

Document:-
A/CN.4/3346

Summary record of the 3346th 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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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. Candioti, 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”.

5. Mr. MURPHY proposed that, in the first sentence, the words “More specifically” be replaced with the word “Moreover” and that the words “the following conduct” be replaced with the phrase “acts that were claimed to be in an official capacity”.

6. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) endorsed Mr. Murphy’s proposals. Indicating that a mistake had been made with regard to the case cited in the second footnote to the paragraph, she proposed that another case be cited in its place. She had in mind the case *Wei Ye v. Jiang Zemin*.

7. Mr. HUANG said that the case referred to in the aboved-mentioned footnote was totally unrelated to the current topic, apart from the fact that it referred to Falun Gong, which was a sect.

8. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that, in the case mentioned, the question had arisen as to whether the acts at issue could be classified as official acts for the purposes of immunity and that it was for that reason that she had cited it. The intention had not been to say whether the judgment handed down by the court in that case was correct but simply to describe it.

9. Mr. FORTEAU said that the existing footnote should be kept, as it correctly described what the court had concluded in that case.

10. Mr. TLADI said that the Commission had, on several occasions, cited cases in which the judgment handed down had not, in its opinion, been correct, but that those cases reflected practice, and as the judgments of national courts were concerned, the Commission had decided not to determine their relevance on the basis of their correctness. That said, at the Commission’s sixty-ninth session, when reference was made to the cases involving the Minister of Justice and the Southern Africa Litigation Centre in the context of the consideration of exceptions to immunity, certain caveats should be mentioned in connection with those court cases so as to reflect his particular preferences and views about the correctness or lack of correctness concerning the decisions handed down.

11. Sir Michael WOOD, supported by Mr. MURPHY, said that he agreed with previous speakers and proposed that the text in parentheses be replaced with “alleged human rights violations”.

12. Mr. KITTICHAISAREE said that Sir Michael’s proposal would not solve the problem because it would mean that the word “alleged” would have to be inserted in front of each reference to a case.

13. Mr. KAMTO said that he, too, was of the view that existing judgments should be reflected whether or not they met with the Commission’s approval, and he proposed to delete the text contained in parentheses.

14. Mr. SABOIA said that he agreed with Mr. Tladi and endorsed Sir Michael’s proposal.

15. Mr. HUANG said that, under the current topic, the Commission was concerned with criminal jurisdiction.

Given that the case mentioned in the footnote was a civil case, he proposed that the footnote be deleted. In several countries, in particular Canada, Spain and the United States of America, the cases brought by Falun Gong against the Government of China had usually been rejected, which, in his view, made the reference to that case unnecessary.

16. Mr. ŠTURMA, stressing that what was important was the type of case that was cited, said that the reference should be retained if it related to a criminal case that illustrated what was explained in the commentary, but if it related to a civil case, that was a different matter.

17. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) acknowledged that the case in question was a civil case but pointed out that it was not the first time the Commission had referred to a civil case in its commentaries in order to determine whether a particular act had been considered by a court to fall within the scope of immunity from jurisdiction. In her opinion, the footnote should not be deleted, and she was prepared to cite other examples of case law. She stressed that the Spanish courts had not rejected cases related to Falun Gong for reasons relating to the type of acts at issue or to immunity but solely because the domestic legislation on universal jurisdiction had been amended, and all pending proceedings that did not fall within the scope of the new provisions had consequently been removed from the docket.

18. Mr. FORTEAU proposed that, in order to address the concern expressed by Mr. Huang, the words “In relation to civil proceedings, see” be inserted at the beginning of the footnote.

19. Mr. HUANG said that he preferred to simply delete the reference in the footnote and to replace it with another reference.

20. The CHAIRPERSON suggested that paragraph (13) be left in abeyance so as to allow time for the Special Rapporteur to coordinate with Mr. Huang on the amendment of the footnote in question.

Paragraph (13) was left in abeyance.

