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International Law Commission

Seventy-fifth session (second part)

Provisional summary record of the 3674th meeting
Held at the Palais des Nations, Geneva, on Monday, 1 July 2024, at 3 p.m.

Contents

Present:

Chair:	Mr. Vázquez-Bermúdez
Members:	Mr. Akande
	Mr. Argüello Gómez
	Mr. Asada
	Mr. Fathalla
	Mr. Forteau
	Ms. Galvão Teles
	Mr. Grossman Guiloff
	Mr. Jalloh
	Mr. Laraba
	Mr. Lee
	Ms. Mangklatanakul
	Mr. Mavroyiannis
	Mr. Mingashang
	Mr. Nesi
	Mr. Nguyen
	Ms. Okowa
	Ms. Oral
	Mr. Ouazzani Chahdi
	Mr. Oyarzábal
	Mr. Paparinskis
	Mr. Patel
	Mr. Reinisch
	Ms. Ridings
	Mr. Ruda Santolaria
	Mr. Sall
	Mr. Savadogo

Secretariat:

Mr. Llewellyn	Secretary to the Commission

The meeting was called to order at 3.20 p.m.

Organization of the work of the session (agenda item 1) (*continued*)

The Chair drew attention to the revised programme of work for the second part of the seventy-fifth session, which had been distributed to Commission members. He took it that the Commission wished to adopt the revised programme of work as proposed by the Bureau.

It was so decided.

Subsidiary means for the determination of rules of international law (agenda item 8) (*continued*) (A/CN.4/769)

Report of the Drafting Committee (A/CN.4/L.999)

Ms. Okowa (Chair of the Drafting Committee), introducing the report of the Drafting Committee on the topic "Subsidiary means for the determination of rules of international law" (A/CN.4/L.999), said that the report contained the texts and titles of the draft conclusions provisionally adopted by the Drafting Committee at the current session. The Special Rapporteur's mastery of the subject, guidance and cooperation had greatly facilitated the Committee's work. The Committee had held five meetings on the topic, from 15 to 22 May 2024, and had proceeded on the basis of the three draft conclusions originally proposed by the Special Rapporteur in his second report (A/CN.4/769), which the plenary Commission had referred to the Drafting Committee at its 3667th meeting.

Draft conclusion 6, as provisionally adopted by the Drafting Committee, was entitled "Nature and function of subsidiary means", as originally proposed by the Special Rapporteur. For the text of the draft conclusion, the Committee had proceeded on the basis of a revised proposal presented by the Special Rapporteur to take into account the views expressed in the plenary debate. After some discussion, the Committee had decided to retain the two-paragraph structure originally proposed by the Special Rapporteur.

Paragraph 1 consisted of two sentences. The first affirmed the basic proposition that "subsidiary means are not a source of international law". Before arriving at that formulation, the Committee had started with a revised proposal by the Special Rapporteur indicating that "subsidiary means are auxiliary in nature *vis-à-vis* the sources of international law". There had been broad agreement with the essence of that proposition during the plenary debate, but views had been more divided in the Drafting Committee. Some members had expressed a preference for formulating paragraph 1 in more positive terms, explaining what the subsidiary means actually were. It had been recalled that the fact that subsidiary means were not sources of international law was already reflected in the commentary to draft conclusion 1, adopted at the previous session. Nonetheless, the Drafting Committee considered it appropriate for a provision dealing with the nature of subsidiary means to start by expressly clarifying what subsidiary means were not. Ultimately, the Committee had opted for that clarification phrased in negative terms rather than a positive statement of what subsidiary means were because the latter was deemed to speak more to the function than to the nature of subsidiary means. While there had been support for a proposal to add a specific reference to treaties, customary international law and general principles of law as the sources of international law set out in Article 38 (1) (*a*)–(*c*) of the Statute of the International Court of Justice, it had ultimately been decided that the addition was unnecessary. Instead, the members had opted for a reference to the sources of international law more generally, the idea being to capture any source of international law used in practice, not just those mentioned in Article 38 (1).

The Drafting Committee had also considered an alternative formulation indicating that subsidiary means were "distinct" or "autonomous" from the sources of international law, but had opted for the more direct formulation that they were not sources. The view had been expressed that, while the proposition contained in the first sentence of paragraph 1 was accurate, it could be understood as being too categorical, given the possibility that subsidiary means could be used for other purposes. Several members had underlined that the nuances of what actually occurred in practice were not captured by such a categorical formulation and had called for that point to be addressed in the report back to the plenary Commission and in the commentary.

The second sentence of paragraph 1 referred to the function of subsidiary means, which was considered to be their distinctive feature. It stated that "[t]he function of subsidiary means is to assist with the determination of the existence and content of rules of international law". The main question for the Drafting Committee had been how to characterize the function and nature of subsidiary means. Several members had thought it best to place the emphasis on the function of subsidiary means, while others had wished instead to focus on their nature, and in particular to draw a contrast with the sources of international law enunciated in Article 38 (1) (*a*)–(*c*).

The Drafting Committee had considered whether it would be desirable to have two separate draft conclusions concerning the function and nature of subsidiary means, respectively. However, the prevailing view had been that the function of subsidiary means was inextricably linked to their nature and that the two aspects should therefore be addressed in a single provision. The nature of a set of materials as a subsidiary means was determined by its function. Thus, materials became subsidiary means when they were used to assist in determining the rules of international law.

The Drafting Committee had considered alternative ways of characterizing the function of subsidiary means, including as being "mainly to assist" or "assistive" or "auxiliary" in nature. The members who had proposed "mainly to assist" had wished to recognize that, in practice, subsidiary means also performed other functions, both collectively and individually. In a discussion on the phrase "auxiliary in nature," proposed by the Special Rapporteur, it had been noted that the use of the word "auxiliary" would result in a repetitive formulation in Spanish and French that would not necessarily add clarity. It had also been noted that adding an adjective to qualify the functions of subsidiary means would not be advisable, as it implied that there existed other functions. In the end, the Drafting Committee had opted for a phrase similar to that used in draft conclusion 2 (c), adopted at the previous session, which included the phrase "used to assist in determining rules of international law".

Other proposals had included using terms such as "secondary" or "subordinate" to characterize the nature of subsidiary means and their relationship with the sources of international law. Such formulations had ultimately not been adopted in order to avoid the possible implication that subsidiary means were sources of a secondary or subordinate nature. The view had been expressed that the Drafting Committee should have employed the term "autonomous sources", as had been used in the 2023 resolution of the Institute of International Law on precedents and case law (*jurisprudence*) in inter-State litigation and advisory proceedings to refer to the decisions of courts and tribunals.

