

Document:-  
**A/CN.4/3126**

**Summary record of the 3126th meeting**

Topic:  
**<multiple topics>**

Extract from the Yearbook of the International Law Commission:-  
**2011, vol. I**

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(a) *Introduction* (concluded) (A/CN.4/L.783/Add.8)

40. The CHAIRPERSON drew attention to document A/CN.4/L.783/Add.8, recalling that the adoption of paragraph (1) had been deferred pending the completion of work on the other parts of chapter IV. All those texts having now been adopted, he would take it that the Commission wished to adopt paragraph (1) of document A/CN.4/L.783/Add.8.

Paragraph (1) (concluded)

*Paragraph (1) was adopted.*

*Section F of chapter IV, as amended, was adopted.*

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

41. Mr. PELLET (Special Rapporteur) said that he wished to thank all members of the Commission for their spirit of cooperation. In particular, he thanked the members of the Working Group on reservations to treaties, who had helped him to complete his work on the Guide to Practice, and the Chairperson, for his able conduct of the proceedings. He also thanked his assistants and members of the Secretariat for their invaluable contributions.

*The meeting rose at 12.55 p.m.*

### 3126th MEETING

*Thursday, 11 August 2011, at 3 p.m.*

*Chairperson:* Mr. Maurice KAMTO

*Present:* Mr. Caffisch, Mr. Candiotti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escobar Hernández, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hmoud, Mr. Huang, Ms. Jacobsson, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

#### **Expulsion of aliens (concluded)\* (A/CN.4/638, sect. B, A/CN.4/642)**

[Agenda item 5]

#### REPORT OF THE DRAFTING COMMITTEE

1. The CHAIRPERSON invited the Chairperson of the Drafting Committee to introduce the progress report of the Committee concerning the topic “Expulsion of aliens” before the Commission adopted chapter VIII of its draft report.

2. Mr. MELESCANU (Chairperson of the Drafting Committee) said that during the current session, the Drafting Committee had held 12 meetings, during which it

had considered six draft articles referred to it during the second part of the sixty-second session of the Commission following the debate on the Special Rapporteur’s sixth report,<sup>459</sup> seven draft articles referred to it during the first part of the current session following the debate on the second addendum to the Special Rapporteur’s sixth report<sup>460</sup> and a draft article on “Expulsion in connection with extradition”, as revised by the Special Rapporteur during the sixty-second session,<sup>461</sup> which had also been referred to the Drafting Committee at the current session. Moreover, the Special Rapporteur had submitted to the Drafting Committee, in the light of the plenary debate, a number of suggestions with a view to modifying the text of some of the draft articles referred to the Committee during the current session, and he had also proposed an additional draft article on the suspensive effect of an appeal against an expulsion decision. The Commission would recall that, at the current session, it had also referred to the Drafting Committee the restructured summary of the draft articles contained in the Special Rapporteur’s seventh report (A/CN.4/642).

3. The work undertaken by the Drafting Committee on those various draft articles had been very productive. The Drafting Committee had been able to provisionally adopt the following 15 draft articles: “Prohibition of disguised expulsion”, “Grounds for expulsion”, “Detention conditions of aliens subject to expulsion”, “Requirement for conformity with the law”, “Procedural rights of aliens facing expulsion” (which provided a single list of procedural rights applicable both to aliens lawfully present and to aliens unlawfully present in the territory of the expelling State), “Expulsion in connection with extradition”, “Return to the receiving State of the alien being expelled”, “State of destination of expelled aliens”, “Protecting the human rights of aliens subject to expulsion in the transit State”, “Protecting the property of aliens facing expulsion”, “Right of return to the expelling State”, “Responsibility of States in cases of unlawful expulsion”, “Diplomatic protection”, “Procedures for individual recourse” and “Suspensive effect of an appeal against an expulsion decision”.

