Document:-
**A/CN.4/2996**

# Summary record of the 2996th meeting

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

Extract from the Yearbook of the International Law Commission:-
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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. Caflisch, 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.*

Paragraph 5

3. Mr. WAKO said that the word "rallied" in the second sentence gave the impression that the Special Rapporteur was under siege. He therefore proposed that the word "rallied" should be replaced by a more neutral term, such as "supported" or "agreed with".

4. On another matter, he noted that the report as currently drafted did not reflect what had been discussed in the debate on the question of the adoption by national courts of the principle of universal jurisdiction, a question that deserved to be given greater prominence. The reference to that issue in a single sentence at the end of the paragraph came across as almost an afterthought.

5. He therefore suggested that the last sentence should be incorporated into a new paragraph that would read:

> "Some members suggested that the Commission should consider the implications on immunity of the principle of universal jurisdiction in the light of the developments in the international systems and, in particular, the setting up of ad hoc international criminal tribunals and the establishment of the permanent International Criminal Court. Some members noted that the assertion by national courts of the principle of universal jurisdiction had led to misunderstandings, escalation of State tensions, accusations of double standards and given rise to perceptions of abuse on political or other grounds."

6. In addition, a footnote containing the recent decision on the Report of the Commission on the Abuse of the Principle of Universal Jurisdiction adopted by the Assembly of Heads of State and Government of the African Union at its eleventh ordinary session, held in Sharm El-Sheikh, Egypt, from 30 June to 1 July 2008[316] should be placed at the end of the new paragraph. That decision would have an impact on the implementation of the principle of universal jurisdiction and ought to be taken into account when the topic was considered at future sessions of the Commission.

7. Mr. PETRIČ said that the reference to the international courts cited by Mr. Wako in his proposed text was not really relevant to the principle of universal jurisdiction, as those courts dealt with cases in which international jurisdiction had been established as a form of *lex specialis*.

8. Ms. ESCARAMEIA (Rapporteur) said that she was inclined to agree with Mr. Wako that greater prominence should be given in the report to the question of universal jurisdiction, and she had no problem with his suggestion to add a new paragraph. However, she did have a problem with the fact that, in the debate, members who had spoken about the principle of universal jurisdiction had linked it not only to the development of international criminal courts but also to the development of the principle in national courts. She therefore suggested that Mr. Wako's proposal should be reformulated to indicate clearly the two positions that had been expressed by members.

9. Mr. OJO supported Mr. Wako's proposal and suggested that Mr. Wako and Ms. Escarameia should consult with a view to formulating a joint proposal.

10. Mr. VALENCIA-OSPINA said that he was perturbed by the fact that at the previous meeting the Special Rapporteur had changed the word "concept" to "notion" in some, although not all, instances. For the sake of consistency, he suggested that the title "Basic concepts" should be reworded to read "Basic notions".

11. Mr. KOLODKIN (Special Rapporteur) said that he had proposed changing the word "concept" to "notion" in those cases where the Commission was considering the definition of a term. As he understood it, when a precise definition was sought, the word "notion" ought to be used, whereas when a broader term was intended, the word "concept" should be used. Unless others disagreed, he would prefer to retain the current wording.

12. Mr. NOLTE said that he shared Mr. Kolodkin's understanding, surmising that the Special Rapporteur had probably wished to draw a distinction, well known in continental law, between the term "notion", which had a normative connotation, and the term "concept", which was used for analytical purposes at a higher level of abstraction. He wondered whether that conformed to the usual understanding of the terms in English.

13. Mr. BROWNLIE said that the term "notion" conveyed a certain element of provisionality and pragmatism, and was sometimes used to refer to an idea that one held but might or might not eventually adopt. He was not sure whether that was the distinction Mr. Kolodkin was trying to establish. The term "concept" was more definitive in nature. In his opinion, the term "basic notions" was somewhat awkward, since notions tended not to be basic. Unless there was a compelling reason for doing so, using the word "notion" instead of "concept" would create confusion.

14. Mr. KOLODKIN (Special Rapporteur) said that he was in favour of retaining the words "basic concepts".

15. Mr. WAKO said that, on the basis of consultations with Ms. Escarameia, he wished to propose a revised version of the text he had suggested earlier. The last sentence of paragraph 5 should be deleted and a new paragraph should be inserted, which would read:

> "Some members suggested that the Commission consider the implications on immunity of the principle of universal jurisdiction taking into account the developments in national legislation and national case law and in the light of the developments in the international system, in particular the establishment of the International Criminal Court. Some members noted that the assertion by national courts of the principle of universal jurisdiction has led to misunderstandings, escalation of State tensions, accusations of double standards and given rise to perceptions of abuse on political or other grounds."

