

*Paragraph (4)*

*Paragraph (4) was adopted with a minor drafting change.*

*Paragraphs (5) to (7)*

*Paragraphs (5) to (7) were adopted.*

*Paragraph (8)*

*Paragraph (8) was adopted with a minor drafting change.*

*Paragraphs (9) and (10)*

*Paragraphs (9) and (10) were adopted.*

*Paragraph (11)*

**Mr. Ouazzani Chahdi** said that the final sentence, and specifically the reference to "the rules contained in Part Two or Part Three", was confusing in that it implied that the reader could choose whether to apply Part Two or Part Three. The text should make clear that it was the type of immunity being invoked that determined which rules applied and should indicate which type of immunity was addressed in each part.

**Ms. Escobar Hernández** (Special Rapporteur) said that, to address that concern, the subject matter of each part could be mentioned in parentheses. The final sentence would thus read: "The reference to the position held by the official and the grounds for invoking immunity should provide a basis on which the forum State can assess whether the rules contained in Part Two (*ratione personae*) or Part Three (*ratione materiae*) of the present draft articles apply."

*Paragraph (11), as amended, was adopted.*

*Paragraphs (12) and (13)*

*Paragraphs (12) and (13) were adopted.*

*Commentary to draft article 12 (Waiver of immunity)**Paragraph (1)*

**Mr. Forteau** said it was clear that invocation and waiver were distinct institutions. The words “that should not be confused”, in the final sentence, were superfluous and should be deleted.

**Ms. Escobar Hernández** (Special Rapporteur) said that, while it should be clear to all that invocation and waiver were distinct institutions, the two had been confused in some academic writings and judicial decisions, and even in some statements made by members during the Commission’s debates. It had even been incorrectly suggested that non-invocation was a form of waiver. The final sentence therefore served as a necessary reminder that invocation and waiver were two separate institutions.

*Paragraph (1) was adopted.*

*Paragraphs (2) to (18)*

*Paragraphs (2) to (18) were adopted.*

*Commentary to draft article 13 (Requests for information)**Paragraph (1)*

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

*Paragraphs (2) to (13)*

*Paragraphs (2) to (13) were adopted.*

*Commentary to draft article 14 (Determination of immunity)**Paragraph (1)*

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

*Paragraph (2)*

*Paragraph (2) was adopted.*

*Paragraph (3)*

*Paragraph (3) was adopted with a minor drafting change.*

*Paragraph (4)*

*Paragraph (4) was adopted.*

*Paragraph (5)*

**Ms. Escobar Hernández** (Special Rapporteur) proposed that the introductory clause of the second sentence, which read “In using this expression, the Commission took two considerations into account”, should be replaced with a lightly amended version of what was currently the third sentence, which would read “The reference to ‘the competent authorities of the forum State’ introduces an element of flexibility that allows two factors to be taken into account”. The word “exclusively”, between the words “not limited” and the word “to” in the second sentence, should be deleted.

*Paragraph (5), as amended, was adopted.*

*Paragraph (6)*

**Ms. Escobar Hernández** (Special Rapporteur) said that, during informal consultations on the text, some Commission members had expressed the view that the phrase “immunity is an institution under international law”, in the penultimate sentence, was unclear

in English. Since the equivalent phrase in the original Spanish text – “*la inmunidad es una institución de derecho internacional*” – was clear and correct, she wished to propose, on the basis of a suggestion made by Mr. Murphy during the informal consultations, that the words “an institution under” should be replaced with the words “a field of” in the English text only. The amendment would not affect the other language versions of the paragraph.

**Mr. Forteau** said that, in order to bring the text of paragraph (6) into line with paragraph 1 of draft article 14, in the penultimate sentence, the phrase “an express reference to ‘the applicable rules of international law’ has also been included” should be amended to read “an express reference to the determination ‘in conformity with the applicable rules of international law’ has also been included”.

