Document:-
A/CN.4/3388

Summary record of the 3388th meeting

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

Extract from the Yearbook of the International Law Commission:-
2017, **vol. I**

she has been accused or suspected of having committed a crime under international law." It would be simpler, however, to delete the sentence altogether, particularly as the Commission had already dealt with the subject matter of the sentence at length in its report on the work of its sixty-fifth session.[430]

96. Mr. TLADI said that he agreed, in substance, with the changes proposed by Sir Michael. However, if the second sentence was retained and amended, it would be preferable to refer to exceptions to immunity rather than to immunity itself, as it was such exceptions that were the subject of draft article 7.

97. Mr. SABOIA, supported by Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur), Mr. RUDA SANTOLARIA and Mr. CISSÉ, said that he agreed with Sir Michael's proposal to delete the second sentence altogether.

Paragraph (2), as amended, was adopted.

Paragraph (3)

98. Sir Michael WOOD proposed that, in the second sentence, the word "established" be replaced with "indicated". The quotation in the third sentence should be completed with the addition of the phrase "during such term of office" after the words "official capacity".

Paragraph (3), as amended, was adopted.

Paragraph (4)

99. Sir Michael WOOD said that, for the sake of consistency, the words "period in office" at the end of the first sentence should be replaced with "term of office".

100. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that, in the second sentence, the word "foreign" should be inserted before "criminal jurisdiction".

Paragraph (4), as amended, was adopted.

Paragraph (5)

101. Mr. MURPHY said that, although it was not the Commission's normal practice, it would be useful to state, in the first sentence, that the Commission had decided to include draft article 7 "by a majority vote", thereby linking the paragraph to an earlier part of chapter VII in which the Commission noted that a vote had taken place. In the second sentence, he would be in favour of inserting the words "it is considered that" before "there has been".

102. The major issue concerning paragraph (5), however, was what to do with the three footnotes. Several members of the Commission had raised serious doubts about the accuracy of the descriptions of the cases cited in the first footnote to the paragraph, the relevance of the national laws mentioned in its second footnote and the approach to discussing international case law in its third footnote. There were, in his view, three options for addressing the problem. The first was not to include the footnotes. The second was to make a number of changes to the footnotes; for example, some members of the Commission believed that the *Pinochet* case cited in the first footnote did not directly support the content of draft article 7. The third option was to insert a series of footnotes to paragraph (8) of the commentary to enable those members to set out their rationale for opposing the adoption of draft article 7. Proposed texts for those footnotes could be found in the informal paper that had been circulated in the meeting room.

103. Mr. JALLOH said that he was opposed to specifying, in the first sentence, that the Commission had decided to include draft article 7 "by a majority vote", since there was no established practice in that regard. On the other hand, he had no objection to the addition of "it is considered that" in the second sentence. As to the footnotes, he wondered whether the concern expressed by Mr. Murphy about the first footnote was not suitably addressed in paragraph (5) by the words "even though they do not all follow the same line of reasoning".

104. Mr. PETER said that, since commentaries were supposed to be comprehensive, and since it was a fact that the Commission had voted on whether to include draft article 7, he supported Mr. Murphy's proposed amendment to the first sentence. He was opposed to deleting any of the footnotes, however, particularly bearing in mind that the Commission regularly urged States to provide it with examples of their practice.

105. Ms. GALVÃO TELES said that the Commission should follow its standard practice and that the first sentence of paragraph (5) should therefore be adopted as it stood. Regarding the first footnote to the paragraph, she agreed with Mr. Jalloh that the words "even though they do not all follow the same line of reasoning" addressed the concern expressed by Mr. Murphy.

106. Mr. MURPHY said that, unless a series of footnotes was inserted in paragraph (8) of the commentary to explain why some members had opposed the adoption of draft article 7, he would want to correct what he viewed as errors in the three footnotes to paragraph (5).

The meeting rose at 1 p.m.

3388th MEETING

Thursday, 3 August 2017, at 3.05 p.m.

Chairperson: Mr. Georg NOLTE

Present: Mr. Argüello Gómez, Mr. Aurescu, Mr. Cissé, Ms. Escobar Hernández, Ms. Galvão Teles, Mr. Gómez Robledo, Mr. Grossman Guiloff, Mr. Hassouna, Mr. Jalloh, Mr. Laraba, Ms. Lehto, Mr. Murase, Mr. Murphy, Mr. Nguyen, Ms. Oral, Mr. Ouazzani Chahdi, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Rajput, Mr. Reinisch, Mr. Ruda Santolaria, Mr. Saboia, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Sir Michael Wood.

---

[430] *Yearbook … 2013*, vol. II (Part Two).

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

Chapter VII. *Immunity of State officials from foreign criminal jurisdiction* (*continued*) (A/CN.4/L.903/Rev.1 and Add.1–3)

1. The CHAIRPERSON invited the Commission to resume its consideration of the portion of chapter VII contained in document A/CN.4/L.903/Add.2.