4. The Drafting Committee had also considered the restructuring and renumbering of the draft articles on the basis of the general framework provided in the last chapter of the Special Rapporteur’s seventh report, which had been considered at the current session. However, due to lack of time, the Drafting Committee had not been able to make a final determination on certain issues that were still pending. He was confident, however, that the Drafting Committee would be in a position to complete the remaining work and finalize the text so that it could be submitted to the Commission for adoption on first reading at the 2012 session. An introduction of all the draft articles would be provided on that occasion.

<sup>459</sup> *Yearbook ... 2010*, vol. II (Part One), document A/CN.4/625 and Add.1–2.

<sup>460</sup> At its sixty-second session, the Commission began the consideration of chapters I to IV, section C, of the sixth report of the Special Rapporteur, and continued at the present session with chapters IV, section D, to VIII, contained in the second addendum to the sixth report (see the summary records of the 3091st to 3094th meetings above).

<sup>461</sup> *Yearbook ... 2010*, vol. II (Part Two), p. 165, para. 176.

\* Resumed from the 3098th meeting.

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

### CHAPTER VIII. *Expulsion of aliens* (A/CN.4/L.787)

5. The CHAIRPERSON invited the Commission to begin its consideration of chapter VIII of its draft report, on expulsion of aliens, contained in document A/CN.4/L.787.

#### A. Introduction

Paragraphs 1 to 7

*Paragraphs 1 to 7 were adopted.*

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

Paragraphs 8 to 10

*Paragraphs 8 to 10 were adopted.*

##### 1. INTRODUCTION BY THE SPECIAL RAPporteur OF THE REMAINING PORTION OF HIS SIXTH REPORT AND OF HIS SEVENTH REPORT

Paragraphs 11 to 24

*Paragraphs 11 to 24 were adopted.*

##### 2. SUMMARY OF THE DEBATE

###### (a) General remarks

Paragraphs 25 to 29

*Paragraphs 25 to 29 were adopted.*

###### (b) Comments on the draft articles

Paragraphs 30 to 48

*Paragraphs 30 to 48 were adopted.*

###### (c) The question of appeals against an expulsion decision

Paragraphs 49 to 53

*Paragraphs 49 to 53 were adopted.*

##### 3. SPECIAL RAPporteur'S CONCLUDING REMARKS

Paragraphs 54 to 59

*Paragraphs 54 to 59 were adopted.*

6. The CHAIRPERSON said that, following consultations, it had been decided to insert, after paragraph 10 of chapter VIII, a paragraph 10 *bis*, which read:

“At its 3126th meeting, the Commission took note of an interim report by the Chairperson of the Drafting Committee informing the Commission of the progress of work on the set of draft articles on the expulsion of aliens, which were being finalized with a view to being submitted to the Commission at its sixty-fourth session for adoption on first reading.”

*Paragraph 10 bis was adopted.*

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

### CHAPTER X. *The obligation to extradite or prosecute* (aut dedere aut judicare) (A/CN.4/L.789)

7. The CHAIRPERSON invited the Commission to begin its consideration of chapter X of its draft report, on the obligation to extradite or prosecute (*aut dedere aut judicare*), contained in document A/CN.4/L.789.

#### A. Introduction

Paragraphs 1 to 3

*Paragraphs 1 to 3 were adopted.*

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

##### 1. INTRODUCTION OF THE FOURTH REPORT BY THE SPECIAL RAPporteur

Paragraphs 5 to 16

*Paragraphs 5 to 16 were adopted.*

##### 2. SUMMARY OF THE DEBATE

###### (a) General comments

Paragraphs 17 and 18

*Paragraphs 17 and 18 were adopted.*

###### (b) Draft article 2: Duty to cooperate

Paragraphs 19 to 26

*Paragraphs 19 to 26 were adopted.*

###### (c) Draft article 3: Treaty as a source of the obligation to extradite or prosecute

Paragraphs 27 to 30

*Paragraphs 27 to 30 were adopted.*

###### (d) Draft article 4: International custom as a source of the obligation aut dedere aut judicare

Paragraphs 31 to 37

*Paragraphs 31 to 37 were adopted.*

###### (e) Future work

Paragraph 38

8. Mr. NOLTE said that the first sentence combined two issues which, if he recalled correctly, had been separate, namely suspending or terminating consideration of the topic and expanding the scope of the topic to include universal jurisdiction.

