

Document:-
A/CN.4/3289

Summary record of the 3289th meeting

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

Extract from the Yearbook of the International Law Commission:-
2015, vol. I

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

94. Sir Michael WOOD (Special Rapporteur) said that while he could agree to the deletion of the word “exceptionally”, there was no need to replace it with “sometimes”, since the notion was covered by the expression “there could be occasions where”. Furthermore, the statement in the third sentence that “the determination of a rule of customary law had to be ascertained separately for each element” should be amended to read “each element had to be separately ascertained in order to identify rules of customary international law”.

Paragraph 41, as amended by Mr. Nolte and further amended by Sir Michael Wood (Special Rapporteur), was adopted.

Paragraph 42

95. Mr. NOLTE, referring to the last sentence, which concerned the role of non-State actors in the formation and identification of rules of customary international law, proposed that after the expression “through prompting or recording State practice”, the words “and the practice of international organizations” be added.

96. Sir Michael WOOD (Special Rapporteur), referring to the first sentence, said that there was no need to add particular emphasis by using italics for the words “as such”. He was not satisfied with the wording of the second part of the sentence, “since it appeared clearly that the practice of international organizations in their relations among themselves, at least, could give rise to customary rules binding in such relations”, and proposed its deletion.

97. Mr. MURPHY said that it was important to retain the substance of that part of the sentence since it reflected the debate on the subject.

98. Mr. NOLTE said that the second part of the sentence would read better without the word “clearly” and proposed its deletion.

Paragraph 42, as amended by Mr. Nolte and with the editorial correction proposed by Sir Michael Wood (Special Rapporteur), was adopted.

Paragraphs 43 to 45

Paragraphs 43 to 45 were adopted.

Paragraph 46

99. Sir Michael WOOD (Special Rapporteur) said that some important details had been omitted from the paragraph, including comments that both he and others had made concerning the collective writings of the Commission. He therefore proposed that the paragraph be left in abeyance to allow him to submit additional text.

Paragraph 46 was left in abeyance.

Paragraphs 47 to 49

Paragraphs 47 to 49 were adopted.

The meeting rose at 1 p.m.

3289th MEETING

Thursday, 6 August 2015, at 3.05 p.m.

Chairperson: Mr. Narinder SINGH

Present: Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Kolodkin, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

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

CHAPTER VI. Identification of customary international law (*concluded*) (A/CN.4/L.859)

1. The CHAIRPERSON invited the Special Rapporteur to explain what had been decided following the consultations on paragraph 46, which had been left in abeyance, with the members concerned.

B. Consideration of the topic at the present session (*concluded*)

3. CONCLUDING REMARKS OF THE SPECIAL RAPPORTEUR (*concluded*)

Paragraph 46 (*concluded*)

2. Sir Michael WOOD (Special Rapporteur) said that the question of the Commission's role had been raised by a number of members during the discussion, but had not been mentioned in the summary of the debate. He therefore proposed that a new paragraph be inserted after paragraph 46, to read: “The Special Rapporteur noted that many colleagues had suggested that there should be a separate conclusion on work of the International Law Commission. He was not convinced of the need for a separate conclusion, as opposed to explaining the Commission's role in the commentaries. He nevertheless hoped that the Drafting Committee would consider the matter.” The proposal replaced the one made at the previous meeting.

The proposal was adopted.

3. Mr. VÁZQUEZ-BERMÚDEZ said that, while he endorsed the proposal by the Special Rapporteur, the summary of the debate should reflect what a number of members had said about the work of the Commission. He therefore proposed the insertion, at the end of the section on judicial decisions and writings, of a new paragraph 31 *bis*, to read: “Several members affirmed that the work of the International Law Commission, which is a subsidiary organ of the General Assembly of the United Nations entrusted with the mandate to promote the progressive development of international law and its codification, could not be equated to ‘writings’ or teachings of publicists.”

The proposal was adopted.

The new paragraph proposed for insertion after paragraph 46 and the new paragraph 31 bis were adopted.