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 article, with the commentary thereto, provisionally adopted by the Commission at its sixty-ninth session (*continued*)

Commentary to draft article 7 (Crimes under international law in respect of which immunity *ratione materiae* does not apply) (*continued*)

Paragraph (5) (*continued*)

2. Sir Michael WOOD expressed support for the amendments to paragraph (5) proposed by Mr. Murphy at the Commission's previous meeting. Paragraphs (5) and (6) and the footnotes thereto set out the views of the Special Rapporteur concerning a "discernible trend towards limiting the applicability of immunity from jurisdiction *ratione materiae*", citing a large body of case law. A number of members of the Commission disagreed with the interpretation of those cases, however. In his own view, the arguments presented by the Special Rapporteur were seriously defective. The amendments proposed by Mr. Murphy sought to avoid a blanket endorsement of the arguments, while retaining the information provided and changing the text as little as possible. The statement, in the first sentence, that the Commission had decided to include draft article 7 "by a majority vote" was a simple statement of fact. It would allow subsequent explanations to be understood as representing the majority view. The inclusion of the words "it is considered that" in the second sentence was no more than a drafting change. The proposal to indicate, at the beginning of the first two footnotes, that the cases listed therein had been invoked in support of the position taken in the commentary also reflected the facts; however, he accepted, as Mr. Tladi had said, that the suggested words "on various grounds" did not need to be included in the first footnote as they duplicated the content of the third sentence of paragraph (5). If the modest changes proposed were accepted, he would be in a position to join the consensus on a paragraph with which he otherwise had serious difficulties.

3. Ms. LEHTO expressed reluctance to include the words "by a majority vote" in paragraph (5). All the information concerning the process of adopting draft article 7 was presented unambiguously in the portion of chapter VII already adopted at the previous meeting. The proposed amendment was neither elegantly drafted nor in line with the Commission's established practice of referring to the views of groups of its members.

4. Mr. RAJPUT said that the Commission should adopt the third approach suggested by Mr. Murphy at the previous meeting: inserting footnotes in paragraph (8) setting out the minority view. The changes proposed by Mr. Murphy to paragraph (5) and to its first two footnotes would go some way towards allaying his own concern at being associated with what he viewed as a flawed interpretation of the cases relied upon in those footnotes. In the Commission's practice, it seemed that there were three ways of handling dissenting views: either the members concerned agreed to join the consensus and their view was not reflected; the members felt strongly enough to want their view reflected in the commentary or elsewhere but not strongly enough to block consensus or request a vote; or the members held extremely strong views and insisted on voting, which was the situation in which the Commission now found itself. To categorize such a strongly held position simply as "a view" was highly inappropriate. Where such a serious disagreement existed, it was only fair to reflect the minority view clearly.

5. Mr. PARK suggested that it would be permissible to include a reasonable description of what had transpired within the Commission in the commentary to a draft article adopted on first reading: instead of "by a majority vote", the words "by a recorded vote" could be inserted in the first sentence of paragraph (5) as a more neutral option.

6. The CHAIRPERSON observed that there were two issues to deal with: the specifics of drafting amendments to paragraph (5) and the wider question of how the situation that had arisen within the Commission should be reflected in the commentary, in which regard Mr. Murphy had made three suggestions at the previous meeting.

7. Mr. MURPHY, agreeing with the Chairperson's analysis, said that he had refrained from making further drafting proposals until it became clear which overall approach the Commission favoured.

8. Mr. TLADI, supported by Mr. SABOIA, sought clarification as to whether accepting the proposed changes to paragraph (5) and to its first two footnotes would be sufficient to meet Mr. Murphy's concern and avoid the introduction of additional footnotes in paragraph (8), in which case he would be prepared to go along with the proposals.

9. Mr. MURPHY indicated that this was not the case.

10. Mr. CISSÉ suggested that the first two footnotes to paragraph (5) be left unaltered on the understanding that the secretariat would be requested to consult the Special Rapporteur to ensure the accuracy of all references. If that approach met the concerns expressed by Sir Michael and others, paragraph (5) could be adopted on that basis.

11. The CHAIRPERSON expressed doubt that such an approach would resolve the issue. Speaking in his personal capacity, he said that it was customary for commentaries adopted on first reading to reflect the different views expressed within the Commission. He therefore favoured retaining the first two footnotes and making the views of those who disagreed with the interpretation of the cases cited therein clear elsewhere in the text, by means of additional footnotes.

12. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that the procedure by which draft article 7

had been adopted was clearly reflected both at the start of chapter VII and in the summary records of the Commission's proceedings, and that the views of dissenting members were covered in paragraph (8). Consequently, she would prefer no mention to be made in paragraph (5) of the vote; however, if the consensus was to accept such an amendment, she would favour the wording proposed by Mr. Park, which was more neutral. While members of the Commission had differed—in some cases radically—in their interpretation of the cases cited in the first two footnotes to paragraph (5), it had been generally agreed that a trend, rather than a norm of customary international law, could be identified, and that was clearly reflected in the text of the commentary. Differences of interpretation were quite common among legal experts, but it was unreasonable to imply that the first footnote to the paragraph contained errors of fact. Nevertheless, she could accept the amendments to the two footnotes indicating that the cases cited therein had been invoked in support of a specific position.