The Drafting Committee had also considered the use of the term "determination" versus "identification" of the existence and content of rules of international law, which had been discussed extensively at the previous session in the context of the work on draft conclusion 1. Some members had reiterated their preference for the term "identification" to emphasize that subsidiary means did not create norms, but rather played an assistive function in identifying whether a certain rule existed and, if so, whether it could then be applied to a given situation. Others had maintained that "determination" was more precise, as it was the term used in the Statute of the International Court of Justice and it also encompassed the element of identification, perhaps as part of an earlier step. Several members had argued that the interchangeable nature of the two terms was why the Commission had used both "identification" and "determination" in its previous projects that had touched on subsidiary means. Other suggestions had included making an express reference to the possible role of subsidiary means in the interpretation of rules; simply stating that "subsidiary means are not sources but may be used for other purposes"; and stating that "subsidiary means are not sources of international law, and are used for the determination, including identification, interpretation and application, of rules of international law".

The Drafting Committee had ultimately settled on the phrase "determination of the existence and content of rules of international law", as the use of subsidiary means could assist in the identification and application of rules to solve a specific legal problem. The use of that formulation would ensure consistency with the previously adopted draft conclusions, including draft conclusion 4. On the other hand, it had been pointed out by several members that merely following the approach taken in prior draft conclusions, without careful regard to the specific context, was potentially problematic, as it could undermine the technical rigour

of the work being done on later draft conclusions and deprive them of meaningful substantive content.

Paragraph 2 of draft conclusion 6 contained a “without prejudice” clause with regard to the use of subsidiary means for other purposes. The Special Rapporteur had initially proposed a formula stating that “subsidiary means are mainly resorted to when identifying, interpreting and applying the rules of international law derived from the sources of international law”. The Drafting Committee had agreed that subsidiary means did primarily assist with the determination of rules of international law and that the determination process required interpretation in first identifying and then applying the rules of international law. The “without prejudice” clause was intended to recognize that other functions existed and were performed by certain materials as subsidiary means.

The term “materials”, which was a reference primarily to judicial decisions and teachings, had been chosen to emphasize the point that such materials were only qualified as subsidiary means when they were used for the function indicated in paragraph 1. It had been recalled in the Drafting Committee that the term “materials” had been used in a different manner in the conclusions on identification of customary international law, namely, to refer to elements other than primary evidence of the constitutive elements of customary international law.

The text of paragraph 2 referred to “their use for other purposes” and did not refer to the “functions” of subsidiary means. That more extensive formulation had been chosen in order to emphasize the fact that subsidiary means could only have one function: assisting in the determination of the existence and content of rules of international law, as defined in paragraph 1. At the same time, the phrase “use for other purposes” acknowledged the fact that the same materials could play other roles, including those identified in the Commission’s previous work.

For example, it had been pointed out that the purpose of the issuance of a decision by an adjudicator was not to produce a subsidiary means but rather to resolve a dispute. In other words, such decisions could have multiple uses. That point would be elaborated upon further in the commentary. It was in line with the Commission’s existing position that materials such as teachings and the decisions of national or international courts and tribunals could have various uses. For example, the decisions of national courts could serve as both evidence of the constituent elements of customary international law and as subsidiary means to help assess evidence of State practice and *opinio juris*. It had been recalled that the other uses had been addressed under the topics concerning subsequent agreements and subsequent practice in relation to the interpretation of treaties, identification of customary international law, identification and legal consequences of peremptory norms of general international law (*jus cogens*) and general principles of law.

The Drafting Committee had also observed that such materials could have other uses beyond those identified in the Commission’s recent work. One example was the use of materials as supplementary means to interpret the provisions of a treaty, following the rules of the Vienna Convention on the Law of Treaties. Other examples included the use of court decisions as sources of obligations for the parties to a dispute or for third parties affected by the findings of an international court decision, such as those establishing the delimitation of a given area. Judicial decisions could also serve as inspiration for the inclusion of provisions in treaties.

The Drafting Committee had also seen fit to include a broad reference to other uses of the materials because the Commission had left open, in draft conclusion 2, the possibility of the existence of other materials that could fall within the category of subsidiary means. Such materials could include, for example, resolutions of international organizations or resolutions adopted at international conferences, which in certain contexts could have other uses besides serving as possible subsidiary means assisting in the determination of rules of international law, as the Commission had recognized in its previous work. Other uses of subsidiary means, including judicial decisions, could include assisting in providing evidence of the evolution of the content of certain rules over time or explaining what international law provided in respect of a specific aspect or activity.

The Drafting Committee would return to the question of the placement of draft conclusion 6 at a later stage in the light of a suggestion made in the Drafting Committee to place it after draft conclusion 1.

The title of draft conclusion 7 was "Absence of legally binding precedent in international law". The Drafting Committee had decided to add the qualifier "legally" before "binding" in the title initially proposed by the Special Rapporteur in order to follow more closely the general rule reflected in the draft conclusion.

The Special Rapporteur's original proposal stated that international courts or tribunals "do not normally follow their own prior decisions or those of other courts and tribunals as legally binding precedents". The word "normally" had been used in an attempt to acknowledge that such decisions were sometimes binding, namely on the parties to the case or where that was provided for in a particular court with a formal internal hierarchy or in a legal instrument. The word "generally" had been considered as an alternative to the word "normally," but in the end, the Drafting Committee had opted for a positive formulation comprising two sentences, the first recalling the general rule – the situations in which decisions were usually followed – and the second the exception to the rule.

The Drafting Committee had grappled with the question of how to approach the fact that there was no system of legally binding precedent, or *stare decisis*, deriving from the decisions of international courts and tribunals. At the same time, it understood that the Commission could contribute by providing clarity on the ways in which the statements of law made by a court or tribunal in a decision could be used.

The Committee had settled on the phrase "[d]ecisions of international courts or tribunals may be followed on points of law" so as to identify three aspects more precisely. First, the word "may" had been chosen in order to indicate that following a decision on points of law was not an obligation but rather a possibility, thus conveying greater discretion. Second, the reference to "points of law" had been included to indicate that it was not the decision itself, but rather the legal reasoning contained therein, that could be used to resolve a new case. It had been recalled that in the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria*, the International Court of Justice had referred to the "reasoning and conclusions of earlier cases". Third, the draft conclusion specified that those points of law could be followed if the decisions addressed "the same or similar issues as those under consideration".

The Committee had considered referring to "the same or similar factual and legal issues as those under consideration". However, it had decided that including a double requirement could excessively narrow the possibility of following the reasoning of a decision in a future case where the fact pattern was not the same. It had been noted that in many instances courts and tribunals relied on the reasoning of previous decisions even if the fact patterns were different.

The Drafting Committee had also considered other formulations, such as referring to the "persuasive" value of decisions. However, it had been argued that the concept of persuasiveness was inspired by common law legal traditions, the connotations of which might not be shared by civil law, and that the text should instead be based on concepts emanating from international law itself. It had also been noted that the word "persuasive" had not been used by the International Court of Justice, nor did it appear in the recent work of the Institute of International Law. On the other hand, it had been pointed out that the Dispute Settlement Body of the World Trade Organization (WTO) and various international criminal tribunals had referred to decisions as being "persuasive".

