

Document:-  
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**Summary record of the 2995th meeting**

Topic:  
**Draft report of the Commission on the work of its sixtieth session**

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Paragraphs 36 to 38

*Paragraphs 36 to 38 were adopted.*

Paragraph 39

57. Mr. GAJA proposed that the word “sentence” in the first sentence should be replaced by the words “partial award” and that the word “sentence” in the second sentence should be replaced by “award”.

58. Mr. BROWNLIE endorsed that amendment.

59. Mr. CAFLISCH said that the word used in the French text, “*sentence*”, should remain unchanged.

60. Ms. ESCARAMEIA (Rapporteur) drew attention to the second sentence and said that the word “Claims” should be inserted before the word “Commission” in order to avoid any confusion with the International Law Commission. In the same sentence, the word “individual” should be inserted between “various” and “cases”.

*Paragraph 39, as amended, was adopted.*

**C. Concluding remarks of the Special Rapporteur (A/CN.4/L.735)**

Paragraphs 40 to 45

*Paragraphs 40 to 45 were adopted.*

Paragraph 46

61. Mr. GAJA drew attention to the final sentence and suggested that, as in paragraph 39, the word “Claims” should be inserted before the word “Commission”.

62. Mr. VALENCIA-OSPINA proposed that the word “sentence” in the first sentence should be replaced by “partial award”.

*Paragraph 46, as amended, was adopted.*

*Chapter VIII of the draft report as a whole, as amended, was adopted.*

*The meeting rose at 5.35 p.m.*

## 2995th MEETING

*Thursday, 7 August 2008, at 10 a.m.*

*Chairperson:* Mr. Edmundo VARGAS CARREÑO

*Present:* Mr. Brownlie, Mr. Caflich, Mr. Candioti, Mr. Comissário Afonso, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kolodkin, Mr. McRae, Mr. Nolte, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Mr. Yamada.

## Draft report of the Commission on the work of its sixtieth session (*continued*)

### CHAPTER IX. *Protection of persons in the event of disasters* (A/CN.4/L.736)

1. The CHAIRPERSON invited the members of the Commission to adopt chapter IX of the Commission’s draft report on the work of its sixtieth session.

#### A. Introduction

#### B. Consideration of the topic at the present session

Paragraphs 1 to 11

*Paragraphs 1 to 11 were adopted.*

Paragraph 12

2. Mr. GAJA proposed deleting the word “uniquely” in the first sentence of the paragraph.

*Paragraph 12, as amended, was adopted.*

Paragraph 13

*Paragraph 13 was adopted.*

Paragraph 14

3. Mr. GAJA said that the beginning of the third sentence of the paragraph was phrased somewhat awkwardly. He proposed deleting the words “solidly grounded in positive law”.

4. Ms. ESCARAMEIA (Rapporteur) proposed amending the beginning of the third sentence to read: “Such an approach, solidly grounded in positive law, would draw upon, in particular, international humanitarian law”. The rest of the sentence would remain unchanged.

*Paragraph 14, as amended by Ms. Escarameia, was adopted.*

Paragraph 15

5. Mr. NOLTE said that the wording of the last sentence of the paragraph implied that the view it reported was incompatible with the view reported in the preceding sentence, which was not the case. He therefore proposed replacing “Some other members” at the beginning of the sentence with “Some members”.

*It was so decided.*

6. Mr. PERERA said that the discussion that had taken place in the General Assembly had focused on the principle of subsidiarity, mentioned in the penultimate sentence of the paragraph, with States emphasizing the paramount role of the affected State. He therefore proposed adding at the end of the sentence the words “which should not be taken unilaterally”.

*It was so decided.*

*Paragraph 15, as amended, was adopted.*

Paragraphs 16 and 17

*Paragraphs 16 and 17 were adopted.*

Paragraph 18

7. Mr. PERERA said that he had emphasized in his statement the key role of affected States and the complementary role of other actors. He therefore proposed inserting the following sentence before the last sentence of paragraph 18: "Some members emphasized the necessity to underline the primary role of the affected State as a general principle and the contributory and subsidiary role of other actors as part of an overarching umbrella of international cooperation and solidarity."