13. She had sought to structure the commentary so as to explain the Commission's overall position, the various views expressed, the reasons why draft article 7 had been adopted and what the opposition had been to its adoption. It would not facilitate the work of the Sixth Committee of the General Assembly if supporting and dissenting views were presented together, rather than clearly separated. Once a decision had been taken, the view of the majority constituted the view of the Commission and should be presented first, followed, where necessary, by dissenting views and reservations. That said, she did not favour the suggestion of adding the kind of footnotes envisaged by Mr. Murphy to paragraph (8), although that issue could be discussed in detail when paragraph (8) came up for discussion.

14. The CHAIRPERSON highlighted the fact that there was a close connection between paragraphs (5) and (8) and how the Commission opted to tackle them.

15. Mr. PETRIČ said that, while he did not oppose the idea of exceptions to immunity *ratione materiae*, he had voted against the adoption of draft article 7 in the firm belief that the exceptions it listed did not reflect the current state of international law. Given the importance of the issue, great caution and in-depth consideration were needed. It was also vital to present the views of the minority in addition to those of the majority.

16. Mr. GROSSMAN GUILOFF acknowledged the need to reflect the fact that there were strongly held minority views within the Commission, but emphasized that they in no way equated in importance to a decision of the Commission. Such views should not be reflected in paragraph (5), particularly when paragraph (8) already made multiple mentions of the strong disagreement of some members. He suggested that it would be better to include the words proposed by Mr. Park in paragraph (8), rather than in paragraph (5). He also pointed out that the Sixth Committee would be well aware of the procedures that had been followed within the Commission, particularly as everything would be reflected in the summary records.

17. The CHAIRPERSON suggested that a small group of interested members hold informal consultations on how best to approach the issue of the footnotes, which seemed unlikely to be resolved through further discussions in plenary.

18. Mr. VÁZQUEZ-BERMÚDEZ, supported by Mr. RUDA SANTOLARIA, expressed the view that the Commission should continue to examine its draft report paragraph by paragraph, coming to the question of whether additional footnotes should be inserted in paragraph (8) when it took up that paragraph. Although he saw no need to refer in paragraph (5) to the voting procedure, as it would already have been covered earlier in chapter VII, he was prepared to accept Mr. Park's amendment to the first sentence as a compromise. In the second sentence, he suggested that the words "it considered that" be added, rather than "it is considered that". With regard to the first two footnotes, he could accept the changes proposed if they were agreeable to the Special Rapporteur.

19. Sir Michael WOOD welcomed Mr. Vázquez-Bermúdez's comments, expressed support for Mr. Park's proposed wording for the first sentence of paragraph (5) and endorsed the idea that the Commission continue to consider the text paragraph by paragraph. He would strongly support the inclusion of additional footnotes in paragraph (8).

20. Mr. JALLOH echoed the comments of Mr. Grossman Guiloff and Mr. Vázquez-Bermúdez and expressed the view that the Chairperson's suggestion of informal consultations on the issue of the footnotes might enable the Commission to make progress.

21. Mr. RAJPUT expressed bemusement at the reluctance of some members to reflect the minority view in the Commission's commentary. In the interests of compromise, he was prepared to accept Mr. Park's proposed amendment to the first sentence of paragraph (5). With regard to the Chairperson's suggestion of how to proceed, he highlighted the inextricable links between paragraphs (5) and (8) and the need to consider them together, along with any footnotes. It was important to convey the fact that a number of members disagreed with the interpretation being placed on certain cases, and the appropriate place to do that was in a footnote to paragraph (8), along the lines alluded to by Mr. Murphy. Any wording should be suitably neutral.

22. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said it was clear that the Commission agreed on the need to reflect minority views in its commentary. The inclusion within her original draft of the text of paragraph (8), which had been carefully crafted, demonstrated her personal readiness to reflect such views. Moreover, she had indicated her willingness to consider amending the text on the basis of Mr. Murphy's proposals. She proposed that the Commission adopt the text of paragraph (5) itself and leave all footnotes in abeyance, on the understanding that paragraph (8) would be handled in the same way and that any and all footnotes to those two paragraphs would be considered together in due course.

23. The CHAIRPERSON took it that the Commission agreed to her proposal. The text of paragraph (5) would be adopted with the amendments to the first and second sentences suggested by Mr. Park and Mr. Vázquez-Bermúdez, on the basis of Mr. Murphy's proposed changes,

which also included an editorial amendment to combine the third and fourth sentences; the Commission would return to the footnotes to paragraphs (5) and (8) later.

It was so decided.

Paragraph (6)

24. Mr. MURPHY said that the changes he wished to propose comprised a few editorial amendments to the first sentence to make the text read more smoothly: "the Commission also took into account" should be replaced with "account was also taken of" and "are intended to operate" with "exist".

25. He also proposed the addition, at the end of the paragraph, of three new sentences, to read: "Some members of the Commission, however, stressed the difference between procedural immunity from foreign jurisdiction, on the one hand, and substantive criminal responsibility, on the other, and maintained that the recognition of exceptions to immunity was neither required nor necessarily appropriate for achieving the required balance. Rather, impunity can be avoided in situations where a State official is prosecuted in his or her own State; is prosecuted in an international court; or is prosecuted in a foreign court after waiver of the immunity. Asserting exceptions to immunity that States have not accepted by treaty or through their widespread practice risks creating severe tensions, if not outright conflict, among States whenever one State exercises criminal jurisdiction over the officials of another based solely on an allegation that a heinous crime has been committed."

