

Document:-
A/CN.4/3387

Summary record of the 3387th meeting

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

Extract from the Yearbook of the International Law Commission:-
2017, vol. I

*Downloaded from the web site of the International Law Commission
(<http://legal.un.org/ilc/>)*

reference to the Marrakesh Agreement Establishing the World Trade Organization.

123. The CHAIRPERSON proposed that paragraph (7) be left in abeyance to allow the Special Rapporteur and any interested members to prepare a new draft.

It was so decided.

Paragraph (8)

124. Mr. MURPHY proposed that the words “largely echo the WTO standard” in the second sentence be replaced with “also contain standards”.

125. Mr. RAJPUT said that in the last sentence, it would be preferable to replace “Such investment tribunals” with “Some investment tribunals”. The references in the second and third footnotes to the paragraph should be expanded to give specific examples of bilateral investment treaties.

It was so decided.

Paragraph (9)

126. Ms. ORAL said that, as currently formulated, the fourth sentence seemed to suggest that the definition of pollution of the marine environment in article 1, paragraph 1 (4), of the United Nations Convention on the Law of the Sea expressly referred to all airborne sources of marine pollution, including atmospheric pollution from land-based sources and vessels, which was not the case. She therefore proposed rephrasing that part of the sentence to read: “which defines the ‘pollution of the marine environment’ ... implicitly to include ...”.

127. Mr. PARK said that he had doubts about the references to the enforcement of rules in the last two sentences of paragraph (9), since draft guideline 9, paragraph 1, mentioned only identification, interpretation and application of rules.

128. Mr. NGUYEN said that he shared Mr. Park’s concerns and proposed replacing the word “enforcement” with “implementation”. In the penultimate sentence, the words “and maritime law” should be added after “applicable rules of the law of the sea”. A footnote referring to the same source as the footnote to paragraph (4) of the commentary to the preambular paragraph beginning with the words “Noting the close interaction between the atmosphere and the oceans” should be added.

129. Sir Michael WOOD said that he agreed with Ms. Oral’s point and proposed amending that part of the fourth sentence to read “in such a way as to include ...”. He also agreed with Mr. Nguyen but would suggest saying “effective implementation” in the last two sentences. He did not believe that an express reference to maritime law was necessary.

Paragraph (9), as amended by Sir Michael Wood, was adopted.

The meeting rose at 6.05 p.m.

3387th MEETING

Thursday, 3 August 2017, at 10.05 a.m.

Chairperson: Mr. Georg NOLTE

Present: Mr. Argüello Gómez, Mr. Aurescu, Mr. Cissé, Ms. Escobar Hernández, Ms. Galvão Teles, Mr. Gómez Robledo, Mr. Grossman Guilloff, Mr. Hassouna, Mr. Jaliloh, Mr. Laraba, Ms. Lehto, Mr. Murase, Mr. Murphy, Mr. Nguyen, Ms. Oral, Mr. Ouazzani Chahdi, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Rajput, Mr. Ruda Santolaria, Mr. Saboia, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Sir Michael Wood.

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

CHAPTER VI. Protection of the atmosphere (continued) (A/CN.4/L.902 and Add.1-2)

1. The CHAIRPERSON invited the Commission to resume its consideration of the portion of chapter VI that was contained in document A/CN.4/L.902/Add.2. He recalled that the Special Rapporteur had held consultations with a small group of interested Commission members on a number of paragraphs the adoption of which had been deferred pending some redrafting. He invited the Special Rapporteur to introduce his proposed amendments, as contained in an informal paper that had been circulated to members.

C. **Text of the draft guidelines on the protection of the atmosphere, together with preambular paragraphs, provisionally adopted so far by the Commission (continued)**

2. **TEXT OF THE DRAFT GUIDELINE, TOGETHER WITH PREAMBULAR PARAGRAPHS, AND COMMENTARIES THERETO PROVISIONALLY ADOPTED BY THE COMMISSION AT ITS SIXTY-NINTH SESSION (continued)**

Commentary to the preambular paragraph beginning with the words “Noting the close interaction” (concluded)

Paragraph (1) (concluded)

2. Mr. MURASE (Special Rapporteur) said that, in response to amendments suggested by members of the group, he had merged the first two sentences, deleted the word “generally” from the third sentence and changed the phrase “that is from anthropogenic activities” to “including from anthropogenic activities”, deleted the fourth and fifth sentences, added the phrase “and stressed the importance of increasing the scientific understanding of the ocean–atmosphere interface” at the end of the last sentence, merged the first two footnotes to the paragraph, and included a reference to the Intergovernmental Panel on Climate Change in the third footnote to the paragraph, which had become the second footnote to the paragraph.

