

Document:-  
**A/CN.4/3345**

**Summary record of the 3345th meeting**

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

Extract from the Yearbook of the International Law Commission:-  
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Conflict “referenced above”. As no reference appeared to have been made to that Convention, he proposed the deletion of “referenced above”.

*Paragraph (4), as amended, was adopted.*

Paragraph (5)

*Paragraph (5) was adopted.*

*The commentary to draft principle 13, as a whole, as amended, was adopted.*

*Section C, as amended, was adopted.*

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

*The meeting rose at 6 p.m.*

## 3345th MEETING

*Thursday, 11 August 2016, at 10 a.m.*

*Chairperson: Mr. Pedro COMISSÁRIO AFONSO*

*Present: Mr. Cafilisch, Mr. Candiotti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Mr. Huang, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.*

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

#### **CHAPTER XII. Provisional application of treaties (A/CN.4/L.890)**

1. The CHAIRPERSON invited the Commission to consider chapter XII of the draft report, which was contained in document A/CN.4/L.890.

##### **A. Introduction**

Paragraphs 1 to 4

*Paragraphs 1 to 4 were adopted.*

*Section A was adopted.*

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

Paragraphs 5 to 6

*Paragraphs 5 to 6 were adopted.*

Paragraph 7

2. Mr. LLEWELLYN (Secretary to the Commission) said that the Special Rapporteur had proposed the

insertion at the end of the second sentence of a footnote referring to draft guidelines 1 to 9.

3. The CHAIRPERSON said he took it that the Commission wished to accept the Special Rapporteur’s proposal.

*It was so decided.*

4. Sir Michael WOOD said that, in the first sentence, the words “draft guidelines 1 to 3 and draft guidelines 4 to 9” should be replaced with “draft guidelines 1 to 4 and draft guidelines 6 to 9”, as draft guideline 5 was not contained in the report of the Drafting Committee.

*Paragraph 7, as amended, was adopted.*

1. INTRODUCTION BY THE SPECIAL RAPporteur OF THE FOURTH REPORT

Paragraphs 8 and 9

*Paragraphs 8 and 9 were adopted.*

Paragraph 10

5. Sir Michael WOOD proposed that, in the last sentence, the word “on” be replaced with “for”.

*Paragraph 10, as amended, was adopted.*

Paragraph 11

6. Sir Michael WOOD said that, in the fifth sentence, he would prefer not to cite the *Yukos* and *Kardassopoulos v. Georgia* cases. The former, in particular, was quite controversial.

7. The CHAIRPERSON recalled that the paragraph was intended to reflect comments made by the Special Rapporteur and was not attributable to the Commission as a whole.

8. Mr. MURPHY, noting that the *Yukos* case was also mentioned in paragraph 25, said that the references should be retained to preserve the internal consistency of the document.

9. Mr. FORTEAU said that the controversial nature of the *Yukos* case should not prevent the Commission from mentioning it, particularly as it was of relevance and had been cited by the Special Rapporteur when introducing his report.

*Paragraph 11 was adopted.*

Paragraphs 12 to 16

*Paragraphs 12 to 16 were adopted.*

2. SUMMARY OF THE DEBATE

Paragraph 17

10. Sir Michael WOOD, referring to the last sentence, suggested that the word “holistically” be replaced.

11. Mr. FORTEAU said that “holistically” could be replaced with “in a comprehensive and systematic manner”.

*Paragraph 17, as amended, was adopted.*

Paragraph 18

12. Sir Michael WOOD said that the second sentence should be simplified to read: “They noted, however, that, while agreeing in general with the conclusions, many of them were reached by way of analogy, while the practice behind them was not always clear.”

*Paragraph 18, as amended, was adopted.*

Paragraphs 19 and 20

*Paragraphs 19 and 20 were adopted.*

Paragraph 21

13. Sir Michael WOOD said that the first sentence could be clarified by replacing the words “different nature and characteristics of the treaty” with “nature and characteristics of the particular treaty”. Turning to the second sentence, he proposed that the words “all involved different complexities” be replaced with “might raise different issues”.

14. Mr. FORTEAU said that as he recalled it, the discussion had hinged on the need to take into account the existence of different categories of treaties in order to draw conclusions about their provisional application. Hence, it was important to keep the word “different” in the first sentence. He proposed that the original wording be retained, with the word “the”, before “treaty”, being replaced with “each”.