**Sir Michael Wood**, building on Mr. Forteau’s proposed amendment, suggested that the phrase in question should be amended to read “an express reference to a determination to be made ‘in conformity with the applicable rules of international law’ has also been included”. With regard to the proposed amendment to the English text, he proposed the phrase “immunity is part of international law” as an alternative to the phrase “immunity is a field of international law”.

**Mr. Forteau** said that the amended part of the third sentence would read “However, while the domestic law of the forum State will be the primary basis for determining immunity, an express reference to the determination to be made ‘in conformity with the applicable rules of international law’ has also been included”.

*Paragraph (6), as amended by Mr. Forteau and with the amendment to the English text proposed by Sir Michael Wood, was adopted.*

*Paragraph (7)*

**Ms. Escobar Hernández** (Special Rapporteur) proposed that, in the second sentence of the paragraph, the phrase “criteria in this paragraph should be generally taken into account” should be amended to read “criteria in this paragraph shall be taken into account” and that the word “the” should be inserted before the phrase “determination of immunity”. In the third sentence, the word “should” should be replaced with the word “shall”.

*Paragraph (7), as amended, was adopted.*

*Paragraph (8)*

*Paragraph (8) was adopted with a minor drafting change.*

*Paragraph (9)*

*Paragraph (9) was adopted.*

*Paragraph (10)*

**Ms. Escobar Hernández** (Special Rapporteur) proposed that, in the first sentence of the paragraph, the word “conditions” should be replaced with the word “prerequisites”. In the second sentence, the word “requirement” should be replaced with the word “prerequisite”.

**Mr. Forteau** said he did not agree that the invocation of immunity was not a prerequisite for the application of immunity. In paragraph 196 of its judgment in *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, the International Court of Justice had stated the contrary, finding that immunity *ratione materiae* must be invoked in order for it to be applicable.

*Paragraph (10), as amended by the Special Rapporteur, was adopted.*

*Paragraphs (11)*

*Paragraph (11) was adopted with minor editorial changes.*

*Paragraph (12)*

*Paragraph (12) was adopted with a minor drafting change.*



*Paragraph (13)*

**Mr. Forteau** said that the Commission had not taken a position on whether draft article 7 provided for an exception or for a limitation. He therefore proposed that, in the final sentence of the paragraph, the words “the exception provided for in” should be deleted.

*Paragraph (13), as amended, was adopted.*

*Paragraph (14)*

*Paragraph (14) was adopted with a minor drafting change.*

*Paragraphs (15) and (16)*

*Paragraphs (15) and (16) were adopted.*

*Paragraph (17)*

*Paragraph (17) was adopted with a minor drafting change.*

*Paragraph (18)*

*Paragraph (18) was adopted.*

*Paragraph (19)*

*Paragraph (19) was adopted with a minor drafting change.*

*Paragraph (20)*

*Paragraph (20) was adopted with minor editorial changes.*

*Paragraph (21)*

**Mr. Forteau** said that the phrase “substantial grounds to believe” [*motifs substantiels de croire*] was also used in the French version of article 61 (7) of the Rome Statute of the International Criminal Court. The second sentence of paragraph (21) should be amended to reflect that fact. The wording used in the Arabic, Chinese and Russian versions of article 61 (7) should be carefully checked; in the event that the same wording was used in any of those versions, paragraph (21) should be amended accordingly.

**Mr. Murphy** said he had previously suggested to the Special Rapporteur that paragraphs (19) to (22) should be whittled down to a couple of sentences. Such an extensive discussion of the Rome Statute and the standard that had been extracted from it did not constitute a compelling argument for States that were not parties to the Rome Statute. It would be of greater help to States simply to provide an explanation as to why the Commission believed that the formulation “substantial grounds to believe” was useful.

**Mr. Jalloh** said that he also had doubts about the content of paragraphs (19) to (22), albeit for different reasons. The paragraphs were intended to reflect a long discussion that had taken place in the Drafting Committee with regard to variations in the standards that were applied under different national legal systems in respect of what was required before and after an accused was formally charged. At the end of that discussion, it had been decided that the Commission would not attempt to impose any particular standard. The purpose of highlighting the “substantial grounds to believe” standard was essentially to signal that a standard higher than *prima facie* evidence should be applied. That point was not accurately reflected in the current text of the paragraphs in question. The issue could perhaps be resolved at the second-reading stage.