Paragraph (1), as amended, was adopted.

Paragraph (4) (concluded)

3. Mr. MURASE (Special Rapporteur) proposed the insertion, in the footnote to the paragraph, of a reference

to paragraph 14 of General Assembly resolution 70/1 of 25 September 2015.

Paragraph (4), as amended, was adopted.

The commentary to the preambular paragraph beginning with the words “Noting the close interaction”, as amended, was adopted.

Commentary to the preambular paragraph beginning with the words “Noting that the interests” (concluded)

Paragraph (2) (*concluded*)

4. Mr. MURASE (Special Rapporteur) said that, as agreed by the group, he had reformulated the paragraph to read:

“The Commission opted for the term ‘interests’ rather than ‘benefit’ under the present preambular paragraph. A similar formulation was used in draft guideline 6 provisionally adopted by the Commission at the sixty-eighth session, which referred to interests of future generations in the context of ‘equitable and reasonable utilization of the atmosphere’. As yet, no international court or tribunal has found that there exists under customary international law intergenerational ‘rights’ such that a current generation may advance rights on behalf of a future generation.^[footnote] Standing to sue in some proceedings was granted on the basis of the ‘public trust doctrine’, which holds Governments accountable as trustees for the management of common environmental resources.^[footnote]”

5. In order to incorporate a suggestion from Mr. Tladi, he had also inserted, in the footnote to the third sentence of that paragraph, citations to several of the most important domestic court cases that involved issues relating to the interests of future generations. He had furthermore rearranged the content of the various footnotes to the original paragraph so as to create two new footnotes.

6. Mr. PARK proposed that an additional footnote be inserted at the end of the second sentence of the reformulated paragraph that would refer to pages 11 and 12 of the statement made by the Chairperson of the Drafting Committee, Mr. Šturma, at the Commission’s 3314th meeting, held on 4 July 2016.

It was so decided.

7. Mr. PARK pointed out that there was some repetition between the third sentence of the proposed paragraph and its footnote.

8. Mr. TLADI said that referring in the body of the paragraph to the fact that, as yet, no international court or tribunal had found that there existed under customary international law intergenerational “rights”, while indicating less prominently, in the footnote to the third sentence of the proposed paragraph, that there had been many national court decisions that recognized intergenerational equity risked undermining the important principle set out in the preambular paragraph. Both statements should appear together, either in the footnote or in the paragraph.

9. Following an exchange in which the CHAIRPERSON, Sir Michael WOOD, Mr. TLADI, Mr. MURPHY, Ms. ORAL and Mr. VÁZQUEZ-BERMÚDEZ took part, Mr. MURPHY made a series of proposals for reconciling the various viewpoints expressed. First, the third and fourth sentences of the reformulated paragraph should be deleted. Moreover, the contents of the two footnotes of the text proposed by the Special Rapporteur should be merged into one large footnote that would begin with the new citation that had just been proposed by Mr. Park, to be followed by a sentence reading: “Though there are as yet no decisions by international tribunals concerning customary intergenerational rights, there have been many national court decisions, which may constitute practice for the purposes of customary international law, recognizing intergenerational equity.” Next would come the references to scholarly works and to national court cases, followed by the deleted fourth sentence from paragraph (2). The footnote indicator would appear at the end of the second sentence of paragraph (2).

Paragraph (2), as amended, was adopted.

The commentary to the preambular paragraph beginning with the words “Noting that the interests”, as amended, was adopted.

Commentary to draft guideline 9 (Interrelationship among relevant rules) (continued)

Paragraph (7) (*concluded*)

10. Mr. MURASE (Special Rapporteur) said that, in response to several proposals by Commission members, he had deleted the words “there are a number of institutional and jurisprudential references to” from the first sentence, as they had elicited strong controversy. The first sentence now read: “With respect to international trade law, the concept of mutual supportiveness has emerged to help that law and international environmental law, which relates in part to protection of the atmosphere.”

