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Summary record of the 3156th meeting

Topic:
Draft report of the International Law Commission on the work of its sixty-fourth session

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3156th MEETING

Thursday, 2 August 2012, at 10.10 a.m.

Chairperson: Mr. Lucius CAFLISCH

Present: Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gevorgian, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kittichaisaree, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Wisnumurti, Sir Michael Wood.

Draft report of the International Law Commission on the work of its sixty-fourth session (*continued*)

Chapter V. Protection of persons in the event of disasters (A/CN.4/L.803)

1. The CHAIRPERSON invited the Commission to consider chapter V of the draft report as contained in document A/CN.4/L.803.

A. Introduction

Paragraphs 1 to 4

Paragraphs 1 to 4 were adopted.

Paragraph 5

2. Mr. MURPHY said that the phrase in the second sentence “in its aspect related to persons in need of protection” seemed unnecessary and should be deleted.

Paragraph 5, as amended, was adopted.

Paragraph 6

Paragraph 6 was adopted.

Section A, as amended, was adopted.

B. Consideration of the topic at the present session

Paragraph 7

3. Mr. FORTEAU suggested that the reference to the Commission’s question in section C of chapter III of its report on the work of its sixty-third session³⁶⁹ should be expanded to make it clear what the question concerned.

4. Mr. CANDIOTI pointed out that the content of the question was explained in paragraph 11.

5. Mr. FORTEAU proposed that a footnote should then be inserted at the end of the first sentence of paragraph 7, referring to paragraph 11.

With the addition of the footnote, paragraph 7 was adopted.

Paragraphs 8 and 9

Paragraphs 8 and 9 were adopted.

Paragraph 10

6. The CHAIRPERSON said that the words “took note of the report of the Drafting Committee” should be added at the end of the paragraph. The appropriate date and meeting number would be filled in by the Secretariat at a later date.

7. Mr. VALENCIA-OSPINA (Special Rapporteur) said that the proposed text was too succinct. It did not explain the work done on the topic in plenary session and in the Drafting Committee, which had resulted in the provisional adoption of five draft articles. Two years previously, when he had raised the question of what seemed to be an anomaly in the presentation of the Commission’s work to the General Assembly, the Commission had decided to refer in its report to all the draft articles provisionally adopted during the session and to reproduce the full text of the draft articles in a footnote. He was aware that the Commission was inclined to reconsider some of its practices, but he hoped that it would maintain that particular one.

8. Mr. PETRIČ, after endorsing Mr. Valencia-Ospina’s comments, said that reference must be made to the draft articles considered and provisionally adopted by the Drafting Committee during the current session. Paragraph 9 referred to three new draft articles that had been proposed but not adopted, and that might well cause some confusion in the Sixth Committee.

9. Mr. SABOIA endorsed the comments by Mr. Valencia-Ospina and Mr. Petrič. The Commission had provisionally adopted a number of draft articles after a substantive debate in which the views of members had been taken into account. It was important that the Sixth Committee should be made aware of the work that had been done.

10. Mr. NOLTE said that any decision taken with regard to the topic in question should be without prejudice to the Commission’s other practices or future practice.

11. Sir Michael WOOD said that it must be made clear that the draft articles had been not adopted, but merely provisionally adopted, and not by the Commission, but by the Drafting Committee. Moreover, they were not yet accompanied by commentaries, which were essential to their understanding—they were not self-explanatory. Member States on the Sixth Committee could then decide whether they wished to comment on the draft articles at that juncture.

12. Mr. VALENCIA-OSPINA (Special Rapporteur) proposed, for the sake of expediency, that the Commission should amend the paragraph along the lines of paragraph 297 of the report of the Commission on the work of its sixty-second session.³⁷⁰ The text of the paragraph would read, “At its ... meeting, on ... July 2012, the Commission received the report of the Drafting Committee and took note of draft articles 5 *bis* and 12 to 15, as provisionally adopted by the Drafting Committee (A/CN.4/L.812)”. A footnote marker should be added at the end of that sentence and the footnote itself should read, “The draft articles provisionally adopted by the Drafting

³⁶⁹ Yearbook ... 2011, vol. II (Part Two), para. 44.