**Ms. Escobar Hernández** (Special Rapporteur) said that paragraphs (19) to (22) accurately reflected the discussion held in the Drafting Committee. Sufficient information was provided on the various standards of proof discussed. The commentary did not say that States must use the “substantial grounds to believe” standard; rather, it explained that the Commission had assessed the different standards established in the Rome Statute and had made its own proposal.

She supported Mr. Forteau's proposal with regard to the second sentence of the paragraph and proposed that the sentence should be amended to read: "This expression is taken from the English and French versions of article 61, paragraph 7, of the Rome Statute." She would review the wording used in the Arabic, Chinese and Russian versions of article 61 (7) and make any necessary changes.

**The Chair** said he took it that the Commission agreed with the Special Rapporteur's proposed amendment to the second sentence of the paragraph. The Special Rapporteur would consult with members of the Commission whose first language was Arabic, Chinese or Russian regarding the wording of article 61 (7) of the Rome Statute in those languages in order to determine whether further amendments were necessary.

*Paragraph (21), as amended, was adopted on that understanding.*

*Paragraph (22)*

**Mr. Forteau** said that different wording was used in the French version of article 53 (1) (c) of the Rome Statute, which referred to "*raisons sérieuses de penser*" rather than "*motifs substantiels de croire*". Thus, in the first sentence of paragraph (22), the words "the English version of" should be inserted before the words "article 53, paragraph 1 (c), of the Rome Statute".

**The Chair** said he took it that the Commission agreed with Mr. Forteau's proposed amendment. The Special Rapporteur would review the various language versions of article 53 (1) (c) of the Rome Statute in order to determine whether further amendments to paragraph (22) were necessary.

*Paragraph (22), as amended, was adopted on that understanding.*

*Paragraphs (23) and (24)*

*Paragraphs (23) and (24) were adopted.*

*Paragraph (25)*

**Mr. Forteau** proposed that, in the second sentence of the paragraph, the words "or in applicable treaties" [*ou découlant d'une convention internationale*] should be inserted after the words "by virtue of the jurisdictional powers provided for in their legal systems". Such treaties might include international conventions that referred to the principle of *aut dedere aut judicare*.

*Paragraph (25), as amended, was adopted.*

*Paragraphs (26) to (39)*

*Paragraphs (26) to (39) were adopted.*

*Commentary to draft article 15 (Transfer of the criminal proceedings)*

*Paragraph (1)*

**Mr. Murphy**, noting that the first sentence of paragraph (1) stated that draft article 15 was the last of the provisions of Part Four that established procedural safeguards that operated directly between the forum State and the State of the official, said that it was unclear why draft article 16, on the fair treatment of officials, and draft article 18, on the settlement of disputes, should not be viewed as establishing such procedural safeguards. Both of those draft articles contained provisions that addressed the relationship between the forum State and the State of the official. He proposed that the words "is the last of the provisions" should be replaced with the words "is a further provision".

**Mr. Jalloh** said he had understood that draft article 16 dealt with the fair treatment of the official and not a right of the State as such. In particular, paragraphs (1) and (4) of the commentary to draft article 16 emphasized that the draft article dealt with the individual. That was particularly important because the State might decide not to invoke immunity in respect

of a given individual. However, draft article 17 expressly addressed the relationship between the forum State and the State of the official.

**Ms. Escobar Hernández** (Special Rapporteur) said that, in the first sentence of paragraph (1), it was stated that draft article 15 was the last of the provisions of Part Four establishing procedural safeguards “that operate directly between the forum State and the State of the official”. That statement was related to the general structure of Part Four, in which draft articles 9 to 15 referred directly to the relationship between the forum State and the State of the official. She accepted that draft article 16 also referred to that relationship, though it did so from a different perspective, placing emphasis on the individual, not on the States. Nonetheless, to address Mr. Murphy’s concerns, she proposed that the first sentence of the paragraph should be deleted and that the paragraph should simply read: “Draft article 15 provides for the possibility of transferring criminal proceedings to the State of the official and regulates the conditions under which this may occur, as well as its effects.”