Section B, as amended, was adopted.

Chapter VI of the draft report of the Commission, as a whole, as amended, was adopted.

CHAPTER IX. Protection of the environment in relation to armed conflicts (A/CN.4/L.862)

4. The CHAIRPERSON invited the members of the Commission to consider chapter IX, as contained in document A/CN.4/L.862, paragraph by paragraph.

A. Introduction

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 to 12

Paragraphs 3 to 12 were adopted.

Paragraph 13

5. Mr. NOLTE proposed the insertion of the words “in principle” after the word “applied” in the fifth sentence, which began with the phrase “It was acknowledged”.

Paragraph 13, as amended, was adopted.

Paragraph 14

Paragraph 14 was adopted.

Paragraph 15

6. Mr. MURPHY proposed that, in the portion of the penultimate sentence that read “rules under the law of armed conflict”, the word “some” be inserted before “rules”.

Paragraph 15, as amended, was adopted.

Paragraph 16

Paragraph 16 was adopted.

Paragraph 17

7. Mr. NOLTE proposed that, in the fourth sentence, the words “did indeed” be replaced with “would indeed”, and the words “legal normativity”, by “legal significance”.

Paragraph 17, as amended, was adopted.

Paragraph 18

8. Mr. PARK proposed the insertion of the words “in the context of non-international armed conflicts” at the end of paragraph 18.

Paragraph 18, as amended, was adopted.

Paragraphs 19 to 41

Paragraphs 19 to 41 were adopted.

Section B, as amended, was adopted.

Chapter IX of the draft report of the Commission, as a whole, as amended, was adopted.

CHAPTER X. Immunity of State officials from foreign criminal jurisdiction (A/CN.4/L.863 and Add.1)

9. The CHAIRPERSON invited the members of the Commission to consider chapter X, as contained in document A/CN.4/L.863, paragraph by paragraph.

A. Introduction

Paragraphs 1 and 2

Paragraphs 1 and 2 were adopted.

Paragraph 3

Paragraph 3 was adopted with a minor editorial amendment to the first footnote to the paragraph.

Section A was adopted.

B. Consideration of the topic at the present session

Paragraphs 4 to 6

Paragraphs 4 to 6 were adopted.

1. INTRODUCTION BY THE SPECIAL RAPporteur OF THE FOURTH REPORT

Paragraphs 7 and 8

Paragraphs 7 and 8 were adopted.

Paragraph 9

10. Mr. NOLTE proposed that in the ninth sentence, the word “high” be replaced with “large”.

That proposal was adopted.

11. Mr. MURPHY suggested that the paragraph should be broken into a number of smaller ones to improve its readability.

12. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that she endorsed that proposal and would indicate to the Secretariat how it should be applied.

Paragraph 9, as amended, was adopted.

Paragraphs 10 to 16

Paragraphs 10 to 16 were adopted.

Paragraph 17

Paragraph 17 was adopted with a minor editorial amendment to the English text.

Paragraph 18

13. Mr. NOLTE, drawing attention to the final sentence, said that the phrase “which would be addressed fully in the

fifth report” should refer to the automatic and mechanical recognition of immunity from foreign criminal jurisdiction with respect to acts performed by State officials in their official capacity, and not to the qualification of that category of acts as international crimes, since the latter question had already been covered in the fourth report (A/CN.4/686). He therefore proposed amending that phrase and inserting a new final sentence, to read: “The question will be the subject of more in-depth study in the fifth report.”

14. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) endorsed the idea of inserting a new final sentence, but suggested that it instead read: “The question will be analysed in greater detail in the fifth report.”

The proposal was adopted.

15. Sir Michael WOOD proposed deleting “as”, a superfluous term before the word “performed”, in the English version of the sentence referred to by Mr. Nolte.

The proposal was adopted.

Paragraph 18, as amended, was adopted.