He further proposed that the new paragraph should be accompanied by a footnote reading: "See, for

[316] Assembly of the African Union, eleventh ordinary session (see footnote 276 above).

example, the decision of the Assembly of Heads of State and Government of the African Union on the Report of the Commission on the Abuse of the Principle of Universal Jurisdiction (Assembly/AU/Dec.199(XI) of 1 July 2008)."

16. Mr. BROWNLIE said that, in the first line, "on immunity" should be revised to read "for immunity". In addition, the reference to double standards and abuse on political grounds at the end of the paragraph seemed tautological, since the idea of double standards was covered by the notion of abuse on political or other grounds.

17. Mr. PERERA asked if the words "State tensions" meant inter-State tensions.

18. Mr. NOLTE said that double standards in the context of universal jurisdiction meant the prosecution of certain people but not of others who equally deserved to be brought before a court. That was not political abuse but a violation of the principle of equality, whereas political abuse meant carrying out an action without having the right to do so.

19. Mr. WAKO agreed that the term "State tensions" should be corrected to "inter-State tensions". He could also see the logic of Mr. Nolte's argument, and he noted that it was Mr. Brownlie and Mr. Vasciannie who had referred to double standards during the debate.

20. Mr. BROWNLIE said that double standards constituted an abuse on political grounds, as when the leaders of one country were dealt with in a particular way while the leaders of another country were given different treatment for the same offence. In fact, it might be more effective to end the sentence at the words "double standards".

21. Mr. WAKO said that, having heard all the arguments, he would prefer to delete the reference to "double standards".

22. The CHAIRPERSON said that if he heard no objection, he would take it that the Commission wished to insert the text proposed by Mr. Wako as a new paragraph after paragraph 5.

*It was so decided.*

*Paragraph 5, as amended, was adopted.*

Paragraphs 6 to 9

*Paragraphs 6 to 9 were adopted.*

Paragraphs 10 and 11

*Paragraphs 10 and 11 were adopted.*

Paragraph 12

23. Mr. GAJA drew attention to the penultimate sentence and proposed that the phrase "for instance, because they may be considered on a special mission" should be placed at the end of it, after a comma, in order to reflect views he had expressed during the debate.

24. Mr. NOLTE objected, saying that as he understood it, the "other senior officials" referred to in that sentence were the minister of defence and the minister for international trade. What was at issue was the fact that they were outside the "so-called 'troika' ", and not the fact that they had been assigned a special mission. It might therefore be somewhat misleading to modify the sentence in the manner suggested by Mr. Gaja.

25. Mr. GAJA said that the last part of the paragraph reflected the views of members expressed during the discussion, including a proposal by some members not to add any other officials, such as ministers of defence or deputy ministers, to the list of those who enjoyed immunity *ratione personae* but who might nevertheless be considered to enjoy it in specific circumstances. It was at that point in the debate that he had tried to explain that one such circumstance was considering those other officials as being on special mission when abroad, and according them personal immunity solely for the purposes of their mission. Whether such immunity would be accorded on the basis of the Vienna Convention on Diplomatic Relations and the Convention on Special Missions, as had been suggested by the ICJ, or on the basis of general international law, remained to be seen. The point was simply that it was not necessary to consider such officials as generally enjoying personal immunity and including them in the same category as the "troika". That was precisely the point he wished to have reflected in the report.

26. Mr. KOLODKIN (Special Rapporteur) said that the sentence which Mr. Gaja was proposing to amend was the one that reflected Mr. Nolte's intervention on that issue and concerned only immunity *ratione personae*. Subject to Mr. Gaja's agreement, he suggested that the penultimate sentence should be retained as it currently stood and that Mr. Gaja should formulate an additional sentence that reflected his intervention on that issue during the debate.

27. Mr. BROWNLIE said that the word "contention" in the second sentence was somewhat dismissive and should be replaced by "finding". It was undignified to use such dismissive language in describing the work of other tribunals, especially those with which the Commission wished to maintain normal relations. He further suggested that the phrase "find grounds on" in the same sentence should be replaced by "have a firm basis in".