The Drafting Committee had considered drawing a distinction between following the court or tribunal's own decisions and following those of other tribunals, in order to take into account the practice of some courts such as the Inter-American Court of Human Rights. However, it had settled on a broader formulation, applicable generally to all courts and tribunals, on the understanding that the variation in practice among courts would be discussed in the commentary. An example of that variation was that, in courts with an internal hierarchy, the decisions of courts at the higher or appellate level would be binding on those of the lower court.

The phrase “as those under consideration” had been included to provide further clarity by confirming that the relevance of the reasoning employed in an earlier decision was to be considered in comparison with the new case or legal issue at hand. Thus, the existence of precedent, even if not binding, was to be assessed on a case-by-case basis. That wording had been chosen over other possible options, including “for the resolution of the issue”, which had been considered to suggest a link to the context of dispute settlement, whereas the draft conclusions could also be helpful in other contexts and for entities and persons other than adjudicators.

The second sentence of draft conclusion 7 sought to clarify the legal implications of the first sentence by confirming that the possibility that decisions of international courts or tribunals might in certain circumstances be followed on points of law did not, as a general proposition, mean that they constituted legally binding precedent, unless otherwise provided in a specific instrument or rule of international law. Specific exceptions to that general proposition would be addressed in the commentary.

The Drafting Committee had noted that there could be certain instances where, pursuant to a specific rule, a court or tribunal would have to follow other decisions, for example if it was located within a structure with various chambers. The Committee had discussed the impact of internal hierarchy on the practice of some of the international criminal tribunals, particularly when it came to following earlier decisions handed down by chambers within the tribunals.

The Committee had concluded that possible *lex specialis* or exceptions to the general assertion that there existed no legally binding precedent would be best addressed in the commentary. For example, explanations would be provided on the possible implications and practice in the context of the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes, as well as the practice of the international criminal tribunals. Other examples could include the applicable rules and practice of the Caribbean Court of Justice, the Court of Justice of the European Union and the Inter-American Court of Human Rights. The commentary would also address additional scenarios, such as reliance on a court’s prior decisions on procedural matters.

At the end of the second sentence of draft conclusion 7, the Committee had decided to refer to a “specific instrument or rule of international law” to acknowledge the range of possibilities that existed in practice. The phrase was intended to cover situations where a system of binding precedent in an international court or tribunal was established in an instrument such as the statute of the tribunal or in other forms such as by the internal rules of the court or tribunal or in a decision, whether of the court or another body, or in a series of such decisions. The term “specific” was meant to qualify both an “instrument” and a “rule” that established an obligation to follow prior decisions.

The title of draft conclusion 8, “Weight of decisions of courts and tribunals”, was a broad reference to the additional criteria for assessing the weight to be given to such materials. The draft conclusion, which comprised a *chapeau* and three subparagraphs, dealt with the specific criteria that could, in addition to the general criteria set out in draft conclusion 3 for assessing the weight to be given to subsidiary means, be considered when using the decisions of courts and tribunals as subsidiary means to assist with the determination of the existence and content of rules of international law. Paragraph (3) of the commentary to draft conclusion 3, as contained in the Commission’s report on the work of its seventy-fourth session (A/78/10), stated that the relevant factors to be considered in assessing the weight of subsidiary means “would depend on the specific subsidiary means in question and the prevailing circumstances” and anticipated the possibility that the Commission would prepare further criteria for the assessment of specific subsidiary means.

The *chapeau* of draft conclusion 8 served to contextualize the provision by referring explicitly to the criteria set out in draft conclusion 3 and confirmed that the purpose of draft conclusion 8 was to specify additional criteria for assessing the weight to be given to decisions of courts and tribunals as subsidiary means in particular. The language of the *chapeau* tracked that of the *chapeau* of draft conclusion 3, while emphasizing that the criteria in draft conclusion 8 were additional to those in draft conclusion 3. The use of the phrase “*inter alia*” in the *chapeau* confirmed that the criteria listed in subparagraphs (a) to (c) were

not intended to be exhaustive, and the use of the phrase "regard should be had" emphasized that the listed criteria were to serve only as guidance and were not requirements *per se*.

Subparagraph (a) of draft conclusion 8 referred to the mandate of the court or tribunal. Although it used a formulation similar to that of subparagraph (f) of draft conclusion 3, subparagraph (a) dealt specifically with the competence given to a court or tribunal to apply a particular rule. It took account of decisions of the International Court of Justice, including in *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo),* where the Court had considered that it should ascribe great weight to the interpretation adopted by the Human Rights Committee, which had been established specifically to supervise the application of the International Covenant on Civil and Political Rights. It had been pointed out during the Drafting Committee's debate that the Court had also ascribed some weight to the decisions of bodies such as regional human rights courts and tribunals with competence over regional treaties and had indicated that due account should be taken of such decisions, since they had been issued by the bodies specifically mandated to interpret and apply those treaties. An example could be found in the Court's remarks regarding the African Commission on Human and Peoples' Rights in the *Diallo* case.

Subparagraph (b) of draft conclusion 8, which referred to "the extent to which the decision is part of a body of concurring decisions", anticipated the existence of prior decisions that followed the same reasoning; in other words, the existence of a *jurisprudence constante* or established case law, as referred to by the International Court of Justice, that would suggest that the same legal reasoning could be used to address the legal issues at hand. After consideration, the Drafting Committee had decided against the use of the formulation "established case law". In the view of some members, that expression conveyed connotations from national legal systems, which could lead to confusion, especially in the light of the absence of legally binding precedent in international law. Other members had considered the formula appropriate, since it had been used in the Court's case law. In the end, the Committee had opted for terms used in the 2023 resolution of the Institute of International Law, which it had considered to be neutral and descriptive.

Subparagraph (c), on the need to consider "the extent to which the reasoning remains relevant, taking into account subsequent developments", sought to account for the possible evolution of international law, which might result in less weight being given to previous decisions. It was possible that decisions could be overtaken by developments and, particularly in the case of decisions of national courts, that their effects could be limited by subsequent legislation or other government actions. The phrase "subsequent developments" had been chosen to introduce a measure of flexibility and encompassed not only new decisions of courts and tribunals, but also factual or legal developments, such as the emergence of a different rule through, for example, the adoption of a treaty or the subsequent practice of States, that would limit the applicability or relevance of the reasoning of a court or tribunal in an earlier decision or group of decisions.

The Drafting Committee recommended that the Commission should adopt draft conclusions 6, 7 and 8. The Special Rapporteur would submit commentaries to those draft conclusions in due course.

The Chair invited the Commission to adopt the texts and titles of draft conclusions 6, 7 and 8 as provisionally adopted by the Drafting Committee.

Draft conclusion 6

Draft conclusion 6 was adopted.