2. SUMMARY OF THE DEBATE

(a) General comments

Paragraph 19

16. Mr. NOLTE, drawing attention to the fourth sentence, which began with the words “More crucially”, said that the paragraph was about the Special Rapporteur’s fourth report, which dealt with the concept of the act performed in an official capacity, but he did not have the impression that this aspect of State immunity was in a “state of flux”, apart from the matter of exceptions. The phrase “state of flux” did not seem appropriate to him in that context, and he therefore proposed its deletion. In addition, the penultimate sentence set up the wrong comparison, since during the discussion, the preservation of stability in inter-State relations had been contrasted, not with the advancement of international law, but with the struggle against impunity. He therefore proposed that the phrase “while at the same time preserve stability in inter-State relations” be deleted.

17. Mr. KOLODKIN said that he shared the concerns outlined by Mr. Nolte. In addition, if paragraph 19 was to summarize the debate instead of putting forward a general remark, the two phrases referred to by Mr. Nolte should be introduced by a phrase such as “Certain members pointed out”.

18. Mr. HMOUD said that the fourth report as a whole showed that State practice was not settled; the phrase “state of flux” was perfectly appropriate in that context, and he would prefer to see it retained. Regarding Mr. Nolte’s second point, he proposed that instead of deleting the entire phrase that read “while at the same time preserve stability in inter-State relations”, the words “taking account of the need to combat impunity” be inserted before it.

19. Mr. KITTICHAISAREE proposed that the entire fourth sentence (“More crucially ... applicable rules”) be

replaced by the following: “More crucially, State practice was not uniform”, since, in her fourth report, the Special Rapporteur showed that practice diverged. He further proposed that the rest of the paragraph be deleted, since some members had repeatedly stated in recent years that no distinction should be made between the progressive development of international law and its codification.

20. Sir Michael WOOD said that he shared the views of Mr. Nolte and Mr. Kolodkin. It seemed to him that the first part of the paragraph reflected the views of the Commission as a whole, and the second, those of certain members. He therefore proposed that the text be divided into two parts after the third sentence, with the new part to begin “Some members pointed out”.

21. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that in the light of the comments made, and in order to give a more precise rendering of the various views expressed during the discussion, she would propose that the fourth sentence, which began with the words “More crucially” be amended to read: “Some members of the Commission expressed the view that State practice was not uniform, and more crucially, the direction of State practice was in a ‘state of flux’ such that it was not easy to identify the clear and unambiguous applicable rules.” She likewise proposed inserting a full stop in the penultimate sentence, after the words “to advance international law”, and to include thereafter a new sentence, to read: “The view was also expressed that it was necessary to strike a balance between fighting impunity and preserving stability in inter-State relations.”

22. Mr. HMOUD proposed that the Special Rapporteur’s first suggestion for an amendment begin on an impersonal note rather than by stating “Some members of the Commission”, in order to convey the sense that the point of view expressed was not that of the Commission but of only some of its members.

Paragraph 19, as reformulated by Ms. Escobar Hernández and with the drafting change proposed by Mr. Hmoud, was adopted.

Paragraphs 20 and 21

Paragraphs 20 and 21 were adopted.

Paragraph 22

23. Mr. HMOUD proposed that, in the fourth sentence, the word “fully” be deleted; the words “restrictive jurisdictional immunity of States” be replaced with “the restrictive theory of jurisdictional immunity of States”; and after those words, the following text be inserted: “which allowed a State to exercise jurisdiction over commercial and other non-public activities of another State. According to this view, the proper test for granting a State official immunity for an act performed in an official capacity should depend upon the benefit of the act to his or her State and upon ensuring the effective exercise of its function.”

24. Mr. TLADI proposed that, in the fifth sentence, which began “While some members recognised the asymmetry that exists”, the second part be simplified to read:

“the cautionary point was made that the Commission risked establishing a regime ...”.

25. Mr. KITTICHAISAREE supported the proposal made by Mr. Tladi and, with regard to the same sentence, said that the phrase “diametrically opposed” did not seem correct and should be replaced by another formulation.