28. The CHAIRPERSON endorsed Mr. Brownlie's suggestion.

29. Mr. NOLTE said that, as he recalled the debate, most members had supported the view that the troika enjoyed immunity *ratione personae*. He therefore suggested that the word "Some" in the first sentence should be replaced by the word "Most".

30. Ms. JACOBSSON said that, in principle, she had nothing against that amendment if it was consistent with Commission practice. However, she wondered what criteria had traditionally been used in the Commission to determine when to use the phrase "some members" as opposed to "most members".

31. Mr. KOLODKIN (Special Rapporteur) said that, judging from the debate in the Commission on that question, he had had the same impression as Mr. Nolte. That impression was reflected in his concluding remarks, which had been summarized in paragraph 28.

32. Mr. PERERA suggested that a new sentence should be added after the end of the second sentence that would read: "Others, however, pointed to the pre-eminent role of the Minister for Foreign Affairs in the conduct of international relations and also his representative character as justification for the treatment of the Minister for Foreign Affairs on the same footing as a Head of State for purposes of according immunity."

33. Ms. ESCARAMEIA (Rapporteur) said that if detailed viewpoints were going to be included in the report, she would like for her position to be reflected as well. During the debate, she had argued that the Minister for Foreign Affairs did not have any representative character. Her primary inclination, though, was to leave the paragraph as it currently stood.

34. Mr. PERERA said that his suggestion was intended to ensure balance in the report, based on the fact that members, himself included, had discussed at some length the position and role of the Minister for Foreign Affairs, who was part of the so-called troika. In all fairness, that was an important point that must be reflected in the report. Moreover, the issue had also been discussed at considerable length in the majority judgment of the ICJ in the *Arrest Warrant* case and in the joint separate opinion relating to that case, as noted in paragraph 12.

35. Mr. NOLTE endorsed Mr. Perera's suggestion and pointed out that Ms. Escarameia's position was reflected in the second sentence. If she wished for it to be emphasized further, then perhaps she could propose an addition to the paragraph.

36. Ms. ESCARAMEIA (Rapporteur) said that she did not feel that her position had been reflected in the second sentence, which contained only a mild argument against the enjoyment of immunity by Ministers for Foreign Affairs. With the incorporation of Mr. Brownlie's amendment to the effect that such immunity "did not have firm basis in customary law", the sentence even gave the impression that there might be some justification for such immunity in customary law, albeit not a sufficiently strong one. That was definitely not what she thought. What was more, she could find no reference in the report to the dissenting opinion mentioned by Mr. Perera. If Mr. Perera wished to include his proposal, then it should also be stated that some members felt that the Minister for Foreign Affairs did not have a representative character and thus should not enjoy immunity *ratione personae*. That could be accomplished with the simple addition of one sentence.

37. Mr. SABOIA said that he supported Mr. Perera's viewpoint. He recalled that members had emphasized the special nature of the role of Ministers for Foreign Affairs as one of the three categories of officials who had the capacity to commit their States internationally without the need for special powers, as opposed to other officials who had to be granted plenipotentiary powers in order to take such action as signing a convention, for example.

38. Mr. SINGH endorsed Mr. Perera's proposal. If Ms. Escarameia wished to elaborate her views further in an additional sentence, that sentence should be added to the end of the second sentence, followed by Mr. Perera's proposed additional sentence.

39. Mr. PETRIČ supported the additional sentence proposed by Mr. Perera because it reflected the Commission's actual discussion. He agreed with Mr. Singh that there was no reason not to add a sentence that would reflect Ms. Escarameia's position. At the risk of reopening the discussion, he wished to emphasize that the representative character of the Minister for Foreign Affairs was quite different than the representative character of the Head of State.

40. Ms. ESCARAMEIA (Rapporteur) proposed that the phrase "as was explained in the dissenting opinions in the case" should be inserted at the end of the second sentence.

41. Mr. GAJA proposed that a sentence should be added before the last sentence of the paragraph. The new sentence would read "According to one view, certain State officials enjoy immunity *ratione personae* when exercising official functions abroad because they would have to be considered as being on a special mission."

*Paragraph 12, as amended by Mr. Brownlie, Ms. Escarameia and Mr. Gaja, was adopted.*

Paragraph 13

42. Mr. BROWNLIE proposed that the phrase "which was often covered under multilateral and bilateral agreements" should be amended to read "which was often the subject of multilateral and bilateral agreements".

