

Document:-
A/CN.4/3241

Summary record of the 3241st meeting

Topic:
Draft report of the Commission on the work of its sixty-sixth session

Extract from the Yearbook of the International Law Commission:-
2014, vol. I

*Downloaded from the web site of the International Law Commission
(<http://legal.un.org/ilc/>)*

C. Text of the draft articles on Immunity of State officials from foreign criminal jurisdiction provisionally adopted so far by the Commission

1. TEXT OF THE DRAFT ARTICLES

Paragraph 9

50. Mr. FORTEAU said that, as the Commission had adopted a definition of the term “official”, the footnote to paragraph 1 of article 1 should be deleted.

Paragraph 9, as amended, was adopted.

Section C.1 of chapter IX of the draft report of the Commission, as amended, was adopted.

Document A/CN.4/L.842/Add.1

2. TEXT OF THE DRAFT ARTICLES AND COMMENTARIES THERETO PROVISIONALLY ADOPTED BY THE COMMISSION AT ITS SIXTY-SIXTH SESSION

Commentary to draft article 2 (Definitions)

Paragraph (1)

51. The CHAIRPERSON suggested to the Special Rapporteur that, in view of the lateness of the hour, the Commission should continue its consideration of that paragraph at a later meeting.

The meeting rose at 6 p.m.

3241st MEETING

Thursday, 7 August 2014, at 10.05 a.m.

Chairperson: Mr. Kirill GEVORGIAN

Present: Mr. Al-Marri, Mr. Cafilisch, Mr. Candiotti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Mr. Hmoud, Ms. Jacobson, Mr. Kittichaisaree, Mr. Laraba, 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. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

Draft report of the Commission on the work of its sixty-sixth session (continued)

CHAPTER IX. Immunity of State officials from foreign criminal jurisdiction (continued) (A/CN.4/L.842 and Add.1)

1. The CHAIRPERSON invited the Commission to resume its consideration of the portion of chapter IX of the report contained in document A/CN.4/L.842, with specific regard to paragraphs 5 and 6, whose adoption had been left in abeyance and for which the Special Rapporteur had proposed reformulations (document without a symbol and only available in English and Spanish).

B. Consideration of the topic at the present session

Paragraph 5 (*concluded*)

2. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that her reformulation of paragraph 5 read:

“In her third report, the Special Rapporteur commenced with an analysis of the normative elements of immunity *ratione materiae*, focusing on those aspects related to the subjective element. In this context, as was announced at the previous session of the Commission, the general concept of an ‘official’ was examined in the report, and the substantive criteria that could be used to identify such persons were considered, especially with respect to those who may enjoy immunity *ratione materiae* from foreign criminal jurisdiction. The report further considered a linguistic point concerning the choice of the most suitable term for designating persons who enjoy immunity, given the terminological difficulties posed by the term ‘official’ and its equivalents in the various languages, and suggested instead that ‘organ’ be employed. Following an analysis of relevant national and international judicial practice, treaty practice and the previous work of the Commission, the Special Rapporteur proposed two draft articles relating to the general concept of ‘an official’ for the purposes of the draft articles and the subjective scope of immunity *ratione materiae*. It was envisaged that the material and temporal scope of immunity *ratione materiae* would be the subject of consideration in the Special Rapporteur’s next report.” [“*En su tercer informe, la Relatora Especial comenzó el análisis de los elementos normativos de la inmunidad ratione materiae, centrándose en los aspectos relacionados con el elemento subjetivo. En este marco, tal como se anunció en el anterior periodo de sesiones, examinó el concepto general de ‘funcionario del Estado’ y expuso los criterios sustantivos que podrían emplearse para identificar a dichas personas, en especial respecto de los posibles beneficiarios de la inmunidad ratione materiae de jurisdicción penal extranjera. Igualmente abordó una cuestión lingüística: la elección del término más adecuado para designar a las personas que se benefician de la inmunidad, habida cuenta de los problemas terminológicos que planteaba el uso del término ‘funcionario’ y sus equivalentes en las demás versiones lingüísticas, y propuso el empleo del término ‘órgano’. Tras un análisis de la práctica judicial a escala nacional e internacional, de los tratados y de ciertos trabajos previos de la Comisión, la Relatora Especial presentó dos proyectos de artículos dedicados al concepto general de ‘funcionario’ a los efectos del proyecto de artículos y al alcance subjetivo de la inmunidad ratione materiae. Está previsto que el alcance material y temporal de la inmunidad ratione materiae se examine en el siguiente informe de la Relatora Especial.*”]

