

Provisional

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Seventy-fifth session (second part)

Provisional summary record of the 3697th meeting

Held at the Palais des Nations, Geneva, on Tuesday, 30 July 2024, at 10 a.m.

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Present:

Chair: Mr. Vázquez-Bermúdez

Members: Mr. Akande
Mr. Argüello Gómez
Mr. Asada
Mr. Fathalla
Mr. Fife
Mr. Forteau
Mr. Galindo
Ms. Galvão Teles
Mr. Grossman Guiloff
Mr. Jalloh
Mr. Laraba
Mr. Lee
Ms. Mangklatanakul
Mr. Mavroyiannis
Mr. Nesi
Mr. Nguyen
Ms. Okowa
Ms. Oral
Ms. Orosan
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 10.05 a.m.

Tribute to the memory of Mehmet Güney, former member of the Commission

Ms. Oral said that she had the honour to present a brief tribute to the memory of Mehmet Güney, a former member of the Commission, who had passed away on 24 April 2024. As the third national of Türkiye to have been elected to the Commission, Mr. Güney had served as a member between 1992 and 1997, including as Second Vice-Chair. She wished to extend her sincerest condolences to Mr. Güney's family and to acknowledge the presence of two of his daughters at the current meeting.

Prior to his election to the Commission, Mr. Güney had served as Chief Legal Adviser to the Ministry of Foreign Affairs of Türkiye and, between 1984 and 1989, as a judge of the European Nuclear Energy Tribunal. He had also served as Ambassador of Türkiye to Cuba, Indonesia and Singapore. As a member of the Commission, he had been actively involved in drafting what had become the Rome Statute of the International Criminal Court; in addition, he had headed the delegation of Türkiye to the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court. He had subsequently served as a judge of the International Criminal Tribunal for Rwanda and the International Tribunal for the Former Yugoslavia. He was remembered as a tireless promoter of diplomacy, the rule of law and multilateralism.

The Chair said that he wished to express the Commission's condolences to the family of Mehmet Güney, an outstanding jurist, barrister, legal counsellor and international judge who had served with distinction as a member of the Commission.

Draft report of the Commission on the work of its seventy-fifth session *(continued)*

Chapter V. Subsidiary means for the determination of rules of international law
(continued) (A/CN.4/L.991 and A/CN.4/L.991/Add.1)

The Chair invited the Commission to resume its consideration of chapter V (C) (2) of its draft report, as contained in document A/CN.4/L.991/Add.1.

Commentary to draft conclusion 8 (Weight of decisions of courts and tribunals) *(continued)*

Paragraphs (11) and (12)

Paragraphs (11) and (12) were adopted.

Paragraph (13)

The Chair said that the Special Rapporteur was proposing the insertion of the words "however they may be characterized" after "specific competencies".

Mr. Paparinskis said that, in the light of the amendments that the Commission had made to the text the previous day, "case law" near the beginning of the sentence should be replaced with "decisions".

Paragraph (13), as amended, was adopted.

Subparagraph (b) – whether the decision is a part of a body of concurring decisions

Paragraph (14)

The Chair said that the Special Rapporteur was proposing the deletion of the word "famous" from the third sentence and the replacement of the words "so much" in the last sentence with "considerable".

Mr. Mavroyiannis said that, if the word "famous" was deleted, the preceding words "by now" should also be deleted.

Paragraph (14), as amended, was adopted.

Paragraph (15)

The Chair said that the Special Rapporteur was proposing the deletion of the words “stream or” from the first sentence and of the word “only” from the second.

Mr. Forteau proposed that, for ease of understanding, the second sentence should be deleted.

Paragraph (15), as amended, was adopted.

Paragraphs (16) to (18)

Paragraphs (16) to (18) were adopted.

*Subparagraph (c) – whether the reasoning remains relevant**Paragraph (19)*

Mr. Akande said that, as the criteria set out in draft conclusion 8 were not exhaustive, the words “the third and final” in the first sentence should be replaced with “a third”.

Paragraph (19), as amended, was adopted.

Paragraph (20)

The Chair said that the Special Rapporteur was proposing that a new footnote should be inserted, with the marker to be placed at the end of the third sentence, to describe how part of the reasoning of the Permanent Court of International Justice in its judgment in *The Case of the S.S. “Lotus”* had been reversed by subsequent legal developments, including the adoption of the United Nations Convention on the Law of the Sea.

Mr. Galindo said that he had some doubts about the new footnote. Draft conclusion 8 (c) concerned the extent to which the reasoning of a court or tribunal remained relevant. However, the example provided in the footnote illustrated not so much a change in relevance as a change in perspective or understanding.