11. Mr. MURPHY proposed that, in that sentence, the word “reconcile” be inserted after the word “help”.

Paragraph (7), as amended, was adopted.

Paragraph (8) (*concluded*)

12. Mr. MURASE (Special Rapporteur) said that, following a suggestion from Mr. Rajput, he had replaced the text of the second footnote to the paragraph with references to examples of model bilateral investment treaties.

Paragraph (8), as amended, was adopted.

13. The CHAIRPERSON invited the members to consider the adoption of the remaining paragraphs of the commentary to draft guideline 9.

Paragraph (10)

14. Mr. MURPHY proposed that, in the fifth sentence, the words “obliges the parties” be replaced with the words “provides that the parties are determined” and that the words “of a certain magnitude” be added at the end of the same sentence. He also proposed that, in the following

sentence, the words “in accordance with the Convention and the Protocols to which they are party” be inserted after the words “appropriate measures”.

Paragraph (10), as amended, was adopted.

Paragraph (11)

15. Mr. AURESCU proposed that the footnotes supporting the first sentence also contain references to the case law of international courts and tribunals, not only to articles of human rights treaties. Furthermore, the rights enumerated in that sentence should include the right to a healthy environment—perhaps in place of the right to private and family life—which had been developed in the case law of the European Court of Human Rights. One example that could be provided was the 1994 *López Ostra v. Spain* decision, which was the first case on the right to a healthy environment that had been decided by the Court.

16. Mr. MURASE (Special Rapporteur) said that he agreed with those proposals and could supply examples of case law from his fourth report (A/CN.4/705).

17. The CHAIRPERSON said that including a reference to the case suggested by Mr. Aurescu might be problematic because the right to a healthy environment had been developed by the Court on the basis of the right to privacy and other rights, meaning that it did not have the same textual explicitness as the other rights listed in the first sentence. Given that the Commission was in the process of adopting the report, it might be best not to supplement the text with that degree of detail.

18. Mr. MURPHY said that, if the Commission decided to cite examples of the case law of international courts and tribunals in the footnotes to that sentence, he would like to have an opportunity to see the cases in question. An alternative solution would be to replace the opening words of the sentence, “A review of the jurisprudence of international courts and tribunals and of human rights treaty bodies shows that the most commonly used ‘general’ substantive rights in environmental claims are”, with the words “In this regard, relevant human rights are”, followed by the three rights that currently appeared in the sentence. He also proposed that, in the final sentence, in order to clarify the causal link mentioned, the words “that impairs the protected right” be inserted after the word “degradation”.

19. Mr. OUAZZANI CHAHDI said that, in the first sentence, it might be better to replace the expression “‘general’ substantive rights” with “fundamental rights” [*droits fondamentaux*].

20. Mr. MURASE (Special Rapporteur) said that the terms “general rights” and “substantive rights” were terms of art that appeared in the scholarly literature in English, and the replacement of the expression “‘general’ substantive rights” with “fundamental rights” might not capture that common usage.

21. The CHAIRPERSON suggested inserting the word “human”, so that the expression would read “‘general’ substantive human rights”.

22. Mr. ŠTURMA said that the point of the first sentence was that, because no specific human right to a healthy environment had been established, environmental claims before international courts and tribunals or human rights treaty bodies tended to rely on classic or traditional human rights. Yet none of those cases, including the one mentioned by Mr. Aurescu, had anything to do with the protection of the atmosphere; rather, they concerned other forms of environmental damage.

23. Mr. CISSÉ said that the terms “general rights” [*droits généraux*] and “specific rights” [*droits particuliers*] were also terms of art in French and should be maintained in the text. Perhaps a footnote could be used to explain that the first expression referred to fundamental rights.

24. Mr. SABOIA proposed that the word “‘general’” before “substantive rights” be deleted, as it was unnecessary.

25. Mr. GROSSMAN GUILOFF said that the word “‘general’” should be maintained, as it was used in contrast to the word “‘specific’”.

26. Mr. MURASE (Special Rapporteur) said that, since there appeared to be opposition to the use of the terms “‘general’ substantive rights” and “‘specific’ right” in the first and second sentences, it might be best to follow Mr. Murphy’s suggestions for amending the first and final sentences. He also proposed that the word “‘specific’” in the second sentence be deleted.