³⁷⁰ Yearbook ... 2010, vol. II (Part Two), p. 180.

Committee read as follows ...". The full text of the draft articles should be reproduced in the footnote.

Paragraph 10, as amended, was adopted.

1. INTRODUCTION BY THE SPECIAL RAPPORTEUR OF THE FIFTH REPORT

Paragraph 11

Paragraph 11 was adopted.

Paragraph 12

13. Mr. NOLTE, referring to the seventh sentence, proposed that the order of the adjectives "scientific" and "technical" should be inverted.

Paragraph 12, as amended, was adopted.

Paragraph 13

Paragraph 13 was adopted.

Paragraph 14

14. Mr. MURPHY, referring to the penultimate sentence, proposed that the words "under the circumstances and balance" should be replaced with the words "in the light of". That would make it clear that a State had to weigh the desirability of waiving certain provisions of domestic law against its obligations to protect its population.

It was so decided.

15. Mr. NOLTE, supported by Mr. VALENCIA-OSPINA (Special Rapporteur), proposed the deletion of the adjective "natural" before the word "disaster" in the penultimate sentence, which was not solely about natural disasters.

It was so decided.

Paragraph 14, as amended, was adopted.

Paragraph 15

Paragraph 15 was adopted.

2. SUMMARY OF THE DEBATE

(a) General remarks

Paragraph 16

16. Mr. TLADI said that, in order to reflect a view expressed by himself and other members of the Commission, the end of the second sentence, which read "and concepts such as the arbitrary withholding of consent, was best only applied in extreme cases" should be replaced with the words "in these few extreme cases where States did arbitrarily withhold consent, that a right-duty approach would assist persons affected by disaster". For similar reasons, he proposed that the phrase in the third sentence that read "was weakly grounded in State practice" should read "was not supported by State practice".

17. Mr. NOLTE said that, while he had no objection to the substance of Mr. Tladi's proposal, he thought that the

words "it was noted" in the third sentence should read "some members noted".

Paragraph 16, as amended by Mr. Tladi and Mr. Nolte, was adopted.

Paragraphs 17 and 18

Paragraphs 17 and 18 were adopted.

Paragraph 19

18. The CHAIRPERSON suggested that, in the final sentence of the French version, the words "*mais d'autres ont exprimé des doutes quant à la faisabilité de cette proposition*" ["others expressed doubts about the feasibility of the proposal"] should be replaced with the phrase "*alors que d'autres ont exprimé des doutes quant à la possibilité de réaliser cette proposition*" ["others expressed doubts about the possibility of implementing the proposal"].

19. Sir Michael WOOD said that he could go along with that amendment as long as the word "feasibility", which conveyed exactly the right meaning in English, was retained in the English text.

It was so decided.

20. Mr. NOLTE proposed that in the first sentence, the definite article "the", before "Status of Forces Agreement", should be replaced with the indefinite article "a".

Paragraph 19, as amended, was adopted.

(b) Comments on draft article A

Paragraph 20

21. Mr. MURPHY proposed that in the second sentence, the word "third", before "and other actors", should be replaced with "States".

22. Mr. FORTEAU said the fact that draft article A referred to "States and other actors" lent support to Mr. Murphy's proposal.

Paragraph 20, as amended, was adopted.

Paragraphs 21 to 23

Paragraphs 21 to 23 were adopted.

(c) Comments on draft article 13

Paragraph 24

23. Mr. NOLTE said that, in the second sentence, the word "core", before "principles", did not add anything to the meaning; he therefore proposed to delete it.

It was so decided.

24. Mr. PETRIČ queried the appropriateness of beginning the second sentence with the phrase "Agreement was also expressed", as it implied that a consensus had been reached on the view, which did not quite reflect the Commission's debate. He proposed to replace the phrase with an expression along the lines of "The view was expressed" or "It was generally felt that".