Mr. Akande said that, in his view, the judgment in the *S.S. Lotus* case was a good example of how subsequent practice could cast doubt on the reasoning of a court or tribunal on a particular point in an earlier case.

Mr. Forteau said that the footnote had been inserted in response to a proposal that he had made to the Special Rapporteur informally. It had been necessary, in his view, to provide at least one example to illustrate the situation referred to in paragraph (20). What struck him as interesting in the example provided in the footnote was the reference to the 2020 arbitral award in *The “Enrica Lexie” Incident (Italy v. India)*, which had rejected the reasoning of the 1927 *S.S. Lotus* judgment in the light of the instruments adopted in the intervening period, including the 1982 United Nations Convention on the Law of the Sea. The example did not cover all situations, but it seemed to be a relatively clear demonstration of what the Commission was trying to address in the paragraph.

Mr. Paparinskis said that, while the footnote elegantly captured an important point, he was not sure that it belonged in the commentary to draft conclusion 8. The example of the *S.S. Lotus* judgment was more relevant in the context of draft conclusion 3 (e), which identified the reception by States and other entities as a consideration to be taken into account when assessing the weight of subsidiary means. The *S.S. Lotus* case had given rise to specific negative reactions on the part of States. Draft conclusion 8 (c), by contrast, concerned developments in international law that were unrelated to the decision in question, such as changes in the applicable rules. The Commission might wish to consider moving the footnote to the commentary to draft conclusion 3 when it adopted the full set of draft conclusions on first reading.

Ms. Oral said she agreed that the *S.S. Lotus* case was a good example of the point being made in the paragraph. While that judgment had historic importance, in particular for Türkiye, which had been a party to the case, the description provided in the footnote reflected the reality that the judgment had created issues which, in turn, had served as the impetus for

a reversal, including through the development of instruments such as the United Nations Convention on the Law of the Sea.

Mr. Forteau said that Mr. Paparinskis's comments were fully justified. On reflection, he thought that the footnote would be better placed in the commentary to draft conclusion 3.

Mr. Jalloh (Special Rapporteur) said that he shared Mr. Akande's views regarding the footnote. Paragraph (20) of the commentary to draft conclusion 8 concerned subsequent developments that might affect the validity or relevance of a decision in terms of its weight. While the footnote could be moved to the commentary to draft conclusion 3, it was also relevant to the paragraph under consideration. The Commission might wish to defer a decision on the footnote.

Mr. Galindo said that one solution might be to insert a cross reference to draft conclusion 3. For example, the words "which is also useful for draft conclusion 3" could be inserted after "One example" in the first sentence of the footnote. It was noted in the footnote that the *S.S. Lotus* judgment had been very strongly criticized and had caused serious disquiet in international maritime circles, but that was a description of how it had been received at the time of its adoption. He was therefore not sure that the example reflected a subsequent development.

Mr. Akande said that he supported Mr. Galindo's proposal to insert a cross reference. He understood Mr. Paparinskis's point that the example described in the footnote was relevant to draft conclusion 3. However, there was some overlap between draft conclusion 3 and draft conclusion 8 (c), which was broader in scope. He supported the proposal to move the footnote to the commentary to draft conclusion 3 and to include a footnote with a cross reference in the commentary to draft conclusion 8 (c).

Mr. Jalloh (Special Rapporteur) said that, to address the concerns that had been raised, the words "which is also relevant for draft conclusion 3, paragraph (e)" should be inserted after "One example" in the first sentence of the footnote, as proposed by Mr. Galindo. His understanding was that the judgment had generated criticism at the time of its issuance, which had in turn given rise to subsequent developments. When the Commission came to adopt the entire set of draft conclusions on first reading, it could insert a cross reference in the commentary to draft conclusion 3.

Paragraph (20), as amended, was adopted.

The Chair said that the Commission would resume its consideration of chapter V (C) (2) at a subsequent meeting in order to adopt the pending paragraphs.

*Chapter VII. Immunity of State officials from foreign criminal jurisdiction
(A/CN.4/L.993)*

The Chair invited the Commission to consider chapter VII of its draft report (A/CN.4/L.993), noting that a revised draft reflecting the Special Rapporteur's proposed amendments had been circulated informally to the members in English only.

A. Introduction

Paragraphs 1 to 5

Paragraphs 1 to 5 were adopted.

B. Consideration of the topic at the present session

Paragraph 6

The Chair said that the Special Rapporteur was proposing the addition of the words "made by States in both written comments and in the Sixth Committee" at the end of the last sentence.

Paragraph 6, as amended, was adopted.

Paragraph 7

Mr. Forteau said that, in order to clarify the chronology of the Commission's work, a new sentence should be inserted at the end of the paragraph, to read "*Le résumé du débat en séance plénière figure ci-après aux paragraphes 9 à 77*" [The summary of the plenary debate can be found in paragraphs 9 to 77 below].