26. Mr. JALLOH opposed the first change, because it made the sentence more impersonal instead of a straightforward statement about how the Commission had proceeded. He also questioned the need for the lengthy addition at the end of the paragraph.

27. Ms. GALVÃO TELES said that she, too, preferred the original version of the first part of the first sentence. As to the additional sentences, she thought they made important points about the reasoning behind the opposition of some members to the Commission's majority decision, but they would be better placed in paragraph (8), where other explanations of the opposition were set out.

28. Ms. LEHTO agreed that the additional sentences should be placed in paragraph (8). It would be more user-friendly to present one line of reasoning first, and then move on to the opposing views.

29. Mr. GÓMEZ ROBLEDO agreed with the two previous speakers. He likewise endorsed the Chairperson's earlier statement that the minority view should not be given disproportionate emphasis in the commentary. While it was certainly important to recount how decisions had been arrived at, the commentaries were adopted by the Commission, not by a minority or a majority of its members, and they reflected the position of the Commission as a whole.

30. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said she agreed that the three additional sentences would best be placed in paragraph (8); she proposed that they should be discussed when that paragraph was considered. She also agreed that the first change to the first sentence was unnecessary, because the text simply described what the Commission had done. The proposal to say that the draft articles "exist", instead of "are intended to operate" within the international legal order, was illogical and objectively incorrect, since the draft articles did not yet exist, they were in the process of being developed. If it was preferable, however, one could say that they "will operate".

31. The CHAIRPERSON, speaking as a member of the Commission, said that he, too, was in favour of retaining the phrase "the Commission also took into account" at the start of the first sentence.

32. Sir Michael WOOD said that it would be better to say "shall apply" rather than "will operate."

33. Mr. CISSÉ said that in the French text, the phrase should read *destiné à s'appliquer*.

34. The CHAIRPERSON said he took it that the Commission wished to adopt the Special Rapporteur's proposal to take up the three new sentences when it came to consider paragraph (8), to retain the phrase "the Commission also took into account" at the start of the first sentence, and to replace the words "are intended to operate" with "shall apply".

It was so decided.

Paragraph (6), as amended, was adopted.

Paragraph (7)

35. Mr. MURPHY proposed the insertion in the first sentence of the words "two reasons" after "In light of the above"; the replacement in the second sentence of the word "does" with "shall"; and the transposition, in the second sentence, of "*ratione materiae*" to follow "covered by immunity" instead of "from foreign criminal jurisdiction".

With those amendments, paragraph (7) was adopted.

Paragraph (8)

36. Mr. MURPHY said he was extremely grateful to the Special Rapporteur for crafting the paragraph, which captured the views of those who had opposed the adoption of draft article 7. The amendments he was proposing did not add to the length of the text but did add several aspects of the minority viewpoint that had not been included in the original paragraph. The new paragraph would read:

> "However, some members strongly disagreed with this analysis. They opposed draft article 7, which had been adopted by vote, stating that: (*a*) the Commission should not portray its work as possibly codifying customary international law when, for reasons indicated in the footnotes below, it is clear that national case law, national statutes and treaty law do not support the exceptions asserted in draft article 7; (*b*) the relevant practice showed no 'trend' in favour of exceptions to immunity *ratione materiae* from foreign criminal

jurisdiction; (*c*) immunity is a procedural matter and, consequently, (i) it is not possible to assume that the existence of criminal responsibility for any crimes under international law committed by a State official automatically precludes immunity from foreign criminal jurisdiction; (ii) immunity does not depend on the gravity of the act in question or on the fact that such act is prohibited by the peremptory norm of international law; (iii) the issue of immunity must be considered at an early stage of the exercise of jurisdiction, before the case is considered on the merits; (*d*) the lack of immunity before an international criminal court is not relevant to the issue of immunity from the jurisdiction of national courts; and (*e*) the establishment of a new system of exceptions to immunity, if not agreed upon by treaty, will likely harm inter-State relations and risks undermining the international community's objective of ending impunity for the most serious international crimes. Furthermore, these members took the view that the Commission, by proposing draft article 7, was conducting a 'normative policy' exercise that bore no relation to either the codification or the progressive development of international law. For those members, draft article 7 is a proposal for 'new law' that cannot be considered as either *lex lata* or desirable progressive development of international law."

37. The CHAIRPERSON invited the Commission to consider the new text of paragraph (8) just proposed by Mr. Murphy, with the addition, at the end, of the three sentences he had proposed for inclusion in paragraph (6), leaving the footnotes in abeyance.

It was so decided.

38. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that, in (*a*), contained in the second sentence, the phrase "for reasons indicated in the footnotes below" should be deleted. Footnotes should contain, not the reasoning behind arguments made in the commentary, but the documentary sources that underpinned those arguments.

39. Mr. RAJPUT proposed that the Special Rapporteur's concern be addressed in the following way: in (*a*), the words "when, for reasons indicated in the footnotes below" should be replaced with "for them"; that part of the description of the views of some members would then read "the Commission should not portray its work as possibly codifying customary international law; for them, it is clear that national case law, national statutes and treaty law do not support the exceptions asserted in draft article 7".

