

Provisional

**For participants only**

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## **International Law Commission**

### **Sixty-eighth session (second part)**

#### **Provisional summary record of the 3347th meeting**

Held at the Palais des Nations, Geneva, on Friday, 12 August 2016, at 10 a.m.

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***Present:***

*Chairman:* Mr. Comissário Afonso

*Members:* Mr. Caflisch  
Mr. Candiotti  
Mr. El-Murtadi  
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

***Secretariat:***

Mr. Llewellyn Secretary to the Commission

*The meeting was called to order at 10.05 a.m.*

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

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

**The Chairman** 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*

**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*

**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”.

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

**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).

**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).

**Mr. Candiotti** 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.

**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.

**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” should be inserted after the word “consultation” in Sir Michael Wood’s proposal.

**Ms. Escobar Hernández** (Special Rapporteur) said that she agreed that the most appropriate place for the amendment was in subparagraph (e). While she did not oppose the formulation “between the State and a relevant foreign State”, she would still prefer to maintain the subparagraph as originally drafted, because it covered both bilateral cooperation and broader forms of cooperation.

**Mr. Vázquez-Bermúdez** said that the focus should certainly remain on bilateral cooperation and tribunals. On the basis of all the proposals, he suggested that subparagraph (e) should be amended to read “the mechanisms for international legal assistance, cooperation and consultation that State authorities may resort to in relation to a case in which immunity is or may be considered”.

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

*B. New topics*

*Paragraphs 4 and 5*

*Paragraphs 4 and 5 were adopted.*

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

*Chapter XIII. Other decisions and conclusions of the Commission (A/CN.4/L.891)*

**The Chairman** invited the Commission to consider chapter XIII of the draft report, contained in document A/CN.4/L.891.

*A. Requests by the Commission for the Secretariat to prepare studies on two topics in the Commission’s agenda*

*Paragraphs 1 and 2*

*Paragraphs 1 and 2 were adopted.*

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

*Paragraphs 3 to 5*

*Paragraphs 3 to 5 were adopted.*

*1. Working Group on the Long-term Programme of Work*

*Paragraph 6*

*Paragraph 6 was adopted.*

*Paragraph 7*

**Mr. Forteau** proposed inserting the words “during the current quinquennium” [*au cours du présent quinquennat*] after the words “already recommended”.

*Paragraph 7, as amended, was adopted.*

*Paragraphs 8 to 10*

*Paragraphs 8 to 10 were adopted.*

*Paragraph 11*

**Sir Michael Wood** said that the capitalization in the name of the Working Group should be corrected and that the phrase “the decision on new topics” should be replaced with the words “the decision to place new topics on the long-term programme of work”. In addition, the last sentence of the paragraph did not accurately reflect the aims of the Working Group; he therefore proposed that the end of the sentence, beginning with the words “during the current quinquennium”, should be replaced with the words “to make such additions during the course of the current quinquennium”.

**Mr. Forteau** proposed that, for the sake of greater clarity, a footnote referring back to paragraph 7 should be inserted.

*Paragraph 11, as amended, was adopted.*

*Paragraph 12*

**Sir Michael Wood** proposed deleting, in the second sentence, the bracketed word “survey”, as what was meant was unclear.

*Paragraph 12, as amended, was adopted.*

*Paragraph 13*

**Mr. Kamto** said that the somewhat ambiguous pronoun “It” in the second sentence of paragraph 13 should be replaced with the words “The Commission”. In addition, the title of the second potential topic seemed to make two assumptions: that there existed subjects of international law other than States or international organizations; and that agreements concluded with or between such subjects of international law could be described as international agreements. If the Commission decided to take up the topic, it would determine whether such assumptions were in fact correct; in the meantime, he proposed deleting the word “International” in the phrase “International agreements”.

**Mr. Forteau**, supported by **Ms. Escobar Hernández**, said that the Commission could not change the titles of potential topics which were proposed by the secretariat in an official document of the United Nations; moreover, changing them would imply that the Commission had already taken a position on them. He proposed inserting quotation marks around each title and replacing the word “welcomed” with the words “took note of” to indicate that the Commission had not yet endorsed the titles.

**Mr. Candiotti** said that paragraph 13 would undoubtedly be of great interest during the proceedings of the Sixth Committee. He requested clarification on the scope of the first topic proposed.

**Mr. McRae** said that the potential topic “General principles of law” referred to sources of international law as per Article 38 of the Statute of the International Court of Justice. Further clarification on all the topics proposed could be sought from the secretariat’s memorandum (A/CN.4/679/Add.1) mentioned in paragraph 12.

**Mr. Valencia-Ospina** proposed inserting, in the first sentence, the words “as listed by the secretariat” after the words “six potential topics”.