Mr. Ouazzani Chahdi said that Mr. Forteau's proposal might be relevant for other chapters of the Commission's report as well, when the referral of draft texts to the Drafting Committee was mentioned.

The Chair said that chapter VII was the first of the chapters considered at the current session to contain a summary of the plenary debate. The Commission could consider whether a sentence of the kind proposed by Mr. Forteau should be added to other chapters, where appropriate.

Paragraph 7, as amended, was adopted.

Paragraph 8

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

*1. Introduction by the Special Rapporteur of the first report**Paragraph 9*

The Chair said that the Special Rapporteur was proposing the addition of a new sentence at the beginning of the paragraph, to read: "The Special Rapporteur emphasized that the Commission found itself in the second reading of the topic, where both the views of States as well as new developments were central to the work of the Commission." The words "The Special Rapporteur" at the beginning of the next sentence would be replaced with "He".

Paragraph 9, as amended, was adopted.

Paragraph 10

The Chair said the Special Rapporteur was proposing that the third sentence should be replaced with three sentences, to read: "The Special Rapporteur noted two reasons for the difficulty of reviewing all the draft articles for the purpose of the second reading. First, some State submissions were delayed, which in turn led to a subsequent delay in receiving translations of those submissions. Second, the Special Rapporteur referred to the request by States for additional time to comment on the entire set of draft articles." The Special Rapporteur was also proposing the addition of a new sentence at the end of the paragraph, to read: "Additionally, he proposed to the Commission allowing a period until the first week of November for States to comment particularly on draft articles 7 to 18, to be considered at the next session."

Ms. Galvão Teles proposed that, to avoid the repetition of the word "feedback" in the first sentence and ensure an appropriate level of formality, the first instance of that word should be replaced with "comments and observations".

Paragraph 10, as amended, was adopted.

Paragraph 11

The Chair said that, in the Special Rapporteur's revised draft, the word "further" had been inserted after "explore" in the last sentence.

Paragraph 11, as amended, was adopted.

Paragraph 12

The Chair said that the Special Rapporteur's proposal was to insert the words "as appropriate" after "elements of both" in the second sentence.

Paragraph 12, as amended, was adopted.

Paragraph 13

The Chair said the Special Rapporteur was proposing that the second sentence should be amended to read: “He recalled the question posed to States in paragraph (13) of the commentary adopted on first reading and considered it important for the Commission to clarify the final form of its work on the topic at the present stage.”

Mr. Forteau proposed that the word “general” should be inserted before “commentary” in the second sentence, as amended by the Special Rapporteur.

Paragraph 13, as amended, was adopted.

Paragraphs 14 to 16

Paragraphs 14 to 16 were adopted.

Paragraph 17

The Chair said that the Special Rapporteur was proposing the insertion of a new sentence, just before the last sentence, to read: “In his view, there was no evidence of consistent State practice to support the extension.”

Paragraph 17, as amended, was adopted.

Paragraph 18

Paragraph 18 was adopted.

Paragraph 19

The Chair said that the Special Rapporteur was proposing the replacement of the word “add” in the second sentence with “consider adding”.

Paragraph 19, as amended, was adopted.

Paragraph 20

Paragraph 20 was adopted.

Paragraph 21

The Chair said that the Special Rapporteur was proposing the replacement of the word “Commission” at the end of the last sentence with “Drafting Committee”.

Paragraph 21, as amended, was adopted.

Paragraph 22

Paragraph 22 was adopted.

*2. Summary of the debate**(a) General comments**Paragraph 23*

The Chair said that the Special Rapporteur was proposing the deletion of the word “generally” in the first sentence.

Paragraph 23, as amended, was adopted.

Paragraph 24

Paragraph 24 was adopted.

Paragraph 25

The Chair said that the Special Rapporteur was proposing the replacement of the words “it was” in the sixth sentence with “some members” and the insertion of a new sentence, just before the last sentence, to read: “Others suggested the opposite.”

Paragraph 25, as amended, was adopted.

Paragraph 26

The Chair said the Special Rapporteur was proposing that the second sentence should be amended to read: “Nevertheless, a few members encouraged the Commission to consider providing further information on those specific points where States requested it.”

Paragraph 26, as amended, was adopted.

Paragraph 27

The Chair said that the Special Rapporteur was proposing the replacement of the words “the view” in the second sentence with “a view” and of “It was” in the third sentence with “One member”. The Special Rapporteur was also proposing the insertion of a new sentence at the end of the paragraph, to read: “On the other hand, many members recalled that the draft articles were adopted in 2022 and included reference to jurisprudence up to that point.”