40. Mr. REINISCH said that the words "some members strongly disagreed" in the first sentence should be replaced with more matter-of-fact language like "some members disagreed". If, in the new version of the paragraph, the phrase originally contained in the second sentence, "a large majority of Commission members", were to be deleted, he would prefer a reference to a recorded vote to be included. The verb tenses used in (*a*) and (*b*) of the second sentence should be harmonized so that the past tense was used throughout: thus, the words "it is clear" should be replaced with "it was clear" and "do not support" with "did not support".

41. Mr. RUDA SANTOLARIA endorsed the points made by the two previous speakers. The Commission should avoid using wording that could complicate reaching a consensus. It should say "some members argued against the decision" and, instead of "strongly disagreed", simply indicate that there had been a difference of views.

42. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that, for the sake of consistency, the words "exceptions or limitations" should be retained throughout the commentary rather than simply "exceptions", since the focus of her fifth report was both exceptions and limitations. That change would also apply in paragraph (9). If the additional sentences proposed under paragraph (6) were moved to paragraph (8), it would be necessary to ensure that there was no duplication.

43. Mr. MURPHY said that the phrase "exceptions or limitations" had not been included in paragraph (8) because it did not appear in draft article 7, but it was simply a matter of drafting and he did not object to its insertion throughout the commentary. He agreed with the proposals to replace the words "strongly disagreed" in the first sentence and to delete the words "for reasons indicated in the footnotes below" in the second sentence, but believed that Mr. Rajput's proposal for (*a*) would not fit in well with the remainder of the second sentence.

44. If the additional sentences he had proposed for paragraph (6) were added at the end of paragraph (8), the words "Some members" should be replaced with "These members" and "however" should be replaced with "also" in the first additional sentence.

45. Mr. TLADI said that, in the second of the three new sentences proposed for paragraph (6), the words "in the view of these members" should be inserted after "rather", to make it clear that the view being expressed was not the Commission's.

46. Mr. ŠTURMA said that, although he supported paragraph (8) as modified by Mr. Murphy, the three new sentences created some redundancies; for example, the argument concerning the procedural nature of immunities appeared in (*c*) of the second sentence in paragraph (8) and need not be repeated.

47. Mr. MURPHY said that the additional sentences were not duplicative. The distinction between substantive and procedural matters was relevant both when analysing practice and in the context of the structure of international law. Perhaps it would be helpful to add the word "first" at the beginning of the second sentence of paragraph (8), and then to add "second" at the beginning of the first sentence of the new text from paragraph (6), deleting the word "also", which would then be unnecessary.

48. Mr. JALLOH said that he had reservations about the text for reasons similar to Mr. Šturma's. Mr. Murphy's proposal helped the flow, but there would continue to be imbalances throughout the commentary between the paragraphs reflecting the majority position and those on the minority position, and that was very problematic.

The amendments proposed by Mr. Murphy and Mr. Tladi were accepted.

Paragraph (9)

49. Mr. MURPHY said that his amendments to paragraph (9) were simple drafting changes. At the beginning of the first sentence, the words "On the other hand, it should be borne in mind that these members" should be replaced with "Some members". In the second sentence, the word "however" should be deleted and "take" replaced with "took".

50. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that she would rather retain the original formulation.

51. Sir Michael WOOD said that the words "On the other hand" at the beginning of the first sentence made little sense.

52. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that the words *Por otro lado* ["On the other hand"] could be deleted without changing the meaning of the sentence.

Paragraph (9), as amended, was adopted.

Paragraph (10)

53. Mr. MURPHY said that, in the first sentence, he proposed replacing the words "sets out" with "lists", in line with paragraph (1) of the commentary, and adding the word "allegedly" before "committed" in the first sentence.

Paragraph (10), as amended, was adopted.

Paragraph (11)

54. Mr. MURPHY said that he proposed adding two new sentences at the end of the paragraph, to read: "Some members viewed this alleged dichotomy as unsustainable and as not reflecting the reasoning set forth in the very limited case law on this issue. For example, the *Pinochet* case in the United Kingdom turned on the existence of a treaty relationship between the two States concerned which was interpreted as involving a waiver of immunity, not on either of the two views indicated above." The intention was to indicate that, in the view of some members, the two different interpretations cited were not the only basis for decisions in that area and that other possibilities for not according immunity, such as implicit waiver, existed. He also proposed replacing "must" with "may" and "is" with "may be" in the third sentence and "various" with "some" in the fourth. A footnote referring to paragraph 60 of the judgment of the International Court of Justice in *Jurisdictional Immunities of the State* should be inserted at the end of the third sentence.

55. Mr. GROSSMAN GUILOFF said that the paragraph was intended to describe two views—that the commission of the crimes listed in draft article 7 could not be considered a function of the State and could therefore not be regarded as acts performed in an official capacity, and the contrary view that such crimes required the presence of a State element or else must have been committed with the backing, express or implied, of the State machinery. However, the proposed introduction of the words "may" and "may be" in the third sentence confused matters and suggested that there might in fact be three views rather than two. He had no objection to mentioning the *Pinochet* case in the final sentence, but as currently formulated the sentence was problematic in several other respects.