**Sir Michael Wood** said that he supported the Special Rapporteur’s proposal.

*Paragraph (1), as amended, was adopted.*

*Paragraph (2)*

*Paragraph (2) was adopted.*

*Paragraph (3)*

*Paragraph (3) was adopted with a minor drafting change.*

*Paragraphs (4) to (10)*

*Paragraphs (4) to (10) were adopted.*

*Paragraph (11)*

*Paragraph (11) was adopted with a minor drafting change.*

*Paragraph (12)*

**Mr. Forteau** proposed that the last sentence should be simplified to read: “The phrase ‘submit the case ... for the purpose of prosecution’ has similarly to be interpreted in a substantive manner and with the ultimate purpose in mind.” The end of the sentence – “this interpretation is equally applicable to the present draft article” – would be deleted. The problem was with the word “thus” in the last sentence, as what was stated by the International Court of Justice, as cited earlier in the paragraph, did not concern the phrase “submit the case ... for the purpose of prosecution”. That phrase appeared in draft article 15 and not in the judgment of the Court. As he understood it, what the Commission wished to convey in that paragraph was that what was stated in the Court’s judgment in the *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* case applied *mutatis mutandis* to the phrase “submit the case ... for the purpose of prosecution” used in draft article 15.

**Ms. Escobar Hernández** (Special Rapporteur) said that she would discuss the matter directly with Mr. Forteau and return with a proposal at a later stage.

*Paragraph (12) was left in abeyance.*

*Paragraphs (13) to (18)*

*Paragraphs (13) to (18) were adopted.*

*Paragraph (19)*

**Mr. Forteau** said that, in the first half of the third sentence, it was stated, with reference to the judgment of the International Court of Justice in *Questions relating to the Obligation to Prosecute or Extradite*, that “the Court has defined the obligation to prosecute as an automatic and primary obligation, and extradition as an alternative that comes into play only when the forum State is prevented from exercising its jurisdiction”. However, the Court

had not stated that the obligation to prosecute was an “automatic and primary obligation”, but simply that it was an “international obligation”, and that extradition was “an option offered to the State”. The third sentence of paragraph (19) should therefore be brought into line with what was actually stated in paragraphs 94 and 95 of the judgment.

**Mr. Ouazzani Chahdi** said that it would be helpful to include a footnote quoting the exact passage from the Court’s judgment.

**Ms. Escobar Hernández** (Special Rapporteur) said that, in the light of the comments made by Mr. Forteau, she proposed that the first half of the third sentence should be amended to read “Since the Court has defined the obligation to prosecute as a treaty obligation and extradition as an option, a question arose”. She agreed with Mr. Ouazzani Chahdi that the relevant paragraph from the Court’s judgment should be added to the existing footnote connected with that sentence.

**Sir Michael Wood** said that it should perhaps be specified in the third sentence that the Court had drawn those conclusions only in connection with the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

**Ms. Escobar Hernández** (Special Rapporteur) said that, as the previous sentence already made reference to the obligation to extradite or prosecute established under the Convention against Torture, she did not consider it necessary to add that clarification in the third sentence.

*Paragraph (19), as amended, was adopted.*

*Paragraph (20)*

*Paragraph (20) was adopted.*

*Commentary to draft article 16 (Fair treatment of the official)*

*Paragraphs (1) to (4)*

*Paragraphs (1) to (4) were adopted.*

*Paragraph (5)*

**Ms. Escobar Hernández** (Special Rapporteur) proposed that the first sentence should be split into two. The first sentence would end after “national law of the forum State and international law”, and the second sentence would begin “In particular, human rights law and international humanitarian law define the applicable international standard”. A new footnote should be inserted at the end of the second sentence, with references to the commentary to article 11 of the draft articles on prevention and punishment of crimes against humanity and to the relevant paragraphs of the Special Rapporteur’s seventh report ([A/CN.4/729](#)).