Mr. Forteau said that he would not object to the wording “One member”, although he had not been the only member to express the view referred to in the sentence. In the proposed new final sentence, the word “some” should be inserted before “jurisprudence”. In 2022, the Commission had held a rich discussion on a judgment of the Court of Cassation of France, but no reference to that judgment had ultimately been included in the commentary adopted on first reading.

Mr. Fife said that he supported the point made by Mr. Forteau. However, it would be preferable to replace the words “included reference to jurisprudence” with “included some references to jurisprudence”.

Ms. Ridings, supported by **Mr. Oyarzábal**, said that the statement “many members recalled that the draft articles were adopted in 2022” was not accurate.

Mr. Oyarzábal said that, in the second and third sentences, it would be preferable to revert to the original language, namely “the view” and “It was recalled”, respectively.

The Chair said that the Commission did not usually single out members when attributing views to them.

Mr. Grossman Guiloff (Special Rapporteur) said that he would have no objection to reverting to the original language of the second and third sentences and deleting the word “many” in the new sentence proposed for insertion at the end of the paragraph. The word “reference” in that sentence could be replaced with “references”, which was not exhaustive.

Mr. Fife said that the Special Rapporteur’s proposal to replace “reference” with “references” would address his concerns.

Paragraph 27, as amended, was adopted.

Paragraph 28

The Chair said that the Special Rapporteur was proposing that a new sentence should be inserted, after the first sentence, to read: “Some members recalled comments made by States before the conclusion of the first reading and suggested that those might be relevant to the Commission’s present work.” The Special Rapporteur was also proposing that the original second and third sentences should be amended to read: “It was observed that prior State comments were incorporated into the prior reports on the topic.” The Special Rapporteur was further proposing that the words “Several members” in the original fourth sentence should be amended to read “A few members”.

Mr. Paparinskis said that the original third sentence, concerning the comments made by States before the conclusion of the first reading, should be retained, as at least three members had recalled those comments and some had done so at length. In the following sentence, it would be preferable to revert to the original text, which began “Several members”, as virtually all members had “emphasized the importance of giving adequate and equal consideration to the views of States from all regions”. If the original text of those two sentences was not retained, he proposed that the words “Some members” at the beginning of the new second sentence should be replaced with “Several members” and that the new fourth sentence should begin “Many members”.

Mr. Forteau said that, regarding the new third sentence, he wished to state for the record that prior State comments had not in fact been “incorporated into the prior reports on the topic”.

Ms. Okowa said that, in the new third sentence, the words “the prior reports” should be replaced with “the previous reports”. She agreed with Mr. Paparinskis that, in the original fourth sentence, the words “Several members” or even just “Members” would be preferable to “A few members”. In the original fifth sentence, the words “the normal process of the Commission” were unclear. She wondered whether they could be replaced with “the formal process of consultation by the Commission”.

Mr. Grossman Guiloff (Special Rapporteur) proposed that informal consultations should be held to discuss the issues that had been raised by members.

The Chair, recalling that paragraph 28 was part of the summary of the plenary debate, said he took it that the Commission wished to suspend its consideration of the paragraph to enable the Special Rapporteur to hold informal consultations with interested members.

It was so decided.

Paragraph 29

The Chair said that the Special Rapporteur was proposing the insertion of a new sentence at the end of the paragraph, to read: “Other members reiterated that draft articles 1 to 6 were provisionally adopted in 2022 and the jurisprudence referenced indicated that there had been a thorough discussion at that time.”

Paragraph 29, as amended, was adopted.

Paragraph 30

Paragraph 30 was adopted.

(b) Draft article 1 (Scope of the present draft articles)

Paragraph 31

The Chair said that the Special Rapporteur was proposing that the words “Others suggested” in the third sentence should be replaced with “Others agreed with the Special Rapporteur”.

Mr. Galindo said that it would be useful to replace the word “protection” in the fifth sentence with “exemption”. In the literature on immunities, the word “protection” was related more to a positive duty of the State to protect the diplomats and missions of foreign States.

Mr. Forteau said that, while he understood Mr. Galindo’s concern, the word “exemption” had not been used during the debate, as far as he recalled. It would be preferable to replace the words “immunity provided protection only from” with “immunity only related to”.

Mr. Grossman Guiloff (Special Rapporteur) said that he could accept Mr. Forteau’s proposed amendment, as it was preferable to reflect the language that had been used during the debate.

Paragraph 31, as amended, was adopted.

Paragraph 32

Mr. Akande proposed that, in the second sentence, the phrase “seemed to conflate the two in its decisions” should be replaced with “combined discussion of the two concepts in its decisions”.