56. Mr. JALLOH said that he agreed that the words "may" and "may be" introduced ambiguity into the text, but he was in favour of replacing "various" with "some". He had reservations about the two additional sentences being proposed, as the views of the minority of members had already been covered quite adequately, despite concerns about textual repetition. Moreover, it was not necessary to refer to the *Pinochet* case.

57. Mr. SABOIA said that he shared the views expressed by Mr. Grossman Guiloff and Mr. Jalloh with respect to the proposal to insert the words "may" and "may be" and was also in favour of replacing "various" with "some". The two additional sentences did not belong in paragraph (11), but could perhaps be added to paragraph (8), which reflected the views of the minority of members. He agreed with Mr. Gómez Robledo's earlier statement about the need for proportionality and balance.

58. Mr. MURPHY said that he understood the concerns about the introduction of "may" and "may be" and would not insist on those changes. However, he did not agree that the concerns of the minority of members should be listed solely in paragraph (8). That paragraph dealt with the broad issues raised by draft article 7 as a whole. However, the part of the commentary now being discussed related to the individual paragraphs of the draft article. It was appropriate and fair to reflect the specific differences of opinion on those paragraphs. In order to address the concerns of some members, the proposed new sentence on the *Pinochet* case could be deleted.

59. The CHAIRPERSON suggested that the proposed sentence on the *Pinochet* case be moved to a footnote.

60. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that she did not support the insertion of the two new sentences in paragraph (11). That paragraph sought to explain the arguments for using the words "does not apply" in the draft article. In her view, that paragraph was not the appropriate place to include a reference to the *Pinochet* case. She agreed with other members about the importance of ensuring a proper balance when reflecting the views that had been expressed. If it was decided to keep the reference to the view of "Some members", she would suggest saying instead "A small number of members".

61. Sir Michael WOOD said that it was not clear what was meant by the statement that "Some members viewed this alleged dichotomy as unsustainable". In his opinion, it was not the dichotomy that was unsustainable but rather the views put forward in the two new sentences. He would be in favour of adopting the original version of the paragraph.

62. Mr. VÁZQUEZ-BERMÚDEZ said that, in the first sentence, the words "'does not apply'" should be replaced with "'shall not apply'".

63. The CHAIRPERSON said that he took it that the Commission wished to replace the word "various" with

"some" in the fourth sentence and to add the footnote with the reference to *Jurisdictional Immunities of the State*, but otherwise to retain the original version of the paragraph.

Paragraph (11), as amended, was adopted.

Paragraph (12)

64. Sir Michael WOOD said that the first proposed change was to replace the words "immunity from jurisdiction *ratione materiae* that might" with "immunity *ratione materiae* from foreign criminal jurisdiction that otherwise might" in the first sentence. The second was to delete the words "legal practitioners with a reliable list" in the second sentence, since the text was not addressed to legal practitioners only.

Paragraph (12), as thus amended, was adopted.

Paragraph (13)

65. The CHAIRPERSON said that the words "'does not apply'" should be changed to "'shall not apply'".

66. Sir Michael WOOD said that the proposal was to replace the words "on this occasion" with "in draft article 7" in the second sentence.

Paragraph (13), as amended, was adopted.

Paragraph (14)

Paragraph (14) was adopted.

Paragraph (15)

67. Mr. MURPHY said that the first sentence had been redrafted to read: "The expression 'crimes under international law' refers to conduct that is criminal under international law whether or not such conduct has been criminalized under national law." In the second sentence, the word "covered" had been changed to "addressed" and the phrase "at the universal level" had been deleted.

68. Mr. PARK, supported by Mr. JALLOH, said that he disagreed with the proposed changes to the first sentence, as they weakened the text compared with the original version.

69. Mr. MURPHY said that the phrase "crimes of greatest concern to the international community" was commonly associated with the preamble to the Rome Statute of the International Criminal Court and therefore only with the four crimes within the jurisdiction of the Court. His amendment to the first sentence aimed to clarify that all the crimes listed in the Commission's draft article 7 were to be viewed as crimes of greatest concern to the international community, despite not all being covered by the Statute. As indicated in paragraph (16) of the commentary, the Commission had not previously used the expression "crimes under international law" to mean "crimes of greatest concern to the international community".

70. Mr. JALLOH said that, while the phrase "most serious crimes of concern to the international community as a whole" was indeed embedded in the Statute and was in fact language derived from the preamble to the Commission's 1994 draft statute for an international criminal court,[431] the concept of "crimes under international law" had been under discussion by experts well before the Statute's adoption: the phrase had first appeared in Principle 6 of the Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal.[432] It had been repeated in the Commission's 1954 draft code of offences against the peace and security of mankind[433] and its 1996 draft code of crimes against the peace and security of mankind.[434] As formulated in those instruments, the phrase "crimes under international law" had virtually always been understood as including other crimes besides those covered by the Rome Statute of the International Criminal Court, such as crimes against United Nations and other associated personnel. Crimes under international law, as the commentaries to those instruments also made clear, were the most serious crimes of concern to the international community. Therefore, while he applauded Mr. Murphy's attempts at clarity, the original language of the first sentence seemed perfectly adequate.