Paragraph (14)

21. Mr. PARK (Rapporteur) said that the content of paragraph (14) prejudged the outcome of the discussion that would be held on draft article 7 regarding exceptions to immunity during the Commission’s sixty-ninth session. He therefore asked whether its adoption could be postponed.

22. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that paragraph (14) did not indicate which acts could constitute exceptions to immunity but merely provided examples of cases in which domestic courts had concluded that immunity was not applicable because the acts at issue could not be considered as acts performed in an official capacity. She therefore saw no reason to delete the paragraph. After having reviewed information provided by Mr. Murphy concerning two cases cited in the first and last footnotes to the paragraph, she noted that the

references to the cases *Jiménez v. Aristeguieta et al.* in the first footnote and *Islamic Republic of Iran v. Pahlavi and Others* in the last footnote would be deleted. The reference to the first footnote that appeared in parentheses in the last footnote to the paragraph should be deleted and replaced with the information on the *Jiménez v. Aristeguieta et al.* case that had previously been included in the first footnote to the paragraph.

23. Mr. SABOIA agreed with the Special Rapporteur that paragraph (14) was purely factual and did not at all prejudice the outcome of the discussion that would take place at the Commission's sixty-ninth session.

24. Mr. VÁZQUEZ-BERMÚDEZ said that he, too, was in favour of retaining paragraph (14), which contained examples of case law relevant to the discussion concerning acts performed in an official capacity.

25. Sir Michael WOOD said that he understood Mr. Park's reservations and was not convinced himself that the paragraph belonged in the commentary to draft article 2 (f). Moreover, he was not sure that all the cases referred to in the footnotes were actually relevant.

26. Mr. PETRIČ said that he, too, had some difficulty with the footnotes, but that did not mean that paragraph (14) should be deleted, even though no one had proposed to do so. Nevertheless, in view of the objections that had been made, he agreed with Mr. Park that the Commission should postpone its adoption.

27. Mr. FORTEAU proposed that, in order to address the concerns of members who did not wish to prejudice the future debate, a "without prejudice" clause should be added to the end of the paragraph that would read: "The factual reminder of those various examples is without prejudice to the position that the Commission may take on the subject of exceptions to immunities."

28. Mr. MURPHY said that he saw no need to include such a clause in paragraph (14), which did not prejudice the future debate any more than the preceding paragraphs did.

29. Mr. FORTEAU said that the clause in question was, in his view, justified in the case of paragraph (14) because, unlike the preceding paragraphs, which contained examples of acts performed in an official capacity, it referred to non-official acts, namely, acts that, in principle, were excluded from the scope of application of immunity. Paragraph (14) was therefore directly related to the subject of exceptions to immunity, on which the Committee would reach a decision at its sixty-ninth session.

30. The CHAIRPERSON said he took it that the Commission wished to adopt paragraph (14) with the addition proposed by Mr. Forteau and the amendments to its first and last footnotes proposed by the Special Rapporteur.

Paragraph (14), as amended, was adopted.

Paragraph (16)

Paragraph (16) was adopted.

31. The CHAIRPERSON invited the Special Rapporteur to read out paragraph (13) of the commentary to draft article 6 as reproduced in document A/CN.4/L.889/Add.1 and paragraph (5) of the commentary to draft article 2 (f), reproduced in document A/CN.4/L.889/Add.2, which had been left in abeyance and which had been amended in the light of comments made during the discussion, a new version of which she had asked to have circulated.

Commentary of draft article 6 (Scope of immunity ratione materiae) (concluded)

Paragraph (13) (concluded)

32. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that paragraph (13) of the commentary to draft article 6 had been revised to read:

"(13) However, regarding the situation described in draft article 6, paragraph 3, some members of the Commission consider that, during their term of office, Heads of State, Heads of Government and Ministers for Foreign Affairs, enjoy both immunity *ratione personae* and immunity *ratione materiae (stricto sensu)*. Other members of the Commission emphasized that, for the purposes of these draft articles, immunity *ratione personae* is general and broader in scope and encompasses immunity *ratione materiae*, since it applies to both private and official acts. For these members, such officials enjoy only 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*, as provided for in draft article 4 and reflected in the commentaries to draft articles 4 and 5. While favouring one or other option might have consequences before the national courts of certain States (in particular with regard to the conditions for invoking immunity before these tribunals), such consequences would not extend to all national legal systems. During the debate, some members of the Commission expressed the view that it was not necessary to include paragraph 3 in draft article 6, and that it was sufficient to refer to the matter in the commentaries thereto."