*Paragraph 18, as amended, was adopted.*

Paragraphs 19 and 20

*Paragraphs 19 and 20 were adopted.*

Paragraph 21

8. Mr. NOLTE said that the first sentence reflected a view that he had expressed. He proposed deleting the word "full" before "effects as a natural disaster".

*Paragraph 21, as amended, was adopted.*

Paragraphs 22 to 27

*Paragraphs 22 to 27 were adopted.*

Paragraph 28

9. Mr. NOLTE said that there was no reason why the principles of sovereignty and territorial integrity should apply only to the coordination of emergency humanitarian assistance. He therefore proposed amending the third sentence to read: "Moreover, sovereignty and territorial integrity were guiding principles."

*Paragraph 28, as amended, was adopted.*

Paragraph 29

10. Mr. NOLTE said that paragraph 29 reflected the doubts expressed by certain members regarding a right to humanitarian assistance. Some considered that there was no such right and others, including himself, considered that a right existed provided that it was not imposed by force. The two separate opinions were not clearly discernible in paragraph 29. He therefore proposed splitting the paragraph in two. Paragraph 29 and paragraph 29 *bis* would then read:

"29. In relation specifically to the right to humanitarian assistance, some members doubted its existence and urged the Special Rapporteur to proceed on the assumption that there was no such right. Such a right would be in conflict..." [the remainder of the paragraph would remain unchanged]

"29 *bis*. Some other members, while expressing the view that a right to humanitarian assistance should be recognized as being implicit in certain human rights as well as in international human rights and

international humanitarian law in general, nevertheless maintained that such a right could not be seen as implying a right to impose assistance on a State that did not want it."

11. Furthermore, paragraph 30 would begin with the words "Some members noted". The rest of the paragraph would remain unchanged.

*It was so decided.*

*Paragraph 29, as amended, and paragraph 29 bis were adopted.*

Paragraph 30

12. Mr. GAJA proposed, for logical reasons, splitting paragraph 30 into two paragraphs. New paragraph 30 would consist of the last two sentences of current paragraph 30, with the words "it being perceived as" being replaced with "considering", the word "construe" with "envisage" and the word "interpretation" with "approach". The beginning of current paragraph 30 would become paragraph 30 *bis*, with the words "to humanitarian assistance" being inserted after the word "right" in the first sentence. Again for logical reasons, current paragraph 33 should be inserted immediately after paragraph 30 *bis*.

*It was so decided.*

*Paragraph 30, as amended, was adopted.*

Paragraph 31

*Paragraph 31 was adopted.*

Paragraph 32

13. Ms. ARSANJANI (Secretary of the Commission) drew attention to a typographical error in the paragraph. "Chapters VI and VIII of the Charter" should read "Chapters VI and VII of the Charter of the United Nations".

14. Mr. PETRIČ proposed adding the words "to protect" after "responsibility" in the last sentence of the paragraph.

*Paragraph 32, as amended, was adopted.*

Paragraph 33

*Paragraph 33 was adopted.*

Paragraph 34

15. Mr. PERERA said that as one of the "other members" referred to at the beginning of the third sentence, he would like the position of those members to be reflected in greater detail. He therefore proposed inserting the following phrase after the words "a political and a moral concept": "the legal parameters of which were yet to be developed".

*Paragraph 34, as amended, was adopted.*

Paragraph 35

*Paragraph 35 was adopted.*

Paragraphs 36 and 37

*Paragraphs 36 and 37 were adopted.*

Paragraph 38

16. Ms. JACOBSSON proposed replacing the words “it was not necessary to” with “it was important not to”. She further proposed making the reference to the work done by the Red Cross and the Red Crescent more explicit by inserting “in the Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance adopted”<sup>315</sup> before “by the International Conference of the Red Cross and Red Crescent” and by adding a footnote concerning the guidelines in question at the end of the sentence.