Paragraph 32, as amended, was adopted.

Paragraph 33

Paragraph 33 was adopted.

Paragraph 34

Mr. Akande said that the phrase “but were also covered by the doctrine of combatant immunity” at the end of the third sentence should be replaced with “but the view was also expressed that they were covered by the doctrine of combatant immunity” to reflect the fact that there were differing opinions among Commission members on whether members of the armed forces participating in armed conflict fell within the scope of the draft articles. He himself, for instance, had suggested that combatant immunity might be covered by special rules.

Mr. Grossman Guiloff (Special Rapporteur) said that he had no issue with using the language put forward by Mr. Akande. He proposed that it should become a new sentence beginning with the words “The view was also expressed”, following the insertion of a full stop after the phrase “particularly when participating in an armed conflict” and the deletion of the word “but”.

Paragraph 34, as amended, was adopted.

Paragraph 35

The Chair said that, in the Special Rapporteur’s revised draft, the second sentence had been reordered to read: “The importance of the paragraph were the draft articles to become a treaty was highlighted, as without it, the rule expressed in draft article 30 of the Vienna Convention on the Law of Treaties that a later treaty takes precedence over an earlier one would apply.”

Mr. Forteau said that there was a need to amend the phrase “the rule expressed in draft article 30” by replacing the word “expressed” with “reflected”, which was the formulation normally used by the Commission, and deleting the word “draft”.

Paragraph 35, as amended, was adopted.

Paragraph 36

Paragraph 36 was adopted.

Paragraph 37

The Chair said the Special Rapporteur had proposed that the first sentence should be amended to read: “A few members expressed concern that it is not clear whether hybrid and internationalized tribunals are included within the scope of the provision, and it was suggested that a separate subparagraph might be necessary to that end.”

Mr. Forteau, supported by **Ms. Galvão Teles**, said that it would be helpful if those members who had raised the point made in the second sentence could explain exactly what that sentence meant, with a view to its reworking.

Ms. Okowa said that the idea behind the sentence in question was to highlight the need for the Commission to clarify what made a court or tribunal international for the purposes of exemption from the draft articles, given that the Commission had already established that the draft articles would not cover the special regimes relating to international criminal courts and tribunals. That left open the possibility that States might decide to manipulate the situation by joining forces to create what they claimed to be an international court or tribunal in order to evade their obligations under the draft articles.

Mr. Akande proposed that the second sentence should be reworded to read: “The importance of making clear which tribunals fall within the category of international tribunals was underscored.”

Mr. Forteau said that he was unsure whether the wording proposed by Mr. Akande reflected the view expressed by Ms. Okowa.

Mr. Fife said he was unconvinced that Mr. Akande’s proposal added much to what was already stated in the first sentence. In his view, the key point to be stressed in the second sentence was the importance of preventing a lack of clarity in that regard.

Mr. Akande said that he had proposed neutral wording because, while a number of members had raised points regarding the definition of international tribunals, not all of them had made the same argument as Ms. Okowa. Some members, for instance, had simply pointed to the need for clarity on the matter. Furthermore, he considered that his proposed sentence would complement the first sentence of the paragraph by noting that members had raised not only the matter of hybrid or internationalized tribunals, but also the question of what constituted an international tribunal.

Ms. Okowa said that the Commission should adopt wording that highlighted the importance of having workable criteria regarding what defined a tribunal as international and therefore outside the scope of the draft articles.

Mr. Grossman Guiloff (Special Rapporteur) said that he wished to remind members that the sentence in question should be read together with the rest of the paragraph, in particular the first sentence, rather than considered in isolation.

Mr. Akande said that, in view of the Special Rapporteur’s comments, he wished to withdraw his proposal, as his point was adequately captured by the third sentence.

Ms. Okowa said that she, too, wished to withdraw her proposal, since it appeared to be reflected in the final two sentences of the paragraph.

Mr. Oyarzábal said that one option might be to delete the second sentence, as he was unsure whether it was appropriate to mention that States might manipulate international tribunals, and the sentence said little about the point made by Ms. Okowa in the relevant plenary discussion.

Mr. Paparinskis, supported by **Ms. Okowa**, said that, in line with the Commission’s usual practice, the words “A few” in the first sentence should be replaced with “Some”.

The Chair said he took it that the Commission wished to adopt the paragraph with the amendments proposed by the Special Rapporteur, Mr. Oyarzábal and Mr. Paparinskis.

Paragraph 37 was adopted with those amendments.

Paragraphs 38 to 41

Paragraphs 38 to 41 were adopted.

(c) *Draft article 2 (Definitions)*

Paragraph 42

Mr. Forteau said that the phrase “in the Drafting Committee” should be inserted before the words “(English, French and Spanish)” in the final sentence.