*Paragraph 21 was adopted, with the amendments made by Sir Michael Wood to the second sentence and by Mr. Forteau to the first.*

Paragraphs 22 to 24

*Paragraphs 22 to 24 were adopted.*

Paragraph 25

15. Mr. KAMTO proposed adding some wording in order to reflect more accurately the debate held by the Commission. In the third sentence, the words “which was ongoing” [*qui était pendante*] should be replaced with “on the one hand, because it was ongoing, and on the other, because it was based on a treaty regime that could not be generalized” [*d’une part parce qu’elle était pendante, d’autre part parce qu’elle reposait sur un régime conventionnel qui ne pouvait être généralisé*]. In the sixth sentence, the words “it was suggested that” [*on a suggéré qu’*] should be inserted before “three different scenarios needed to be distinguished” [*il fallait distinguer trois cas de figure*].

16. Sir Michael WOOD, referring to the fifth sentence, said that it was an exaggeration to state that “article 46 of the 1969 Vienna Convention was key to the topic”. He proposed replacing “key to” with “an important part of”. The first part of the seventh sentence could be made more accurate by redrafting it to read: “The first was where an agreement on provisional application itself qualified provisional application by reference to internal law”. In the ninth sentence, the words “an agreement on provisional application was silent with respect to internal law

although” should be deleted, because one could have a situation where an agreement did contain a reference to internal law, but a State at the same time claimed that its consent to be bound by the agreement was invalid.

*Paragraph 25, as amended, was adopted.*

Paragraph 26

*Paragraph 26 was adopted.*

Paragraph 27

17. Sir Michael WOOD proposed that, in the second sentence, the words “rather complex and uncertain” be removed.

*Paragraph 27, as amended, was adopted.*

Paragraphs 28 and 29

*Paragraphs 28 and 29 were adopted.*

Paragraph 30

18. Sir Michael WOOD said that the arbitral tribunal referred to in the second sentence was merely administered by the Permanent Court of Arbitration, not a part of it. The words “the Arbitral Tribunal of the Permanent Court of Arbitration” should therefore be replaced with “an arbitral tribunal”. He also proposed the deletion of the footnote to the paragraph, as it was not the Commission’s practice to illustrate the summaries of its debates with footnotes. If readers wished to obtain further information on the debates, they should consult the summary records of the pertinent meetings.

*Paragraph 30, as amended, was adopted.*

Paragraph 31

*Paragraph 31 was adopted.*

Paragraph 32

19. Sir Michael WOOD said that the final sentence should be strengthened by replacing “could” with “needed to”.

*Paragraph 32, as amended, was adopted.*

Paragraphs 33 to 40

*Paragraphs 33 to 40 were adopted.*

3. CONCLUDING REMARKS OF THE SPECIAL RAPPORTEUR

Paragraph 41

*Paragraph 41 was adopted.*

Paragraph 42

20. Mr. MURPHY said that, in the interests of consistency, the word “holistically” should be replaced with “in a comprehensive and systematic manner”.

*Paragraph 42, as amended, was adopted.*

Paragraph 43

*Paragraph 43 was adopted.*

Paragraph 44

21. Mr. FORTEAU proposed that, in the first sentence, the words “in his view” [*selon lui*] should be inserted after “since” [*dès lors que*].

*Paragraph 44, as amended, was adopted.*

Paragraph 45

22. Mr. LLEWELLYN (Secretary to the Commission) said the first sentence indicated that in his concluding remarks, the Special Rapporteur had agreed with members of the Commission that it would be useful to undertake a comparative analysis of treaties providing for provisional application. He had subsequently decided to request the Codification Division to undertake such an analysis. That information would be incorporated into chapter XIII of the report, “Other decisions and conclusions of the Commission”.

*Paragraph 45 was adopted.*

Paragraphs 46 to 49

*Paragraphs 46 to 49 were adopted.*

*Section B, as amended, was adopted.*

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

**CHAPTER XI. Immunity of State officials from foreign criminal jurisdiction (A/CN.4/L.889 and Add.1–3)**

23. The CHAIRPERSON invited the Commission to consider chapter XI of its draft report, beginning with the text contained in document A/CN.4/L.889.

**A. Introduction**

Paragraphs 1 and 2

*Paragraphs 1 and 2 were adopted.*

Paragraph 3

24. Mr. TLADI, supported by Mr. CANDIOTI, said that the first sentence should be redrafted, as its current wording could give rise to misunderstandings about why Mr. Kolodkin had been replaced as Special Rapporteur on the topic.

25. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) proposed that the Commission should use the same language as in paragraph 173 of its report on the work of its sixty-seventh session: “The Commission, at its sixty-fourth session (2012), appointed Ms. Concepción Escobar Hernández as Special Rapporteur to replace Mr. Kolodkin, who was no longer with the Commission.”<sup>522</sup>

*Paragraph 3, as amended, was adopted.*

*Section A, as amended, was adopted.*

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

Paragraph 4

26. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that paragraph 4 was important, because it referred to the exceptional circumstances surrounding the consideration of her fifth report (A/CN.4/701): it had been available in only two of the six official languages of the United Nations, and as a result, its consideration by the Commission at the current session had been only preliminary in nature. She suggested that, in the penultimate sentence, the phrase “In these circumstances” be inserted before the words “it was understood” in the English text, and she proposed an editorial correction to the Spanish version.