*Paragraph (5), as amended, was adopted.*

*Paragraph (6)*

*Paragraph (6) was adopted.*

*Paragraph (7)*

**Ms. Escobar Hernández** (Special Rapporteur) said that a new footnote should be inserted at the end of the last sentence, also containing a reference to the commentary to article 11 of the draft articles on prevention and punishment of crimes against humanity.

*Paragraph (7), as amended, was adopted.*

*Paragraph (8)*

**Mr. Forteau** said that the statement made at the end of the first sentence – “in which case he or she would not be covered by the right to consular assistance” – was inaccurate, as in such situations the State official would be entitled to consular assistance from his or her State of nationality. In the third sentence, he proposed that the word “recognizing” should be

replaced with “creating”, as the rights covered in that provision were entirely new and did not appear in any universal convention on immunity. It was important for the Commission to be transparent on that point.

**Ms. Escobar Hernández** (Special Rapporteur) said that she had no objection to replacing the word “recognizing” with “creating”. She would not be in favour of deleting the end of the first sentence, but she recognized that it could be amended to make it clear that a State official who was not a national of the State would not be covered by the right to consular assistance from that State, but would still be entitled to consular assistance from his or her own State of nationality. She therefore proposed that the relevant part of the sentence should be amended to read “in which case he or she would not be covered by the right to consular assistance by the State of the official”.

*Paragraph (8), as amended, was adopted.*

*Paragraph (9)*

*Paragraph (9) was adopted.*

*Paragraph (10)*

**Ms. Escobar Hernández** (Special Rapporteur) proposed the addition of a new second sentence, which would read: “It must be noted that, for the sake of consistency with the terminology used in the present draft articles, paragraph 3 refers to applicable law as ‘the laws and regulations of the forum State’.” That sentence was considered necessary to explain the difference in terminology between paragraph 3 of draft article 16 and the Vienna Convention on Consular Relations, even though it was stated in the first sentence of paragraph (10) that paragraph 3 reproduced almost verbatim the corresponding paragraph of article 11 of the draft articles on prevention and punishment of crimes against humanity, which in turn was based on article 36 (2) of the Vienna Convention. She had also amended footnote 229 to explain the exact differences in terminology.

**Mr. Jalloh** said that, in his view, the last sentence of paragraph (10) should be amended to align it more closely with the wording of the draft article itself. He therefore proposed that the words “the forum State will not exercise its margin of discretion” should be replaced with “the forum State will not apply its laws and regulations” and that the words “which, in any event, must remain in conformity with international law” should be inserted after “draft article” at the very end of the sentence.

**Mr. Forteau** said that, in order to clearly reflect the difference in terminology, in the new second sentence proposed by the Special Rapporteur, the quotation marks should surround the words “of the forum State”.

**Mr. Murphy** said that he would welcome clarification of the reason for the proposed addition of the words “which, in any event, must remain in conformity with international law”.

**Mr. Jalloh** said that he had proposed the addition of that clause in order to create a link with the end of paragraph 1 of the draft article, which provided that the forum State should guarantee fair treatment of the individual, including “full protection of his or her rights and procedural guarantees under applicable national and international law, including human rights law and international humanitarian law”.

**Mr. Forteau** said it was his understanding that, as paragraph 3 of draft article 16 referred only to paragraph 2 and not to paragraph 1, the end of paragraph (10) of the commentary also referred only to paragraph 2.

**Sir Michael Wood** said that he had no objection to including a reference to international law in the last sentence. However, it should be inserted earlier in the sentence, to read “This criterion of interpretation in accordance with the intended purpose is designed to ensure that the forum State will, in accordance with international law, not apply its laws and regulations in an arbitrary manner”.

**Mr. Murphy** said that paragraphs 2 and 3 of draft article 16 drew on a well-established understanding of the framework established by the Vienna Convention on

Consular Relations. Paragraph 2 set forth the specific rights to which the individual was entitled and paragraph 3 specified that those rights should be exercised in conformity with the laws and regulations of the forum State. The Vienna Convention model did not indicate that other aspects of international law should apply to those rights. He would therefore be wary of attempting to alter those Vienna Convention rights or to view them differently from the way in which they typically operated. Paragraph 1 was a different matter entirely.