25. The CHAIRPERSON suggested that the words “by some members” should instead be inserted after the phrase “Agreement was also expressed” in order to address the point made by Mr. Petrič.

It was so decided.

Paragraph 24, as amended, was adopted.

Paragraph 25

Paragraph 25 was adopted.

Paragraph 26

26. Mr. NOLTE said that in the third sentence the phrase “internal rules” should be replaced with “domestic legislation”, since paragraph 26 said that it was not easy to waive such requirements and that doing so could give rise to constitutional difficulties.

Paragraph 26, as amended, was adopted.

(d) *Comments on draft article 14*

Paragraphs 27 and 28

Paragraphs 27 and 28 were adopted.

3. CONCLUDING REMARKS OF THE SPECIAL RAPPORTEUR

Paragraphs 29 to 31

Paragraphs 29 to 31 were adopted.

Paragraph 32

27. Mr. MURASE said that paragraph 32 seemed to suggest that a model status-of-forces agreement for disaster situations could be used to provide for the activities of non-military actors, whereas such agreements, by definition, did not cover such activities. By way of clarification, he proposed, first of all, to add the words “for peacekeeping operations” at the end of the first sentence. Second, given that it was necessary in the context of disasters to provide for the activities of military and non-military actors in separate agreements, he wondered whether the two issues should be addressed in separate paragraphs of the commentary.

28. Mr. VALENCIA-OSPINA (Special Rapporteur) said that he could accept Mr. Murase’s first proposal, as it further clarified the purpose of the existing United Nations model status-of-forces agreement for peacekeeping operations.³⁷¹ However, with regard to the second proposal, he said that the model agreement to be used in disaster situations that the Commission was to prepare would draw upon the United Nations model but would differ in that it would cover the activities of both military and non-military actors. In order to clear up any ambiguity, he proposed that the phrase “to be prepared by the Commission” should be inserted after “However, such model agreement”.

29. In the last sentence, he proposed to replace the portion of the text that read “mandate of the Commission

to codify and progressively develop the applicable rules of international law”, which was vague, with “scope of this topic as it was approved by the Commission”.

It was so decided.

30. Mr. NOLTE proposed that, in the third sentence, the words “United Nations” should be inserted before “model status of forces agreement”.

It was so decided.

Paragraph 32, as amended, was adopted.

Paragraphs 33 and 34

Paragraphs 33 and 34 were adopted.

Section B, as amended, was adopted.

C. Text of the draft articles on the protection of persons in the event of disasters provisionally adopted so far by the Commission

Paragraph 35

Paragraph 35 was adopted.

Section C was adopted.

Chapter V, as amended, was adopted.

Chapter VI. Immunity of State officials from foreign criminal jurisdiction (A/CN.4/L.804 and Add.1)

A. Introduction (A/CN.4/L.804)

Paragraphs 1 and 2

Paragraphs 1 and 2 were adopted.

Section A was adopted.

B. Consideration of the topic at the present session

Paragraphs 3 and 4

Paragraphs 3 and 4 were adopted.

1. INTRODUCTION BY THE SPECIAL RAPPORTEUR OF THE PRELIMINARY REPORT

Paragraph 5

31. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) proposed that, in the second sentence, the words “about which there was no consensus” should be inserted before “to be considered”. She further proposed that, in the penultimate sentence, the words “including possible exceptions,” should be inserted after the second mention of “*ratione materiae*”.

Paragraph 5, as amended, was adopted.

Paragraph 6

32. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that she wished to propose various amendments to paragraph 6 that would more accurately reflect her introduction to her preliminary report and the ensuing debates. Her first proposal was to reformulate the first part

³⁷¹ Model status-of-forces agreement for peace-keeping operations, Report of the Secretary-General (A/45/594).

of the first sentence to read, “In her introduction of the report, the Special Rapporteur underlined that the report was ‘transitional’ in nature and took into account the work carried out by the previous Special Rapporteur in his three reports³⁷² and by the Secretariat in its memorandum³⁷³ (which would continue to serve as useful texts for the future work of the Commission), as well as the progress in the debates of the Commission and the Sixth Committee”.