43. Mr. GAJA expressed support for Mr. Brownlie's proposal. He proposed that the words "devote more careful analysis" should be replaced by "also analyse", since the question of immunity of military personnel deployed abroad in times of peace had not been analysed at all. He further proposed the deletion of the text placed between brackets: problems arising from the obligations of third States should be dealt with more fully at a later stage.

*Paragraph 13, as amended by Mr. Brownlie and Mr. Gaja, was adopted.*

Paragraph 14

44. Mr. HMOUD proposed the deletion of the word "finally" from the last sentence.

*Paragraph 14, as amended, was adopted.*

Paragraph 15

*Paragraph 15 was adopted.*

Paragraph 16

*Paragraph 16 was adopted.*

Paragraph 17

45. Ms. JACOBSSON said that the paragraph reflected only two different views held by members on the judgment in the *Arrest Warrant* case, yet there was a third, more neutral view that she herself held and had expressed during the debate, which she wished to be recorded. She therefore proposed that a sentence should be added to the end of the paragraph that would read: "Other members considered that the contents and the implications of the judgment merit further consideration by the Commission."

46. Mr. BROWNLIE drew attention to the phrase in the penultimate sentence which read "and that the Commission should not hesitate to depart from that precedent, if necessary as a matter of progressive development" and said that it was possible to depart from the precedent without following the course of progressive development. He would prefer the two elements to be presented as alternatives and therefore proposed that the phrase should be reworded to read "either to depart from that precedent or to pursue the matter as one of progressive development".

*Paragraph 17, as amended, was adopted.*

Paragraph 18

47. Mr. NOLTE drew attention to the first sentence and proposed that the adjective "possible" should be inserted before the phrase "exceptions to immunity" in order to align it with the title of the subsection and to make it clear that such exceptions should not be assumed to exist. He further proposed that the phrase "these exceptions" in the second sentence should read "such exceptions" and that the words "this exception" in the fourth sentence should be amended to read "such an exception".

48. Ms. ESCARAMEIA (Rapporteur) said that the first sentence reflected her position and possibly that of other members as well. She therefore proposed that the beginning of the sentence should be redrafted to make that quite clear. Furthermore, she would prefer that the adjective "possible" should be retained, since she had indeed been referring to possible exceptions to immunity.

49. Mr. BROWNLIE noted that the words "possible explanations to" should correctly read "possible explanations of".

50. Mr. NOLTE proposed that, in order to meet Ms. Escarameia's concern and to avoid any confusion, the article "the" before the words "possible exceptions to immunity" should be deleted.

51. Mr. KOLODKIN (Special Rapporteur) endorsed Mr. Nolte's proposal and proposed that the paragraph should begin with the words "Some members mentioned".

52. Mr. CANDIOTI questioned the appropriateness of the words "were mentioned" in the light of the amendment proposed by the Special Rapporteur.

53. The CHAIRPERSON said he would take it that the Commission was in favour of the general thrust of the amendments proposed, and suggested that the Secretary of the Commission should find a suitable formulation to take them all into account.

*Paragraph 18 was adopted on that understanding.*

Paragraph 19

54. Mr. GAJA said that, logically, paragraph 19 followed on from paragraph 20. He therefore proposed that the order of the two paragraphs should be inverted.

55. Ms. JACOBSSON endorsed Mr. Gaja's proposal. Furthermore, since the problem of maritime intrusion had also been raised during the debate, she proposed that the phrase "aerial intrusion" should be amended to read "aerial and maritime intrusion".

*Paragraph 19, as amended, was adopted.*

Paragraph 20

56. Mr. NOLTE said that the debate on possible exceptions to immunity had been one of the most extensive and interesting of the current session, but it had not been accurately reflected in a balanced fashion in the chapter of the report under consideration. The views of those who were in favour of a further or broader exception to immunity had been diligently and empathetically reflected, yet the views of those who had been somewhat sceptical had been described in a very summary fashion. He therefore proposed that paragraph 20 should be replaced by the following text:

> "Some other members maintained, on the contrary, that there were good reasons for the Commission to hesitate before recognizing possible new exceptions to immunity. In their opinion, the *Arrest Warrant* judgment reflected the current state of international law. In their opinion, developments after this judgment in international and national jurisprudence, as well as in national legislation, confirmed this state of affairs rather than called it into question. It could therefore not be said that the *Arrest Warrant* judgment went against a general trend. The absence of immunity before international courts did not speak in favour of a corresponding restriction of immunity before national courts, to the contrary. The *Prosecutor* v. *Tihomir Blaškić* judgement of the International Criminal Tribunal for the Former Yugoslavia was therefore not pertinent. In the opinion of those members, important legal principles, as well as policy reasons, spoke in favour of maintaining the state of international law, as it is expressed, for example, in the *Arrest Warrant* judgment. According to them, the principles of sovereign equality and of stability of international relations were not merely abstract considerations, but they reflected substantive legal values, such as the protection of weak States against discrimination by stronger States, the need to safeguard human rights, both of persons suspected of having committed a crime and of persons who could be affected by the possible disruption of inter-State relations, and finally, in extreme cases, even the need to respect the rules on the use of force. Those members maintained that, while the Commission should, as always, consider the possibility of making proposals *de lege ferenda*, it should do so on the basis of a careful and full analysis of the

*lex lata* and of the policy reasons which underpin this *lex lata*. It was only on this basis that a balancing of interests between the principles of immunity and the fight against impunity could be fruitfully undertaken. In the opinion of those members, the *jus cogens* character of certain international crimes did not necessarily affect the principle of immunity of State officials before national criminal jurisdictions."

57. Mr. GAJA expressed concern about the phrase in the first sentence of the text proposed by Mr. Nolte, "before recognizing possible new exceptions to immunity", which implied that some exceptions had already been identified. He proposed that the phrase should be replaced by the words "before restricting immunity".

58. Ms. ESCARAMEIA (Rapporteur) said that she shared Mr. Gaja's concern and found his proposal acceptable, although another solution would be simply to delete the word "new".

59. Mr. NOLTE said that he had qualified exceptions with the adjective "new" in order to distinguish them from "old" exceptions such as the *acta jure gestionis*. Nevertheless, he could agree to Mr. Gaja's proposal.

60. Mr. McRAE said that since paragraphs 19 and 20 were to be inverted, the phrase "on the contrary" in the first sentence of paragraph 20 no longer seemed necessary and should be deleted. He also proposed the deletion of the fourth sentence of Mr. Nolte's text, which seemed to be a repetition of the third sentence.

61. Mr. NOLTE said that even if paragraphs 19 and 20 were inverted, they still reflected different positions; thus the words "on the contrary" should be retained. As to the fourth sentence, while both Mr. Pellet and Mr. Dugard had clearly stated that the *Arrest Warrant* case went against the general trend, he had responded forcefully that it did not do so, arguing that another trend might exist or that the judgment reflected a trend that had been misinterpreted. In his view, then, the sentence was not superfluous. How the Commission evaluated developments subsequent to the judgment was crucial to the debate on the topic, and he believed that the Special Rapporteur had also made that point in his concluding remarks.

62. Ms. ESCARAMEIA (Rapporteur) proposed that the second and third sentences of the text proposed by Mr. Nolte should be merged by deleting the phrase "In their opinion" from the beginning of the third sentence and replacing it with the word "and". She agreed with Mr. McRae that there was some repetition in the third and fourth sentences, although she also understood Mr. Nolte's concern.

63. Nevertheless, she took issue with Mr. Nolte's statement that the judgement in the *Prosecutor* v. *Blaškić* case was not pertinent. The preceding sentence stated that "[t]he absence of immunity before international courts did not speak in favour of a corresponding restriction of immunity before national courts, to the contrary". While it was true that the fact that a person enjoyed immunity before an international court did not automatically mean that he or she was entitled to immunity before national courts, the *Prosecutor* v. *Blaškić* judgement, which had been mentioned in passing but had not been quoted in full, indicated that immunity should not apply before either national or international courts for certain crimes. The *Prosecutor* v. *Blaškić* judgement therefore said the opposite of what had been stated in the previous sentence and was thus pertinent. Accordingly, she therefore suggested that the quotation from paragraph 41 of the Appeals Chamber's judgement of 18 July 1997 in *Prosecutor* v. *Blaškić*, which she had read out in the plenary debate, should be included in full in chapter X of the Commission's report.