33. Sir Michael WOOD proposed deleting the words "*stricto sensu*" in parentheses at the end of the first sentence.

Paragraph (13), as amended, was adopted.

The commentary to draft article 6, as a whole, as amended, was adopted.

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

Paragraph (5) (concluded)

34. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that paragraph (5) of the commentary to draft article 2 (f) had been revised to read:

"(5) For the purpose of attributing an act to a State, it is necessary to consider, as a point of departure, the rules included in the articles on the responsibility of States for internationally wrongful acts adopted by the Commission at its fifty-third session. Nonetheless,

it must be borne in mind that the Commission established those rules in the context and for the purposes of State responsibility. Consequently, the application of the rules to the process of attributing an act to a State in the context of immunity of State officials from foreign criminal jurisdiction should be examined carefully. For the purposes of immunity, the criteria for attribution set out in articles 7, 8, 9, 10 and 11 of the articles on the responsibility of States for internationally wrongful acts do not seem generally applicable. In particular, the Commission is of the view that, as a rule, acts performed by an official purely for their own benefit and in their own interests cannot be considered as acts performed in an official capacity, even though they may appear to have been performed officially. In such cases, it is not possible to identify any self-interest on the part of the State, and the recognition of immunity, whose ultimate objective is to protect the principle of the sovereign equality of States, is not justified. It does not mean, however, that an unlawful act as such cannot benefit from immunity *ratione materiae*. Several courts have concluded that unlawful acts are not exempt from immunity simply because they are unlawful, even in cases when the act is contrary to international law. The question whether or not acts *ultra vires* can be considered as official acts for the purpose of immunity from criminal jurisdiction will be addressed at a later stage, together with the limitations and exceptions to immunity.”

35. Mr. KITTICHAISAREE proposed that, in the third sentence, the words “of an official” be inserted after the words “attributing an act”.

36. Mr. FORTEAU said that, in the final sentence, the word “foreign” should be inserted before the words “criminal jurisdiction”.

Paragraph (5), as amended, was adopted.

37. The CHAIRPERSON invited the members of the Commission to consider, paragraph by paragraph, the portion of chapter XI contained in document A/CN.4/L.889/Add.3.

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

1. INTRODUCTION BY THE SPECIAL RAPPORTEUR OF THE FIFTH REPORT

Paragraphs 1 to 4

Paragraphs 1 to 4 were adopted.

Paragraph 5

38. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that, in the third sentence of the Spanish text, the word *restricciones* should be replaced with the word *excepciones*.

39. Mr. SABOIA said that the English text should be corrected accordingly.

Paragraph 5 was adopted, subject to the requisite amendments to the English and Spanish texts.

Paragraph 6

40. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that the end of the third sentence contained a mistake and should be corrected to read: “but rather to the exercise of the prerogative of the State of the official”.

Paragraph 6, as amended, was adopted.

Paragraphs 7 to 13

Paragraphs 7 to 13 were adopted.

2. SUMMARY OF THE DEBATE

Paragraph 14

41. Mr. CANDIOTI proposed that, in the first sentence, the words “was partial and preliminary” be replaced with the phrase “was only the beginning of the discussion”.

Paragraph 14, as amended, was adopted.

Paragraph 15

42. Mr. HUANG proposed that, in the penultimate sentence, the word “highly” be inserted before the words “politically sensitive”. He further proposed that the following sentence be added to the end of the paragraph: “It was emphasized that the Commission should focus on codification instead of development of new norms of international law in dealing with the issue of exceptions to the immunity of State officials from foreign criminal jurisdiction.”