**Mr. Jalloh** said that he saw the paragraphs of draft article 16 as being interlinked and as following a sequence. The Commission had used the Vienna Convention as inspiration but had gone beyond it in some respects. After all, it was stated in paragraph (7) of the commentary that paragraph 2 established a new right. He would nonetheless be willing to withdraw his proposal to add the reference to international law at the end of the sentence.

*Paragraph (10), as amended, was adopted.*

*Commentary to draft article 17 (Consultations)*

*Paragraph (1)*

**Sir Michael Wood** said that the end of the second sentence could be simplified to read “to identify ways of avoiding a dispute between two States or to facilitate a solution to a dispute that has already arisen”.

*Paragraph (1), as amended, was adopted.*

*Paragraphs (2) to (5)*

*Paragraphs (2) to (5) were adopted.*

*Commentary to draft article 18 (Settlement of disputes)*

*Paragraphs (1) to (13)*

*Paragraphs (1) to (13) were adopted.*

*Commentary to the annex (List of treaties referred to in draft article 7, paragraph 2)*

*Paragraphs (1) to (8)*

*Paragraphs (1) to (8) were adopted.*

*Paragraph (9)*

*Paragraph (9) was adopted with minor drafting changes.*

**The Chair** suggested that the Commission should return to the various paragraphs that had been left in abeyance at its next meeting so as to allow the Special Rapporteur time to conclude her informal consultations and produce the necessary revised texts.

*It was so decided.*

*Chapter VII. Succession of States in respect of State responsibility (continued)*  
([A/CN.4/L.963](#), [A/CN.4/L.963/Add.1](#), [A/CN.4/L.963/Add.2](#) and [A/CN.4/L.963/Add.3](#))

**The Chair** invited the Commission to resume its consideration of chapter VII of its draft report, as contained in document [A/CN.4/L.963/Add.1](#).

*Paragraph 1*

**Mr. Šturma** (Special Rapporteur) proposed the insertion of a new third sentence, which would read: “The revisions consist of adaptation of draft articles to the form of draft guidelines, including the deletion of draft articles 3 and 4.” That sentence would be accompanied by a footnote, which would read: “For ease of reference, the earlier adopted draft articles revised to the form of draft guidelines are reproduced below.” There would follow the text of draft guidelines 1, 2, 5, 7, 8 and 9. Those changes were important for the

sake of transparency and would also increase readability, as elsewhere in the text there were footnotes indicating that the commentary should be read in the light of the change from draft articles to draft guidelines.

**Mr. Forteau** said that the word “revised” should be added before “commentaries” in the last sentence. Given that the draft articles that had been deleted had originally been adopted by the plenary Commission, he wondered whether the Commission should take a position on their deletion.

**Sir Michael Wood** said that the second sentence, which stated that “The Commission also took note of revised draft guidelines 1, 2, 5, 7, 8 and 9, as provisionally adopted by the Drafting Committee”, was inaccurate. In fact, those draft guidelines had simply been modified by the Drafting Committee and annexed to the statement by the Chair of the Committee, but had not, to his knowledge, been provisionally adopted. The new sentence proposed by the Special Rapporteur should be amended to read: “The revisions by the Drafting Committee were modifications to convert them into guidelines.” The proposed new footnote would set out draft guidelines 1, 2, 5, 7, 8 and 9 verbatim. However, section C of the report set out verbatim the text of draft articles 1, 2, 5, 7, 8 and 9. To his mind, that would be extremely confusing for delegations in the Sixth Committee. He therefore did not see the benefit of including the new footnote.