26. Sir Michael WOOD proposed replacing the word “asymmetry” with “contradictions”.

27. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that in principle she was in favour of including the proposals made by Mr. Hmoud and Mr. Tladi, but would be grateful if they could submit them in writing. In response to Mr. Kittichaisaree’s comment, she proposed replacing the words “diametrically opposed” with “was inconsistent with”. As for the proposal by Sir Michael to replace the word “asymmetry” with “contradictions”, she would prefer the more neutral word “differences”.

28. Mr. PETRIČ requested the Special Rapporteur to read out the sentences just modified.

29. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that if the Commission so wished, after broader consultations with the members concerned, she would provide a written version of the paragraph, as amended, either later in the meeting or at another meeting.

30. The CHAIRPERSON proposed continuing with the discussion of the document and suspending the meeting later on, to enable the Special Rapporteur to carry out the necessary consultations in order to finalize the paragraphs left in abeyance.

Paragraph 22 was left in abeyance.

Paragraph 23

31. Sir Michael WOOD said that the first sentence in the paragraph was strangely worded, at least in English; it should be redrafted.

32. The CHAIRPERSON proposed that paragraph 23 should likewise be the subject of consultations to be held later.

Paragraph 23 was left in abeyance.

Paragraph 24

33. Mr. KOLODKIN said that the paragraph should be revised in order to make it clear, as was done in the first sentence, that the points of view expressed were not those of the Commission but of some of its members.

34. Mr. NOLTE endorsed that remark and proposed that the second sentence be amended to read: “Some members indicated that while it was difficult to pigeonhole serious international crimes, *ultra vires* acts, or acts *jure gestionis* as being private acts, it was better to address them as limitations or exceptions rather than as part of a definition of official acts.”

35. Mr. KITTICHAISAREE, supported by Mr. WAKO, said that the word “pigeonhole”, used in the English text

of the second sentence, was inappropriate and should be replaced by another term, such as “classify”, “characterize” or “identify”.

36. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that the word *catalogar* which was used in the Spanish text was perfectly appropriate and that she would leave it to the English speakers to choose the best term for the English text. As for the paragraph as a whole, she thought that it was a faithful reflection of the positions taken during the discussion and therefore she could see no need to amend it. If other members thought differently, however, the paragraph would also have to be the subject of further consultations.

37. The CHAIRPERSON proposed that paragraph 24 be left in abeyance to enable the Special Rapporteur to speak with the members concerned when the meeting was suspended.

Paragraph 24 was left in abeyance.

(b) Methodology

Paragraphs 25 to 27

Paragraphs 25 to 27 were adopted.

(c) Draft article 2 (f): Definition of an “act performed in an official capacity”

Paragraphs 28 to 30

Paragraphs 28 to 30 were adopted.

Paragraph 31

38. Mr. NOLTE said that, as currently drafted, the paragraph seemed to him to be difficult to understand, at least in the English version, and that it should either be redrafted or deleted.

39. Mr. KITTICHAISAREE said that he shared Mr. Nolte’s difficulties and that the paragraph did not seem to him to truly reflect the discussions.

40. Mr. ŠTURMA said that the idea that he had outlined during the plenary debate was that some international instruments expressly stated that an act must have been committed by a State official or a person acting in an official capacity, whereas others categorized such an act as a crime, irrespective of the capacity in which it had been committed or the status of the perpetrator. Nevertheless, in practice, such crimes could be, and often were, committed by persons acting in an official capacity. The main question therefore was not whether the act was criminal in nature, but whether, in order for it to constitute a crime, it had to have been committed by a person acting in an official capacity.

41. Mr. FORTEAU endorsed that explanation and proposed that the meaning of the first sentence be clarified by amending it to read: “Some members observed that there was practice which treated the participation of a State official in the commission of the act as part of the definition of a crime, while in other instances, participation by an official was not an express element of the crime in question,

but that did not necessarily exclude the possibility of an official being involved in that capacity in the commission of the crime in question.”