64. Mr. NOLTE said that the position of the Appeals Chamber of the International Tribunal for the Former Yugoslavia in the *Prosecutor* v. *Blaškić* case was covered adequately in paragraph 17. Moreover, he disagreed with Ms. Escarameia as to the pertinence of the judgement in that case. That judgement had concerned immunity in a case entailing cooperation between national courts and an international court. The position regarding a person's immunity before a national court might therefore differ depending on whether an international court was involved. If one held that in the *Prosecutor* v. *Blaškić* case the Tribunal had made a general statement about the international law of immunity in situations where international courts were not concerned, that statement would have been an *obiter dictum* and thus would not constitute a very strong argument in the context at hand. He therefore deduced from the judgement in the *Prosecutor* v. *Blaškić* case that the lack of immunity before international courts had no bearing on immunity before national courts.

65. Mr. GAJA said that the phrase "on the contrary" would make sense only if paragraph 19 was moved to the end of the section.

66. Mr. WAKO said that the phrase "on the contrary" would not be needed if paragraph 19 was moved to the end of the section. He supported Mr. Nolte's proposal for a modified paragraph 20, subject to the minor amendments already agreed. The sentence "In their opinion, the *Arrest Warrant* judgment reflected the current state of international law" should be retained in any event. The report itself did tilt in favour of one point of view expressed in the Commission, and the amended text would restore a balance by reflecting that there were two possible interpretations of the judgement in the *Prosecutor* v. *Blaškić* case.

67. The quotation mentioned by Ms. Escarameia could be placed in a footnote, as she had proposed. However, that did not mean that no reference should be made to those two interpretations in paragraph 20, because opinions were divided on the question whether the removal of immunity at the international level before the International Tribunal for the Former Yugoslavia had an impact on immunity before national courts.

68. Ms. ESCARAMEIA (Rapporteur) suggested that, as the paragraph proposed by Mr. Nolte was rather long, it would be better to split it in two, with the second paragraph starting with the words "Those members maintained that …" and the word "Those" amended to read "These".

69. Mr. NOLTE, supported by Mr. BROWNLIE, said that it appeared that a consensus had been reached on the amended version of the replacement for paragraph 20.

*Paragraph 20, as amended, was adopted.*

*The order of paragraphs 19 and 20 was inverted.*

3. Special Rapporteur's concluding remarks (A/CN.4/L.737/Add.1)

Paragraphs 21 to 24

*Paragraphs 21 to 24 were adopted.*

Paragraph 25

70. Mr. KOLODKIN (Special Rapporteur) said that the end of the paragraph should read "he intended to consider the issue of international criminal jurisdiction when dealing with possible exceptions to immunity".

*Paragraph 25, as amended, was adopted.*

Paragraphs 26 and 27

*Paragraphs 26 and 27 were adopted.*

Paragraph 28

71. Mr. KOLODKIN (Special Rapporteur) said that the phrase "the so-called 'troika' ", which appeared in brackets, should be deleted.

*Paragraph 28, as amended, was adopted.*

Paragraphs 29 and 30

*Paragraphs 29 and 30 were adopted.*

Paragraph 31

72. Mr. KOLODKIN (Special Rapporteur) said that the phrase "in the territory of a foreign State" at the end of the second sentence should read "in the territory of a State exercising jurisdiction".

*Paragraph 31, as amended, was adopted.*

Paragraph 32

73. Mr. NOLTE said that the word "totally" should be deleted before the word "correct".

74. Mr. BROWNLIE suggested that the phrase in question should read "was both a correct and also a landmark decision".

*Paragraph 32, 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 I. *Introduction* (A/CN.4/L.728)**

Paragraph 1

*Paragraph 1 was adopted.*

**A. Membership**

Paragraph 2

*Paragraph 2 was adopted.*

**B. Officers and the Enlarged Bureau**

Paragraphs 3 to 5

*Paragraphs 3 to 5 were adopted.*

**C. Drafting Committee**

Paragraphs 6 and 7

*Paragraphs 6 and 7 were adopted.*

**D. Working Groups**

Paragraph 8

75. Mr. VALENCIA-OSPINA recalled that the Commission had decided to include in chapter XI, on the obligation to extradite or prosecute (*aut dedere aut judicare*), a short reference to the establishment at the current session of a working group whose membership and mandate would be determined at the sixty-first session. Paragraph 8 of chapter I, which listed the Commission's working groups, should reflect that fact.

76. Mr. GAJA pointed out that, according to the sentence that had been included in chapter XI, the working group was to be established at the next session and thus did not yet exist.