43. Mr. CANDIOTI, referring to the first sentence, said that the phrase “Those members who spoke”, variants of which were found in several other paragraphs of the present document, was somewhat infelicitous because it suggested that other members had wished to take the floor but had been prevented from doing so. It would be preferable to use the expressions that were typically used to summarize the discussion, such as “members”, “most members” or “some members”, depending on the situation, or else impersonal expressions. As to the sentence proposed by Mr. Huang, it would be necessary, if it was retained, to indicate in one way or another that it reflected the position of a very small minority of Commission members who had taken part in the discussion.

44. Mr. FORTEAU said that he concurred with the view expressed by Mr. Candiotti. In order to correctly reflect the debate, if the sentence proposed by Mr. Huang was added to the text, another sentence should be added to indicate that other members had, conversely, expressed opinions in favour of the progressive development of the law. On the other hand, that divergence of views was clearly reflected in paragraphs 17 and 18, and for that reason, it might not be necessary to amend paragraph 15.

45. Sir Michael WOOD said that, since the discussion that was summarized in the document was only the beginning of the debate and since relatively few Commission members had taken part in it, the Commission must be very careful in deciding how to present the views expressed, a requirement that the existing wording fully met. It would be counterproductive to attempt to take stock of

how many members were in favour of each position, as well as unnecessary, since the summary records could be consulted by anyone who wished to have a full account of the debate.

46. Mr. CANDIOTI said that he would not insist on amending the introductory phrase “Those members who spoke” and would leave it up to the Special Rapporteur and the Secretariat to resolve the issue in whatever manner they deemed appropriate. He maintained, however, that the sentence that Mr. Huang proposed to add might upset the balance of the paragraph by including a minority view, when the rest of the paragraph described the generally positive reception of the Special Rapporteur’s fifth report.

47. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that she had no objection to the drafting change proposed by Mr. Huang in the penultimate sentence nor to the sentence he wished to add to the end of the paragraph, except that, if that sentence was included in the text, it should be reformulated in order to avoid giving the impression that it expressed the general opinion of the Commission. A sentence would also need to be added, as had been pointed out by Mr. Forteau, in order to reflect the other views that Commission members had expressed.

48. The CHAIRPERSON suggested that paragraph 15 be left in abeyance and that it be taken up again at a later stage.

It was so decided.

Paragraph 16

Paragraph 16 was adopted.

Paragraph 17

49. Sir Michael WOOD said that, while some members had criticized the approach adopted by the previous Special Rapporteur, others had praised it. He therefore proposed that the phrase “by some members of the Commission” be added to the end of the final sentence.

50. Mr. FORTEAU proposed that, in the final sentence, the words “, in their view,” be inserted after the words “given that” and before the words “the approach” in order to indicate that it was not the Commission’s position but only that of the members to whom reference was made at the beginning of paragraph 17.

51. Mr. KAMTO proposed that, in the final sentence, the phrase “given that the approach taken by the former Special Rapporteur had been the subject of critical comment” be deleted, since it did not seem to serve any purpose.

52. Mr. SABOIA, Mr. McRAE and Mr. CANDIOTI supported that proposal.

53. Mr. CANDIOTI said that the word “bold” in the first sentence had a certain emotional connotation and did not belong in a report of the Commission. He proposed that it be replaced with the qualifier “lucid”.

54. Mr. SABOIA endorsed Mr. Candiotti’s proposal.

Paragraph 17, as amended, was adopted.

Paragraph 18

55. Mr. CANDIOTI said that he was against the idea of referring to the “loss of balance” caused by the Special Rapporteur, who had allegedly “made a gradual deviation from her own approaches in the treatment of the topic”; the last sentence of the paragraph, which had an unacceptable emotional connotation, should be deleted.

56. Mr. MURPHY recalled that some Commission members had, in fact, referred to a “loss of balance”. The sentence did nothing more than to capture what had been said in the debate. Care must be taken to avoid modifying the text on the basis of the personal positions of Commission members.