27. Sir Michael WOOD said that he agreed with the suggestions made by the Special Rapporteur and Mr. Saboia. It would, however, be wise to retain the word “specific” in the second sentence, but without quotation marks, in order to contrast the right to environment with the rights spelled out in the first sentence.

28. Mr. OUAZZANI CHAHDI proposed that the phrase “the most commonly used ‘general’ substantive rights” be replaced with “the most commonly used human rights” [*les droits de l’homme les plus souvent invoqués*], since the rights at stake were human rights.

29. The CHAIRPERSON said that the phrase proposed by Mr. Ouazzani Chahdi would make it necessary to specify sources and would give the Special Rapporteur much additional work.

30. Mr. JALLOH said that, in the light of the Special Rapporteur’s explanation of the logic behind the terms “general” and “specific”, the original wording of the first two sentences of the paragraph should be retained.

31. The CHAIRPERSON drew attention to the fact that the Special Rapporteur had agreed to Mr. Murphy’s proposal.

Paragraph (11), as amended by Mr. Murphy and Sir Michael Wood, was adopted.

Paragraphs (12) and (13)

32. Mr. RUDA SANTOLARIA said that, for the sake of consistency, in the first sentence, the word “law” should be replaced with “rules”.

33. Mr. PARK said that he endorsed the correction proposed by Mr. Ruda Santolaria, especially as he and a number of other members had queried the existence of a law on the atmosphere during the plenary debate. The reference in the second sentence to the “law on the atmosphere” should therefore also be amended. Moreover, in that sentence, it would be more accurate to say that the scope of application of human rights treaties was “*a priori* limited to the persons subject to a State’s jurisdiction”. In the third sentence, the phrase “the case becomes a matter of extra-jurisdictional application” was strange and should, perhaps, be recast to read “the case might become an international dispute”. Lastly, he requested clarification of the last part of that sentence, which read “and thus a situation that human rights treaties cannot normally cope with”.

34. Mr. NGUYEN said that he concurred with Mr. Ruda Santolaria and Mr. Park that the reference to the law on the atmosphere should be changed, because draft guideline 9, paragraph 1, referred to the “rules of international law relating to the protection of the atmosphere”. In order to retain some consistency, he therefore proposed that this phrase be used in both the first and the second sentences in place of “law relating to the atmosphere” and “law on the atmosphere”.

35. Mr. GROSSMAN GUILOFF said that the second sentence seemed to be comparing two different things. In human rights law, the States of victims were normally the States of origin, whereas “persons subject to a State’s jurisdiction” was a different notion. Perhaps what the Special Rapporteur wished to indicate was that human rights law normally had an impact within the territory of a country. He suggested that the last part of the second sentence instead indicate that different notions had been developed in human rights law, including *erga omnes* jurisdiction, crimes against humanity, international tribunals and so forth, that had broadened the scope of application of human rights law, establishing a potentially important link to the rules of environmental law.

36. The CHAIRPERSON said that paragraphs (12) and (13) raised some very important general questions concerning the relationship between human rights law and other fields of law, which had not been extensively discussed in the Drafting Committee but deserved closer examination. He therefore suggested that the deliberations on those two paragraphs be suspended in order to enable consultations to be held among a small group of members.

It was so decided.

37. Mr. MURASE (Special Rapporteur) said it was unfortunate that further consultations were necessary. The extra-jurisdictional application of human rights law in the context of environmental protection was discussed in detail in his fourth report. It was therefore somewhat surprising that the issue had been raised at that late stage of the session. He had used the term “extra-jurisdictional application” to avoid confusion with the extraterritorial application of domestic law.

Paragraphs (14) and (15)

Paragraphs (14) and (15) were adopted.

Paragraph (16)

38. Mr. MURPHY, supported by Sir Michael WOOD, said that he was concerned about the statistics quoted in the second sentence because they very probably referred to deaths from both indoor and outdoor air pollution. It was well known that indoor air pollution was the cause of the bulk of such deaths. The sentence was therefore misleading, as it suggested that 6.5 million people were dying every year from the failure to address transboundary pollution and climate change. The simplest solution would be to delete that sentence. The next sentence would then start with the words, “The World Health Organization (WHO) has noted that ...”.