77. Mr. VALENCIA-OSPINA said that certain decisions taken at the current session would become operational at the next. Since the decision had actually been adopted at the current session, that fact should be reflected in paragraph 8, even though the working group would be convened only at the next session.

78. The CHAIRPERSON recalled that the working group had been established on 31 July 2008 by a decision taken in plenary. It was true, however, that the group's mandate and membership were to be determined at the sixty-first session.

79. Mr. GALICKI said that in chapter I, working groups were listed together with their membership. The inclusion of the title of the newly established working group by itself without listing of its membership would look strange.

80. Ms. ARSANJANI (Secretary to the Commission) said that open-ended working groups, which by definition had no members, had in the past been listed in the relevant chapter of the Commission's report. There was also justification, however, for not including a reference to the new working group in chapter I, and instead leaving the reference in the substantive chapter alone.

81. Mr. BROWNLIE said that the decision taken had been to establish the working group at the next session, and its membership and mandate had not yet been determined. It would therefore be premature to list it in that part of the report.

82. Mr. VALENCIA-OSPINA, suppported by Ms. ESCARAMEIA, pointed out that chapter I did not specify a mandate for any of the working groups listed and, as the Secretary had noted, open-ended working groups which had no membership had in the past been included in such lists.

83. The CHAIRPERSON suggested that, in view of the lack of consensus, the Commission should proceed to vote on whether to include a reference to the new working group in paragraph 8.

*It was so decided.*

*The Chairperson's suggestion was adopted by 11 votes to 6, with 4 abstentions.*

*Paragraph 8, as amended, was adopted.*

Paragraph 9

*Paragraph 9 was adopted.*

**E. Secretariat**

Paragraph 10

*Paragraph 10 was adopted.*

**F. Agenda**

Paragraph 11

*Paragraph 11 was adopted.*

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

**Chapter II. *Summary of the work of the Commission at its sixtieth session* (A/CN.4/L.729)**

84. Mr. GAJA said that, insofar as the form and content of the draft report as a whole were concerned, the Rapporteur was to be commended for her efforts in streamlining the material, introducing clarity and following the same pattern for all topics. With specific reference to chapter II, however, he suggested that the information with regard to each topic should be presented in chronological order to make it easier to follow.

Paragraph 1

85. In response to a question by Mr. SABOIA, the CHAIRPERSON said that a portion of the text had been bracketed pending the adoption of a decision by the Commission; now that a decision had been taken, the brackets could be removed. In response to a comment by Mr. GAJA, he said that the text would be aligned with the relevant text in chapter IV.

*With those clarifications, paragraph 1 was adopted.*

Paragraphs 2 to 14

*Paragraphs 2 to 14 were adopted.*

*Chapter II of the report, as a whole, was adopted.*

**Chapter III. *Specific issues on which comments would be of particular interest to the Commission* (A/CN.4/L.730)**

**A. Reservations to treaties**

Paragraphs 1 and 2

86. Ms. ESCARAMEIA (Rapporteur) thanked Mr. Gaja for his general comments on the draft report and said that a particular effort to achieve clarity had been made in the drafting of chapter III. As Mr. Candioti had often pointed out in the past, States should be given clear explanations as to why the Commission wished to receive certain information from them.

87. She wished to announce a number of revisions to paragraphs 1 and 2, on reservations to treaties that had been agreed with the Special Rapporteur for that topic. In paragraph 1, the words "and the different opinions of members of the Commission" should be inserted between "to interpretative declarations" and "the Commission would be", and the words "taking into account their concrete practice" should be appended after the words "the questions below". In paragraph 2, the words "Taking into account that next year's report will deal, *inter alia*, with consequences of interpretative declarations" should be inserted at the beginning of the question.

*Paragraphs 1 and 2, as orally revised, were adopted.*

Paragraph 3

88. Mr. NOLTE suggested that a sentence be added requesting States to supply examples from their practice in their answers to the questions. As currently worded, the questions invited somewhat abstract answers. The phrase "Specific examples would be very welcome", taken from paragraph 1 (*b*), might serve that purpose, and he suggested that the phrase should be inserted at the end of paragraph 3.

89. Ms. ESCARAMEIA (Rapporteur) strongly endorsed that proposal.

90. Mr. HASSOUNA endorsed the proposal but suggested the replacement of the words "very welcome" by "appreciated".

*Paragraph 3, as amended by Mr. Nolte and Mr. Hassouna, was adopted.*

**B. Responsibility of international organizations**

Paragraph 4

91. Ms. ESCARAMEIA (Rapporteur) proposed that each of the two sentences comprising the paragraph should constitute a separate paragraph.