33. Second, she proposed, in the ninth sentence, to replace the phrase “that protect” with the preposition “of”; to insert the words “and of international law” after “international community”; and, in the Spanish version, to replace the expression “*en particular*”, which was excessively restrictive, with “*incluidos*”—a change that would not affect the English version.

34. Lastly, she proposed, in the tenth sentence, to replace “while also investigating the various techniques and relationships at both the national and international levels” with “at stake”, because the longer expression did not correspond to any of her interventions during the introduction of her preliminary report.

35. Mr. NOLTE asked for clarification regarding whether the Special Rapporteur wished her systemic approach to cover only principles and values relating to human rights or all values and principles.

36. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that where the word “including” appeared in the English version, the Spanish version contained the expression “*en particular*”. She had proposed to change it to “*incluidos*” because the latter conveyed the idea that what followed was a specific type of principle but did not exclude the possibility of taking others into account.

Paragraph 6, as amended, was adopted.

Paragraph 7

37. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) proposed that the penultimate and last sentences should be reformulated to read as follows: “The Special Rapporteur recalled that each of these aspects had been addressed to some extent by the previous Special Rapporteur. Although no consensus had been reached on them, it would nevertheless be useful for the Commission to consider these controversial issues from a fresh perspective. To that end, the Special Rapporteur has announced that she intends to begin proposing draft articles in her next report.”

38. The CHAIRPERSON suggested that, in the third sentence, the expression “if any” should be deleted.

39. Sir Michael WOOD said that in the fourth sentence, the phrase “to figure out the actual scope of the functional nature of immunity” was unclear in the English version; he asked whether the Special Rapporteur could propose a way to improve it.

³⁷² *Yearbook ... 2008*, vol. II (Part One), document A/CN.4/601 (preliminary report), *Yearbook ... 2010*, vol. II (Part One), document A/CN.4/631 (second report) and *Yearbook ... 2011*, vol. II (Part One), document A/CN.4/646 (third report).

³⁷³ A/CN.4/596 and Corr.1 (document available from the Commission’s website).

40. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that the Spanish text was clear, but that in order to address Sir Michael’s concern about the English text, she proposed that the words “the actual scope of the functional nature” should be replaced with “the functional dimension”, which was more general and better reflected the comments made during the debate, including her own, to the effect that all immunity had a functional nature.

Paragraph 7 was adopted with the amendments put forward by the Special Rapporteur and the Chairperson.

2. SUMMARY OF THE DEBATE

(a) General remarks

Paragraphs 8 to 10

Paragraphs 8 to 10 were adopted.

(b) Methodological considerations

(1) Progressive development of international law and its codification

Paragraphs 11 to 16

Paragraphs 11 to 16 were adopted.

(2) Systemic approach

Paragraph 17

Paragraph 17 was adopted.

Paragraph 18

41. Mr. NOLTE, referring to the first sentence, said that while he and Sir Michael had made comments regarding a “trend” argument, those comments had not been made in the context of a systemic approach. He would therefore favour removing paragraph 18 from the “Systemic approach” section and including it under a new section, to be entitled “Identification of trends”. The first sentence of the paragraph should be replaced with the following: “It was pointed out that the Commission should be cautious with respect to the contention that a ‘trend’ existed to limit immunities before national jurisdictions and their scope.” In the second sentence, the words “in relation to the practice” should be deleted. The third sentence should be deleted, since it did not refer to the “trend” argument, and the last sentence would remain unchanged. The aim of his proposal was to make clear the context in which the argument had been raised and discussed, and not to conflate it with another argument.

42. Mr. HMOUD said that he saw no problem with the proposal by Mr. Nolte. He would be in favour of inserting the following quotation from the judgment in the case concerning *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*:

The Court must emphasize that it is addressing only the immunity of the State itself from the jurisdiction of the courts of other States; the question of whether, and if so to what extent, immunity might apply in criminal proceedings against an official of the State is not in issue in the present case.