42. Mr. NOLTE thanked Mr. Forteau for that proposal, which greatly improved the text. As for the second sentence, he was not sure he understood the meaning of the phrase “the prescriptive or descriptive nature of a particular characterization of a crime”, and he requested clarification on that point.

43. Sir Michael WOOD said that the word “practice”, as used in the first sentence, did not seem appropriate: there was no “practice”, but rather cases, when the participation of a State official in the commission of an act was an element of the definition of a crime.

44. Mr. ŠTURMA said that he, too, thought that the word “practice” was not well chosen, the idea being that in certain treaties, such as the Convention against torture and other cruel, inhuman or degrading treatment or punishment, the status as a State official of the person who committed the act was an element of the crime. The sentence should be redrafted along those lines.

45. The CHAIRPERSON proposed that the paragraph be left in abeyance so that the Special Rapporteur could review and amend it, in consultation with the members concerned.

Paragraph 31 was left in abeyance.

Paragraph 32

46. Mr. NOLTE said that he was not comfortable with the phrase “factual determination” and proposed that, in the second sentence, the words “some members were of the view” be inserted after “Put differently”.

47. Sir Michael WOOD said that the second sentence was basically superfluous and he proposed that it be deleted.

48. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that she would accept Sir Michael’s proposal, as long as the words “Some members were of the view” were inserted at the beginning of the first sentence.

Paragraph 32, as amended, was adopted.

Paragraph 33

49. Mr. KOLODKIN proposed that, in order to take account of what had been said by at least one member during the debate, the following sentence be inserted at the beginning of the paragraph: “It was also noted that while the criminal nature of the act did not alter its official character, that did not mean that the criminality of the act could be considered as an element of the definition of the act performed in an official capacity.”

Paragraph 33, as amended, was adopted.

Paragraph 34

50. Sir Michael WOOD said that as currently worded, the first sentence seemed to be a general remark about the

international law of immunity, whereas in fact it simply reflected the views of a certain number of members. He therefore proposed that, at the start of the sentence, the words “It was also” be replaced with “Some members”.

Paragraph 34, as amended, was adopted.

Paragraphs 35 to 39

Paragraphs 35 to 39 were adopted.

Paragraph 40

51. Mr. FORTEAU said that the word “assimilation” was problematic and he proposed that the start of the first sentence should be amended to read: “For other members, the reference, in the context of immunity *ratione materiae*, to the rules of attribution”.

Paragraph 40, as amended, was adopted.

Paragraph 41

Paragraph 41 was adopted.

Paragraph 42

52. Mr. NOLTE proposed that, in order to reflect a different view in the debate on the subject, a sentence to read “Other members pointed to the right of a State to waive the immunity of its officials, which demonstrated the connection between all forms of State-based immunity” be added at the end of the paragraph.

Paragraph 42, as thus amended and with a minor editorial correction to the English text, was adopted.

Paragraph 43

Paragraph 43 was adopted.

Paragraph 44

53. Mr. KITTICHAISAREE said an error seemed to have slipped into the English text: the word “guidance” had to be replaced with “direction” at the end of the second sentence.

With that amendment to the English text, paragraph 44 was adopted.

Paragraph 45

54. Mr. FORTEAU proposed that the words “in an asymmetrical international legal system” be deleted.

Paragraph 45, as amended, was adopted.

Paragraphs 46 to 51

Paragraphs 46 to 51 were adopted.

55. Following a discussion in which Mr. KOLODKIN and Ms. ESCOBAR HERNÁNDEZ participated, the CHAIRPERSON proposed adding a paragraph 51 *bis*, to read: “It was also noted that if the Commission adopted a definition of an act performed in an official capacity, then

it might be appropriate to amend accordingly draft article 5, which it had provisionally adopted.”

It was so decided.

(d) Draft article 6: Scope of immunity *ratione materiae*

Paragraphs 52 and 53

Paragraphs 52 and 53 were adopted.

(e) Future workplan

Paragraphs 54 and 55

Paragraphs 54 and 55 were adopted with some minor editorial amendments to the English text.