71. Ms. LEHTO proposed retaining both the original text and the proposed amendment, so that the first two sentences of paragraph (15) would read: "The expression 'crimes under international law' refers to conduct that is criminal under international law whether or not such conduct has been criminalized under national law. The crimes listed in draft article 7 are the crimes of greatest concern to the international community; there is a broad consensus on their definition as well as on the existence of an obligation to prevent and punish them."

72. Sir Michael WOOD said that he supported Ms. Lehto's proposal. He further recalled that the report of the Drafting Committee on the topic stated that the phrase "crimes under international law" had been included in paragraph 1 to highlight the fact that draft article 7 related only to crimes that had their foundation in the international legal order and that were defined on the basis of international law, rather than domestic law.

73. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that she supported Ms. Lehto's proposed formulation. As for the comments made by Sir Michael, the primacy of international law in respect of crimes under international law was explained in detail in paragraph (16). In the interest of achieving consensus, she suggested redrafting the first sentence to the effect that the phrase "crimes of international law" referred to crimes of greatest concern to the international community that were defined under international law and on which there was broad international consensus.

74. Mr. GÓMEZ ROBLEDO proposed that, in line with the preamble to the Rome Statute of the International

[431] The draft statute for an international criminal court adopted by the Commission in 1994 is reproduced *Yearbook … 1994*, vol. II (Part Two), pp. 26 *et seq.*, para. 91.

[432] *Yearbook … 1950*, vol. II, document A/1316, pp. 374–378, paras. 97–127.

[433] *Yearbook … 1954*, vol. II, document A/2693, pp. 151–152, para. 54.

[434] The draft code adopted by the Commission in 1996 is reproduced in *Yearbook … 1996*, vol. II (Part Two), pp. 17 *et seq.*, para. 50.

Criminal Court, the words "as a whole" be inserted after "international community".

75. The CHAIRPERSON said that he took it that the Commission wished to adopt paragraph (15) as amended by Ms. Lehto and with the insertion of the words "as a whole" after "international community", as proposed by Mr. Gómez Robledo.

It was so decided.

Paragraph (15), as amended, was adopted.

Paragraph (16)

Paragraph (16) was adopted.

Paragraph (17)

76. Mr. MURPHY said that in the last sentence, the words "categories of", before "crimes", should be deleted. Two new sentences should be added at the end of paragraph (17); those sentences would read:

> "Some members noted, however, that only seven national laws had been identified as expressly providing an exception for immunity *ratione materiae* in national criminal proceedings for the crime of genocide, crimes against humanity, and war crimes, and that the vast majority of States have not included exceptions to such immunity in either their general criminal codes or in their legislation implementing the Rome Statute of the International Criminal Court. As for case law supporting an exception to immunity *ratione materiae* in national courts, these members noted that no international court case denying such immunity had been identified, and that only one national court case had been advanced in support of an exception for the crime of genocide, two national court cases for crimes against humanity, and five national court cases for war crimes."

77. The proposed new language was aimed at capturing the view of some members as to why the crimes in question were not substantiated by existing practice.

78. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that she had reservations about the proposed additions. Some of her reservations related to previously raised issues about the expression of majority and minority views. However, she appreciated the concerns of members who found themselves in the minority and wondered if it might be acceptable to add, at the end of the original paragraph, a sentence that would read "Some members held, however, that the inclusion of those crimes in draft article 7 was not supported in practice".

79. Sir Michael WOOD said that while he was not opposed to the Special Rapporteur's proposed addition, such language would require a footnote referring back to paragraph (8), where the views of some members had been explained in detail.

80. Mr. SABOIA said that he supported the additional sentence suggested by the Special Rapporteur and proposed that the supporting evidence regarding the number of national court cases be moved from the body of the paragraph to a footnote.

81. Mr. MURPHY said that he was not satisfied with either of the courses of action proposed by the Special Rapporteur and by Sir Michael. He proposed, instead, that the additional sentence read: "The view was expressed that only seven national laws, no international court case, one national court case relating to genocide, two national court cases relating to crimes against humanity and five national court cases relating to war crimes had been identified in support of these exceptions." He would prefer to include a footnote providing details of those laws and cases, but could, for the sake of consensus, be content without a footnote.

82. Mr. RUDA SANTOLARIA said that he supported the amendment proposed by the Special Rapporteur and suggested that a footnote referring to paragraph (8) and the cases cited therein also be inserted.

83. The CHAIRPERSON, speaking as a member of the Commission, said that his personal preference would be to include references to numbers of cases and laws in a footnote, rather than in the body of paragraph (17).

84. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) suggested that the Commission should, for the time being, limit itself to adopting the body of paragraph (17) and should consider the footnotes thereto once the footnotes to paragraphs (5) and (8) had been adopted.

85. Mr. MURPHY said that he did not support that proposal. All members had a right to have their views reflected wherever they chose in the commentary.

86. The CHAIRPERSON suggested that the Commission leave paragraph (17) in abeyance to allow for informal consultations on the pending issues.