17. The CHAIRPERSON said he took it that the members of the Commission approved those proposals and suggested, in order to respond more rationally to Ms. Jacobsson’s second concern, that the footnote to paragraph 38 should refer the reader to paragraph 11 and the footnote on the Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance.

*Paragraph 38, as amended, was adopted.*

Paragraph 39

18. Mr. NOLTE proposed inserting the words “in detail” after “avoid reproducing such rules” in order to clarify the last sentence.

*Paragraph 39, as amended, was adopted.*

Paragraphs 40 to 49

*Paragraphs 40 to 49 were adopted.*

*Section A and, as amended, Section B were adopted.*

*The whole of chapter IX of the Commission’s draft report, as amended, was adopted.*

**CHAPTER XI. The obligation to extradite or prosecute (aut dedere aut judicare) (A/CN.4/L.738 and Add.1)**

19. The CHAIRPERSON invited the members of the Commission to adopt chapter XI of the Commission’s draft report.

**A. Introduction (A/CN.4/L.738)**

**B. Consideration of the topic at the present session**

1. INTRODUCTION BY THE SPECIAL RAPPORTEUR OF HIS THIRD REPORT

Paragraphs 1 to 9

*Paragraphs 1 to 9 were adopted.*

*Sections A and B.1 contained in document A/CN.4/L.738 were adopted.*

<sup>315</sup> *Introduction to the Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance*, Geneva, International Federation of Red Cross and Red Crescent Societies, 2008, p. 8. Available at: [www.ifrc.org/](http://www.ifrc.org/) (see footnote 183 above).

2. SUMMARY OF THE DEBATE (A/CN.4/L.738/Add.1)

Paragraph 1

*Paragraph 1 was adopted.*

Paragraph 2

20. Mr. GAJA proposed replacing “Members abstained from commenting” with “Some members said that they abstained from commenting” in order to reflect more accurately what had actually occurred.

21. Ms. JACOBSSON proposed adding the following sentence: “Some other members indicated their wish to comment on the report next year.”

*Paragraph 2, as amended, was adopted.*

Paragraph 3

22. Mr. GAJA proposed replacing “needed to be further motivated” in the last sentence with “needed to be further elaborated”.

*Paragraph 3, as amended, was adopted.*

Paragraphs 4 to 6

*Paragraphs 4 to 6 were adopted.*

Paragraph 7

23. Mr. GAJA proposed inserting the words “to prosecute” after “obligation” in the second and third sentences. He further proposed inserting the words “that had been rejected” after “a request for extradition” in the second sentence and replacing “the obligation” with “that obligation” in the third sentence.

*Paragraph 7, as amended, was adopted.*

Paragraphs 8 to 10

*Paragraphs 8 to 10 were adopted.*

Paragraph 11

24. Mr. GALICKI (Special Rapporteur) proposed adding the following sentence at the end of the paragraph: “The Special Rapporteur agreed with a suggestion, supported by some members, that a working group could be established next year in order to ascertain the effective scope to which the obligation should be extended and to provide answers to the fundamental issues that arise from the topic.”

25. Following a discussion, in which Mr. CANDIOTI, Mr. NOLTE, Mr. McRAE, Mr. GAJA, Mr. WISNUMURTI, the CHAIRPERSON and Ms. ESCARAMEIA took part, and in which some members claimed that the establishment of the working group had been decided upon at the current session, while others asserted that its establishment had been deferred until the following session, the Special Rapporteur’s initial proposal was rejected in favour of a new paragraph 3 *bis*, which would read: “The Commission, at its 2988th meeting on 31 July 2008, decided to establish a working group on the topic under the chairpersonship of Mr. Alain Pellet.”

26. Mr. GALICKI (Special Rapporteur) reaffirmed his support for the establishment of a working group either at the current session or at the following session. However, he considered that any decision on its mandate should be deferred, since it could only be determined after he presented his report to the following session.