Paragraph 42, as amended, was adopted.

Paragraphs 43 to 45

Paragraphs 43 to 45 were adopted.

Paragraph 46

Mr. Patel said that a reference to “status-of-mission agreements” should be inserted after the mention of status-of-forces agreements in the second sentence, since those were the

two main types of agreements that the Security Council concluded before deploying a mission.

Paragraph 46, as amended, was adopted.

(d) *Draft article 3 (Persons enjoying immunity ratione personae)*

Paragraph 47

The Chair said that, in the first sentence, the Special Rapporteur had proposed replacing the words “number of” with “majority of”.

Mr. Akande said that his preference would be to follow the Commission’s usual practice by avoiding the use of the expression “a majority of”. One way of resolving the issue might be to begin the sentence with the word “Members”.

Mr. Paparinskis said that he shared Mr. Akande’s concern and wondered whether it might be preferable to revert to the original language or to use the words “several members”, which was how the Commission normally indicated numerical preponderance.

Mr. Forteau said that the expression “a majority of” should be retained, since draft article 3 dealt with a matter of principle, and it was thus important for the Commission to indicate that a majority of the members had supported the Special Rapporteur’s proposal.

Mr. Ouazzani Chahdi said that he preferred the term “*plusieurs membres*” [several members], as that was the expression that had been used in the past. Moreover, it was his view that the expression “a majority of” was imprecise.

The Chair, speaking as a member of the Commission, said that the expression “many members” might be another option.

Mr. Grossman Guiloff (Special Rapporteur) said that his aim had been to use an expression that would give States an idea of the reality of the discussion held in the Commission. He wondered whether the word “numerous” would be acceptable as a compromise.

Mr. Galindo said that the words “majority” and “numerous” both reflected the extent to which members had supported the Special Rapporteur’s proposal. That said, his preference would be to retain the word “majority”. As the report would be submitted to States in the Sixth Committee, the Commission needed to choose its words carefully.

Mr. Fife said that, while he had initially been reluctant to accept the use of the expression “a majority of”, he found the arguments made by the Special Rapporteur and Mr. Galindo persuasive. The Commission should not be bound by its previous practices in cases, such as the one at hand, in which it could add real value to the report by making members’ stance on a particular substantive matter clear to States.

Mr. Akande said that he remained unconvinced regarding the use of the word “majority”, as it would introduce a new gradation into the Commission’s work and would wrongly imply that the Commission was not expressing a majority view when it used words such as “many” or “several”. It was unclear to him why the Commission should diverge from its normal practice in the paragraph currently under consideration and why the point being made in the first sentence was considered more important than others contained in the Commission’s reports. He was also unable to support the use of the word “numerous”.

Mr. Asada said that he shared the view expressed by the Special Rapporteur, Mr. Galindo and Mr. Fife.

Ms. Galvão Teles said that the Commission’s normal practice was to use more neutral language when indicating levels of support for a certain position. She was of the view that the phrase “members voiced support” implied that there was general agreement among them. Furthermore, the expression “a majority of” suggested that there had also been a minority view, which was not reflected in the paragraph; in any event, there had been no such discordant view. The same issue had arisen in the work on the topic “Sea-level rise in relation to international law”, and the question of how to reflect the varying levels of support enjoyed by each position was a recurring topic of discussion.

Mr. Grossman Guiloff (Special Rapporteur) said that the Commission had used a range of expressions throughout its history. A possible compromise would be to state that the proposal outlined in the first sentence had been “generally accepted”.

The Chair, speaking as a member of the Commission, proposed replacing the phrase “A majority of members voiced support for” with “Members generally accepted”.

Mr. Forteau said that, if the Chair’s proposed wording was adopted, it would be necessary to delete the phrase “According to those members” from the start of the second sentence.

Paragraph 47, as amended by the Chair and Mr. Forteau, was adopted.

Paragraph 48

Mr. Galindo said he was concerned that the lengthy final sentence might be easily misunderstood. Moreover, it was his opinion that the phrase “it was highlighted” in that sentence should be replaced with “a view was expressed” to make it clear that the point being made had not been supported by a majority of members.

Mr. Forteau said that he wondered whether footnote 24 should contain a reference to *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, which was the case cited in the body of the paragraph, rather than *Delimitation of the Maritime Boundary in the Gulf of Maine Area*.

Mr. Oyarzábal said that he was unsure whether, in the last sentence, the phrase “the International Court of Justice in the *Arrest Warrant* case did not offer sufficient practice to place the Head of Government and the Minister for Foreign Affairs in the same category as the Head of State” reflected what had been discussed by members.