Draft conclusion 7

Ms. Ridings said that the Chair of the Drafting Committee had in her statement referred to the possibility that the approach taken by the WTO dispute settlement system constituted an exception to the first part of the second sentence of draft conclusion 7, which stated that the decisions referred to in the first sentence of that draft conclusion did not constitute legally binding precedent, and that the approach therefore fell under the second part of the sentence, "unless otherwise provided for in a specific instrument or rule of international law". That was an interpretation to which she had vehemently objected during

the debate in the Drafting Committee. She would have difficulty agreeing to the Commission's adoption of draft conclusion 7 if it was the Commission's interpretation that WTO dispute settlement decisions constituted legally binding precedent, as compared with *de facto* precedent. She could accept the Commission's adoption of draft conclusion 7 only if the commentary to the draft conclusion did not reflect that legally incorrect interpretation.

Mr. Forteau said that he fully agreed with the reservations expressed by Ms. Ridings. He believed that the second sentence of draft conclusion 7 was intended to cover only the very specific case where a rule of international law – contained, for example, in a treaty or the statute of the court in question – explicitly provided that a category of decisions was legally binding. The sentence did not cover decisions of international courts that followed a regime of *de facto* precedent but were not bound by any rule to adhere to precedent.

Mr. Jalloh (Special Rapporteur) said that he wished to reassure both Ms. Ridings and Mr. Forteau that, in line with the Commission's normal practice, members would have an opportunity to address matters relating to the interpretation of the draft conclusions when the draft commentary was circulated.

Draft conclusion 7 was adopted.

Draft conclusion 8

Draft conclusion 8 was adopted.

Prevention and repression of piracy and armed robbery at sea (agenda item 7) (*continued*) (A/CN.4/770)

Report of the Drafting Committee (A/CN.4/L.1000)

Ms. Okowa (Chair of the Drafting Committee), introducing the report of the Drafting Committee on the topic "Prevention and repression of piracy and armed robbery at sea" (A/CN.4/L.1000), said that the Special Rapporteur's guidance and cooperation had greatly facilitated the Committee's work. The Committee had held four meetings on the topic between 28 and 30 May 2024 and had provisionally adopted one draft article, namely draft article 4. Her statement was intended to provide the Commission with an interim report on the progress made by the Drafting Committee during the current session.

When the Commission had decided, at its 3672nd meeting, to refer the four draft articles that the Special Rapporteur had proposed in his second report (A/CN.4/770) to the Drafting Committee, it had done so on the understanding that the Committee would take into account the views expressed and the proposals made during the Commission's plenary debate on the topic and that the Committee would first hold a general discussion on the topic as a whole and its future direction. To guide that discussion, she had put six questions to the Committee members relating to, first, the relationship between the 1982 United Nations Convention on the Law of the Sea and the Commission's work on the topic; second, areas in which members perceived there to be legal gaps with respect to piracy; third, new conclusions that could be drawn from State practice with respect to piracy and whether such practice was sufficiently advanced to permit the codification of additional rules; fourth, the areas in which the Commission could make an impactful contribution to the fight against piracy and armed robbery at sea; fifth, the role of international law in the regulation of armed robbery at sea and whether piracy and armed robbery at sea should be considered together or separately; and sixth, the form and structure of the outcome of the Commission's work on the topic. The Committee had considered each question in turn, and a number of points of general agreement had emerged.

To begin with, the Committee had agreed that the 1982 United Nations Convention on the Law of the Sea was the starting point for the Commission's work on the topic and that the Commission would not seek to change the Convention. It had been recalled that the syllabus for the topic had indicated that the Commission would not seek to alter the provisions of the Convention in any way. Nevertheless, several members had pointed out that the Commission could draw on State practice to provide clarity by, for example, interpreting the Convention and filling any gaps in its provisions. It had been noted that the Convention did not address the crime of armed robbery at sea specifically and that the Commission could

clarify States' obligations in that area. Members had recalled that the preamble to the Convention affirmed that matters not regulated by the Convention continued to be governed by general international law. The relevance of other treaties to the Commission's work on the topic, including the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and the United Nations Convention against Transnational Organized Crime, had also been highlighted.

The Committee had identified a number of areas where there were gaps in the law or where the application of the law raised legal issues that the Commission could address. Some of the points raised related to the definitions of piracy and armed robbery at sea, including with respect to the meaning of the references to illegal acts of violence or depredation and the "private ends" criterion, and the application of the definitions to acts committed using new technologies such as uncrewed aerial vehicles and marine autonomous vessels and to modern forms of piracy, including supporting acts that took place on land. The Committee had discussed the possibility of considering issues relating to national legislation, jurisdiction, enforcement, pursuit of suspected offenders, the use of armed private security guards on ships and the root causes of piracy. Issues related to the modalities of cooperation, including, for example, the sharing of information, the use of "shipriders", mutual legal assistance and the transfer of persons detained on suspicion of piracy or armed robbery at sea, and human rights and humanitarian aspects of the problem, including the rescue, repatriation and compensation of victims of piracy and armed robbery at sea, had also been raised.

The Committee had recognized that the jurisdictional bases for measures against piracy and measures against armed robbery at sea were different but that the two should be considered jointly, in a coordinated manner. The need to carefully consider areas of overlap had been underscored. Some members had noted that the legal basis for rules relating to armed robbery at sea was not as clear as that for piracy, reflected in the 1982 Convention. It had also been observed that the various existing instruments dealt with the crimes together, where appropriate, and separately, where necessary; that the Commission could make a contribution with respect to armed robbery at sea while respecting the territorial sovereignty of coastal States within the framework of the Convention; and that whether the two crimes should be dealt with in separate provisions or even separate parts of the draft articles would depend on the subject matter at hand and become clearer as work on the topic progressed.

With respect to the form of the outcome of the Commission's work on the topic, the Special Rapporteur had recalled that his goal had been to develop draft articles for a possible new convention that, in view of the diversity of State practice in the area, would involve a significant degree of progressive development of the law. Several Committee members had supported that approach. It had been noted that, as a possible new convention would require the approval of States, the Commission would have more latitude to propose developments in the law through draft articles than it would through a soft-law product intended to codify existing law. It had been recalled that the possibility of developing a new convention had been envisaged in the syllabus for the topic. In addition, the conclusion of agreements on the implementation of the 1982 Convention had been considered to reflect the willingness of the international community to accept further development of the Convention through new treaties. Nevertheless, it had also been noted that a number of Commission members had expressed a preference for a soft-law approach focused on codification during the plenary debate or the debate in the Drafting Committee.

Committee members had noted that the Commission's proposal of draft articles could add value by filling gaps in the Convention and other relevant international legal instruments, spelling out in detail what the cooperation required by article 100 of the Convention entailed or putting forward further requirements for the prevention and repression of piracy and armed robbery at sea, including, for example, those related to the establishment of the relevant criminal offences and jurisdiction under national criminal law, enforcement measures and mutual legal assistance. It had also been emphasized that it was not the Commission's role to replace or duplicate the work of other international organizations on the topic. The International Maritime Organization (IMO), in particular, had done a great deal of work on the topic, which the Commission should keep in mind as it proceeded with its own work.