**Mr. Llewellyn** (Secretary to the Commission) said that in the six working papers that it had prepared on potential topics, the secretariat had not taken any position on those topics. He supported the amendment proposed by Mr. Valencia-Ospina but suggested that

the verb “listed” might be replaced with the verb “proposed”, so as not to underplay the amount of work invested by the secretariat in preparing the working papers.

*Paragraph 13, as amended, was adopted.*

2. *Consideration of General Assembly resolution 70/118 of 14 December 2015 on the rule of law at the national and international levels*

*Paragraphs 14 to 22*

*Paragraphs 14 to 22 were adopted.*

3. *Consideration of paragraphs 9 to 12 of resolution 70/236 of 23 December 2015 on the report of the International Law Commission on the work of the sixty-seventh session*

*Paragraphs 23 to 26*

*Paragraphs 23 to 26 were adopted.*

4. *Seventieth anniversary session of the International Law Commission*

*Paragraphs 27 and 28*

*Paragraphs 27 and 28 were adopted.*

*Paragraph 29*

**Sir Michael Wood** proposed that the last sentence of paragraph 29 should become a new paragraph, with subsequent paragraphs of chapter XIII to be renumbered accordingly.

*It was so decided.*

*Paragraph 29, as amended, was adopted.*

*Paragraphs 30 and 31*

*Paragraphs 30 and 31 were adopted.*

5. *Honoraria*

*Paragraph 32*

**Mr. Kittichaisaree** proposed the insertion of the word “strongly” before “reiterates its views concerning the question of honoraria”. For many years, the Commission had been expressing the same views, with no results.

**Sir Michael Wood** said that, while he agreed with those sentiments, he thought that in the current financial situation, it would be impolitic to use the phrase “strongly reiterates”.

*Paragraph 32 was adopted.*

6. *Documentation and publications*

*Paragraphs 33 to 35*

*Paragraphs 33 to 35 were adopted.*

*Paragraphs 36 and 36 bis*

**The Chairman** proposed the insertion in paragraph 36 of two new sentences about the new arrangements used during the session for advance editing of documentation, as a result of which the quality of documentation in general had been improved. In particular, the Commission's report to the General Assembly would be of an editorial quality closer to that of the *Yearbook of the International Law Commission*. If the arrangements were continued, they would help to reduce the backlog in the issuance of the *Yearbook*. The two new sentences would read: "In particular, the Commission noted with satisfaction that a number of experimental measures to streamline the editing of the Commission's documents were introduced following exchanges between the secretariat of the Commission and the services involved in the editing of documents. The new arrangements contributed to the improvement of the documents considered by the Commission and facilitated its work." He likewise proposed the creation of a new paragraph, 36 *bis*, using the final two sentences in paragraph 36.

Following a remark by **Mr. Forteau** and a query from **Mr. Kamto, Mr. Llewellyn** (Secretary to the Commission) explained that under the new arrangements, the editors had been working side by side with the secretariat to produce the various chapters of the Commission's report to the General Assembly. As a result, the Commission's report would be issued well in advance of the start of the seventy-first session of the General Assembly.

**The Chairman** and **Mr. Kamto** expressed profound gratitude to all the linguistic services involved in the issuance of the Commission's documentation.

**Mr. Vázquez-Bermúdez** said that he endorsed paragraph 36 *bis* in general but proposed that the words "and disappointment" should be deleted, since the point was conveyed sufficiently well with the words "expressed concern".

Paragraphs 36 and 36 *bis* were adopted, with the inclusion of the sentences proposed by the Chairman and the deletion proposed by Mr. Vázquez-Bermúdez.

*Paragraphs 37 to 39*

*Paragraphs 37 to 39 were adopted.*

## 7. Yearbook of the International Law Commission

*Paragraph 40*

*Paragraph 40 was adopted.*

*Paragraph 41*

**Mr. Huang** expressed concern about the lengthy delays in the publication in Chinese of the Commission's documentation. Thanks to several years of efforts, the large backlog in issuance of the *Yearbook* in Chinese had been greatly reduced, but a number of volumes (2005 to 2010) were still being edited. The main reasons for the backlog were lack of financing and imbalance in the staffing of the linguistic services in Geneva: there were two *Yearbook* editors each for English, French and Spanish, but only one each for Arabic, Chinese and Russian.

Chinese, as one of the six official languages of the United Nations, should be treated on an equal footing with all the other languages; Chinese readers had the right to receive the Commission's publications on the same basis as readers in other languages. There were over 660 law schools and hundreds of thousands of law students in China, where the subject of international law was compulsory. He therefore hoped that the Commission would give due attention to the problem of the backlog in publication of the *Yearbook* in

Chinese. The funding must be allocated in a more balanced manner, and the prompt editing of the *Yearbook* assured.

**Mr. Hassouna** supported those comments. All languages in the United Nations should be treated equally, and the *Yearbook* should be published in all languages on an equal footing.