He would also be in favour of adding a reference to the case concerning the *Arrest Warrant of 11 April 2000*

(*Democratic Republic of the Congo v. Belgium*) in relation to the “trend” argument; he would look for the exact quotation.

43. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that she had no objection to those changes. She therefore proposed that, in the section entitled “Systemic approach”, paragraph 18 should be deleted and paragraph 19 should become paragraph 18. A new text combining the proposals of Mr. Nolte and Mr. Hmoud would form paragraph 19 of a new, separate section, and would read as follows:

“(3) Trends in international law

“19. Some members pointed out that the Commission should be cautious with respect to the contention that a ‘trend’ existed to limit immunities before national jurisdictions and their scope. Indeed, it was recalled that in *Jurisdictional Immunities of the State*, the International Court of Justice had rejected the contention of the Italian courts that a trend existed in international law according to which the immunity of the State was in the process of being restricted in the application of the territorial tort principle for *acta jure imperii*, when in fact there was a contrary trend reaffirming immunity before national criminal jurisdictions. Moreover, it was noted that the *Pinochet* decision, since it was rendered in 1999, had not been widely followed. Some other members referred to the joint separate opinion of Judges Higgins, Kooijmans and Buergenthal in that they seemed to indicate that, at best, no rule exists in relation to immunity *ratione materiae* in terms of the most serious international crimes and that a trend pointing otherwise may exist.”

44. Sir Michael WOOD said that in the final sentence of the new paragraph, the words “in that”, after “Buergenthal”, should be replaced with “in the *Arrest Warrant of 11 April 2000* case, in which ...”.

45. Mr. TLADI said that he wondered whether the final sentence, which was rather ambiguous, adequately reflected the trend not to extend immunity.

46. Mr. HMOUD concurred with Mr. Tladi and suggested that the words “trend pointing otherwise may exist” should be replaced with the phrase “trend pointing towards no immunity may in fact exist”.

47. Mr. HASSOUNA suggested that the replacement phrase should instead read “a trend pointing to the absence of immunity”.

It was so decided.

48. Mr. CANDIOTI proposed the deletion of the words “since it was” in the sentence that read as follows: “Moreover, it was noted that the *Pinochet* decision, since it was rendered in 1999, had not been widely followed.”

It was so decided.

The new paragraph was adopted with the amendments suggested by Sir Michael, Mr. Candiotti and Mr. Hassouna.

Paragraph 18 [former paragraph 19]

Paragraph 18 was adopted.

(3) Values of the international community

Paragraph 20

49. Mr. NOLTE said that, in the first sentence, the words “translating the ‘values’ argument into” should be replaced with “translating ‘values’ into”. In the last sentence, before the word “a”, the words “to have” should be inserted.

Paragraph 20, as amended, was adopted.

Paragraphs 21 and 22

Paragraphs 21 and 22 were adopted.

(4) Identification of basic questions

Paragraph 23

Paragraph 23 was adopted.

(c) Substantive considerations

Paragraph 24

50. Mr. NOLTE said that in the phrase “of another State or its officials”, the word “of” should be replaced with “on”.

Paragraph 24, as amended, was adopted.

Paragraph 25

Paragraph 25 was adopted.

Paragraph 26

51. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that, in order to reflect the discussion during the general debate, the following sentence should be inserted at the end of the paragraph: “However, a number of members of the Commission pointed out that both immunity *ratione personae* and immunity *ratione materiae* had a clearly functional nature.”

52. Mr. NOLTE said that he saw no problem with the proposed addition, but would like the new sentence to be followed by another sentence: “Some other members questioned whether the term ‘functional’ was sufficiently clear to help resolve underlying and substantive issues.”

53. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) endorsed that proposal.

Paragraph 26, as amended, was adopted.

(1) Scope of the topic

Paragraph 27

Paragraph 27 was adopted.