With the general sense that the way forward would be to work on a set of draft articles that could form the basis for a possible future treaty, the Drafting Committee had proceeded to consider the draft articles proposed by the Special Rapporteur in his second report. The draft article 4 provisionally adopted by the Committee had been based on a revised proposal from the Special Rapporteur that built on the text that he had proposed in his second report as draft articles 4 and 5. The draft article comprised a single paragraph that set out States' general obligation to prevent and repress piracy and armed robbery at sea and contained two subparagraphs specifying that the obligation was to be performed through certain measures and cooperation. The title of the draft article, "General obligations", reflected the expectation that further draft articles would provide for various means of prevention and repression with greater specificity. The Committee had chosen to begin the paragraph with the word "States" rather than "Each State" or "Every State" to avoid the implication that States were expected to act even if they lacked the material capacity to do so.

Committee members had generally agreed that the word "undertake", which was used in the *chapeau* of the provision to describe States' obligations with respect to the prevention and repression of piracy and armed robbery at sea, carried the same sense of obligation as the word "shall", and a discussion had been held regarding which term was more appropriate for the draft article. It had been noted that, in several treaties, such as the Convention on the Prevention and Punishment of the Crime of Genocide and the International Covenant on Civil and Political Rights, the word "undertake" was used in connection with a general obligation, while "shall" was used for the more specific obligations that followed.

The Committee had considered a proposal to divide the provision into two sentences, the first specifying that States "undertake" to prevent and to repress piracy and armed robbery at sea, and the second providing that States "shall take" measures and cooperate for that purpose. The Committee had chosen not to use such a structure in order to streamline the provision. The phrasing of the *chapeau* was consistent with the Committee's tendency to move towards the drafting of articles that could form the basis of a new treaty that built upon the obligations reflected in the 1982 Convention. A number of Commission members had expressed a preference in the plenary debate for the drafting of a soft-law instrument limited to codifying the existing law. To that end, the use of the phrase "should undertake" had been proposed, but the proposal had not been taken up.

The phrase "in conformity with international law", while not strictly necessary, had been included to emphasize that measures taken under draft article 4 must be in conformity with the other obligations of the State under international law, for example with respect to the sovereign rights of other States and international human rights law. That was considered important in the light of the distinct contexts in which piracy and armed robbery at sea occurred, in terms both of jurisdiction over the maritime spaces where the respective crimes took place and of the legal basis for rules relevant to the crimes. The phrase had an important role in ensuring the rights of coastal States, especially with respect to armed robbery at sea. The Committee had noted that the phrase might also be read as requiring measures to be taken under draft article 4 only when such measures were otherwise required by international law. That was not the intention behind the use of the phrase.

Subparagraph (a) specified that one of the ways in which States would prevent and repress piracy and armed robbery at sea was by "taking effective legislative, administrative, judicial or other appropriate measures". It anticipated that, at future sessions, draft articles that provided for such measures with greater specificity would be proposed and considered. Examples of such measures could include the establishment of relevant offences or applicable bases for jurisdiction in a State's national criminal law, as the Special Rapporteur had proposed in his second report.

In drafting the provision, the Committee had discussed how appropriately to describe the relationship between the State and the various kinds of measures it could take. In general, it had considered that the provision should be broad and encompass various kinds of measures. One proposal by the Special Rapporteur had referred to "the adoption of effective legislative, administrative, judicial or other appropriate measures". The concern had been raised that such drafting might not be appropriate, and the question of whether it was correct to say that a State could "adopt" judicial measures had been discussed. It had been highlighted that it was often the executive or Government of a State that was the addressee of treaty

obligations. It had also been recalled that a State comprised all its organs, including the legislature and judiciary, and that it was not uncommon for treaty obligations to address those branches as well. To address concerns regarding the word "adoption" in particular, the Drafting Committee had settled on the word "taking", drawing inspiration from article 2 (1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

Another possibility considered had been to refer to the adoption by States of "legislative and other measures", drawing on the wording of article 5 (1) of the United Nations Convention against Transnational Organized Crime. However, several members had considered it important to retain the reference to judicial measures to maintain a focus on the prosecution of acts of piracy and armed robbery at sea.

Under subparagraph (b), concerning cooperation, States would undertake to prevent and to repress piracy and armed robbery at sea by "cooperating to the fullest possible extent with other States and competent international organizations at the international, regional and subregional levels". An important question facing the Committee had been whether to include the expression "to the fullest possible extent" in the subparagraph. The phrase was taken from article 100 of the 1982 Convention and from article 14 of the 1958 Convention on the High Seas and therefore represented the current state of the law as applied to piracy. With respect to armed robbery at sea, it had been recognized that the provision was a proposal for the progressive development of the law. It had been noted that that approach was different from the one taken by the Institute of International Law, which had not assimilated the general obligations applicable to piracy to those applicable to armed robbery at sea because the Institute was not proposing to change customary international law.

The Committee had also considered a proposal to add the phrase "consistent with the territorial sovereignty and jurisdiction of a State, where applicable" at the end of the subparagraph to emphasize that the notion of "the fullest possible extent" did not prejudice the rights of coastal States under the 1982 Convention, which were of particular relevance to armed robbery at sea. That phrase had been considered unnecessary in view of the inclusion of "in conformity with international law" in the *chapeau* of draft article 4.

A number of members had expressed the view that the phrase "to the fullest possible extent" also accommodated differences in the capacities of States. In that connection, some members had emphasized the importance of the duty to cooperate in ensuring that States with more resources assisted those States that had fewer resources in the prevention and repression of piracy and armed robbery at sea. The Committee had considered a proposal to add the phrase "according to their capacity" to the *chapeau* of the draft provision, but had noted that adding such a qualifier would derogate from the text of article 100 of the 1982 Convention. Additionally, several members had considered that an explicit reference to capacity could be subject to abuse by States lacking the political will to fight piracy and armed robbery at sea. It had also been suggested that technical cooperation and capacity-building would be appropriate matters to address more specifically in further draft articles.

The Committee had had before it the very detailed presentation of the practice of cooperation at the regional and subregional levels contained in the second report of the Special Rapporteur. On that basis, the Committee had engaged in a thorough discussion of how best to reflect the varied and multilayered contexts in which States were called upon to cooperate, as appropriate, in the prevention and repression of piracy and armed robbery at sea. For example, one proposal had been to replace the word "international" with "global". Another had been to use the term "interregional" to reflect the practice of cooperation between States and international organizations from multiple regions. It had also been noted that the term "biregional" was used to describe general cooperation between Latin America and Europe. However, some of those terms were less common in international instruments. The current formula had been chosen in view of its simplicity, and its scope was not intended to exclude the possibility of cooperation between States or international organizations from different regions or subregions; rather, it reflected the breadth of possible modes of cooperation.

As the Committee's work on the topic had drawn to a close for the current session, members had been in general agreement that it would be useful to discuss the way forward

in relation to further provisions in informal consultations during the second part of the session. Lastly, she wished to confirm that the Commission was not, at the current stage, being requested to act on the draft article provisionally adopted by the Drafting Committee, as her report was being presented for information purposes only.