9. Mr. GALICKI (Special Rapporteur) suggested that he could recast the beginning of the paragraph in consultation with Mr. Nolte, whose comment was well founded; they could then submit a revised text to the Commission.

*It was so decided.*

##### 3. CONCLUDING REMARKS BY THE SPECIAL RAPporteur

Paragraphs 39 to 43

*Paragraphs 39 to 43 were adopted.*

*Chapter X of the report of the Commission, contained in document A/CN.4/L.789, was adopted as a whole, with the exception of paragraph 38, to which the Commission would return.*

**CHAPTER VII. Immunity of State officials from foreign criminal jurisdiction (A/CN.4/L.786 and Add.1)**

10. The CHAIRPERSON invited the Commission to begin its consideration of chapter VII of its report, on immunity of State officials from foreign criminal jurisdiction, contained in documents A/CN.4/L.786 and Add.1.

**A. Introduction (A/CN.4/L.786)**

Paragraphs 1 and 2

*Paragraphs 1 and 2 were adopted.*

**B. Consideration of the topic at the present session (A/CN.4/L.786)**

Paragraphs 3 and 4

*Paragraphs 3 and 4 were adopted.*

1. INTRODUCTION BY THE SPECIAL RAPPORTEUR OF HIS SECOND REPORT

Paragraphs 5 to 14

*Paragraphs 5 to 14 were adopted.*

2. SUMMARY OF THE DEBATE

(a) *General comments*

Paragraphs 15 to 19

*Paragraphs 15 to 19 were adopted.*

(b) *The question of possible exceptions to immunity*

Paragraphs 20 to 29

*Paragraphs 20 to 29 were adopted.*

(c) *Scope of immunity*

Paragraphs 30 to 33

*Paragraphs 30 to 33 were adopted.*

(d) *Other comments*

Paragraphs 34 to 36

*Paragraphs 34 to 36 were adopted.*

3. INTRODUCTION BY THE SPECIAL RAPPORTEUR OF HIS THIRD REPORT (A/CN.4/L.786/Add.1)

Paragraphs 1 to 15

*Paragraphs 1 to 15 were adopted.*

4. SUMMARY OF THE DEBATE

(a) *General comments*

Paragraphs 16 to 18

*Paragraphs 16 to 18 were adopted.*

Paragraph 19

11. Mr. NOLTE, stressing the need to ensure that the debate was correctly reflected, suggested to end the second sentence after the words “in favour of accountability” and then to start the new third sentence with “Some others

preferred a balance”. He also pointed out that the words at the beginning of the current third sentence (“On the contrary”) incorrectly suggested that what followed was in contrast to what was in the previous sentence, and he therefore suggested the following reformulation: “Some members noted that the Commission had to always balance different legitimate considerations and not let itself be disproportionately swayed by any one of them.” The phrase “no cause to be concerned about risking its reputation since it was part of its functioning” should be deleted, and the idea of such a risk, to which Mr. Dugard had referred, could be introduced earlier.

12. Following a discussion in which Mr. NOLTE, Mr. McRAE and Mr. VASCIANNIE took part, the CHAIRPERSON suggested that paragraph 19 be left in abeyance until an agreed revised formulation was proposed.

*Paragraph 19 was left in abeyance.*

(b) *Timing*

Paragraph 20

*Paragraph 20 was adopted.*

(c) *Invocation of immunity*

Paragraphs 21 to 32

*Paragraphs 21 to 32 were adopted.*

(d) *Waiver of immunity*

Paragraphs 33 to 39

*Paragraphs 33 to 39 were adopted.*

(e) *Relationship between invocation of immunity and the responsibility of that State for an internationally wrongful act*

Paragraphs 40 to 42

*Paragraphs 40 to 42 were adopted.*

5. CONCLUDING REMARKS OF THE SPECIAL RAPPORTEUR

Paragraphs 43 to 60

*Paragraphs 43 to 60 were adopted.*

**CHAPTER XII. The most-favoured-nation clause (A/CN.4/L.791)**

13. The CHAIRPERSON invited the Commission to begin its consideration of chapter XII of its report, on the most-favoured-nation clause, contained in document A/CN.4/L.791.