56. The CHAIRPERSON invited members of the Commission to resume their consideration of the paragraphs that had been left in abeyance, starting with paragraph 22, of which an amended version had been distributed in the meeting room (document without a symbol, English language only).

2. SUMMARY OF THE DEBATE (*continued*)

(a) General comments (*continued*)

Paragraph 22 (*concluded*)

57. Mr. MURPHY said that, for the sake of brevity, the third sentence should be deleted.

Paragraph 22, as amended and with minor editorial corrections to the English text, was adopted.

Paragraph 24 (*concluded*)

58. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that, after having consulted with Mr. Kolodkin and Mr. Nolte, she proposed that the beginning of the second sentence be amended to read: “Some members indicated that while it was difficult to categorize serious international crimes”. She also proposed that the beginning of the last sentence be revised to read: “Some members indicated that such an approach would also make it possible to find solutions”.

59. Sir Michael WOOD proposed that the English text of the second sentence be aligned with the French through the replacement of “private acts” with “acts performed in a private capacity”.

Paragraph 24, as thus amended and with a minor editorial correction to the English version, was adopted.

(c) Draft article 2 (f): Definition of an “act performed in an official capacity” (*concluded*)

Paragraph 31

60. Mr. NOLTE said he wished to see the inclusion in the text of a proposal he had made at an earlier meeting, namely, to insert the words “According to that view,” at the start of the second sentence, in order to show that the position outlined in that sentence was that of the members mentioned in the previous sentence, not that of the Commission as a whole.

Paragraph 31, as amended, was adopted.

61. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that Mr. Kolodkin had sent the Secretariat an amended text for paragraph 33, on which there was no need for discussion. She herself intended to submit a proposed revision of paragraph 23 at a later date.

62. The CHAIRPERSON said that the Commission would consider that proposal and adopt the section as a whole at another meeting.

3. CONCLUDING REMARKS OF THE SPECIAL RAPPORTEUR

Paragraphs 56 to 63

Paragraphs 56 to 63 were adopted.

Paragraph 64

63. Mr. NOLTE requested an explanation of the final sentence, which was not clear.

64. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that the reason was that a number of words that should have appeared at the end of the sentence had been omitted. The sentence should be amended to read: “She did not share the view expressed by a member of the Commission that an act was not official because it was attributed to the State, but was attributed to the State because it had been carried out by an official of the State.”

Paragraph 64, as amended, was adopted.

Paragraphs 65 to 67

Paragraphs 65 to 67 were adopted.

CHAPTER I. *Organization of the session* (A/CN.4/L.855)

65. The CHAIRPERSON invited the members of the Commission to consider chapter I, as contained in document A/CN.4/L.855, paragraph by paragraph.

Paragraphs 1 to 6

Paragraphs 1 to 6 were adopted.

Paragraph 7

66. In response to a comment by Mr. HMOUD, the CHAIRPERSON invited the members of the Commission to verify whether the composition of the Drafting Committees listed in paragraph 7 was correct and to inform the Secretariat of the corrections to be made if their names were not included in the appropriate lists.

Subject to the requisite corrections, paragraph 7 was adopted.

Paragraph 8

Paragraph 8 was adopted with a minor editorial amendment proposed by Mr. Forteau.

Paragraphs 9 to 12

Paragraphs 9 to 12 were adopted.

Chapter I of the draft report of the Commission, as a whole, as amended, was adopted.

CHAPTER II. Summary of the work of the Commission at its sixty-seventh session (A/CN.4/L.856)

67. The CHAIRPERSON invited the members of the Commission to consider chapter II, as contained in document A/CN.4/L.856, paragraph by paragraph.

Paragraphs 1 to 6

Paragraphs 1 to 6 were adopted.

Paragraph 7

68. Mr. FORTEAU said that the final sentence had to be corrected to show that the Commission had not taken note of the interim report of the Drafting Committee.

Subject to the necessary corrections, paragraph 7 was adopted.