3. Mr. VÁZQUEZ-BERMÚDEZ said that, in the second sentence of the English version of the text, the words “an ‘official’” should be replaced by “a ‘State official’”, which was a more accurate translation of the Spanish original.

Paragraph (5), as reformulated by the Special Rapporteur and with the amendment to the English text proposed by Mr. Vázquez-Bermúdez, was adopted.

Paragraph (6) (concluded)

4. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that her reformulation of paragraph 6 read:

“Following its debate on the third report of the Special Rapporteur, the Commission, at its 3222nd meeting, on 11 July 2014, decided to refer the draft articles to the Drafting Committee.” [“*Tras las deliberaciones sobre el tercer informe de la Relatora Especial, la Comisión en su 3222a sesión, celebrada el 11 de julio de 2014, decidió remitir al Comité de Redacción los proyectos de artículos.*”]

Paragraph (6), as reformulated by the Special Rapporteur, was adopted.

Section B of chapter IX of the report of the Commission, as amended, was adopted.

C. Text of the draft articles on immunity of State officials from foreign criminal jurisdiction provisionally adopted so far by the Commission (continued)

2. TEXT OF THE DRAFT ARTICLES AND COMMENTARIES THERETO PROVISIONALLY ADOPTED BY THE COMMISSION AT ITS SIXTY-SIXTH SESSION (continued)

5. The CHAIRPERSON invited the Commission to resume its consideration of the portion of chapter IX of the report contained in document A/CN.4/L.842/Add.1.

Commentary to draft article 2 (Definitions) (continued)

Paragraph (1) (continued)

6. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that she had prepared a revised text that incorporated Commission members' comments. She requested that the adoption of the paragraph be deferred until she had had time to consult the members concerned.

It was so decided.

Paragraph (1) was left in abeyance.

Paragraph (2)

7. Mr. MURPHY said that, in the first sentence of the English text, the words “the concept of” were superfluous and should be deleted and that, in the final sentence, the words “are identified based on” should be replaced with “both fall within”, the current formulation being inaccurate.

8. Sir Michael WOOD said that he supported Mr. Murphy's proposals. He further proposed that, in the first sentence, the phrase “under the present draft articles” be inserted between the words “jurisdiction” and “either”. The reason for his proposal was that, in draft article 1, a series of persons who enjoyed immunity under special regimes had already been excluded from the scope of the draft articles, which therefore could not be said to apply to “any person who enjoys immunity”, as the commentary currently indicated.

9. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said she could agree to those proposals.

10. Mr. VÁZQUEZ-BERMÚDEZ said he disagreed with Sir Michael's proposal, since it was understood that all explanations in the commentaries were for the purposes of the present draft articles. In Mr. Murphy's first

proposal, the phrase *del concepto* should be retained in the Spanish version of the text; in the English text, the words “concept of” should be replaced with “term”.

11. Sir Michael WOOD said that he agreed with the proposal made by Mr. Vázquez-Bermúdez, which read well in English. He proposed, in the second sentence, deleting the words “the present”.