Mr. Nguyen proposed that the phrase “extending such immunity” in the last sentence should be replaced with “the application of such immunity”, since it was his understanding that members of the troika already enjoyed immunity *ratione personae*.

Mr. Forteau said that the phrase highlighted by Mr. Oyarzábal accurately reflected members’ discussions, as certain members had stated that they considered the extension of immunity *ratione personae* to Heads of Government and Ministers for Foreign Affairs to be problematic. One solution that might make the final sentence clearer would be to delete the word “even”.

Mr. Akande said that the phrase mentioned by Mr. Oyarzábal closely reflected the comment he had made on draft article 3 at the Commission’s 3679th meeting. Nonetheless, he was happy to accept the amendments proposed by Mr. Galindo and Mr. Forteau.

Paragraph 48 was adopted with those amendments.

Paragraph 49

The Chair said that the Special Rapporteur’s revised draft contained one proposed amendment in the paragraph, with the words “It was” at the beginning of the second sentence replaced with “A few members”.

Mr. Paparinskis said that the original wording of the paragraph should be retained, as it was in line with the language generally used in the Commission’s reports.

Mr. Grossman Guiloff (Special Rapporteur) said that the words “A few members” could be replaced with “A view was expressed”.

Paragraph 49, as amended, was adopted.

Paragraph 50

The Chair said that there was one proposed amendment in the paragraph, to delete “others” and replace it with “the majority of members”.

Mr. Grossman Guiloff (Special Rapporteur) said that, in the light of the current discussion, those words could be replaced with “members generally”.

Mr. Forteau said that the word “generally” implied greater support than “the majority”. Given that not many members had commented on the proposal in question, he would prefer either to retain the original word “others” or to reformulate the second part of the sentence, to begin “the preference was to retain”.

Mr. Akande said that members did not necessarily express an opinion on every point raised during the Commission’s debates if they thought that certain points were less important or had been adequately addressed by other members. Summarizing the debates in terms of what “a majority of members” or “a few members” had said could have the effect of changing that approach. It would thus be preferable to avoid such references.

Mr. Ouazzani Chahdi said he agreed that it was preferable to remain neutral and not speak of majorities or minorities. Wording such as “some members” and “other members” was more appropriate.

Mr. Grossman Guiloff (Special Rapporteur) said that one of the Commission’s goals was to share its thinking on the topics it considered with the Member States; its reports should thus reflect the full content of its debates.

The Chair suggested that the last part of the sentence should begin with the words “several members preferred”.

Mr. Oyarzábal said that the question of merging draft articles 3 and 4 had attracted much less discussion than the proposed merging of draft articles 5 and 6. He proposed that the second part of the sentence should be amended to read “retaining stand-alone provisions for clarity was preferred”. There would thus be no mention of the number of members concerned, but the idea that there was a majority in favour of keeping the draft articles separate would be conveyed.

Mr. Forteau said that, although it would be more accurate to say “the majority of members who addressed this issue”, he could support Mr. Oyarzábal’s proposal.

Mr. Nguyen pointed out that the phrase “members generally”, which the Special Rapporteur had already proposed as an alternative, was also used in paragraph 54.

Mr. Fife said that he supported Mr. Oyarzábal’s proposal, amended slightly to read “retaining stand-alone provisions was preferred for clarity”.

Mr. Paparinskis said that he agreed with Mr. Fife’s proposal. It was important to remember that, although the paragraphs under discussion summarized the debate, readers wishing for a more detailed account could consult the summary records.

Mr. Grossman Guiloff (Special Rapporteur) said that, in his experience, silence in response to a point made during a debate was generally understood to indicate agreement. In the case of the proposal referred to in paragraph 50, the position taken by the Commission was clear.

The Chair said he took it that the members wished to adopt the paragraph with the amendment proposed by Mr. Oyarzábal and adjusted by Mr. Fife. The paragraph would thus read: “While some members suggested merging draft articles 3 and 4 to ensure coherence between the two provisions, retaining stand-alone provisions was preferred for clarity.”

Paragraph 50, as amended, was adopted.

(e) *Draft article 4 (Scope of immunity ratione personae)*

Paragraph 51

The Chair said that the Special Rapporteur’s proposed amendments to paragraph 51 consisted in the insertion in the sixth sentence, after the words “Nevertheless, several members”, of the words “felt that the phrase ‘term of office’ did not accurately reflect the circumstances of officials that do not have predetermined terms of office. Hence, they”; and the addition of a new sentence at the end of the paragraph, to read: “The Special Rapporteur did not oppose modifications to the language, but preferred retaining it.”

Mr. Forteau said it should be specified in the text that the expression “term of office” had been problematic only in the English text.