Paragraphs 8 to 11

69. The CHAIRPERSON said that the blank spaces in paragraphs 8, 10 and 11 would be filled in later by the Secretariat.

Subject to the necessary additions, paragraphs 8 to 11 were adopted.

Chapter II of the draft report of the Commission, as amended, was adopted.

CHAPTER III. Specific issues on which comments would be of particular interest to the Commission (A/CN.4/L.857)

70. The CHAIRPERSON invited the members of the Commission to consider chapter III, as contained in document A/CN.4/L.857, paragraph by paragraph.

71. Mr. FORTEAU said that he wished to make a number of general remarks on the text of chapter III before the Commission took it up paragraph by paragraph. In his view, a great deal of information was being requested of Member States: for the five topics listed, they needed to provide a large quantity of specific information, and to do so by 31 January 2016—a very short time frame. In addition, he thought it was premature to ask States to provide information on their practice relating to *jus cogens* when the Commission had not yet received the preliminary report of the Special Rapporteur on the topic. Section E of the text should perhaps therefore be deleted. It would also be useful to divide the chapter into two separate sections, one devoted to requests for information that were reminders of requests made in previous years, and the other, to new requests to Member States. Lastly, pointing out that the formulation used since 2011 (“The Commission requests States to provide information, by ...”) was much more peremptory than the one used in the past (“The Commission would welcome any information that States could provide on ...”), he said that more leeway should be given to States in the requests for information from them. He recalled that the statute of the Commission set out two different formulations, depending on whether the request related to the progressive development of international law (“urges States”) or to the codification of international law (“invites States to provide information”).

72. Mr. NOLTE endorsed those proposals, especially the one about making the requests for information less peremptory.

73. Mr. MURPHY said that he, too, endorsed the proposals, especially the one on combining in a single section reminders of requests for information. For the sake of brevity, he proposed developing a general formulation to cover all such requests.

74. Mr. TLADI said that he did not intend to produce a preliminary report on *jus cogens* and would prefer to draft a first report based on the information transmitted by States; that was why he would like section E to be retained. As to the large number of requests for information, he did not think it was actually a problem, since States were perfectly free not to respond to some requests if they did not wish to.

75. Sir Michael WOOD said that he endorsed the idea of reducing the number of requests for information and to combine all the reminders. He hoped that, at a future session, the Commission would be able to discuss the related priorities to be set.

76. Ms. JACOBSSON said that she endorsed the proposals by Mr. Forteau but thought that since the Commission had not yet discussed such matters in the context of its working methods, it would be useful to do so. While she was aware of the need to limit the number of requests for information, she very much hoped that the requests contained in section B would be retained; the answers given by States had been very useful to her in drawing up her previous reports, and those she was to receive would certainly be useful for her next report.

77. Ms. ESCOBAR HERNÁNDEZ said that she fully supported Mr. Forteau’s proposal on the way the requests should be formulated and thought that it would be better not to set a deadline for States to reply. She wished her request for information on limits and exceptions to the immunity of State officials from foreign criminal jurisdiction to be retained in chapter III, as she had never before made such a request.

78. Mr. McRAE said that every year, the Planning Group should discuss the priorities to be set in selecting the requests for information to be included in chapter III, and it should do so before the draft report was considered in plenary, so as to avoid giving the impression that the Commission was treating States like the research assistants that supported the Special Rapporteurs in their work.

79. Mr. KITTICHAISAREE said that the requests for information should be formulated more simply: some States found them difficult to understand.

80. Mr. FORTEAU recalled that under article 19, paragraph 2, of its statute, the Commission must “address to Governments a detailed request to furnish the texts of laws, decrees, judicial decisions ... and other documents relevant to the topic being studied and which the Commission deems necessary”. The practice was accordingly laid down in the statute, but solely in the context of the codification of international law—requests for information concerning the progressive development of international law were to be worded differently. It would be useful for the Commission to discuss the differences at a future session.

81. The CHAIRPERSON invited Mr. Forteau to draw up a new paragraph bringing together all the reminders about requests for information and said that the Commission would continue its consideration of draft chapter III at another meeting.