12. The CHAIRPERSON said he took it that the Commission wished to reformulate the paragraph to read:

“The definition of the term ‘State official’ contained in draft article 2 (e) is general in nature, applicable to any person who enjoys immunity from foreign criminal jurisdiction under the present draft articles, either immunity *ratione personae* or immunity *ratione materiae*. Consequently, the nature and object of draft article 2 (e) must not be confused with the nature and object of draft articles 3 and 5, which define who enjoys each category of immunity. The persons who enjoy immunity *ratione personae* and immunity *ratione materiae* both fall within the definition of ‘State official’, which is common to both categories” [“*La definición del concepto de ‘funcionario del Estado’ contenida en el apartado e del proyecto de artículo 2 tiene un carácter general, aplicándose a cualquier persona que se beneficie de la inmunidad de jurisdicción penal extranjera en virtud del presente proyecto de artículos, tanto si se trata de inmunidad ratione personae como de inmunidad ratione materiae. En consecuencia, no debe confundirse la naturaleza y objeto del proyecto de artículo 2, apartado e, con la naturaleza y objeto de los proyectos de artículos 3 y 5, dedicados a definir quiénes son los beneficiarios de cada categoría de inmunidad. La determinación de los beneficiarios de la inmunidad ratione personae y de la inmunidad ratione materiae se realiza partiendo la definición de ‘funcionario del Estado’ que es común a ambas categorías.*”]

Paragraph (2), as amended, was adopted.

Paragraph (3)

13. Mr. MURPHY said that, in the first sentence, the placement of the terms “official” and “State official” should be inverted, and in the first and second sentences, the phrase “concept of” should be replaced with “term”. In the footnote to the paragraph, it might be useful to cite the articles in each of the listed treaties in which the terms “State official” or “official” appeared, and not solely the name of the treaty.

14. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that the words “concept of” should be replaced with “term” throughout the text. Although she was not opposed, in theory, to amending the footnote along the lines proposed by Mr. Murphy, doing so would make it cumbersome and difficult to read. In her view, the final sentence of the footnote, which referred to her third report on the topic (A/CN.4/673), provided the reader with sufficient information and avoided overburdening the footnote with references. She pointed out that, in the second sentence of paragraph (3), the opening phrase in the Spanish text, *Por otro lado*, had been omitted in the English version. Lastly, she proposed that, in the English text of the same sentence,

the word “each” be inserted between the words “in” and “individual”, and the word “domestic” be deleted.

15. Mr. MURPHY said that simply replacing the word “individual” with “different” in that sentence would make for the clearest expression in English.

16. The CHAIRPERSON suggested that the word “Furthermore” be inserted at the beginning of the second sentence. The reformulated sentences would read: “There is no general definition in international law of the term ‘State official’ or ‘official’, although Furthermore, the term ‘State official’, or simply ‘official’, can mean different things in different domestic legal systems. Consequently,”

Paragraph (3), as amended, was adopted.

Paragraph (4)

17. Mr. FORTEAU said that current wording of paragraph (4) did not reflect a decision taken in the plenary and in the Drafting Committee to include a “without prejudice” clause regarding the rules applicable to legal persons. In France, there were examples in case law in which legal persons had been granted immunity from criminal prosecution. He therefore proposed to amend the paragraph to read:

“The term ‘individual’ in the definition of ‘State official’ is used to indicate that the present draft articles cover only natural persons. The present draft articles are without prejudice to any rules that may apply to legal persons in this area” [*La définition du ‘représentant de l’Etat’ emploie le terme ‘individu’ pour indiquer que le présent projet d’articles couvre uniquement les personnes physiques. Le présent projet d’articles est sans préjudice des règles applicables en la matière aux personnes morales.*”]

18. Sir Michael WOOD said that he fully supported Mr. Forteau’s proposal.

19. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that her recollection was that a wider range of opinions had been expressed on that issue than had been reflected in Mr. Forteau’s proposal. Various members had expressed the view, not that the draft articles should not apply in any circumstances to legal persons, but rather that, given the current state of development of international law, legal persons did not enjoy immunity from foreign criminal jurisdiction. Some members had referred to the fact that not all domestic legal systems provided for the criminal prosecution of legal persons, and if the Commission wished to make that point in the commentary, she was not opposed.