27. Mr. GAJA proposed amending paragraph 3 *bis* to read: “The Commission, at its 2988th meeting on 31 July 2008, decided that a working group on the topic would be established at the next session under the chairpersonship of Mr. Alain Pellet.”

28. Mr. BROWNLIE expressed support for Mr. Gaja’s proposal, given that the membership and mandate of the working group would be decided upon at the following session.

*Paragraph 3 bis, as amended, was adopted.*

*Section B.2, as amended, was adopted.*

*The whole of chapter XI of the Commission’s draft report, as amended, was adopted.*

**CHAPTER X. Immunity of State officials from foreign criminal jurisdiction (A/CN.4/L.737 and Add.1)**

29. The CHAIRPERSON invited the members of the Commission to adopt chapter X of the Commission’s draft report.

**A. Introduction (A/CN.4/L.737)**

Paragraph 1

*Paragraph 1 was adopted.*

*Section A was adopted.*

**B. Consideration of the topic at the present session (A/CN.4/L.737 and Add.1)**

**1. INTRODUCTION BY THE SPECIAL RAPPORTEUR OF HIS PRELIMINARY REPORT**

Paragraphs 2 to 4

*Paragraphs 2 to 4 were adopted.*

Paragraph 5

30. Mr. McRAE proposed amending the first sentence to read: “According to the Special Rapporteur, the very title of the topic gave guidance to determining its boundaries.”

*Paragraph 5, as amended, was adopted.*

Paragraph 6

*Paragraph 6 was adopted.*

Paragraph 7

31. Mr. GAJA proposed deleting the phrase “the concepts of immunity and criminal jurisdiction, while interrelated, should be clearly distinguished” in the first sentence and amalgamating the first two sentences.

*Paragraph 7, as amended, was adopted.*

Paragraph 8

*Paragraph 8 was adopted.*

Paragraph 9

32. Mr. KOLODKIN (Special Rapporteur) said that the word “concept” in the first sentence should be replaced with “notion”, since he had not used the word “concept” during the debate.

*Paragraph 9, as amended, was adopted.*

Paragraph 10

*Paragraph 10 was adopted.*

Paragraph 11

33. Mr. KOLODKIN (Special Rapporteur) said that the words “general concept” in the third sentence should be replaced with “notion”.

*Paragraph 11, as amended, was adopted.*

Paragraphs 12 and 13

*Paragraphs 12 and 13 were adopted.*

**2. SUMMARY OF THE DEBATE (A/CN.4/L.737/Add.1)**

Paragraphs 1 to 3

*Paragraphs 1 to 3 were adopted.*

Paragraph 4

34. Ms. JACOBSSON said that the first sentence, as currently worded, implied that the Special Rapporteur had almost been surprised to learn that the right to immunity was also of customary origin. That impression could be avoided by replacing “and not simply on international comity” with “and that this source of law was distinct from international comity”.

35. Mr. KOLODKIN (Special Rapporteur) said that he was unable to accept the proposal. The fact that international customary law was distinct from international comity was a truism. Although the text as it stood was also a truism, it better reflected the substance of the debate and should therefore be maintained.

36. Mr. NOLTE said that the problem did not stem from the idea underlying Ms. Jacobsson’s proposal but from the unduly general form in which it was expressed. To emphasize that the source of the rules governing immunity lay not only in international comity, and that the latter did not carry the same weight as rules of customary international law, the word “simply” in the first sentence could be replaced with “merely”.

37. The CHAIRPERSON said that, if he heard no objection, he would take it that the members of the Commission endorsed Mr. Nolte’s proposal.

*It was so decided.*

38. Mr. WAKO proposed adding the following sentence at the end of the paragraph: “In the view of some members, there was also room for progressive development of international law in this field.”

39. Mr. NOLTE said that, while he supported the proposal, he was unsure whether the progressive development of international law should be mentioned in the section of the chapter dealing with sources.