57. Mr. SINGH said that he supported the retention of the last sentence and proposed that, in the first sentence, the words “with appreciation” be inserted after the word “recalled”.

The proposal was adopted.

Paragraph 18, as amended, was adopted.

Paragraphs 19 to 25

Paragraphs 19 to 25 were adopted.

Paragraph 26

58. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) proposed the deletion of the footnote to the paragraph, since it was not the Commission’s practice to place footnotes in summaries of debates.

Paragraph 26, as amended, was adopted.

Paragraphs 27 and 28

Paragraphs 27 and 28 were adopted.

Paragraph 29

59. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) suggested the deletion of the footnote to the paragraph.

60. Mr. FORTEAU pointed out that the phrase “possible measures of redress” that appeared in the first sentence of the paragraph actually referred to criminal sanctions, and the word “redress” should be replaced with the words “prevention and punishment” in all language versions. He proposed that this phrase be replaced with the phrase “other possible measures to ensure prevention and punishment”.

61. Sir Michael WOOD proposed that the formulation “other ways of avoiding impunity” could be used in the English version.

62. Mr. FORTEAU supported Sir Michael’s proposal and proposed that the phrase *pour empêcher l’impunité* could be used in the French version.

Paragraph 29, as amended, was adopted.

Paragraph 30

63. Mr. FORTEAU said that the third sentence of the English version referred to the “affected State”, while the French version referred to *l’État de nationalité* (State of nationality). Both expressions were approximations. It would be preferable to refer to “the State of which those persons are the agents”.

Paragraph 30, as amended, was adopted.

Paragraphs 31 to 38

Paragraphs 31 to 38 were adopted.

Paragraph 39

64. Mr. FORTEAU said that it was unclear what was meant by the phrase “the issue for determination before the domestic court”.

65. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that she had intended to convey the idea that, in some cases, the immunity of a State official and the question of whether exceptions existed had to be established on the basis of domestic law and not international law.

66. Mr. FORTEAU said that, in his understanding, it was a matter of stating that “in some instances, the question submitted to the domestic court was not the question of immunity under international law but that of immunity under the domestic law”.

67. Mr. MURPHY proposed that a full stop be placed after the phrase “in the context of each case” and that the remainder of the sentence be deleted. A new sentence, beginning with the words “For example,” and continuing with the wording proposed by Mr. Forteau, should then be added.

The proposal was adopted.

Paragraph 39, as amended, was adopted.

Paragraph 40

68. Mr. KAMTO said that, for the sake of clarity, the second sentence of the paragraph should be shortened.

69. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) explained that the sentence was indeed difficult to understand because it was inaccurate. She suggested that it could be reformulated so that it would read: “In this context, some members supported the methodological approaches pursued by the Special Rapporteur in viewing immunity on the basis of a view of international law as a complete normative system, in order to ensure that the regime of immunity did not produce negative effects on, or nullify, other components of the contemporary system of international law as a whole.”

70. Mr. KAMTO endorsed that proposal.

Paragraph 40, as amended, was adopted.

Paragraph 41

Paragraph 41 was adopted.

Paragraph 42

71. Mr. KITTICHAISAREE proposed that, in the second sentence of the English text, the word “and” between the words “State” and “had” be replaced with the words “which therefore”.

Paragraph 42, as amended, was adopted.

Paragraph 43

72. Mr. KITTICHAISAREE proposed that, in the final sentence, the words “foreign criminal” be inserted between the words “from” and “jurisdiction”.

Paragraph 43, as amended, was adopted.

Paragraphs 44 and 45

Paragraphs 44 and 45 were adopted.

Paragraph 46

73. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) suggested that, in the first sentence, the words “the crime of” be inserted between the words “of” and “aggression”.

Paragraph 46, as amended, was adopted.

Paragraphs 47 to 53

Paragraphs 47 to 53 were adopted.

74. The CHAIRPERSON drew attention to paragraphs (13) and (15) of document A/CN.4/L.889/Add.2, which had been left in abeyance in order to allow the Special Rapporteur time to revise them in consultation with interested members.