20. Mr. MURPHY said that he supported Mr. Forteau’s proposal. The reality was that the Commission had not, either in the Special Rapporteur’s reports²⁹⁸ or in the memorandum by the Secretariat,²⁹⁹ analysed the relevant case law, statements made by Governments or treaty provisions concerning the criminal prosecution of legal persons in national jurisdictions. Certainly, in the United

States, it was possible to prosecute a legal person, and there might well be cases in which a legal person might be entitled to immunity: for instance, if it was an instrumentality of a foreign Government. For the time being, the most the Commission could do was to state its intention to leave the issue of the criminal prosecution of legal persons in national jurisdictions outside the scope of the present topic.

21. The CHAIRPERSON said he took it that the Commission wished to adopt the paragraph as amended by Mr. Forteau.

Paragraph (4), as amended, was adopted.

Paragraph (5)

22. Mr. MURPHY proposed, in the second sentence, to replace the phrase “the technique used by the Commission to identify” with “the Commission identified”; to replace the words “is the” with “by”; and to replace the words “of individuals cited” with “them”. In the third sentence, the phrase “the present draft articles” should be replaced with “this definition” and the word “cannot” should be replaced with “need not”.

23. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that she could agree to all of Mr. Murphy’s amendments to the second sentence except for the replacement of the words “of individuals cited”, which she wished to retain. With regard to the third sentence, she wished to retain the phrase “the present draft articles”. Rather than replacing the word “cannot” with “need not”, she would prefer to replace it with “should not”, which was a better translation of the Spanish *no deben*.

Paragraph (5) was adopted with those amendments.

Paragraph (6)

24. Mr. NOLTE, referring to the second sentence, said that what made it difficult to define the term “State official” was the wide range of positions occupied by individuals in national legal systems—not the diversity of the individuals themselves. He therefore proposed that, in the second sentence, the words “the position of” be inserted between the words “diversity of” and “the individuals”; in the third sentence, the words “positions of” should be inserted between the words “those” and “individuals”; and in the fourth sentence, the word “names” be replaced with “positions”. On another point, the word “specific” should be inserted between the words “a” and “link” in the last sentence.

25. Mr. MURPHY said that he agreed with Mr. Nolte’s proposals regarding the inclusion of references to positions. However, he proposed to delete the third sentence altogether, since paragraph (7) of the commentary set out the very kind of list that paragraph (6) deemed “neither possible nor suitable”. In the fourth sentence, he proposed to replace the words “In both cases, the” with “Such a”.

26. Mr. VÁZQUEZ-BERMÚDEZ said that the Special Rapporteur had probably meant to say that it was not possible to include an indicative list in the draft articles; he therefore proposed inserting the words “in a draft article” between the words “list” and “of”.

²⁹⁸ *Yearbook ... 2012*, vol. II (Part One), document A/CN.4/654, and *Yearbook ... 2013*, vol. II (Part One), document A/CN.4/661.

²⁹⁹ Document A/CN.4/596 and Corr.1, mimeographed; available from the Commission’s website, documents of the sixtieth session (2008). The final text will be reproduced in an addendum to *Yearbook ... 2008*, vol. II (Part One).

27. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that she agreed with the amendment proposed by Mr. Vázquez-Bermúdez; it had indeed been her intention to reflect the conclusion reached in the debate that it was not possible, in a set of draft articles, to include either an exhaustive or indicative list of persons who enjoyed immunity.

28. She also agreed with Mr. Nolte's proposal to insert the word "specific" (*específico*) between the words "a" and "link" in the final sentence. As to his proposal to insert the word "positions" in three places, she considered that word to be implicit in the meaning of the draft commentary as it currently stood. She recalled that, in the debates in the plenary and the Drafting Committee, it had been agreed that reference to a "specific post" (*puesto concreto*), "specific designation" (*designación concreta*) or "specific position" (*posición específica*) could be problematic, given that, in certain legal systems and States, a person could represent the State or exercise a State function without having been formally designated to do so. Use of the expression "position of the individual" (*posición del individuo*) might give the erroneous impression that the Commission was referring to posts specifically included in the organization charts of Governments.