27. The final sentence seemed to indicate that in 2016, the Sixth Committee would not need to consider the Commission’s work on the topic, because the Commission had held only a “partial” debate. She suggested that the words “a complete basis for consideration by States in the Sixth Committee of the General Assembly would only be available” be replaced with “the Commission would provide to the Sixth Committee of the General Assembly a complete basis of its work only after”.

28. Mr. CANDIOTI, expressing support for the Special Rapporteur’s suggestions, pointed out that the Commission’s annual reports were submitted, not to the Sixth Committee, but to the General Assembly. He therefore proposed the deletion of the reference to the Sixth Committee in the sixth sentence and the replacement of the words “was a partial debate” with the phrase “was only the beginning of the debate”.

*Paragraph 4, as amended by the Special Rapporteur and Mr. Candiotti, was adopted.*

Paragraph 5

*Paragraph 5 was adopted.*

Paragraph 6

*Paragraph 6 was adopted, subject to its completion by the Secretariat.*

**C. Text of the draft articles on immunity of State officials from foreign criminal jurisdiction provisionally adopted so far by the Commission**

1. TEXT OF THE DRAFT ARTICLES

Paragraph 7

29. Mr. MURPHY said that it was not the Commission’s usual practice to include footnotes pointing to the location of the commentary to draft articles, as had been done in paragraph 7.

30. The CHAIRPERSON said that the secretariat would ensure that the text was aligned with the Commission’s practice.

*On that understanding, paragraph 7 was adopted.*

Paragraph 8

*Paragraph 8 was adopted.*

<sup>522</sup> See *Yearbook ... 2015*, vol. II (Part Two), p. 71, para. 173.

31. The CHAIRPERSON invited the Commission to consider the portion of chapter XI of the draft report contained in document A/CN.4/L.889/Add.1.

2. TEXT OF THE DRAFT ARTICLES AND COMMENTARIES THERETO PROVISIONALLY ADOPTED BY THE COMMISSION AT ITS SIXTY-EIGHTH SESSION

Paragraph 1

*Paragraph 1 was adopted.*

*Commentary to draft article 6 (Scope of immunity ratione materiae)*

Paragraph (1)

32. Mr. MURPHY proposed that, in the first sentence, the words “is intended to define” be replaced with the word “addresses”, as draft article 6 did not provide a definition. In addition, the words “which covers” should be replaced with the word “covering”. In the second sentence, the words “provisionally adopted by the Commission in 2014” should be deleted, as they were superfluous. In the third sentence, he proposed that the word “define” be replaced with the word “identify”.

33. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that she could accept Mr. Murphy’s proposals concerning the first and second sentences. However, she could not agree concerning the third sentence, since the words “define” and “identify” were not synonymous.

34. Mr. TLADI, referring to the proposal on the first sentence, said that in paragraph (1) of the commentary to draft article 5,<sup>523</sup> the Commission had used the formulation “is intended to define”, and for the sake of consistency, that formulation should be retained in the commentary to draft article 6.

35. Mr. MURPHY said that the Commission should use whatever language was most appropriate, even if that meant changing formulations it had used previously. He would prefer to amend the formulation, especially since the Special Rapporteur had already indicated her approval for doing so.

36. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that in light of Mr. Tladi’s point about maintaining consistency with the language used in the commentary to draft article 5, and without precluding the revision of that language when the commentary was adopted on first reading, she would prefer to retain the existing wording of the paragraph, except for two minor changes: an editorial amendment to the first sentence of the Spanish text and the deletion of the words “provisionally adopted by the Commission in 2014”, as proposed by Mr. Murphy.

37. Mr. KITTICHAIRSAREE, referring to the third sentence, suggested replacing the word “define” with “stipulate”.

38. Mr. VÁZQUEZ-BERMÚDEZ proposed that, in the third sentence, the word “define” be replaced with “determine”.

*Paragraph (1), as amended by the Special Rapporteur and Mr. Vázquez-Bermúdez, was adopted.*

Paragraph (2)

39. Mr. MURPHY said that, in the first sentence, the words “similar structure” should be replaced with “different structure”, and in the second sentence, the word “However” should be deleted. In the third sentence, he suggested deleting the words “material element and on the”. He proposed the replacement of the words “In any case” with “Even so” in the fourth sentence and the deletion of the clause “provisionally adopted by the Commission in 2013” in the final sentence.

40. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that the word “structure” in the first sentence referred to the various elements of immunity *ratione materiae* that were covered by the scope of draft article 6; it might be more appropriate to replace it with the word “content”. She agreed to the deletion of the word “However” but doubted the wisdom of deleting the words “material element and on the”. She had no problem with the deletion, in the final sentence, of the phrase “provisionally adopted by the Commission in 2013” and suggested an editorial amendment to the Spanish text of the first sentence.

41. Mr. KITTICHAISAREE said he was concerned that the term “material element” could be understood, erroneously in the current context, as referring to a constituent element of a crime, the *actus reus*, which was one of the meanings of the term under international criminal law, as evidenced by its inclusion in the Rome Statute of the International Criminal Court.

42. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that the expression “material element” had been used repeatedly in the Commission’s work on the topic over the past five years, and there had never been any expression of concern that it might be confused with the *actus reus*. She suggested that the Commission revisit the use of the expression during the adoption of the commentary on first reading but that it should retain it in the current paragraph.

*Paragraph (2), as amended by the Special Rapporteur, was adopted.*

Paragraph (3)

43. Mr. MURPHY proposed that, in the second sentence, the phrase “the immunity *ratione personae* regime” be replaced with the words “immunity *ratione personae*”. The third sentence should be recast to read: “When drafting paragraph 1, the words ‘during their term of office’ were not used, since in some national systems, that expression might be viewed as not applying to all State officials and could therefore give rise to confusion.”

44. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that she could go along with Mr. Murphy’s proposal for the second sentence. However, as the third sentence was taken nearly verbatim from the report of the Drafting Committee at the Commission’s sixty-seventh session, she was reluctant to change it.

45. Mr. MURPHY said that it was not the Commission’s practice to insist that, because specific wording had been

<sup>523</sup> Yearbook ... 2014, vol. II (Part Two) and Corr.1–2, p. 146.

used in the report of the Drafting Committee, it was imperative to use it in the commentary. His suggestion was perfectly consistent with the point of the third sentence, which was that the Commission had not chosen to use the expression “term of office” because that expression was viewed as problematic for some national legal systems.

46. Mr. FORTEAU proposed the deletion of the second and third sentences, since they explained something that was not in the draft article, whereas the goal of the commentary was to explain what was in the draft article.

47. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that she could agree to the deletion of the final sentence and Mr. Murphy’s amendment to the second sentence.

*Paragraph (3) was adopted with the amendments agreed to by the Special Rapporteur.*

Paragraph (4)

48. Mr. MURPHY proposed that, in the first sentence, the word “the” be deleted before “paragraph”; the word “is” be inserted before the words “to emphasize”; the word “dimension” be replaced with the word “element”; the word “only” be deleted; and the word “such” be inserted before the final word “immunity”. In the third sentence, the words “such an element” should be replaced with the phrase “the status of the official”; the words “but rather the subjective element of immunity (the beneficiary)” should be deleted; the word “thus” should be replaced with “already”; and the words “provisionally adopted by the Commission in 2014” should be deleted. In the final sentence, the words “the provision was” should be changed to “these provisions were”.

49. Mr. KITTICHAISAREE, supporting Mr. Murphy’s proposals, suggested that, in the first sentence, the word “material” be changed to “functional”, given that the expression “functional immunity” was sometimes favoured over the term “immunity *ratione materiae*” – a view that he himself shared. In the second sentence, he proposed the deletion of the words “(subjective and material)”, which would become superfluous if Mr. Murphy’s proposal to delete the words “but rather the subjective element of immunity (the beneficiary)” was accepted.

50. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) agreed that the verb “is” should be inserted in the English version of the first sentence. In that sentence she would, however, prefer to retain the adjective “material” in the phrase “the material dimension of immunity *ratione materiae*”, for the sake of consistency with language previously used by the Commission; she could, however, also accept the formulations “material element” or “material nature” in that context. The deletion of the words “(the beneficiary)” in the third sentence would improve the text, as would replacing “such an element” with “the status of the official”. She had already expressed her opinion on doing away with the phrase “provisionally adopted by the Commission in 2014”. She was against the deletion of the word “only” in the first sentence because, as it stood, that sentence conveyed the conclusion reached in discussions in plenary meetings and in the Drafting

Committee that only State officials could perform acts covered by immunity *ratione materiae*. Similarly, she was opposed to deleting the words “subjective and material” in parentheses in the second sentence, since doing so would run counter to what had been agreed in the Drafting Committee. Lastly, she agreed to the replacement of “thus” with “already” in the third sentence, as proposed by Mr. Murphy.