**A. Introduction**

Paragraphs 1 and 2

*Paragraphs 1 and 2 were adopted.*

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

Paragraphs 3 and 4

*Paragraphs 3 and 4 were adopted.*

## 1. DISCUSSIONS OF THE STUDY GROUP

Paragraphs 5 to 12

*Paragraphs 5 to 12 were adopted.*

Paragraph 13

14. Mr. McRAE said that the end of the first sentence was not complete, and he suggested amending it to read: “a difference between the qualifying conditions for access to the substantive rights and the substantive rights themselves and the qualifying conditions for access to the jurisdictional means and the exercise of jurisdiction itself”.

*Paragraph 13, as amended, was adopted.*

Paragraph 14

*Paragraph 14 was adopted.*

Paragraph 15

15. Mr. McRAE said that the third sentence was unclear and should be deleted.

*It was so decided.*

*Paragraph 15, as amended, was adopted.*

## 2. FUTURE PROGRAMME OF WORK

Paragraphs 17 and 18

*Paragraphs 17 and 18 were adopted.*

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

**CHAPTER XI. Treaties over time (A/CN.4/L.790 and Add.1)**

16. The CHAIRPERSON invited the Commission to begin its consideration of chapter XI of its report, on treaties over time, contained in document A/CN.4/L.790 and Add.1.

**A. Introduction (A/CN.4/L.790)**

Paragraph 1

*Paragraph 1 was adopted.*

**B. Consideration of the topic at the present session (A/CN.4/L.790)**

Paragraphs 2 and 3

*Paragraphs 2 and 3 were adopted.*

## 1. DISCUSSIONS OF THE STUDY GROUP

Paragraphs 4 to 7

*Paragraphs 4 to 7 were adopted.*

Paragraph 8

17. Mr. HMOUD suggested the insertion, in the last sentence, of the word “his” before “nine preliminary conclusions”.

*It was so decided.*

*Paragraph 8, as amended, was adopted.*

Paragraph 9

18. Mr. HMOUD proposed that the last sentence be amended to read: “The Study Group agreed that those preliminary conclusions by the Chairperson would have to be revisited and expanded ...”.

*It was so decided.*

*Paragraph 9, as amended, was adopted.*

## 2. FUTURE WORK AND REQUEST FOR INFORMATION

Paragraphs 10 and 11

*Paragraphs 10 and 11 were adopted.*

**CHAPTER IX. Protection of persons in the event of disasters (concluded)\* (A/CN.4/L.788/Add.1–2)****C. Text of the draft articles on protection of persons in the event of disasters provisionally adopted by the Commission at its sixty-third session (concluded)\***

## 2. TEXT OF THE DRAFT ARTICLES AND COMMENTARIES THERETO (concluded)\*

19. The CHAIRPERSON invited the Commission to return to the commentaries to draft article 10 (Duty of the affected State to seek assistance) and draft article 11 (Consent of the affected State to external assistance), contained in document A/CN.4/L.788/Add.2.

*Article 10. Duty of the affected State to seek assistance (concluded)\**

*Commentary (concluded)\**

*Paragraph (1) (concluded)\**

20. Mr. VASCIANNIE suggested the insertion of the following sentence at the end of the paragraph: “The existence of the duty to seek assistance, as set out in draft article 10, was supported by a majority of the members of the Commission but opposed by others.”

*It was so decided.*

*Paragraph (1), as amended, was adopted.*

Paragraph (2 bis)

21. Mr. VASCIANNIE proposed the insertion of a new paragraph (2 bis), which would read:

“It is to be noted that in the debate within the Commission concerning the formulation of draft article 10, some members of the Commission opposed the idea that affected States are under, or should be placed under, a legal duty to seek external assistance in cases of disaster. This opposition was premised on the view that, as it currently stands, international law does not place any such binding duty upon affected States. The members of the Commission who shared this perspective indicated that draft article 10 should be worded in hortatory terms to the effect that affected States ‘should’ seek external assistance in cases where a disaster exceeds national response capacity.”