The meeting rose at 6.05 p.m.

3290th MEETING

Friday, 7 August 2015, at 10.05 a.m.

Chairperson: Mr. Narinder SINGH

Present: Mr. Al-Marri, Mr. Caffisch, Mr. Candioti, Mr. Comissário Afonso, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kitichaisaree, Mr. Kolodkin, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

Draft report of the International Law Commission on the work of its sixty-seventh session (concluded)

1. Mr. LLEWELLYN (Secretary to the Commission), announcing the results of consultations on the use of footnotes to refer to draft texts in the Commission's report, said that the Special Rapporteur on the identification of customary international law preferred that the draft conclusions as provisionally adopted by the Drafting Committee not be set out in a footnote; rather, the report would indicate that the relevant statement by the Chairperson of the Drafting Committee and the documents containing the conclusions were to be found on the Commission's website. A link to the website would be provided in a footnote. The footnote would further indicate that it was anticipated that commentaries to the draft conclusions, together with the draft conclusions themselves, would be considered at the next session. Only the draft conclusions as originally submitted by the Special Rapporteur would be set out in a footnote in the report. The same practice would be followed in relation to the topic of provisional application of treaties. The Special Rapporteurs on the topics of protection of the environment in relation to armed conflicts and immunity of State officials from foreign criminal jurisdiction also wished the draft texts as originally submitted in their respective reports to be set out in footnotes. The corresponding texts as provisionally adopted by the Drafting Committee would be set out in footnotes; it would be made clear therein that those texts, together with the commentaries, would be considered by the Commission at its next session. The Planning Group would consider the entire question of footnotes and how to refer to draft texts in the Commission's report at the next session.

CHAPTER X. Immunity of State officials from foreign criminal jurisdiction (concluded) (A/CN.4/L.863 and Add.1)

2. The CHAIRPERSON invited the Commission to resume its consideration of the portion of chapter X of its draft report contained in document A/CN.4/L.863.

B. Consideration of the topic at the present session (concluded)

2. SUMMARY OF THE DEBATE (concluded)

(a) General comments (concluded)

Paragraph 23 (concluded)

3. The CHAIRPERSON recalled that the adoption of paragraph 23 had been deferred pending its redrafting. He invited the Special Rapporteur to read out the proposed new text.

4. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that, following consultations with Sir Michael, she proposed amending paragraph 23 to read: "It was, for instance, suggested that in determining the scope of immunity *ratione materiae*, there were certain acts that could potentially be beyond the benefit of immunity *ratione materiae*. This was the case for acts involving allegations of serious international crimes, *ultra vires* acts, *acta jure gestionis*, or acts performed in an official capacity but exclusively for personal benefit, as well as acts performed on the territory of the forum State without its consent" [*Se sugirió por ejemplo que en la determinación del alcance de la inmunidad ratione materiae, había ciertos actos que potencialmente podrían quedar fuera del beneficio de la inmunidad ratione materiae. Era el caso de los actos que comportaban alegaciones de graves crímenes internacionales, actos ultra vires, acta jure gestionis o actos realizados a título oficial pero exclusivamente en beneficio personal, así como actos realizados en el territorio del Estado del foro sin su consentimiento*].

5. Mr. KAMTO drew attention to the risk that the final phrase, "acts performed on the territory of the forum State without its consent", might be understood to refer not only to the category of acts that the Commission had in mind, such as espionage, but also to other types of acts.

6. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that, while she shared Mr. Kamto's concern, it should be borne in mind that the proposed text reflected the Commission's discussion, not its position. The question he had raised would in all likelihood be debated when the Commission came to consider the commentaries to the draft articles.

Paragraph 23, as amended, was adopted.

Section B, as amended, was adopted.

Chapter X of the draft report of the Commission, as a whole, as amended, was adopted.

CHAPTER XI. Provisional application of treaties (A/CN.4/L.864)

7. The CHAIRPERSON invited the Commission to consider chapter XI of its draft report, as contained in document A/CN.4/L.864.