29. Mr. NOLTE said that, in the context in question, the Commission's aim was to identify the "State officials" to whom immunity applied, with reference to their specific link to the State, which was usually denoted by the word "position". That word was sufficiently general so as not to exclude individuals to whom immunity might apply; at the same time, it was not entirely identical to the individual's rank in the State hierarchy.

30. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that, in light of Mr. Nolte's explanation, she could go along with his proposals.

Paragraph (6), as amended, was adopted.

Paragraph (7)

31. Mr. CANDIOTI said that, in the first sentence of the English text, the phrase "for purely indicative purposes" should be replaced with "only by way of example".

32. Mr. TLADI said that he had some difficulty with the paragraph, in particular the classification of State officials into four supposedly distinct groups. He suggested that the paragraph either be deleted or redrafted in order to present the examples of State officials who enjoyed immunity in a single list.

33. Mr. FORTEAU said that he was in favour of Mr. Tladi's proposal for a paragraph containing a simple list of examples, to which footnotes referring to relevant cases should be added.

34. Sir Michael WOOD said that his preference was for the paragraph's deletion because the examples provided were not particularly helpful. Many did not relate to cases where courts had actually considered whether an individual was a State official for the purposes of immunity. Alternatively, the paragraph should be substantially restructured.

35. Mr. VÁZQUEZ-BERMÚDEZ said that, as he understood it, it was not the Special Rapporteur's intention to divide State officials into distinct groups, but rather to make a systematic listing of examples of judicial practice involving State officials. In his view, the paragraph was useful for illustrative purposes.

36. Mr. PETRIČ said that he had no recollection of any discussion, either in the plenary or in the Drafting Committee, concerning a categorization of State officials like that presented in the paragraph. He therefore supported Mr. Tladi's proposal that the paragraph be either deleted or redrafted, possibly with the list of State officials placed in a footnote.

37. Mr. SABOIA said that, in view of the limited time available for redrafting, he was in favour of deleting the paragraph.

38. Mr. NOLTE said that the paragraph raised a number of difficulties, in particular with regard to the relevance of the cases referred to in the footnotes. He therefore agreed with previous speakers that the paragraph should be deleted or shortened.

39. Mr. MURPHY said that, while he appreciated the Special Rapporteur's attempt to respond to the wish of certain members for a list of examples, the paragraph as it stood was confusing. It would be helpful if it could be reformulated in simplified form with a single list of examples and one footnote referring to relevant cases, but without descriptive information. However, in view of time constraints, he suggested that the paragraph simply be deleted and consideration be given to including such a list in a future document.

40. Mr. ŠTURMA said that he endorsed Mr. Tladi's proposal, as supplemented by Mr. Forteau, for a streamlined paragraph with a footnote that listed relevant cases.

41. Mr. CANDIOTI said that he too supported Mr. Tladi's proposal. It was perhaps a little premature for the Commission to be giving examples of State officials before it had made further progress on establishing a definition of the term. However, the work done so far would provide a valuable basis for future consideration of the issues involved.

42. Mr. KITTICHAISAREE said that he was in favour of deleting the paragraph and exploring the subject further in 2015.

43. The CHAIRPERSON suggested that the Commission should defer consideration of paragraph (7) pending further consultations.

It was so decided.

Paragraph (8)

44. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that, in the first sentence of the English text, the phrase "in the sense these terms are used in the present draft articles" should be replaced with "in accordance with the present draft articles".

Paragraph (8) was adopted with that amendment.

Paragraph (9)

45. Mr. MURPHY said that the first part of the fourth sentence, which read “This is a clear and simple statement, summing up the Special Rapporteur’s proposal regarding the criteria for identifying what constitutes an official”, might cause confusion, since the Special Rapporteur’s original proposal had been changed by the Commission. He therefore suggested that the first part of the sentence be deleted, but that the first footnote, which referred to the draft article originally proposed by the Special Rapporteur, be retained.

46. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that the sentence, which in her view did not cause confusion, had been reproduced verbatim from the report of the Drafting Committee.