\* Resumed from the 3122nd meeting.

*It was so decided.*

*Paragraph (2 bis) was adopted.*

*The commentary to article 10, as amended, was adopted.*

Article 11. *Consent of the affected State to external assistance (concluded)\**

*Commentary (concluded)\**

*Paragraph (3) (concluded)\**

22. Mr. VASCIANNIE suggested the insertion of the following sentences at the end of the paragraph:

“On the other hand, some members of the Commission resisted the idea that the dual nature of sovereignty necessarily meant that the Commission should support the approach taken in draft article 11, paragraph 2. For these members of the Commission, draft article 11, paragraph 2, should not be drafted to include the mandatory ‘shall’; rather, the provision should indicate that consent to external assistance ‘should’ not be withheld arbitrarily.”

*It was so decided.*

*Paragraph (3), as amended, was adopted.*

*The commentary to article 11, as amended, was adopted.*

*Section C, as a whole, as amended, was adopted.*

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

**CHAPTER VII. Immunity of State officials from foreign criminal jurisdiction (concluded) (A/CN.4/L.786 and Add.1)**

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

4. SUMMARY OF THE DEBATE (concluded)

(a) *General comments (concluded)*

23. The CHAIRPERSON invited the Commission to return to paragraph 19, the adoption of which had been postponed pending the formulation of a new text.

*Paragraph 19 (concluded)*

24. Mr. NOLTE suggested the following wording for the paragraph:

“It was also observed that some of the views presented certain risks for the future not only for the Commission but also for the development of international law itself. It was cautioned that there was a risk to the reputation of the Commission if there was a greater tilt towards State interests; the Commission would not be in a position to find the necessary balance between the old law—based on an absolute conception of sovereignty—and the new expectation of the international community in favour of accountability. Other members preferred a balance between legitimate

interests of sovereign States and the concern for accountability. Some members noted that the Commission had no cause to be concerned about risking its reputation since it was part of its functioning to always balance different legitimate considerations and not let itself be disproportionately swayed by any one of them.”

*It was so decided.*

*Paragraph 19, as amended, was adopted.*

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

**CHAPTER X. The obligation to extradite or prosecute (aut dedere aut judicare) (concluded) (A/CN.4/L.789)**

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

2. SUMMARY OF THE DEBATE (concluded)

(e) *Future work (concluded)*

25. The CHAIRPERSON invited the Commission to return to paragraph 38 of chapter X, the adoption of which had been postponed pending the formulation of a drafting proposal.

*Paragraph 38*

26. Mr. GALICKI (Special Rapporteur) read out the new version of the paragraph, which had been distributed in the conference room, and said that it constituted a compromise from among all the proposals made by members. The text read:

“As to the future work on the present topic, the view was expressed that there was an inherent difficulty in the topic. It was even suggested that the Commission should not be hesitant to reflect on the possibility of suspending or terminating the consideration of the topic, as it had done in the past with respect to other topics. Some other members, however, noted that the topic remained a viable and useful project for the Commission to pursue. Moreover, States were interested and had legitimate expectations and were keen for progress. It was also recalled that this aspect had been a subject for discussion in the past and that the resulting preparation of the 2009 general framework pointed to the viability of the topic.

“Furthermore, recognizing that the Sixth Committee was dealing with a related item on the scope and application of the principle of universal jurisdiction, it was also suggested that the topic could be combined with the topic on the *aut dedere aut judicare* obligation.”

27. Sir Michael WOOD suggested the deletion of the reference to legitimate expectations in the fourth sentence, which would then read: “Moreover, States were interested in the topic and were keen for progress.” If the second paragraph was retained, he proposed that a phrase be added to the effect that there had also been differing views on the question within the Sixth Committee.

28. Mr. GALICKI (Special Rapporteur) said that the point was not to give the position of the Commission, but to reflect the discussion. He was not sure that the paragraph should refer to the views of the Sixth Committee.