**Mr. Jalloh** said that he supported the inclusion of the new sentence proposed by the Special Rapporteur. The plenary Commission had referred to the Drafting Committee the question of the form of the draft articles and their potential transformation into draft guidelines. The word “adaptation” appropriately reflected what the Drafting Committee had done. As to whether the Commission had taken note of the revised draft guidelines, his understanding was that the Chair of the Drafting Committee had reported back to the plenary Commission and the Commission had taken note of his statement in the usual manner. He did not see anything unusual in that paragraph in terms of the practice of the Commission. In his view, the inclusion of a reference to the deletion of draft articles 3 and 4 was important for the sake of transparency and was helpful to the reader.

**The Chair**, speaking as a member of the Commission, said that, either in the second sentence or in the new footnote, it could be pointed out that the previously adopted draft articles, which were now in the form of draft guidelines, remained in the Drafting Committee.

**Mr. Šturma** (Special Rapporteur) said that he agreed with Mr. Forteau’s proposal to insert the word “revised” before “commentaries” in the last sentence. Draft articles 3 and 4 had been pending in the Drafting Committee and had not yet been provisionally adopted; he thus saw no need to amend the reference to them in the new sentence. With regard to Sir Michael Wood’s concern, the new sentence and footnote had been proposed precisely in order to avoid confusing the reader by referring to both draft articles and draft guidelines without an explanation. He would, however, be open to using alternative wording, such as “modifications” rather than “adaptation”.

**Mr. Murphy** said he agreed that it was important to report clearly and transparently to the Sixth Committee, but the current text was confusing even for those who had been members of the Drafting Committee. He proposed that the second sentence and the new third sentence should be combined to read: “The Commission also took note of draft articles 1, 2, 5, 7, 8 and 9, as revised by the Drafting Committee to be draft guidelines.” He was not convinced that the new footnote was particularly helpful; it might make more sense for the footnote to contain a reference to the statement by the Chair of the Drafting Committee, to which the full set of draft guidelines had been annexed.

**Mr. Forteau** said that if draft articles 3 and 4 had not been adopted in the Drafting Committee, it should not be stated that they had been deleted, but rather that the Drafting Committee had not pursued those proposals. He agreed with the drafting proposal made by Mr. Murphy, with the inclusion of the word “formally” after “as revised” to make it clear that no substantive changes had been made.

**Mr. Park** said that he supported Mr. Murphy’s proposed amendment and the deletion of the new sentence proposed by the Special Rapporteur, which was potentially confusing. He would be in favour of maintaining the Special Rapporteur’s proposed new footnote and

placing it at the end of the sentence proposed by Mr. Murphy, as it explained what had happened at the current session. The beginning of the footnote should perhaps be redrafted.

**Mr. Rajput** said it seemed that the source of the confusion was actually section C, given that what was set out there no longer existed, having been superseded by what was contained in the new footnote. The most important information for the Sixth Committee delegations was now in the footnote and not in section C. The Commission might therefore wish to change its practice by placing the draft guidelines in section C, so that it reflected the current status of what had been adopted, and moving the current text of section C, which reflected an earlier version of the draft text, to a footnote. He also proposed that a sentence should be added before the final sentence to indicate that the Commission had decided to change the proposed outcome of the topic from draft articles to draft guidelines. The sentence should be accompanied by a footnote with a reference to the summary record of the meeting at which that decision had been taken.

**The Chair**, speaking as a member of the Commission, said that the Commission's decision to change the outcome was reflected in the introductory part of the chapter contained in document [A/CN.4/L.963](#), which had already been adopted. As to the proposal to amend section C, the Commission must be careful to ensure that the body of the text reflected what it had done and not what the Drafting Committee had done. The Special Rapporteur's approach was thus appropriate.

**Ms. Oral** said that she would support the new sentence proposed by the Special Rapporteur, but that it should perhaps be amended to read: "The revisions consist of changing the draft articles into the form of draft guidelines." The beginning of the footnote could be amended to read: "For ease of reference and clarification, the draft articles as previously adopted by the Drafting Committee and subsequently revised into draft guidelines are reproduced below." Perhaps it should be specified that the draft articles and draft guidelines were identical.

**The Chair** said that the Commission would resume its consideration of paragraph 1 at the following meeting.

*The meeting rose at 1.05 p.m.*