Mr. Forteau said that the phrase "to the fullest possible extent" in subparagraph (b) had been rendered as "*dans toute la mesure possible*" in the French version, which was not in keeping with article 100 of the 1982 Convention. "*Dans toute la mesure possible*" corresponded to the phrase "as far as practicable" in article 204 of the English version of the Convention, and thus reflected a less stringent standard. If the intention was to align the wording of the draft article with article 100, then the French version should read "*dans toute la mesure du possible*". The Spanish version, which paralleled the French, should thus also be harmonized with the wording in article 100. The Arabic, Chinese and Russian language versions should be checked for consistency as well.

Mr. Savadogo said that, in the French version of the draft article, the reference to "*le vol à main armée en mer*" [armed robbery at sea] should be revised to read "*les vols à main armée à l'encontre des navires"* [armed robbery against ships] to bring the wording into line with other relevant international instruments, such as the Code of Conduct concerning the Repression of Piracy and Armed Robbery against Ships in the Western Indian Ocean and the Gulf of Aden or the Charter on Maritime Security and Development in Africa. The issue was not armed robbery at sea but rather armed robbery against ships.

With respect to subparagraph (a), he had been among the members who had raised objections to the inclusion of the word "judicial" with respect to the measures to be taken by States and his doubts in that regard persisted. States adopted legislative and administrative measures but not judicial ones. He therefore suggested that the Special Rapporteur should consider revising the subparagraph.

Ms. Oral said that the proposal to replace "armed robbery at sea" with "armed robbery against ships" would entail more than a minor drafting change. She had concerns about introducing such a change because the title of the topic referred specifically to armed robbery at sea; that issue had already been discussed. In addition, the Drafting Committee had discussed the issue of judicial measures, which were different from legislative measures. She therefore had reservations about making any changes to the wording beyond those that were strictly linguistic in nature.

Mr. Asada said that the question had been raised at the seventy-fourth session and the Drafting Committee had decided that the phrase "armed robbery at sea" should be used in draft article 3. However, the content of draft article 3 essentially dealt with armed robbery against ships. Therefore, as he had pointed out at the Commission's 3669th meeting, there was a discrepancy between the title of draft article 3 and its content, and also between the definition that it contained and the discussions held in the Drafting Committee. He suggested that the Commission should return to the question at the end of the first reading.

Mr. Akande said he agreed that, as the expression "armed robbery at sea" in draft article 3 had been agreed on at the previous session, the Commission should retain that wording, at least for the time being.

Mr. Jalloh added that, as members had just received an oral interim report and were not being asked to adopt anything, they should simply take note of the report and hold a substantive discussion on the questions and concerns raised by members at a later date.

Mr. Paparinskis said he agreed that the question of the definition of armed robbery at sea should not be reviewed at the current stage. He referred members to the statement he had made at the Commission's 3634th meeting in his capacity as Chair of the Drafting Committee at the seventy-fourth session.

Mr. Savadogo said that his main concern in relation to draft article 4 was the need for consistency with all relevant regional and international instruments, including those of IMO, which used the term "armed robbery against ships". He had no objection to returning to the issue at a later stage in the discussions.

Mr. Ouazzani Chahdi said that the language groups could meet to resolve the inconsistencies mentioned by Mr. Forteau.

The Chair, noting that the Commission would resume its consideration of the topic at a later date to discuss the issues and concerns that had been raised, said he took it that the Commission wished to take note of the interim report by the Chair of the Drafting Committee.

It was so decided.

Mr. Fathalla said that he wished to know how the Commission would proceed after taking note of the report of the Drafting Committee. It was not clear whether draft article 4 would be sent back to the Committee or whether it would be brought before the plenary at the seventy-sixth session, together with commentaries.

The Chair said that, as the Drafting Committee had been unable to adopt all the draft articles in the Special Rapporteur's report that had been submitted to it for consideration, more work would need to be done by the Committee.

Mr. Forteau said that the statement by the Chair of the Drafting Committee covered some very useful points on the issues to be addressed going forward. He wondered whether those points would be summarized in the Commission's annual report. Such a summary in the annual report would enable Member States to express their views in the Sixth Committee on a way forward on the topic.

The Chair said that he welcomed Mr. Forteau's suggestion, as it would allow Member States to see the progress being made on the topic and to voice their opinions, which would be very useful for the Commission and the Drafting Committee.

Immunity of State officials from foreign criminal jurisdiction (agenda item 3) (A/CN.4/771, A/CN.4/771/Add.1, A/CN.4/771/Add.2 and A/CN.4/775)

Mr. Grossman Guiloff (Special Rapporteur), introducing his first report on the topic "Immunity of State officials from foreign criminal jurisdiction" (A/CN.4/775), said that the topic had been on the Commission's programme of work since 2007 and that significant progress had already been achieved. At its seventy-third session, in 2022, the Commission had, under the leadership of the previous Special Rapporteur for the topic, adopted on first reading a set of 18 draft articles, including an annex, together with commentaries thereto. The draft articles and the accompanying commentaries had then been transmitted to Governments, which had submitted comments and observations (A/CN.4/771, A/CN.4/771/Add.1 and A/CN.4/771/Add.2). His first report provided an overview of the feedback that had been received on draft articles 1 to 6 as of January 2024 and, in keeping with the normal practice of the Commission on second reading, made recommendations for the modification of those draft articles and commentaries on the basis of the comments made by States and new developments in international law since the adoption of those provisions on first reading. At the time of finalization of the report, 38 written observations had been received. Comments had also been received from the Republic of Korea, Sierra Leone and Spain after the report had been issued.

Owing to the late submission of comments by several States and the time required to translate the report into all the official languages of the United Nations, the Commission had not been able to address the topic until the second part of the seventy-fifth session. That explained why his report covered only draft articles 1 to 6, although that also accommodated the wish expressed by some States to have more time to reflect on the topic. He would present the feedback from States on draft articles 7 to 18 in 2025.

In analysing the issues and concerns raised by States, he had sought to respect the wide range of perspectives provided. Several States had highlighted the role of immunity in promoting friendly relations among States and the stability of international relations. Almost every State had noted that the Commission's work on the topic involved striking a balance between the principle of the sovereign equality of States and the principle of accountability for the most serious crimes under international law. Some States had maintained that those two guiding principles must also be balanced with the need to maintain international peace and security. He recommended that the Commission should further explore that issue when considering the substantive content of draft articles 7 to 18 in 2025.

Some States, such as Czechia, Mexico and Panama, had noted that the draft articles served to codify existing customary international law. Others, such as Malaysia, the United Arab Emirates and the United Kingdom, considered the draft articles to contain elements of progressive development, which should be grounded in emerging or developing rules. He recommended that the Commission should continue to follow the approach set out in paragraph (12) of the general commentary to the draft articles, which explained that, as was usual in the work of the Commission, the draft articles contained proposals for both the codification and the progressive development of international law.