51. Mr. SABOIA said that he, too, was in favour of retaining the reference to the material dimension of immunity *ratione materiae*. The word “only” was very important because it delimited the scope of that kind of immunity.

52. Mr. MURPHY said that he did not think that the Commission was saying that State officials were the only officials who could perform acts covered by immunity *ratione materiae*. The officials of international organizations could also carry out such acts. Although, for the purposes of the topic, the Commission was talking about State officials and their immunities, it was not true to say that they alone might perform acts covered by immunity *ratione materiae*.

53. Sir Michael WOOD concurred with Mr. Murphy and suggested that the solution might lie in adding the phrase “under the draft articles” at the end of the first sentence.

54. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that she agreed to Sir Michael’s suggestion, because everything said in the commentaries was related to the draft articles.

55. Mr. KITTICHAISAREE said that the meaning of the term “material dimension”, as used in the paragraph, was unclear. It was for that reason that he had proposed replacing that term with “functional dimension”.

*Paragraph (4), as amended, was adopted.*

Paragraph (5)

56. Mr. TLADI said that draft article 6 expanded on what had been said in draft article 5. In paragraph (5) of the commentary to the latter, the Commission had already stated that this draft article was without prejudice to exceptions to immunity *ratione materiae*.<sup>524</sup> There was no need to repeat the same idea in the paragraph under consideration, which could therefore be deleted.

57. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that it was important to clarify which acts were in fact covered by immunity because that question was closely related to the issue of exceptions and limitations; it was not repetition, since the Commission was referring to two quite different things. Draft article 6 on the scope of immunity *ratione materiae* paralleled draft article 4, referring to the scope of immunity *ratione personae*.<sup>525</sup> Draft article 4 concerned exceptions applying to certain officials, whereas draft article 6 concerned exceptions and limitations related to acts. That was the reason why she wished to retain paragraph (5).

<sup>524</sup> *Ibid.*

<sup>525</sup> *Yearbook ... 2013*, vol. II (Part Two), p. 47 (draft article 4).

58. Mr. VÁZQUEZ-BERMÚDEZ and Mr. SABOIA said that they were also in favour of maintaining the paragraph, as the issue of exceptions and limitations was indeed central to the topic.

*Paragraph (5) was adopted.*

Paragraph (6)

59. Mr. MURPHY suggested the deletion of “essentially” and “very” in the second sentence as well as the deletion of the phrase “in order to be official” in the third sentence. He proposed replacing the phrase “on the contrary” with “conversely” in the fourth sentence and the insertion of the words “an act” after “continue to be such” in the penultimate sentence.

*Paragraph (6), as amended, was adopted.*

Paragraph (7)

60. Mr. MURPHY proposed that the last phrase of the final sentence be recast to read: “to reflect the definition of ‘State official’ in draft article 2 (e)”.

*Paragraph (7), as amended, was adopted.*

Paragraph (8)

*Paragraph (8) was adopted.*

Paragraph (9)

61. Mr. MURPHY said that the final sentence would read better if the phrase after the reference to draft article 4, paragraph 3, stated “which also deals with that relationship”.

*Paragraph (9), as amended, was adopted.*

Paragraph (10)

62. Mr. MURPHY proposed some editorial adjustments to the English version of the text and the deletion of the phrase “provisionally adopted by the Commission in 2013” in the first sentence.

63. Mr. FORTEAU said that, if the phrase “provisionally adopted by the Commission in 2013” were to be deleted, the words “then” in the first sentence and “at that juncture” in the third sentence should also be removed.

*Paragraph (10), as amended, was adopted.*

Paragraph (11)

64. Mr. MURPHY queried the phrase “has the same effects” in the second sentence. He proposed that, in the fourth sentence, the phrase “provisionally adopted in 2014” be deleted.

65. Mr. FORTEAU said that the first point raised by Mr. Murphy concerned a mistranslation of the Spanish *incluye*, which should be rendered as “includes”, not “has”.

*Paragraph (11), as amended, was adopted.*

Paragraph (12)

*Paragraph (12) was adopted with a minor editorial amendment to the French text.*

Paragraph (13)

66. Mr. FORTEAU said that it was his understanding that the penultimate sentence alluded to discussions in the Drafting Committee of the different consequences of immunity *ratione personae* during a term of office and immunity *ratione materiae* after a term of office. Some members had drawn attention to the procedural problems which existed in some national legal systems as a result of that disparity. It would facilitate understanding of the sentence if some explanation of the different consequences were provided.

67. Mr. MURPHY confirmed that such differences were problematical in the legal system of the United States, especially in relation to waiver.