47. Sir Michael WOOD proposed the deletion of the words “summing up the Special Rapporteur’s proposal”.

48. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that if express reference was not to be made to her proposals in the commentary, the same procedure should be followed with respect to the other commentaries considered by the Commission.

Paragraph (9), as amended by Sir Michael Wood, was adopted.

Paragraph (10)

49. Mr. KITTICHAISAREE proposed that, in the final sentence, the word “parliamentary” be replaced with “constitutional”.

50. Mr. MURPHY said that, in the second sentence, the phrase “as the commentary to draft article 3 states” should be deleted, since the footnote to that sentence already referred to that commentary. In the final sentence, the clause “who can hardly be described as performing State functions”, referring to monarchs, was inaccurate and should therefore be replaced with “who typically do not perform State functions”.

51. Sir Michael WOOD agreed with Mr. Kittichaisaree’s proposal. Referring to Mr. Murphy’s suggestion, he observed that some Heads of State other than monarchs also had essentially representational State functions. He therefore suggested that the part of the final sentence under consideration should read “certain categories of individuals, such as those Heads of State who typically do not perform State functions”.

52. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that the word “monarchs” had been used because it was those Heads of State in particular who had been the focus of relevant debates in the plenary and the Drafting Committee. However, she found Sir Michael’s final proposal acceptable. In order to align the English text with the Spanish, the word “laws” in the third sentence should be replaced with “acts”.

53. Mr. NOLTE said that the phrase *stricto sensu* in the final sentence was not really appropriate, since the Heads of State in question performed essential State functions.

He therefore proposed the replacement of that phrase by “in a narrow sense”.

54. Mr. PETRIČ, supported by Sir Michael WOOD, proposed that the words “categories of” in the final sentence be deleted.

55. The CHAIRPERSON said that he took it that the Commission wished to adopt the paragraph with the following amendments: in the third sentence of the English text, “laws” would be replaced with “acts” and the final sentence would read: “Lastly, it must be noted that the separate reference to representation of the State as one of the criteria for identifying a link with the State makes it possible to cover certain individuals, such as those Heads of State who do not typically perform State functions in the narrow sense, but who most certainly represent the State.”

It was so decided.

Paragraph (10), as amended, was adopted.

Paragraph (11)

56. Mr. NOLTE said that the phrase “who performs or may perform” in the third sentence might give rise to confusion and should perhaps be reformulated. As it was not clear to what the word “situation” in the penultimate sentence referred, he suggested that it be replaced with “law”.

57. Mr. MURPHY, referring to the first proposal, suggested that the words “or may perform” be deleted.

58. Mr. VÁZQUEZ-BERMÚDEZ said that, in the first sentence of the Spanish text, the words *funciones del Estado* should be replaced with *funciones estatales*. With regard to the phrase “who performs or may perform”, which could indeed cause confusion, it was his understanding that the Special Rapporteur was seeking to capture the idea that the term “State official” referred to individuals who were in a position to perform State functions. He shared Mr. Nolte’s concern with regard to the word “situation” and agreed that it would be more appropriate to speak of “laws” or “rules”. Lastly, in the final sentence, he suggested that the word “infelicitous” be replaced with something less negative, such as “not the best”.

59. Sir Michael WOOD said that the two instances of the word “properly” in the first two sentences of the English text should be deleted. The fourth sentence seemed to deal with a number of separate issues and should be simplified. He suggested that a full stop be placed after “between the official and the State” and that the remainder of the sentence be deleted.

60. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) agreed with the amendment to the Spanish text proposed by Mr. Vázquez-Bermúdez. She also agreed with Sir Michael’s proposal to delete the word “properly”. With regard to the phrase “who performs or may perform”, she said that, if its meaning was not sufficiently clear, it could perhaps be replaced by “who is in a position to perform”. Although the word “situation” had been used

in previous work of the Commission in similar contexts, she had no problem with it being replaced by “laws” or “legislation”. The word “infelicitous” had been used in the report of the Drafting Committee, but she would be in favour of replacing it with the wording proposed by Mr. Vázquez-Bermúdez.