Some States, including Japan and the Russian Federation, had mentioned that, given the significance of the topic, the Commission should take the time it needed to thoroughly consider the draft articles. That concern was addressed by the decision to consider the feedback received from States on draft articles 1 to 6 in 2024 and that received on draft articles 7 to 18 in 2025.

Several States had argued that the draft articles produced by the Commission should form the basis of an international treaty. The need for States to have a binding legal instrument regulating immunity from foreign criminal jurisdiction had been highlighted by Mexico, while the United Kingdom had stated that, if the Commission's aim was both to codify customary international law and to contribute to the progressive development of international law in general, the appropriate outcome of its work should be draft articles that could form the basis of a negotiated convention. However, other States, including the Russian Federation and the United Arab Emirates, were of the view that the draft articles could not serve as the basis of an international convention. France had requested clarification regarding the outcome of the Commission's work on the topic. At the second-reading stage, the Commission needed to adopt one of the two courses of action proposed in paragraph (13) of the general commentary to the draft articles: to commend the draft articles to the attention of States in general or to use them as a basis for the negotiation of a future treaty on the topic.

The definition of the scope of the draft articles set forth in draft article 1 had been welcomed by many States. Some States, such as the Kingdom of the Netherlands and the United Kingdom, had requested further clarification of the distinction between criminal immunity and inviolability in relation to the draft articles. The Russian Federation had noted that the draft articles could more clearly distinguish between criminal and other types of jurisdiction, including jurisdiction to deal with administrative offences. Austria had requested further clarification as to whether the reference to "international criminal courts and tribunals" in draft article 1 (3) also included hybrid or internationalized criminal courts and tribunals. He agreed that there was a need to further clarify the distinction between the exercise of criminal jurisdiction and inviolability and intended to do so in the commentaries. He also recommended reformulating draft article 1 (3) along the lines proposed in paragraph 57 of his report.

Regarding draft article 2, which defined the terms "State official" and "act performed in an official capacity", some States had raised concerns about the translation of certain terms. For instance, France had questioned the translation of "State officials" in French as "*représentants de l'Etat*" and had explained why it preferred "*agents*". While several States had recommended the inclusion of lists to clarify who might be considered a "State official" and what conduct might be considered an "act performed in an official capacity", others, such as the United Kingdom, had expressed a preference for not providing an exhaustive list of either officials or acts that might be covered by the topic. The Russian Federation had raised the issue of which military personnel might be considered "State officials" and the need to distinguish between combatants and military officials in that connection.

While most States generally agreed with the definition of an "act performed in an official capacity" provided in the draft article, some had proposed minor amendments or had requested clarification on that point. For example, Austria had requested further clarification of which acts were covered by the expression "exercise of State authority". The United Kingdom had requested the Commission to clarify which acts carried out "in an official capacity" fell within the scope of immunity *ratione materiae* and, specifically, the notion of *ultra vires* acts. The United States of America had noted that the definition of an official act could be narrower than that of a State official because an official might act *ultra vires*. Czechia had requested the Commission to clarify the relationship between the immunity

ratione materiae of State officials from foreign criminal jurisdiction and the responsibility of States for internationally wrongful acts. Brazil had requested the addition of a definition of foreign criminal jurisdiction.

He found the arguments put forward by France regarding the translation of "State official" into French to be persuasive and thus recommended making the change suggested. Although paragraph (9) of the commentary to draft article 2 already contained a non-exhaustive list of "State officials" in different national contexts, he was amenable to including further examples. The commentary to draft article 1 provided clarification on the regime applicable to military personnel stationed abroad, while the commentary to draft article 2 included a discussion on the lack of a general definition of "State official" under international law. The question of whether to include further definitions, including for "criminal jurisdiction", in the draft article had already been discussed at length by the Commission. The explanation in that regard in paragraph (5) of the commentary to draft article 9 would continue to serve as the definition of that concept, pending further consultations during the Commission's consideration of draft articles 7 to 18 in 2025. In the light of States' comments, the Commission could examine the possibility of building on the explanation of *ultra vires* acts included in paragraphs (32) to (34) of the commentary to draft article 2. As noted in his report, the Commission had stressed that the rules in its articles on responsibility of States for internationally wrongful acts had been established to deal with issues of State and not individual responsibility. Therefore, any automatic application of those rules to the process of attributing an act of an official to a State in the context of immunity of State officials from foreign criminal jurisdiction should be examined carefully. To his mind, it was not necessary to amend the text of draft article 2, as the concerns raised by States could simply be addressed in the commentary.

All States that had submitted replies had expressed agreement with the premise of draft article 3, which established that each country's Head of State, Head of Government and Minister for Foreign Affairs (the "troika") enjoyed immunity *ratione personae* from the exercise of foreign criminal jurisdiction, and had also agreed that the draft article reflected customary international law. However, States had different views as to whether immunity *ratione personae* should be enjoyed only by the members of the troika. The United States had noted that, although some members of the Drafting Committee had taken the view that high-ranking officials other than the members of the troika might enjoy such immunity, customary international law did not support that position. The Kingdom of the Netherlands had argued that other State officials, such as official mission members, might also enjoy immunity *ratione personae* in certain cases. The United Kingdom had encouraged the Commission to explore the issue further, pointing out that, in several cases, the country's domestic courts had shown willingness to recognize the personal immunity of other senior State officials such as ministers of defence or trade. Israel, too, considered that there was an argument for granting immunity *ratione personae* to high-ranking officials other than the members of the troika, recalling that, according to paragraph (11) of the commentary to draft article 3, some members of the Commission also held that view. The United Arab Emirates had suggested that immunity *ratione personae* should also be extended to *de facto* leaders and individuals who held defined roles in the constitutional structure of a State, or to newly elected leaders in the interim period before they formally took office. The Russian Federation had urged the Commission to revisit the question of whether officials holding high-level positions comparable to those held by the troika might also enjoy absolute immunity.

He recognized the value of the consensus among States that draft article 3 reflected customary international law. However, those States that wished to extend immunity *ratione personae* to persons other than the members of the troika, such as crown princes, elected Heads of Government who had not yet taken office or vice-presidents, had not, in his view, adduced sufficient legal grounds to justify the inclusion of such persons in the category of persons entitled to such immunity. Those individuals and others could, however, enjoy immunity under the legal regime governing their participation in special missions or official visits. The issue of *de facto* Heads of Government could be addressed in the commentary to draft article 2. He thus recommended that the text of draft article 3 should remain unchanged.

Draft article 4, "Scope of immunity *ratione personae*", set out the temporal and material scope of immunity *ratione personae* and its relationship to immunity *ratione*

materiae after the individual concerned had left office. The comments received from States such as Brazil, Ireland, Norway (on behalf of the Nordic countries) and the United States were generally supportive of draft article 4 as a reflection of customary international law. Some States had offered suggestions on the terminology used, the structuring of the draft article and the commentary. For example, the Russian Federation had questioned the use of the phrase "term of office", noting that it implied a set period of time, which might not be applicable to all State officials; it had suggested replacing that phrase with a reference to the fact of being in office. The rationale behind its submission was that the question of whether an official's "term of office" had ended could be the subject of dispute and that monarchs and ministers for foreign affairs had no predetermined "term of office".