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

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

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

Paragraph (13) (concluded)

75. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that, following consultation with Mr. Huang, the second footnote to the paragraph had been amended to read: “In re *Ye v. [Jiang] Zemin*, United States Court of Appeals, Seventh Circuit, 383 F.3d 620 (8 September 2004) (this case was settled before a civil court).”

76. Mr. MURPHY said that the case in question had not been “settled”.

77. Mr. FORTEAU, noting that all the examples of case law cited in the first footnote to the paragraph were criminal cases, proposed to reformulate the portion of the Special Rapporteur’s proposal in parentheses to read: “unlike the cases cited in the previous footnote, this was a case before a civil court”.

78. Mr. MURPHY said that the last footnote to the paragraph also referred to a series of criminal cases and could therefore also be mentioned in the text proposed by Mr. Forteau.

Paragraph (13), as amended, was adopted.

Paragraph (15)

79. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) suggested that the paragraph be retained as it stood, but that the following sentences be added to the end of the paragraph: "Some members were of the view that the Commission should focus on codification rather than on the formulation of new rules concerning limitations and exceptions. Others members stated that, as part of addressing limitations and exceptions to immunity, the Commission should take into account both the codification and the progressive development of international law."

Paragraph (15), as amended, was adopted.

The commentary to draft article 2 (f), as a whole, as amended, was adopted.

Section C, as amended, was adopted.

Chapter XI of the draft report of the Commission, as a whole, as amended, was adopted, subject to the requisite adjustments.

CHAPTER I. Organization of the work of the session (A/CN.4/L.879)

80. The CHAIRPERSON invited the members of the Commission to begin their consideration, paragraph by paragraph, of chapter I of the draft report contained in document A/CN.4/L.879.

Paragraphs 1 to 11

Paragraphs 1 to 11 were adopted, subject to the completion of paragraph 7 by the Secretariat.

Chapter I of the draft report of the Commission, as a whole, as amended, was adopted, subject to the requisite adjustments.

CHAPTER II. Summary of the work of the Commission at its sixty-eighth session (A/CN.4/L.880)

81. The CHAIRPERSON invited the members of the Commission to begin their consideration, paragraph by paragraph, of chapter II of the draft report contained in document A/CN.4/L.880.

Paragraph 1

Paragraph 1 was adopted.

Paragraph 2

Paragraph 2 was adopted, subject to its completion by the Secretariat.

Paragraph 3

82. Sir Michael WOOD proposed that, in the first sentence, the word "thereof" and the words "and others" be deleted.

Paragraph 3, as amended, was adopted.

Paragraphs 4 to 7

Paragraphs 4 to 7 were adopted.

Paragraph 8

83. Mr. MURPHY proposed, in the third sentence, replacing the word "subsequently" with the word "also".

Paragraph 8, as amended, was adopted.

Paragraph 9

Paragraph 9 was adopted.

Paragraph 10

84. Sir Michael WOOD proposed that, for the sake of consistency with the second sentence of paragraph 8, in the second sentence, the words "considered and" be deleted.

Paragraph 10, as amended, was adopted.

Paragraph 11

85. Sir Michael WOOD proposed that, in the first sentence, the words "of general international law" be inserted between the word "norms" and the words "(*jus cogens*)". In addition, he wished to know why, in the last sentence, it was specified that the report presented to the Commission by the Chairperson of the Drafting Committee had been an "oral" one.

86. Mr. FORTEAU said that the word "oral" appeared to have been added to show that it was the oral presentation of the report that was meant and not the report itself. He proposed that the beginning of the final sentence be amended to read: "The Chairperson of the Drafting Committee presented the interim report of the Drafting Committee".

Paragraph 11, as amended, was adopted, with a minor editorial amendment to the English text.

Paragraph 12

Paragraph 12 was adopted.

Paragraph 13

87. Sir Michael WOOD said that, in the final sentence, the words "at the sixty-eighth session of the Commission" should be inserted after the word "topic", and the words "sixty-eighth session" should be replaced with the words "sixty-ninth session".