*With those comments, paragraph 41 was adopted.*

8. *Assistance of the Codification Division*

*Paragraph 42*

*Paragraph 42 was adopted.*

9. *Websites*

*Paragraph 43*

*Paragraph 43 was adopted with an editorial amendment proposed by Mr. Forteau.*

10. *United Nations Audiovisual Library of International Law*

*Paragraph 44*

*Paragraph 44 was adopted.*

C. *Date and place of the sixty-ninth session of the Commission*

*Paragraph 45*

**Mr. Huang** pointed out that 1 May was observed as a public holiday by about 80 countries around the world and asked why it was to be a working day at the Commission's sixty-ninth session.

**Mr. Llewellyn** (Secretary to the Commission) said that a decision on which holidays were to be observed in the United Nations was made by the General Assembly every year.

**Mr. Hassouna** said the question had been discussed in the Planning Group, where some members had suggested that the sixty-ninth session should begin on 8 May 2017, not 1 May 2017. The relevant services in Geneva, however, had stated that 1 May to 2 June 2017 were the only dates available for the first part of the session. It was unfortunate that the Commission had no opportunity to express its preferences regarding the scheduling of meetings.

**Mr. Llewellyn** (Secretary of the Commission) said that in principle, the Commission should be able to do so. The underlying reality, however, was that a huge number of meetings took place every year at the United Nations Office at Geneva, and scheduling had to be done a great many years in advance.

**Mr. Forteau** drew attention to the phrase "The Commission decided". He pointed out that in the report on its previous session, it had used the words "The Commission recommended", but his preference would be to use the term "decided" now and in all future reports.

**Mr. Tladi**, supported by **Mr. Saboia** and **Mr. Candiotti**, said that the Commission could make recommendations about the dates for its future sessions, but it was the General Assembly that made the final decision.



**Sir Michael Wood** said that the Commission was entitled to make a decision about the dates for its future session, even though the General Assembly might subsequently decide otherwise. It was therefore correct to use the phrase “The Commission decided” in paragraph 45.

**Mr. Vázquez-Bermúdez** proposed that, taking into account the comment just made by Sir Michael Wood, paragraph 45 should be adopted as it stood.

*Paragraph 45 was adopted.*

*D. Cooperation with other bodies*

*Paragraphs 46 to 49*

*Paragraphs 46 to 49 were adopted.*

*E. Representation at the seventy-first session of the General Assembly*

*Paragraph 50*

*Paragraph 50 was adopted.*

*F. International Law Seminar*

*Paragraph 55*

*Paragraph 55 was adopted, on the understanding that it would incorporate editorial corrections by Ms. Jacobsson.*

*Paragraphs 56 to 60*

*Paragraphs 56 to 60 were adopted.*

*Paragraph 61*

**Mr. Saboia** said that Brazil should be mentioned along with the other countries cited in the first sentence as having made voluntary contributions to the United Nations Trust Fund for the International Law Seminar since 2014.

**Sir Michael Wood**, supported by **Mr. Kamto**, **Mr. Valencia-Ospina**, **Mr. Forteau**, **Mr. Candiotti** and **Mr. Tladi**, suggested that the secretariat should be requested to make sure the list of countries contained in paragraph 61 was correct.

*Paragraph 61 was adopted on the understanding that the secretariat would check the list of countries therein.*

*Paragraphs 62 and 63*

*Paragraphs 62 and 63 were adopted.*

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

*The report of the International Law Commission as a whole, as amended, was adopted.*

**Chairman’s concluding remarks**

**The Chairman** said that the end of the sixty-eighth session also marked the end of the current quinquennium. The Commission was submitting to the General Assembly the full set of draft articles on protection of persons in the event of disasters, completed on

second reading. It was to be hoped that the General Assembly would use them as the basis for a convention. The Commission was also submitting two sets of draft conclusions completed on first reading: on subsequent agreements and subsequent practice in relation to the interpretation of treaties and on identification of customary international law. Earlier in the quinquennium, the Commission had completed its work on three important topics, namely expulsion of aliens, the obligation to extradite or prosecute (*aut dedere aut judicare*) and the most-favoured-nation clause. The Commission could be proud of its productivity, its creativity and the collegial spirit in which it worked. He was grateful to his colleagues on the Bureau and to the former chairmen of the Commission for their advice and guidance: growing up in Africa, he had learned that individuals were never as important as the community that surrounded them. He thanked the secretariat, the Codification Division and the Legal Liaison Office in Geneva for their competent assistance and continuous support. He also thanked the précis-writers, interpreters, editors, conference officers, translators and other members of the conference services who extended their assistance to the Commission on a daily basis.

#### **Closure of the session**

After the customary exchange of courtesies, **the Chairman** declared the sixty-eighth session closed.

*The meeting rose at 12.15 p.m.*