61. Mr. NOLTE and Mr. MURPHY were in favour of replacing “who may perform” with “who is in a position to perform”.

62. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) proposed that the fourth sentence read: “The reference to the exercise of State functions defines more precisely the requisite link between the official and the State, which makes it possible to take sufficient account of the fact that immunity is granted to the individual for the benefit of the State” [“*Con la referencia al ejercicio de funciones estatales se define con mayor precisión el vínculo que debe existir entre el funcionario y el Estado que permite tomar suficientemente en consideración que la inmunidad se ortoga al individuo en beneficio del Estado*”].

Paragraph (11), as amended by the Special Rapporteur, Mr. Vázquez-Bermúdez, Mr. Nolte and Sir Michael Wood, was adopted.

Paragraph (12)

63. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) drew attention to some omissions in the English version of the text, which should read: “It should be noted that the use of the terms ‘represents’ and ‘exercises’ in the present tense ...”.

Paragraph (12) was adopted with that correction to the English text.

Paragraph (13)

64. Mr. MURPHY, supported by Mr. NOLTE and Sir Michael WOOD, said that, as he understood it, the Commission had agreed not to address the issue of contractors because, although it had touched on the issue in its debates, its reports had not so far contained any analysis of national case law or legislation regarding the immunity of contractors from foreign criminal jurisdiction. It would therefore be imprudent and inappropriate for the Commission to take a definitive position at that juncture. He proposed the deletion of the portion of the paragraph after the second sentence, in order to leave open the possibility that the Special Rapporteur might examine the question in greater detail at some point in the future.

65. Mr. SABOIA, supported by Mr. CANDIOTI, said that he favoured the retention of the whole paragraph as a means of indicating that the matter was under discussion. It reflected the tenor of the debate and might assist in the comprehension of the issue in the future.

66. Mr. VÁZQUEZ-BERMÚDEZ said that he was in favour of retaining most of the passage whose deletion had been proposed, except for the phrase “including contractors”.

67. Mr. FORTEAU said that he supported the deletion proposed by Mr. Murphy; the description of contractors as *de facto* officials was incorrect. If there was a contract, there was a link between the State and the contractor and they were therefore *de jure* officials. He would, however, recommend the retention of the final sentence.

68. Sir Michael WOOD said that, in view of Mr. Saboia’s comments, he proposed a compromise solution consisting of the amendment of the third sentence to read: “However, the majority of Commission members are of the view that the link cannot be interpreted so broadly as to cover all *de facto* officials.” The fourth sentence should be retained. The fifth sentence should be deleted, whereas the final sentence should be kept. With those changes, the paragraph would exactly reflect the debate which had taken place, leave the Commission’s position open and meet the concerns expressed by Mr. Saboia.

69. Mr. NOLTE, Mr. KITTICHAISAREE, Mr. MURPHY and Mr. PETRIĆ endorsed the compromise wording proposed by Sir Michael.

70. Mr. MURPHY proposed replacing “the definition” with “a definition” in the last sentence, since the Commission had not yet established a definition of an “act performed in an official capacity”.

71. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) expressed her agreement with the compromise wording.

Paragraph (13), as amended by Sir Michael Wood and Mr. Murphy, was adopted.

Paragraph (14)

72. Mr. VÁZQUEZ-BERMÚDEZ drew attention to the second sentence of the English version, which should refer to State officials holding a high- or mid-level rank.

73. Sir Michael WOOD said, with reference to the second sentence, that the reason why most cases in which persons had been granted immunity concerned high-level officials was that they were the persons whose prosecution had been sought. He therefore proposed recasting the beginning of the second sentence to read: “Although in many cases the persons who have been recognized as State officials for the purpose of immunity hold a high or middle rank”. He also proposed that portion of the final sentence after the words “State official” be deleted, since there was no evidence to suggest that the level of the official was relevant when it came to deciding whether someone was an official for the purposes of the draft articles.