39. Mr. MURASE (Special Rapporteur) said that he accepted that amendment.

Paragraph (16), as amended, was adopted.

Paragraph (17)

40. Sir Michael WOOD asked what was meant by “repatriation” in the penultimate sentence.

41. The CHAIRPERSON, speaking as a member of the Commission, proposed that, in the last sentence, the phrase “other groups of people include local communities, migrants, women, children, persons with disabilities and also the elderly” read, “other groups of potentially particularly vulnerable people include ...”.

42. Mr. MURASE (Special Rapporteur) explained that the term “repatriation”, which was not a legal term, had been drawn from World Bank and WHO documents. It covered situations such as the considerable emigration from Tuvalu to New Zealand every year and the movement of people from low-lying villages to higher ground on other islands in the Pacific Ocean. He agreed to the amendment proposed by the Chairperson.

43. Sir Michael WOOD said that repatriation normally meant the act of returning to one’s country of nationality. The situation described by the Special Rapporteur sounded more like relocation.

44. Mr. RUDA SANTOLARIA said that displacement [*desplazamiento*] was a more apt term to describe forced movement within a person’s home country. Forced migration occurred when someone went to a foreign country.

45. Mr. MURASE (Special Rapporteur) said that he preferred the term “displacement” to “relocation”.

Paragraph (17), as amended, was adopted.

46. Mr. PARK, speaking in exercise of the right of reply, said that the Special Rapporteur had maintained that the issue of the extra-jurisdictional application of human rights law was mentioned in his fourth report and had already been debated in detail. Paragraphs (12) and (13) were taken from paragraphs 89 to 91 of the fourth report, which would be published in volume II (Part One) of the *Yearbook of the International Law Commission 2017*, whereas the commentary to the draft guidelines would be published in volume II (Part Two). The Commission was

therefore entitled to raise any questions of relevance to its work and propose any amendments it thought fit.

47. The CHAIRPERSON said it was his understanding that the Commission had the right to decide on the contents of its commentaries, notwithstanding the debate on the Special Rapporteur's report. The Special Rapporteur had merely wished to indicate that in his fourth report he had already introduced the issue referred to in the commentary, which was still a draft commentary.

CHAPTER VII. *Immunity of State officials from foreign criminal jurisdiction* (A/CN.4/L.903/Rev.1 and Add.1-3)

48. The CHAIRPERSON invited the Commission to consider chapter VII of the draft report, beginning with the portion of the chapter contained in document A/CN.4/L.903/Rev.1.

A. Introduction

Paragraphs 1 to 3

Paragraphs 1 to 3 were adopted.

Section A was adopted.

B. Consideration of the topic at the present session

Paragraphs 4 to 8

Paragraphs 4 to 8 were adopted.

Paragraph 9

Paragraph 9 was adopted subject to its completion by the Secretariat.

Paragraph 10

49. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) requested the addition, at the end of the paragraph, of wording that would fully reflect the progress of work. It would read: "At the 3365th meeting, the Special Rapporteur reported to the Commission on the progress of the informal consultations."

Paragraph 10, as amended, was adopted.

50. The CHAIRPERSON invited the Commission to consider the portion of chapter VII contained in document A/CN.4/L.903/Add.1. The secretariat would add a footnote to the *chapeau* of Part Two (Immunity *ratione personae*) and to the *chapeau* of Part Three (Immunity *ratione materiae*) which would be identical to the footnote relating to procedure on which the Drafting Committee had agreed. The secretariat would also add draft article 7, which had been adopted by the Commission.

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 1

51. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that the annex contained in document A/CN.4/L.893

and adopted by the Commission should also be inserted in the document.

Paragraph 1 was adopted on that understanding.

52. The CHAIRPERSON drew attention to the portion of chapter VII contained in document A/CN.4/L.903/Add.2, which was available in all official languages except Chinese. He asked whether he could take it that the Commission wished nonetheless to proceed with the adoption of the document.

53. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that, before the document was considered, she wished to make two general comments. First, the draft commentary reflected the position adopted by the Commission on the topic. Throughout the Commission's work on the topic, she had displayed great flexibility and had taken into consideration the various views expressed by different members, which were adequately covered in the document. Given that the Commission had already adopted a position on the topic through a roll-call vote, the results of which were recorded in document A/CN.4/L.903/Rev.1, and given that the opinions of all members, including those holding dissenting opinions on draft article 7, were reflected in detail in the summary records, which members had had an opportunity to review, she urged members to bear in mind that, in view of the short time available, the Commission should abide by the opinion of the overwhelming majority of members of the Commission and not reopen the debate on issues which had been exhaustively discussed in plenary meetings and in the Drafting Committee. In point of fact, the Commission was being asked to adopt a decision on whether the commentaries reflected the decision taken by the Commission and the substantive questions which had been debated.

54. Concerning the proposed amendments prepared by Mr. Murphy in consultation with some of the other members and circulated in document form, her view was that some of the proposals could be adopted with no difficulty, while others would need to be debated. Although she appreciated Mr. Murphy's intention to facilitate and expedite the Commission's work, she was surprised that the proposals had been circulated in writing, as she had never been asked whether that should be done. Some of the proposals under other topics had also been circulated in writing, but in every case they had been prepared by the Special Rapporteur for the topic in question, not by other members. Furthermore, it was inappropriate for the proposed amendments to have been circulated under an official symbol, with no indication either in the document or by the Chairperson that what it contained was only a proposal. In her seven-year experience as a member, that was the first time such a paper had been circulated in those circumstances, during the adoption of the Commission's report. Normally, proposals were not circulated in writing unless they had been discussed first.

55. Mr. LLEWELLYN (Secretary to the Commission) said that there appeared to have been a misunderstanding. The secretariat had been requested to circulate the proposals as an informal paper. Had the secretariat been informed of any objections on the part of the Special Rapporteur, it would not have done so. The paper bore a

symbol because it was a marked-up version of an official document; there had been no intention to misrepresent its informal nature.

56. Mr. SABOIA said that he appreciated the Secretary's explanation, but the matter was serious and the Commission must decide whether to accept the unofficial document as a basis for its deliberations. He would like to know the Special Rapporteur's opinion in that regard.

57. Mr. TLADI, supported by Mr. ŠTURMA, said that the Commission should begin its deliberations on the basis of the official document issued under the symbol A/CN.4/L.903/Add.2. The proposals set forth in the informal paper could be introduced and considered during the discussion.

58. Mr. GROSSMAN GUILLOFF said that if the purpose of the paper was to expedite the Commission's work by bringing the relevant issues to the members' attention, he had no objection. Given that it bore a document symbol, however, he wondered whether it would be submitted to the Sixth Committee or circulated to anyone except the Commission members. If it was only an unofficial paper that was not for wider circulation, he would simply thank the members who had prepared it, although they should perhaps have sought the opinion of the Special Rapporteur before circulating it.

59. The CHAIRPERSON suggested that, since the paper contained proposed commentaries, the Commission should proceed to adopt them in the usual way.

It was so decided.

2. TEXT OF THE DRAFT ARTICLE, WITH THE COMMENTARY THERETO, PROVISIONALLY ADOPTED BY THE COMMISSION AT ITS SIXTY-NINTH SESSION

Paragraph 1

60. Sir Michael WOOD said that the text of draft article 7, as reproduced in paragraph 1 of the informal paper, had been adjusted to reflect the text that had been adopted previously by the Commission on the report of the Drafting Committee (A/CN.4/L.893). The annex to the draft article had also been adopted and would be added to paragraph 1.

61. Mr. MURPHY said that the footnotes previously adopted under section C should also be included.

Paragraph 1, as amended, was adopted.

*Commentary to draft article 7 (Crimes under international law in respect of which immunity *ratione materiae* does not apply)*

Paragraph (1)

62. Sir Michael WOOD said that he wished to propose several minor amendments to paragraph (1), some of which were intended to align the text with the version adopted previously by the Drafting Committee and the plenary Commission. The first sentence should be changed from "Draft article 7 refers to crimes under international law in respect of which immunity from foreign criminal jurisdiction

ratione materiae does not apply" to "Draft article 7 lists crimes under international law in respect of which immunity from foreign criminal jurisdiction *ratione materiae* shall not apply under the present draft articles".