40. Mr. PETRIČ said that he fully supported Mr. Wako’s proposal. He thought that the question of progressive development should be addressed at the very beginning of the chapter.

41. Mr. SABOIA noted that the distinction between codification and progressive development was not so clear-cut. When rules were stated more explicitly, codification came close to progressive development. As both raised the question of sources of law, they should be dealt with in that section of the chapter.

42. Ms. ESCARAMEIA (Rapporteur) expressed support for Mr. Wako’s proposal and its inclusion in the “Sources” section of the chapter. She also concurred with the point made by Mr. Saboia. As consideration of the sources of law was a prerequisite for codification, it was appropriate to mention the question of progressive development at the outset, in the “Sources” section of the report.

43. Mr. HASSOUNA expressed support for Mr. Wako’s proposal and agreed that progressive development should be mentioned at the very beginning of chapter X. He thought that it should be inserted after the second sentence, which referred to codification.

44. Mr. NOLTE, quoting Mr. Brownlie, said that if one wished to engage in progressive development, one must know from where to jump. In the interests of clarity, a clear distinction must be made between the question of sources of law and that of the rule to be stated. The sentence proposed by Mr. Wako should therefore be included in the “General comments” section.

45. Mr. PERERA expressed support for Mr. Nolte’s proposal.

46. Mr. KOLODKIN (Special Rapporteur) said that the sentence proposed by Mr. Wako should be inserted at the end of paragraph 4 so as not to disrupt the sequence of thought.

47. Mr. GAJA proposed deleting the “Sources” heading to meet Mr. Nolte’s concerns.

48. Mr. McRAE said that he saw no reason why the sentence proposed by Mr. Wako should not be inserted at the end of the paragraph. He also had no objection to Mr. Gaja’s proposal to delete the “Sources” heading.

49. Ms. ESCARAMEIA (Rapporteur) said that she would prefer the structure of the report to be maintained since it was user-friendly. Progressive development was related to the question of sources of law and was therefore correctly placed in the paragraph under “Sources”.

If the members of the Commission had no objection, she thought that the sentence proposed by Mr. Wako should be inserted at the end of the paragraph in the interests of readability.

50. Mr. FOMBA said that he fully agreed with Ms. Escarameia. It was unnecessary to place undue emphasis on the distinction between sources of law and codification. Mr. Wako’s proposed sentence was not at all out of place in the “Sources” section.

51. Mr. NOLTE said that he was prepared to join the consensus.

52. The CHAIRPERSON said that, if he heard no objection, he would take it that the members of the Commission wished to adopt Mr. Wako’s proposal. He suggested that the Special Rapporteur and Mr. Wako should confer on the precise wording.

*It was so decided.*

*Paragraph 4 was adopted on that understanding.*

*The meeting rose at 1 p.m.*

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## 2996th MEETING

*Thursday, 7 August 2008, at 3.00 p.m.*

*Chairperson:* Mr. Edmundo VARGAS CARREÑO

*Present:* Mr. Brownlie, Mr. Cafilisch, Mr. Candioti, Mr. Comissário Afonso, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kolodkin, Mr. McRae, Mr. Nolte, Mr. Ojo, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Mr. Yamada.

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### Draft report of the Commission on the work of its sixtieth session (*continued*)

CHAPTER X. *Immunity of State officials from foreign criminal jurisdiction (concluded)* (A/CN.4/L.737 and Add.1)

B. *Consideration of the topic at the present session (concluded)* (A/CN.4/L.737 and Add.1)

2. SUMMARY OF THE DEBATE (*concluded*) (A/CN.4/L.737/Add.1)

Paragraph 4 (*concluded*)

1. The CHAIRPERSON suggested that in the light of consultations between Mr. Kolodkin and Mr. Wako, a new sentence should be added to the end of paragraph 4.

2. Mr. KOLODKIN (Special Rapporteur) proposed that the new sentence should read: “In the view of some members, there was also room for progressive development of international law in this field.”

*Paragraph 4, as amended, was adopted.*