Regarding draft article 4 (2), the Kingdom of the Netherlands considered that the scope of immunity *ratione personae* "reflects positive law" and that such immunity "ends when the term of office of these officials ends". The United States agreed that immunity *ratione personae* covered all acts. The Russian Federation had again suggested replacing the phrase "term of office" with a reference to the fact of being in office. The United Kingdom agreed with the Commission that draft article 4 (3) should be structured as a "without prejudice" provision. The United States had recommended that the commentary to draft article 4 should address the "intersection of personal immunity from criminal jurisdiction and personal inviolability" as "a distinct protection that informs the official's treatment". It had also suggested that the commentary should clarify that the reference in draft article 4 (3) to "rules of international law" was in fact a reference to customary international law. France had proposed that the term "*cessation*" should be used instead of "*extinction*" in the French version of draft article 4 (3). Lastly, Switzerland had noted that the link between immunity *ratione personae* and immunity *ratione materiae*, which was spelled out in draft article 4 (3) and draft article 6 (3), could be better addressed in a single paragraph.

To his mind, the phrase "term of office" should not be replaced with a reference to the fact of being in office; rather, the reasons put forward for that proposed substitution should be explained in the commentary. However, he would not oppose that change if the Commission decided that it was warranted. He agreed with the proposed revision to the French-language version of draft article 4 (3) and with the position expressed by the United Kingdom regarding the paragraph's function as a "without prejudice" clause. He thus recommended removing the phrase "the rules of international law concerning" from paragraph 3 and addressing the issue of inviolability in the commentary. He was open to suggestions for simplifying the text of draft article 4 without detracting from its substantive content. The Drafting Committee would perhaps be best placed to address that matter.

Concerning draft article 5, "Persons enjoying immunity *ratione materiae*", Austria had expressed the view that the phrase "acting as such" was too broad and could be understood to include *ultra vires* acts. Ireland considered that draft article 5 should be read in conjunction with draft article 6 and that the phrase "in accordance with draft article 6" should be inserted at the end of the current text. The United States found the wording of draft article 5 confusing, noting that the phrase "acting as such" was inappropriate in the context of an article that defined the personal scope of immunity *ratione materiae*, as it introduced an element concerning its substantive scope. The Nordic countries had invited the Commission to further consider the relationship between draft articles 2 and 5, questioning whether it was necessary to have two separate articles addressing the personal and substantive scope of immunity *ratione materiae*. They had thus suggested merging draft articles 5 and 6. The Russian Federation agreed that draft article 5 should be read in conjunction with draft article 6 but considered that the phrase "acting as such" seemed to subject the application of immunity *ratione materiae* to a new qualifying criterion, in addition to the requirement that an act should be performed in an official capacity. It had further noted that no legal difference existed between the two concepts and had thus invited the Commission to reconsider whether draft article 5 was actually necessary.

Most members of the Commission remained in favour of retaining a separate draft article addressing the personal scope of immunity *ratione materiae*. In the light of the concerns raised by States about the uncertainty introduced by the phrase "acting as such", he proposed removing it from the draft article and inserting the language "in accordance with draft article 6" at the end of the sentence.

Draft article 6 was entitled “Scope of immunity *ratione materiae*”. Several States, including the Nordic countries and the United Kingdom, had expressed general support for paragraph 1, which limited immunity *ratione materiae* to acts performed in an official capacity. The United States had suggested that the Commission should consider in more depth what was, and what was not, an act performed in an official capacity. The Russian Federation had questioned whether draft article 6 (1) was compatible with draft article 5. He maintained that the deletion of the phrase “acting as such” and the addition of a reference to draft article 6 in draft article 5 would address that concern.

Most States agreed that draft article 6 (2), which explained that immunity for such acts continued after the individuals concerned had left office, adequately reflected customary international law. Romania had questioned whether the formulation of draft article 6 (2) correctly characterized customary international law regarding immunity *ratione materiae*. It had noted that such immunity was not absolute and that its application could be excluded in some instances, such as in cases where the person concerned was accused of international crimes. Draft article 6 (3), which noted that immunity *ratione m*ate*riae* continued to apply, with respect to acts performed in an official capacity, to individuals who had enjoyed immunity *ratione personae*, even after they had left office, was generally considered by States to reflect customary international law, although some States had requested modifications. For instance, the Kingdom of the Netherlands had recommended that confirmation that immunity *ratione materiae* continued after the cessation of immunity *ratione personae* for members of the troika should be included in the commentary instead of in the draft article itself. The United States and Romania agreed that former troika officials who had enjoyed immunity *ratione personae* continued to enjoy immunity *ratione materiae* in respect of their prior official acts. France had suggested amending draft article 6 (3) to clarify that the immunity that such officials continued to enjoy was immunity “from jurisdiction”. Similarly, the United Kingdom had proposed stating expressly in draft article 6 (3) that the continuing immunity was immunity “*ratione materiae*” to avoid implying that the ongoing immunity derived in any way from immunity *ratione personae*.

States had likewise suggested combining portions of draft article 6 with provisions currently contained in other draft articles, such as draft articles 2, 4 (3) and 5. For instance, Switzerland had proposed merging draft article 6 (3) with draft article 4 (3), as both provisions addressed the link between immunity *ratione personae* and immunity *ratione materiae*. The United States had proposed moving the reference to the applicability of immunity *ratione materiae* to both current and former officials from draft article 2 (b) to draft article 6 to avoid causing confusion over the temporal scope of immunity *ratione materiae*.

He agreed that there was a need to confirm that immunity *ratione materiae* continued after the cessation of immunity *ratione personae* for members of the troika. The commentary might also be an appropriate space in which to clarify that the relevant immunity also covered measures of constraint adopted by national authorities against foreign officials. While he had taken note of the proposals to merge draft article 5 with draft article 6 (1), he maintained that the two provisions should be kept separate. He agreed that the type of immunity referred to in draft article 6 (3) should be clarified. However, as that was not a substantive issue, the proposal to merge draft article 4 (3) with draft article 6 (3) warranted careful consideration by the Commission. An updated version of draft article 6, including the changes proposed to paragraph 3, was set out in paragraph 163 of his report.

Organization of the work of the session (agenda item 1) (*continued*)

The Chair said that he had received a communication from Mr. Huang informing him and the secretariat of Mr. Huang’s resignation from the Commission with immediate effect. On behalf of the Commission, he wished to thank Mr. Huang for his many years of devoted service and to wish him well in his future endeavours. The secretariat would proceed to prepare a casual vacancy notice and the Bureau would discuss the timeline for filling that vacancy in due course.

The meeting rose at 6 p.m.