Paragraph 28

54. Sir Michael WOOD said that in the second sentence, the phrase “the jurisdiction of the State of his or her own

nationality” should be replaced with the words “the jurisdiction of his or her own State”. The issue was not the nationality of the official but the fact that he or she was an official of a given State.

Paragraph 28, as amended, was adopted.

Paragraph 29

55. The CHAIRPERSON pointed out the need to move the footnote in paragraph 34 to paragraph 29 and to add a slightly different footnote to paragraph 34.

Paragraph 29 was adopted, subject to the changes to the footnotes.

Paragraph 30

56. Sir Michael WOOD said that the phrase “since aspects of inviolability were closely related to immunity” should be replaced with “since inviolability of the person was closely related to immunity”.

Paragraph 30, as amended, was adopted.

(2) Use of certain terms

Paragraph 31

Paragraph 31 was adopted.

Paragraph 32

57. Mr. NOLTE said that, in the first sentence, the word “conveyance” should be replaced with “convergence”.

58. Mr. TLADI said that the sentence was correctly worded as it stood. The reference was to the conveyance, not convergence, of meaning.

Paragraph 32 was adopted.

(3) Immunity *ratione personae*

Paragraph 33

59. Mr. FORTEAU said that in the first sentence, the words “*qui était fondée sur une loi*” did not correspond to the English “which was status based”. The French phrase should be replaced with the words “*qui était attachée à un statut*”.

Paragraph 33 was adopted with that amendment to the French text.

Paragraph 34

60. Mr. HMOUD said that, in the second sentence, the phrase “both aspects” had been erroneously written twice: that error should be corrected.

61. Mr. TLADI said that, towards the end of the first sentence, “canvassed” should be replaced with “assessed”, which was a more accurate term in the context.

62. Sir Michael WOOD said that he would prefer the word “explored” rather than “assessed” to be used.

63. The CHAIRPERSON said that Sir Michael’s proposal corresponded more closely to the French text.

Paragraph 34, as amended by Mr. Hmoud and Sir Michael, was adopted.

Paragraph 35

64. Sir Michael WOOD said that, in the second sentence, the words “in a limited fashion” should be deleted, and the phrase “to other high ranking holders of office” replaced with “to a narrow circle of high ranking holders of office”, which was closer to the wording used in the Special Rapporteur’s preliminary report. In addition, he would be in favour of deleting the phrase “including, it was suggested, members of the parliament”.

65. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that she agreed with all of the proposals by Sir Michael.

66. Mr. MURASE said that the reference to members of parliament had been his suggestion, on the basis of article 27 of the Rome Statute of the International Criminal Court. However, he had no objection to its deletion.

Paragraph 35, as amended, was adopted.

Paragraphs 36 and 37

Paragraphs 36 and 37 were adopted.

(4) Immunity *ratione materiae*

Paragraphs 38 to 40

Paragraphs 38 to 40 were adopted.

Paragraph 41

67. Mr. MURPHY said that, in the final sentence, the words “that would not be” should be inserted before “subject to criminal prosecution”. That would better reflect the point made by some members that the view that the immunity of officials extended to the commission of unlawful acts was untenable.

68. Mr. HMOUD proposed that the following sentence should be inserted at the end of the paragraph: “The point was made that the Commission would be in a position to contribute positively in regard to the definition of an official act for the purposes of this form of immunity, noting that the default position is that there exists no rule on immunity if there was no agreement on the immunity for certain crimes.”

69. Mr. NOLTE endorsed the proposal by Mr. Murphy. As to Mr. Hmoud’s proposal, he believed that a different phrase should be used instead of “the point was made that”, since it had been Mr. Hmoud alone who had taken the view reflected in his proposal.

70. Mr. HMOUD said that if Mr. Nolte preferred, perhaps the words “a point was made” could be used.

71. Mr. ŠTURMA said that the addition proposed by Mr. Murphy for the final sentence was unnecessary. As now worded, the sentence said that an approach that completely excluded *ultra vires* acts was untenable, since

by definition immunity assumed that the person enjoying such immunity was capable of committing unlawful acts subject to criminal prosecution. The sentence simply indicated that the issue of immunity could be invoked.