*It was so decided.*

*Paragraph 4, as orally revised, was adopted.*

**C. Protection of persons in the event of disasters**

Paragraph 5

*Paragraph 5 was adopted.*

Paragraph 6

92. Mr. GAJA said that he had no objection to the contents but thought the paragraph seemed out of place, since it did not ask for views or information on issues of specific interest to the Commission.

93. Mr. VALENCIA-OSPINA (Special Rapporteur) said that the paragraph referred to his intention to solicit replies from the United Nations and IFRC to the following question, which he proposed should be included in paragraph 6: "How has the United Nations system institutionalized roles and responsibilities at the global and country levels with regard to assistance to affected populations and States in the event of disasters, in the disaster response phase but also in the pre- and post-disaster phases, and how does it relate in each of these phases with actors such as States, other international organizations, the Red Cross Movement, NGOs, specialized national response teams, national disaster management authorities and other relevant actors?".

94. The question had been drafted in response to the comments by members of the Commission concerning the need for clear information as to how the main non-State actors went about providing assistance in the event of disaster. He had consulted with OCHA and IFRC, and both had expressed readiness to provide answers to that question.

95. Following a procedural discussion in which Mr. GAJA, Mr. NOLTE and Ms. ESCARAMEIA (Rapporteur) took part, Mr. McRAE proposed that the text read out by the Special Rapporteur should be substituted for the current text of paragraph 6.

*Paragraph 6, as amended, was adopted.*

*Chapter III as a whole, as amended, was adopted.*

*The meeting rose at 5.55 p.m.*

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## 2997th MEETING

*Friday, 8 August 2008, at 10.10 a.m.*

*Chairperson:* Mr. Edmundo VARGAS CARREÑO

*Present*: Mr. Brownlie, Mr. Caflisch, 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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### Filling of casual vacancies in the Commission (A/CN.4/602 and Add.1)

1. The CHAIRPERSON announced that the Commission was required to fill the seat left vacant by the resignation of Mr. Ian Brownlie. The candidate's curriculum vitae had been communicated to the members. The election would take place, as was customary, in a private meeting.

*The meeting was suspended at 10.15 a.m. and resumed at 10.30 a.m.*

2. The CHAIRPERSON announced that the Commission had elected Sir Michael Wood to fill the seat vacated by Mr. Brownlie.

3. Mr. YAMADA, while welcoming the designation of a successor to Mr. Brownlie, expressed disagreement with the election procedure. Unlike elections of Bureau members, special rapporteurs or chairs of working groups, which were held in secret and in private as strictly internal matters and the results of which were announced at a public meeting without disclosure of the details of the votes cast, the election of members of the Commission, which was not an internal matter, was held at a public meeting of the General Assembly. As eligible candidates were nominated by Member States, in accordance with article 3 of the Statute of the Commission, details of the votes cast were disclosed in accordance with the principles of fairness and transparency. In the case of casual vacancies, the Commission was mandated by its Statute to fill the vacancy itself. In doing so, it had a duty to demonstrate the same transparency, but at previous elections casual vacancies had sometimes been filled by acclamation or by recognizing a candidate nominated by a member, or else the result of the vote had not been announced at a public meeting. Although he bore his share of responsibility in some of those cases, he hoped that the Commission would reconsider its practice in future elections.

4. Ms. ESCARAMEIA expressed strong support for Mr. Yamada's statement. She wished to place on record that she had not taken part in the election because she had serious doubts about the legality of the procedure followed. She hoped that in future the Commission would apply rule 140 of the rules of procedure of the General Assembly in such circumstances.

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

**Chapter XII. *Other decisions and conclusions of the Commission* (A/CN.4/741)**

**A. Programme, procedures and working methods of the Commission and its documentation**

5. The CHAIRPERSON invited the members of the Commission to adopt paragraphs 1 to 3 (which had already been adopted (2988th meeting, paras. 16–30) in the form of the report of the Planning Group (A/CN.4/L.742)).

*Paragraphs 1 to 3 were adopted.*

Paragraph 4

*Paragraph 4 was adopted.*

Paragraph 5

6. Mr. BROWNLIE said that it was customary to refer to "the Chatham House rules" rather than "the Chatham House rule".

*Paragraph 5, as amended, was adopted.*