Ms. Galvão Teles said that, as the paragraph was intended to reflect only the discussion that had taken place, and the content of the new final sentence proposed by the Special Rapporteur referred to something he had said in his concluding remarks, that sentence should be removed.

Mr. Galindo said that, in the fourth sentence, the word “presidential” should be inserted before “term limits”, as that was the subject of the advisory opinion mentioned.

Mr. Asada said that he agreed with the proposal to remove the new final sentence, for the reason mentioned by Ms. Galvão Teles.

Ms. Mangklatanakul said that she also agreed with that proposal, as the members had discussed the expression “term of office” at length and had decided to align the wording with the usage in the International Court of Justice judgment in *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*. That was not reflected in the proposed new sentence.

Mr. Grossman Guiloff (Special Rapporteur) said that, although he would prefer to retain the new final sentence, if the other members insisted on deleting it, he would agree. He also agreed to the other proposed amendments.

Mr. Forteau said that it came down to a matter of principle, as the section of the chapter under consideration was a summary of the members’ discussion.

The Chair said that the content of the new final sentence should perhaps be reflected in the section on the Special Rapporteur’s concluding remarks.

Mr. Fife said he agreed that the final sentence should be deleted. He proposed that the word “notably” should be inserted in the sixth sentence, after the proposed new wording “did not accurately reflect”.

The Chair said he took it that the members wished to adopt the paragraph, including the proposed amendments to the revised text: the word “presidential” would be inserted in the fourth sentence before “term limits”; the words “in the English version” would be inserted in the sixth sentence after ““term of office””; and the proposed new final sentence would be deleted.

Paragraph 51, as amended, was adopted.

Paragraph 52

The Chair said that the Special Rapporteur’s proposed amendments to paragraph 52 consisted in replacing the word “rationalize” in the first sentence with “clarify” and inserting in the fifth sentence, after “the customary rule of international law”, the words “and the relevant treaty rules”.

Mr. Forteau proposed that, to reflect what had been said in the plenary debate, the words “in particular in relation to crimes covered by draft article 7” should be added at the end of the final sentence.

Mr. Paparinskis said that the words “the customary rule of international law and the relevant treaty rules” in the fifth sentence should be replaced with the words “the relevant rules of customary international law and treaty law”.

Paragraph 52, as amended, was adopted.

Paragraph 53

The Chair said that the Special Rapporteur’s proposed amendment in the revised draft was to delete the second half of the second sentence, from “and a proposal was also made”.

Paragraph 53, as amended, was adopted.

(f) *Draft article 5 (Persons enjoying immunity ratione materiae)*

Paragraph 54

The Chair said that the Special Rapporteur's revised draft contained one proposed amendment, to replace the word "welcomed" in the first sentence with "supported".

Mr. Akande said that, as not all members had generally supported all the elements of draft article 5, the first and second sentences should be merged, to read: "With respect to draft article 5, members generally supported the suggestion of the Special Rapporteur to delete the phrase 'acting as such'."

Paragraph 54, as amended, was adopted.

Paragraphs 55 and 56

Paragraphs 55 and 56 were adopted.

(g) *Draft article 6 (Scope of immunity ratione materiae)*

Paragraphs 57 to 59

Paragraphs 57 to 59 were adopted.

(h) *Final form*

Paragraph 60

The Chair said that the Special Rapporteur's revised draft contained one proposed amendment, to insert the words "while simultaneously recognizing that the draft articles involve two types of immunity" at the end of the final sentence.

Paragraph 60, as amended, was adopted.

Paragraphs 61 and 62

Paragraphs 61 and 62 were adopted.

Paragraph 63

The Chair said that the Special Rapporteur's revised draft contained one proposed amendment, to replace the word "Some" at the beginning of the first sentence with "A few".

Mr. Paparinskis said that the original wording was adequate and should be retained.

The Chair said he took it that the members wished to adopt the paragraph in its original wording.

Paragraph 63 was adopted.

(i) *Future programme of work*

Paragraph 64

The Chair said that the Special Rapporteur's revised draft contained one proposed amendment, to replace the words "number of" in the second sentence with "few".

Mr. Paparinskis said that the original wording was adequate and should be retained.

The Chair said he took it that the members wished to adopt the paragraph in its original wording.

Paragraph 64 was adopted.

3. *Concluding remarks by the Special Rapporteur*

Paragraphs 65 to 71

Paragraphs 65 to 71 were adopted.

Paragraph 72

Mr. Galindo proposed that, in the second sentence, the word “international” should be inserted before “legal regime”.

Paragraph 72, as amended, was adopted.

Paragraphs 73 to 77

Paragraphs 73 to 77 were adopted.

The meeting rose at 1 p.m.