74. Following a clarification provided by Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur), Mr. MURPHY proposed replacing “the latter” with “the individual” in the first sentence.

Paragraph (14), as amended by Sir Michael Wood and Mr. Murphy, was adopted.

Paragraph (15)

Paragraph (15) was adopted.

Paragraph (16)

75. Mr. VÁZQUEZ-BERMÚDEZ proposed the insertion of the word “necessarily” between “not” and “mean” in the third sentence (*no ... tengan necesariamente*).

76. Sir Michael WOOD queried the last part of the final sentence of the paragraph.

77. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) proposed amending that part of the sentence to read: “in order to ensure that the institutions charged with applying immunity at the national level correctly interpret the term ‘State official’ in the way it is used in the present draft articles” [*“a fin de asegurar que los órganos encargados de la aplicación de la inmunidad a nivel nacional interpreten correctamente el término ‘funcionario estatal’ en el sentido que al mismo se le da en el presente proyecto de artículos”*].

Paragraph (16), as amended by the Special Rapporteur and Mr. Vázquez-Bermúdez, was adopted.

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

Paragraph (1)

78. Sir Michael WOOD proposed the deletion of the phrase “acting as such” in the final sentence.

79. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that the phrase reproduced the wording of draft article 5 and should therefore not be deleted.

80. Mr. SABOIA (Chairperson of the Drafting Committee) agreed with the Special Rapporteur. He drew attention to the section of the Drafting Committee’s report on draft article 5 which had explained that the words “acting as such” had been deemed the most appropriate way of identifying a State official as an individual who represented the State or who exercised State functions.

81. Mr. MURPHY considered that confusion might arise from the words “defined as” in the final sentence, and he therefore proposed their replacement with “referred to as such”.

82. Sir Michael WOOD endorsed Mr. Murphy’s proposal and suggested that the first part of the sentence be recast to read: “There is no list of actual persons who enjoy immunity; instead in the case of immunity *ratione materiae* they have been referred to as ‘State officials acting as such’.”

Paragraph (1), as amended by Mr. Murphy and Sir Michael Wood, was adopted.

Paragraph (2)

83. Mr. MURPHY proposed the insertion of the phrase “in these draft articles” in the second sentence, after the words “found it impossible”.

84. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) drew attention to the fact that the Spanish text was less categorical: the phrase “did not consider it possible” rather than “found it impossible” would be a better equivalent in English.

Paragraph (2), as amended by Mr. Murphy and with the amendment to the English text proposed by the Special Rapporteur, was adopted.

Paragraph (3)

85. Mr. NOLTE said that the second part of the third sentence, which began with the words “Nevertheless, the majority of members”, was misleading, since it could be understood to mean that those members believed that immunity from foreign criminal jurisdiction applied to all individuals.

86. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that the English text should refer to “these individuals” rather than “all individuals”.

Paragraph (3) was adopted with that amendment to the English text.

The meeting rose at 1 p.m.

3242nd MEETING

Thursday, 7 August 2014, at 3.05 p.m.

Chairperson: Mr. Kirill GEVORGIAN

Present: Mr. Cafilisch, Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kittichaisaree, Mr. Laraba, 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. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

Draft report of the Commission on the work of its sixty-sixth session (*continued*)

CHAPTER IX. Immunity of State officials from foreign criminal jurisdiction (*concluded*) (A/CN.4/L.842 and Add.1)

C. Text of the draft articles on immunity of State officials from foreign criminal jurisdiction provisionally adopted so far by the Commission (*concluded*)

2. TEXT OF THE DRAFT ARTICLES AND COMMENTARIES THERETO PROVISIONALLY ADOPTED BY THE COMMISSION AT ITS SIXTY-SIXTH SESSION (*concluded*)

1. The CHAIRPERSON invited the Commission to resume its consideration of document A/CN.4/L.842/Add.1, paragraph by paragraph.

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

Paragraph (4)

2. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that the quotation marks at the end of the first sentence had not been included in the English version, which