87. Mr. GROSSMAN GUILOFF said that, while he supported leaving paragraph (17) in abeyance, he wished also to support Mr. Murphy's position. The expression of the views of some members, as of any minority view, need not be lengthy, but should be included, as a matter of principle. He also suggested that Mr. Murphy check the details of the sources listed in the footnotes, as they did not appear complete.

88. Sir Michael WOOD said that he agreed with temporarily suspending action on paragraph (17). Furthermore, not only was allowing the expression of separate views a principle to be upheld, so was the idea that holders of such views should be allowed to express them in whichever way they saw fit.

89. Mr. TLADI said that members should certainly be permitted to express their views in the commentary, but there also had to be an overall balance in the arguments included.

Paragraph (17) was left in abeyance.

Paragraph (18)

90. Mr. MURPHY introduced several minor drafting changes to paragraph (18).

91. Mr. TLADI proposed adding a new penultimate sentence, to read: "Furthermore, a substantial number of States have themselves criminalized the crime within their national legal systems." A new footnote at the end of that sentence could provide a survey of the existing national practice and legislation.

92. Mr. MURPHY, welcoming Mr. Tladi's proposal, suggested that the Commission, as with certain earlier paragraphs, adopt the paragraph on the understanding that the footnotes would be considered at a later stage.

93. Sir Michael WOOD said that he would be reluctant to adopt any footnote containing a list of legislation without its having first been checked for accuracy.

94. Mr. ŠTURMA said that on principle, proposals by all members should be treated equally: that also applied to footnotes.

95. Ms. LEHTO suggested replacing, in Mr. Tladi's proposed addition, the phrase "have themselves criminalized the crime within their national legal systems" with "have included the crime of aggression within their national criminal law".

96. The CHAIRPERSON said that he took it that the Commission wished to adopt Mr. Tladi's amendment, as further amended by Mr. Murphy and Ms. Lehto.

It was so decided.

The meeting rose at 6.10 p.m.

3389th MEETING

Friday, 4 August 2017, at 10 a.m.

Chairperson: Mr. Georg NOLTE

Present: Mr. Argüello Gómez, Mr. Aurescu, Mr. Cissé, Ms. Escobar Hernández, Ms. Galvão Teles, Mr. Gómez Robledo, Mr. Hassouna, Mr. Laraba, Ms. Lehto, Mr. Murase, Mr. Murphy, Mr. Nguyen, Ms. Oral, Mr. Ouazzani Chahdi, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Rajput, Mr. Reinisch, Mr. Ruda Santolaria, Mr. Saboia, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Sir Michael Wood.

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

Chapter VI. *Protection of the atmosphere* (*concluded*)[*] (A/CN.4/L.902 and Add.1–2)

1. The CHAIRPERSON invited the Commission to resume its consideration of the portion of chapter VI of the draft report contained in document A/CN.4/L.902/Add.2.

[*] Resumed from the 3387th meeting.

C. Text of the draft guidelines on the protection of the atmosphere, together with preambular paragraphs, provisionally adopted so far by the Commission (*concluded*)[*]

2. Text of the draft guideline, together with preambular paragraphs, and commentaries thereto provisionally adopted by the Commission at its sixty-ninth session (*concluded*)[*]

Commentary to draft guideline 9 (Interrelationship among relevant rules) (*concluded*)[*]

Paragraph (12) (*concluded*)[*]

2. Mr. MURASE (Special Rapporteur) said that, on the basis of consultations with a small group of members, he proposed to recast the first two sentences to read:

> "One of the difficulties in the interrelationship between the rules of international law relating to the atmosphere and human rights law is the 'disconnect' in their application. While the rules of international law relating to the atmosphere apply not only to the States of victims but also to the States of origin of the harm, the scope of application of human rights treaties is limited to the persons subject to a State's jurisdiction."

3. The main issue had been to avoid the expression "extra-jurisdictional application", which had not found favour with the Commission. To that end, he proposed that the third sentence be reworded to read: "Thus, where an environmentally harmful activity in one State affects persons in another State, the question of the interpretation of 'jurisdiction' in the context of human rights obligations arises." The second footnote to paragraph (12) would be deleted as it would become redundant, and the other footnotes would be renumbered accordingly. The fourth sentence would be deleted.

Paragraph (12), as amended, was adopted.

Paragraph (13) (*concluded*)[*]

4. Mr. MURASE (Special Rapporteur) said that the aforementioned small group had proposed that paragraph (13) be recast to read:

> "One possible consideration is the relevance of the principle of non-discrimination. It may be considered unreasonable that international human rights law would have no application to atmospheric pollution or global degradation and that the law can extend protection only to the victims of intraboundary pollution. Some authors maintain that the non-discrimination principle requires the responsible State to treat transboundary atmospheric pollution or global atmospheric degradation no differently from domestic pollution. Furthermore, if and insofar as the relevant human rights norms are today recognized as either established or emergent rules of customary international law, they may be considered as overlapping with environmental norms for the protection of the atmosphere, such as due diligence (draft guideline 3), environmental impact assessment (draft guideline 4), sustainable utilization (draft guideline 5), equitable and reasonable utilization (draft guideline 6) and international cooperation (draft guideline 8), among others, which would enable interpretation and application of both norms in a harmonious manner."