68. Regarding the second sentence, in order to bring out the point on which the members of the Commission disagreed, he suggested that this sentence be merged with the third sentence and recast to read: “On the contrary, other members of the Commission consider that the Head of State, Head of Government and Minister for Foreign Affairs only enjoy immunity *ratione personae* during their term of office and, only after their term of office has come to an end, will they enjoy immunity *ratione materiae*.”

69. Mr. SABOIA asked whether, when it was held that the members of the troika enjoyed immunity *ratione personae* for official and non-official acts, which therefore encompassed immunity *ratione materiae*, it was logical to say that only after they had left office did they enjoy immunity *ratione materiae*.

70. Mr. MURPHY said that the belief that the troika enjoyed both forms of immunity while in office was captured at the beginning of the paragraph. Some members were, however, of the opinion that the troika was entitled only to immunity *ratione personae*.

71. Mr. FORTEAU proposed inserting, after the words “the national courts of certain States” in the penultimate sentence, the phrase “(in particular with regard to the conditions for invoking immunity before these courts)” [*en particulier en ce qui concerne les conditions d’invocation de l’immunité devant ces tribunaux*] in order to reflect the concerns expressed in the Drafting Committee.

72. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that she agreed to the addition of the phrase in parentheses proposed by Mr. Forteau. In fact, it was difficult to convey the whole content of the debate on that matter. The question regarding the second and third sentences raised by Mr. Murphy went much deeper because it touched on the very notion and content of immunity *ratione personae*. The Commission members agreed that immunity *ratione personae* was general and broader in scope and encompassed the legal effects of immunity *ratione materiae*, since it applied to both private and official acts. The way in which draft articles 3, 4, 5 and 6 were worded made it difficult to accept Mr. Murphy’s proposal.

She wondered whether both Mr. Murphy's and Mr. Saboia's concerns could be met by saying: "On the contrary, other members of the Commission consider that immunity *ratione personae* as defined in these draft articles is general and broader in scope and encompasses immunity *ratione materiae* ...".

73. Mr. MURPHY said that his point was that he did not think that those two groups of members disagreed that immunity *ratione personae* was general, that it was broader in scope and that it encompassed immunity *ratione materiae* in the sense that everything covered by one immunity was found in the other. It would make more sense to replace the word "encompasses" with "supersedes" in the second sentence because the idea was that, while an official was in office, immunity *ratione personae* eliminated immunity *ratione materiae* and superseded the latter's legal effects.

74. Mr. TLADI suggested that the words "On the contrary" be deleted from the beginning of the same sentence and that the word "consider" be changed to "emphasize". In the next sentence, he suggested that the words "for these members" be inserted after the word "Consequently", to indicate more clearly where the difference of opinion lay.

75. Mr. SABOIA said that he endorsed the general approach being taken. The Commission seemed to be in agreement as to the nature of immunity *ratione personae*, and the relevant wording should not be deleted from the second sentence. It should be remembered that even immunity *ratione personae* included clear elements of a functional nature. Drafting the clause as suggested would further clarify the debate.

76. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that she could support the amendments proposed with the exception of the addition of the words "for these members". Draft article 4, which had already been adopted, established that the members of the troika enjoyed immunity *ratione personae* only during their term of office; as such, that position could not be represented as the view of only some members of the Commission. It was also reflected in the commentaries to draft articles 4 and 5. She suggested that the sentence in question should be amended to make that clear.

77. Mr. MURPHY said that the focus was not on who enjoyed immunity but the nature of that immunity.

78. Mr. TLADI suggested that the following wording for the sentence might respond to the concerns expressed: "Consequently, for these members, persons enjoying immunity *ratione personae* only enjoy such immunity during their term of office and, only after their term of office has come to an end, will they enjoy immunity *ratione materiae*."

79. Mr. SABOIA said that the Commission should be consistent in its methods. If a previous debate was being reproduced, it should be reproduced faithfully. It was not appropriate to try and alter such text to reflect other views, particularly if the members concerned were not present. He would prefer the words "for these members" not to be added.

80. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) reiterated her strong opposition to the inclusion of the words "for these members". The Commission should not reopen a debate on matters that it had already decided.

81. Mr. TLADI stressed that the proposed amendments were not intended to contradict anything that the Commission had already adopted. The position of the word "only" in the sentence was important: the suggestion to move it aimed to clarify the fact that some members of the Commission considered that the members of the troika did not enjoy both immunity *ratione personae* and immunity *ratione materiae* during their term of office, but only the former. That was a matter that the Commission had yet to resolve. Moreover, it was not the case that, once a matter had been decided, the views of dissenting members of the Commission could not be reflected.