\* Resumed from the 3122nd meeting.

29. Mr. CANDIOTI said that, on the contrary, he supported Sir Michael's suggestion. The Commission should be cautious and should not encourage a decision. Thus, it was important to recall that the Sixth Committee was also divided on the question. He also proposed replacing the words "the topic could be combined with" in the last sentence by "this matter could be combined with" to make it clear that it was still not a topic.

30. The CHAIRPERSON said he took it that the Commission agreed to adopt paragraph 38 in its new version, as amended by Sir Michael and Mr. Candiotti and with a minor drafting change suggested by Mr. Nolte.

*It was so decided.*

*Paragraph 38, as amended, was adopted.*

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

**CHAPTER II. Summary of the work of the Commission at its sixty-third session (A/CN.4/L.781 and Add.1)**

31. The CHAIRPERSON invited the Commission to begin its consideration of chapter II of its report, on the summary of the work of the Commission at its sixty-third session, beginning with the portion of the chapter contained in document A/CN.4/L.781.

Document A/CN.4/L.781

Paragraphs 1 to 17

*Paragraphs 1 to 17 were adopted.*

Paragraph 18

32. Ms. JACOBSSON (Chairperson of the Planning Group) proposed the insertion of a paragraph 18 *bis* to recall that certain important issues on which responses were sought were considered in chapter III. The new paragraph would read:

"The specific issues relating to topics which remain under consideration by the Commission, and on which comments would be of particular interest to the Commission, are found in chapter III."

*Paragraph 18 and paragraph 18 bis were adopted.*

Document A/CN.4/L.781/Add.1

Paragraph 1

33. Ms. JACOBSSON (Chairperson of the Planning Group) proposed the insertion of the following phrase at the beginning of the second sentence: "As a result of the work undertaken throughout the quinquennium by the Working Group on the long-term programme of work". It was important to inform the reader that the result of five years of work was concerned. In the last sentence, she suggested the insertion of the phrase "preparations of commentaries to draft articles, how to make the Commission's report more informative" after "on, *inter alia*, Special Rapporteurs, Study Groups, the Drafting Committee,". She also proposed the insertion of a reference at the end to chapter XIII, as had been done in the other paragraphs.

*Paragraph 1, as amended, was adopted.*

Paragraphs 2 to 4

*Paragraphs 2 to 4 were adopted.*

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

**CHAPTER III. Specific issues on which comments would be of particular interest to the Commission (A/CN.4/L.782)**

34. The CHAIRPERSON invited the Commission to begin its consideration of chapter III of its report, on specific issues on which comments would be of particular interest to the Commission, contained in document A/CN.4/L.782.

**A. Immunity of State officials from foreign criminal jurisdiction**

Paragraphs 1 to 4

*Paragraphs 1 to 4 were adopted.*

Paragraph 5

35. Sir Michael WOOD, supported by Mr. VASCIANNIE, suggested the deletion of the paragraph, the substance of which was covered in paragraph 2.

*It was so decided.*

**B. Expulsion of aliens**

Paragraphs 6 and 7

*Paragraphs 6 and 7 were adopted.*

Paragraph 8

36. Sir Michael WOOD said that it would be preferable to delete the words "In the event there is no such practice", because the question was addressed to all States.

37. The CHAIRPERSON, speaking as a member of the Commission, thought that, on the contrary, the paragraph was justified only for States which had not introduced the suspensive effect of an appeal in their legislation. Those States that had already done so did not need to give their opinion on the question.

38. Mr. NOLTE said that even States with a particular practice in the area could have a view with respect to whether the practice was required by international law. That was what the Commission was asking them.

39. The CHAIRPERSON, speaking as a member of the Commission, said that, in that case, the question needed to be reformulated. In the current wording, only States with no practice were being asked about the need for a suspensive effect, without any reference to international law.

40. Sir Michael WOOD proposed the reformulation of the paragraph to read: "The Commission would also welcome the views of States on whether, as a matter of international law or otherwise, an appeal against an expulsion decision should have suspensive effect."