72. Mr. SABOIA said that, during the plenary debate, he had expressed the view that war crimes committed by officials could be subject to prosecution. He supported the comments made by Mr. Šturma.

73. After a discussion in which Sir Michael WOOD, Mr. CANDIOTI and the CHAIRPERSON took part, Mr. HMOUD proposed that the new final sentence of paragraph 41 should read as follows: “A point was made that the Commission would be in a position to contribute positively in regard to the definition of ‘an official act’, if it took the view that, if there was no agreement on the existence of immunity in relation to a specific crime, then the position should be the lack of immunity.”

74. Mr. MURPHY recalled that he had proposed the insertion of the phrase “that would not be” between “unlawful acts” and “subject to criminal prosecution” because he believed that the idea that an official who committed an unlawful act had no immunity was untenable. By definition, immunity assumed that a person enjoying such immunity was capable of committing unlawful acts that would not be subject to criminal jurisdiction.

75. Mr. CANDIOTI drew attention to the fact that Mr. Murphy was talking about criminal jurisdiction whereas the text referred to criminal prosecution. The two were not synonymous. Mr. Šturma’s view on the wording of the sentence seemed the more logical approach.

76. The CHAIRPERSON announced that the discussion of paragraph 41 would be deferred until the next meeting and expressed the hope that the members of the Commission would be able to reach consensus in the intervening period.

Paragraphs 42 and 43

Paragraphs 42 and 43 were adopted.

Paragraph 44

77. Sir Michael WOOD said that, in the third sentence, the words “was entitled” should be replaced with “enjoyed”. The Commission should not suggest that officials were entitled to immunity; rather, it was the State of the official that had immunity.

Paragraph 44, as amended, was adopted.

(5) Possible exceptions to immunity

Paragraph 45

Paragraph 45 was adopted.

Paragraph 46

78. Mr. HMOUD said that an appropriate footnote should be added with regard to the case concerning *Jurisdictional Immunities of the State*.

Paragraph 46 was adopted, subject to the addition of a footnote.

Paragraphs 47 and 48

Paragraphs 47 and 48 were adopted.

Paragraph 49

79. Mr. NOLTE proposed that, in the first sentence, the phrase “the alleged violation of” should be inserted between the words “the case involving” and “*jus cogens* norms”: the question of raising an exception to immunity arose not in every case involving *jus cogens* norms, but only in those where those norms might have been violated. In the same sentence, the word “individualized” should be deleted. In the final sentence, the word “sufficient” should be inserted between “no” and “support”, because without it the sentence was not entirely accurate: the court had found not a total lack of support for the proposition that there was a limitation on State immunity but insufficient support for that position. Lastly, the word “consistent” should be replaced with “widespread”.

80. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) expressed her agreement with all of those amendments.

Paragraph 49, as amended, was adopted.

Paragraph 50

81. Mr. TLADI proposed the addition, at the end of the paragraph, of a sentence to read as follows: “Other members of the Commission, however, pointed out that some dissenting and separate opinions of the Court did, in fact, find that *jus cogens* affected the rules relating to immunity.”

Paragraph 50, as amended, was adopted.

Paragraphs 51 and 52

Paragraphs 51 and 52 were adopted.

(d) Procedural aspects

Paragraphs 53 and 54

Paragraphs 53 and 54 were adopted.

(e) Final form

Paragraph 55

82. In response to a query from Sir Michael, Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that the second sentence should be corrected to read as follows: “There was nevertheless general support for the Special Rapporteur’s intention to prepare and submit draft articles on the topic, the first reading of which would be completed during the present quinquennium.”

83. Mr. NOLTE proposed that the start of the final sentence should be amended to read, “While recognizing that it was too early to indicate ...”.

Paragraph 55, as amended, was adopted.

The meeting rose at 1.05 p.m.