82. Mr. MURPHY expressed support for Mr. Tladi's remarks. He suggested the following wording in an attempt to settle the matter: "Consequently, for these members, the Head of State, Head of Government and Minister for Foreign Affairs do not enjoy immunity *ratione materiae* during their term of office and only do so after their term of office has come to an end." He also expressed support for Mr. Forteau's suggested amendment to the next sentence.

83. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) welcomed Mr. Murphy's suggestion but requested that discussion of the paragraph be suspended to allow for final consultation on the exact wording.

84. The CHAIRPERSON took it that the Commission agreed to her request.

*It was so decided.*

Paragraph (14)

*Paragraph (14) was adopted.*

Paragraph (15)

85. Mr. KITTICHAISAREE suggested that, in the first sentence, the words "which at one time governed" should be altered to "which governs", to reflect the fact that the situation referred to still pertained in a number of legal systems.

*Paragraph (15), as amended, was adopted.*

86. The CHAIRPERSON proposed that, pending agreement on paragraph (13) of the commentary to draft article 6, the Commission begin consideration of the portion of chapter XI of the draft report contained in document A/CN.4/L.889/Add.2.

*It was so agreed.*

*Commentary to draft article 2 (Definitions), subparagraph (f)*

Paragraph (1)

87. Mr. MURPHY suggested that the words "is intended to define" in the first sentence be changed to "defines".

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

Paragraph (2)

88. Mr. MURPHY suggested that, in the first sentence, the words “to identify a particular act as being ‘performed in an official capacity’” be changed to “to identify a particular act as being an ‘act performed in an official capacity’”.

89. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) drew attention to a translation error in the English version of the text and requested that it be corrected.

*Paragraph (2), as amended, was adopted.*

Paragraph (3)

*Paragraph (3) was adopted.*

Paragraph (4)

90. Mr. FORTEAU suggested that, in the last sentence, the word “direct” be altered to “individual”.

*Paragraph (4), as amended, was adopted.*

Paragraph (5)

91. Mr. MURPHY suggested that the second sentence be shortened to end at “the broadest possible range of cases of responsibility” and that the third sentence be shortened to end at “should be examined carefully”. He questioned the statement in the antepenultimate sentence to the effect that *ultra vires* acts could not be considered as acts performed in an official capacity. He was not sure that it was accurate to say that *ultra vires* acts of a State could not be considered acts attributable to that State. He suggested that the reference be either clarified or deleted.

92. Mr. FORTEAU suggested that the second sentence be shortened even further to end at “only in respect of State responsibility”. It would be odd to say that the Commission had formulated rules with the goal of providing for the broadest possible range of cases of responsibility.

93. Mr. ŠTURMA said that he agreed with Mr. Murphy’s suggested amendments to the first and second sentences. It was his understanding that the reference in the antepenultimate sentence to *ultra vires* acts referred not to the acts of States but to *ultra vires* acts performed by officials, although he acknowledged that the wording was not entirely clear.

94. Mr. SABOIA agreed with the comments made by Mr. Šturma. He pointed out that it was customary to interpret legal texts taking into account the usual meaning of the words along with the context, object and purpose of the text. The approach taken to State responsibility could not simply be transferred wholesale to the immunity of State officials. For instance, a State might wish to broaden immunity to include other officials not exercising elements of governmental authority but acting in another capacity.

95. Sir Michael WOOD suggested that Mr. Saboia’s point could be reflected by amending the words “in respect of State responsibility” in the second sentence, as

shortened by Mr. Forteau, to “in the context and for the purpose of State responsibility”. He agreed with Mr. Forteau: to retain the reference to the goal of the rules being to provide for the broadest possible range of cases of responsibility would be to describe the Commission’s work in very sweeping terms. With regard to the antepenultimate sentence, he suggested that the words “*ultra vires* acts and” be deleted, as their inclusion raised issues best avoided at that stage.

96. Mr. SABOIA said that deleting the reference to *ultra vires* acts would exclude the responsibility of persons who might be receiving remuneration from a State to perform certain acts that this State considered to be useful but for which it preferred not to assume responsibility.

97. Mr. FORTEAU agreed that the reference to *ultra vires* acts should be kept. He suggested that the words “for the purpose of immunity from foreign criminal jurisdiction” [*pour les besoins de l’immunité de juridiction pénale étrangère*] be added in the antepenultimate sentence between “cannot be considered” and “as acts performed”.

98. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that Sir Michael’s suggested amendment to the second sentence reflected her intention perfectly. The reference to *ultra vires* acts should be retained; in that regard, she expressed support for Mr. Forteau’s suggested addition.