*Paragraph 8, as amended, was adopted.*

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

Paragraph 9

*Paragraph 9 was adopted.*

Paragraph 10

41. Mr. GAJA, referring to the first sentence, said it was preferable to say that “The Commission has taken the view” rather than “The Commission has affirmed”.

42. Mr. NOLTE said that the paragraph was unclear: it began by making a statement, and then posed a question concerning what had just been affirmed. The second sentence in the English text should start with the word “Does” rather than “Should”.

43. Mr. MELESCANU asked why there was a reference to “third States” in the second sentence, whereas the duty evoked in the first sentence concerned all States.

44. Mr. VASCIANNIE noted that the paragraph would thus be reformulated to read:

“The Commission has taken the view that States have a duty to cooperate with the affected State in disaster relief matters. Does this duty to cooperate include a duty on States to provide assistance when requested by the affected State?”

*Paragraph 10, as amended, was adopted.*

*The meeting rose at 6 p.m.*

## 3127th MEETING

*Friday, 12 August 2011, at 10 a.m.*

*Chairperson:* Mr. Maurice KAMTO

*Present:* Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escobar Hernández, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Ms. Jacobsson, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

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

CHAPTER III. *Specific issues on which comments would be of particular interest to the Commission (concluded)* (A/CN.4/L.782)

1. The CHAIRPERSON invited the Commission to continue its consideration of chapter III of its report, contained in document A/CN.4/L.782.

**D. The obligation to extradite or prosecute (*aut dedere aut judicare*)**

Paragraphs 11 to 13

2. Mr. McRAE said that paragraph 11 gave the impression that the Commission had engaged in a

fairly extensive discussion about the legal source of the obligation to extradite or prosecute. He did not recall that it had done so, however, and he did not think it should be saying to the Sixth Committee that it had.

3. Mr. PETRIČ said that the use of the word “question” in paragraph 11 seemed inappropriate because no question was being asked.

4. Sir Michael WOOD, supported by Mr. VASCIANNIE, said that paragraphs 11 to 13 did not actually raise questions, but instead provided unnecessary background information. The paragraphs should be deleted.

*It was so decided.*

Paragraph 14

5. Mr. McRAE said that it seemed a little odd to attempt to discover whether there was a basis in customary international law for an obligation to extradite or prosecute by conducting an opinion poll in the General Assembly: what was required was a detailed analysis of the literature and State practice. The Sixth Committee might well say that it was up to the Commission to decide whether there was a customary rule of international law. He wondered whether it was necessary to retain the paragraph.

6. Sir Michael WOOD said that he would prefer to see section D deleted, but if paragraph 14 was retained, a number of drafting changes should be made. The final phrase of the *chapeau*, “as to their views on these matters”, should be reworded to read: “as to their views on the following matters”. In the first bullet point, the opening words, “Is there a basis”, should be replaced with the words “Do they consider that there is a basis”, since the Commission would be seeking the views of States as to whether they thought there was a basis in customary international law for an obligation to extradite or prosecute. In the second bullet point, the words “If not” should be deleted, since there was a range of possible answers to the preceding question.

7. Mr. DUGARD said that he also supported the deletion of paragraph 14. The first bullet point did indeed suggest that an opinion poll should be taken in the Sixth Committee on the subject. Surely it was the task of the Commission to decide whether or not there was a basis in customary law for such an obligation. As to the second bullet point, he was not sure whether the Commission had ever asked whether it should engage in a particular exercise *de lege ferenda*. It was for the Commission to decide such an issue. The line between codification and progressive development was very thin and the Commission seldom engaged in a wholesale exercise *de lege ferenda*. It generally engaged in progressive development but within the parameters of codification. The only question the Commission could ask of the Sixth Committee was if States could provide evidence of their practice. The second bullet point should therefore be deleted.

8. Mr. MELESCANU said that he preferred to retain section D, since the Commission had addressed the topic of the obligation to extradite or prosecute and its omission from the report might be misinterpreted. He therefore