88. Mr. KITTICHAISAREE proposed that, in that sentence, the word "speak" be replaced with the word "comment".

89. Mr. CANDIOTI said that it was inaccurate to say that the discussion had been "preliminary in nature", as several members had spoken at great length on the topic.

90. Mr. MURPHY, endorsing that comment, proposed replacing the words "was preliminary in nature" with the

words “was commenced”. He also proposed, in the final sentence of the English version, replacing the word “and” with the word “but”.

Paragraph 13, as amended, was adopted.

Paragraphs 14 to 16

Paragraphs 14 to 16 were adopted.

Paragraph 17

91. Mr. CANDIOTI, noting that several unrelated subjects were mixed together haphazardly in the paragraph, proposed that it be split into several separate paragraphs.

92. Mr. FORTEAU said that, in order to clearly reflect the content of the paragraph, it would be useful to insert before the first sentence, in bold characters, the words “As regards ‘Other decisions and conclusions of the Commission’ (chap. XIII)”.

Paragraph 17, as amended, was adopted with an editorial amendment to the English text.

Paragraphs 18 and 19

Paragraphs 18 and 19 were adopted.

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

The meeting rose at 5.55 p.m.

3347th MEETING

Friday, 12 August 2016, at 10.05 a.m.

Chairperson: Mr. Pedro COMISSÁRIO AFONSO

Present: Mr. Caflisch, 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. Sturma, 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 (concluded)

CHAPTER III. Specific issues on which comments would be of particular interest to the Commission (A/CN.4/L.881)

1. The CHAIRPERSON invited the Commission to consider chapter III of the draft report, contained in document A/CN.4/L.881.

Paragraph 1

Paragraph 1 was adopted with minor editorial changes.

Paragraph 2

2. Mr. FORTEAU proposed deleting the word “also” [*également*]; in addition, he proposed inserting, after the words “any information on”, the phrase “the issues referred to in the preceding paragraph, as well as” [*les points rappelés au paragraphe précédent, ainsi que*].

Paragraph 2, as amended, was adopted.

A. Immunity of State officials from foreign criminal jurisdiction

Paragraph 3

3. Sir Michael WOOD said that paragraph 3 as currently drafted might be understood to mean that the Commission wanted information only on case law; however, both judicial practice and executive practice were important. He therefore proposed replacing the phrase “in particular judicial practice” with the phrase “including judicial and executive practice”.

4. Mr. MURPHY said that he supported the amendment proposed by Sir Michael. He further proposed inserting, in subparagraph (c), the phrase “, and whether it is undertaken in consultation with the authorities of the foreign State”.

5. Mr. KITTICHAISAREE proposed replacing, in subparagraph (c), the word “moment” with the word “phase” or “stage”. He requested clarification as to which instruments were referred to in subparagraph (d).

6. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that she supported adding a reference to executive practice and replacing the word “moment” with the word “phase”. In response to Mr. Murphy’s proposal, she pointed out that subparagraph (d) dealt with the instruments available to the executive for referring information to the national courts. She would not oppose the language proposed by Mr. Murphy, however, as long as it was incorporated into subparagraph (d) and not subparagraph (c).

7. Mr. CANDIOTI said that the substance of Mr. Murphy’s proposal seemed to be covered under subparagraph (e), in the reference to the mechanisms for international legal cooperation. It would be useful if the question of consultation with the authorities of the State was addressed in a future report by the Special Rapporteur.

8. Sir Michael WOOD said that he agreed that subparagraph (e) was the most logical location for the inclusion of the language proposed by Mr. Murphy. The phrase “international legal assistance and cooperation that State authorities may use in relation to a case” could be replaced with the phrase “international legal assistance, cooperation and consultation between States in cases”, thereby incorporating the reference to consultation sought by Mr. Murphy.

9. Mr. MURPHY said that since the focus should be on the State, he would suggest that the phrase “between the State and a relevant foreign State” be inserted after the word “consultation” in Sir Michael’s proposal.

10. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that she agreed that the most appropriate place