99. Sir Michael WOOD expressed his continuing concern about the reference to *ultra vires* acts, which harked back to the Commission’s discussion of whether illegal acts by an official could carry immunity. Most cases of immunity related to illegal or potentially illegal acts. The reference to *ultra vires* acts confused the issue. He suggested that alternative wording, such as “acts performed by officials outside their functions”, might be clearer. Officials frequently acted *ultra vires*, but it did not mean that they did not enjoy immunity in third States.

100. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that Sir Michael’s concern, which she fully shared, seemed to be covered by the last sentence of the paragraph.

101. Sir Michael WOOD said that the reference in the last sentence to “such *ultra vires* acts” was similarly confusing. He was not convinced that it resolved the issue.

102. Mr. FORTEAU said that the problem seemed to be with what constituted *ultra vires* acts. In its commentary to article 4 of the draft articles on the responsibility of States for internationally wrongful acts,<sup>526</sup> the Commission had distinguished between *ultra vires* acts and acts that violated the rules governing the conduct of State representatives, in other words, illegal acts. Paragraph (5) seemed to reflect that distinction accurately.

103. Sir Michael WOOD requested further time to consider the matter.

<sup>526</sup> *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 40–42 (commentary to draft article 4).

104. The CHAIRPERSON took it that the Commission agreed to suspend consideration of paragraph (5) and return to it later.

*It was so decided.*

Paragraph (6)

105. Mr. FORTEAU pointed out that the words “provisionally adopted by the Commission in 2014” in the final sentence could be deleted, as had been done elsewhere in the chapter.

*Paragraph (6), as amended, was adopted.*

Paragraph (7)

106. Mr. MURPHY suggested that the words “concepts of” before “elements of governmental authority” in the second sentence be deleted. He also suggested a minor editorial amendment to the English version of the text.

*Paragraph (7), as amended, was adopted.*

Paragraphs (8) and (9)

107. Mr. MURPHY, supported by Mr. FORTEAU, suggested that both paragraphs (8) and (9) could be deleted. Although he understood their relevance and the Special Rapporteur’s desire to reflect the Commission’s debate on whether the definition of an “act performed in an official capacity” should include a reference to the fact that the act must be criminal in nature, the explanation given in the two paragraphs went beyond what was necessary.

108. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that she would prefer to retain both paragraphs unless there was strong opposition. It had been agreed not to include the criminal dimension in the definition of an “act performed in an official capacity” but that dimension did play a role in identifying such acts. It was important to maintain that link, and the two paragraphs had been included in the commentary to that end.

109. The CHAIRPERSON took it that the Commission agreed to suspend discussion of the two paragraphs until its next meeting.

*It was so decided.*

*The meeting rose at 1.05 p.m.*

### 3346th MEETING

*Thursday, 11 August 2016, at 3 p.m.*

*Chairperson:* Mr. Pedro COMISSÁRIO AFONSO

*Present:* Mr. Cafilisch, Mr. Candiotti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Mr. Huang, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič,

Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

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

#### CHAPTER XI. *Immunity of State officials from foreign criminal jurisdiction (concluded)* (A/CN.4/L.889 and Add.1–3)

1. The CHAIRPERSON invited the members of the Commission to continue their adoption, paragraph by paragraph, of the portion of chapter XI of the draft report contained in document A/CN.4/L.889/Add.2.

#### C. *Text of the draft articles on immunity of State officials from foreign criminal jurisdiction provisionally adopted so far by the Commission (continued)*

2. TEXT OF THE DRAFT ARTICLES AND COMMENTARIES THERETO PROVISIONALLY ADOPTED BY THE COMMISSION AT ITS SIXTY-EIGHTH SESSION (*continued*)

*Commentary to draft article 2 (Definitions), subparagraph (f) (continued)*

Paragraphs (8) and (9) (*concluded*)

2. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) proposed to merge paragraphs (8) and (9) into a single paragraph that would read:

“The Commission did not consider it appropriate to include in the definition of an ‘act performed in an official capacity’ a reference to the fact that the act must be criminal in nature. In so doing, the aim was to avoid a possible interpretation that any act performed in an official capacity was, by definition, of a criminal nature. In any case, the concept of an ‘act performed in an official capacity’ must be understood in the context of the present draft articles, which is devoted to the immunity of State officials from foreign criminal jurisdiction.”

*Paragraphs (8) and (9), as amended and merged, were adopted.*

Paragraph (10)

*Paragraph (10) was adopted.*

Paragraph (11)

3. Mr. KITTICHAISAREE proposed that, in the first sentence, the words “a list” be replaced with the words “an exhaustive list”.

*Paragraph (11), as amended, was adopted.*

Paragraph (12)

*Paragraph (12) was adopted.*

Paragraph (13)

4. Sir Michael WOOD proposed that, in the final sentence, the phrase “the courts have been seized of other acts” be replaced with the phrase “the courts have considered other acts”.