63. Mr. MURPHY proposed that a third sentence be added to the paragraph to capture language from the statement made by the Chairperson of the Drafting Committee at the Commission's 3378th meeting: "The Commission proceeded in its work on the general understanding that the outcome of its work was without prejudice to, or taking a position on, the question whether the text of draft article 7, or any part thereof, codified existing law—reflecting *lex lata*—or whether the result constituted an exercise in progressive development, reflecting *lex ferenda*."

64. Mr. TLADI said, with respect to the first sentence, that the addition of the phrase "under the present draft articles" was problematic because the Commission could have adopted a similar phrase in respect of every draft article, yet it had not done so. Regarding the new sentence proposed by Mr. Murphy, his consistent position had been that the Commission should not litter the text with such language. While it might be acceptable to indicate at the outset that the topic involved both codification and progressive development, that indication should not appear in the commentary to every draft article.

65. Mr. JALLOH said that he shared Mr. Tladi's view on the phrase proposed by Sir Michael. He was also uncomfortable with the new sentence proposed by Mr. Murphy, as the Commission had for decades held the view that it should not attempt to specify whether its work on a particular topic represented codification or progressive development. Since the wording of the proposal was taken from the statement made by the Chairperson of the Drafting Committee at the Commission's 3378th meeting, that statement and the debate on the subject were captured in the summary records in any event. The debate should not be revisited in the commentary.

66. The CHAIRPERSON, speaking as a member of the Commission, said that the Commission had traditionally taken the view that it was not always clear whether a particular draft article reflected *lex lata* or *lex ferenda*. The proposed new sentence was hardly revolutionary, as it merely indicated that the Commission had proceeded on that assumption. While the proposed sentence might appear to be stating the obvious, the draft articles were addressed not only to States, but also to courts, for which the question of whether a particular provision was *lex lata* or *lex ferenda* was important.

67. Mr. SABOIA said that he shared the views of Mr. Tladi and Mr. Jalloh on the proposals made by Sir Michael and Mr. Murphy.

68. Mr. RUDA SANTOLARIA said that the first sentence of the paragraph, as adopted on the report of the Drafting Committee (A/CN.4/L.893), was already clear as it stood. The important issue of *lex lata* versus *lex ferenda* was reflected in the statement made by the Chairperson of the Drafting Committee and in the summary records of the relevant meetings. The Commission should not enter into every aspect of its discussions in the commentary.

69. Mr. VÁZQUEZ-BERMÚDEZ said that he agreed with Mr. Tladi and Mr. Jalloh that it was not necessary to add the phrase “under the present draft articles” to the end of the first sentence, as it was redundant. The proposal advanced by Mr. Murphy was also unnecessary, as the point was already expressed in the statement made by the Chairperson of the Drafting Committee. Moreover, that statement had been made under the responsibility of the Chairperson of the Drafting Committee and should not be reflected in the commentary. It was understood that the Commission was working within its general mandate of codification and progressive development; further elaboration on that point could create confusion.

70. Mr. JALLOH said that the prevailing view seemed to be that the proposed additional sentence should not be included in the commentary. His understanding of commentaries was that they were analogous to the explanations provided in court decisions, in that their purpose was to flesh out substantive provisions by offering insights into the Commission’s thinking. He was hesitant to overload the commentary with unnecessary text. Moreover, he considered that the Commission’s position on *lex lata* versus *lex ferenda* referred to the general unworkability of establishing a clear division between codification and progressive development, not to the question of how to categorize specific provisions.

71. Mr. RAJPUT said he agreed with Mr. Ruda Santolaria that the first sentence should be retained as adopted by the Drafting Committee and the plenary Commission. The new sentence proposed by Mr. Murphy would provide a very necessary clarification of the Commission’s point of departure. In the debates, some members had expressed discomfort with the non-inclusion, in draft article 7, of certain crimes such as terrorism and slavery. To address that issue comprehensively, the Commission should state up front, in paragraph (1) of the commentary, the basis on which it had proceeded. Unlike Mr. Tladi, he was not sure whether that principle pertained to all of the draft articles; his understanding was that the Commission had discussed the genesis or nature of the provision only in relation to draft article 7. Clarifying that point would be helpful for those who would eventually implement that draft article, including courts and even Governments.

72. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that she had no objection to the first two amendments proposed by Sir Michael, whereby “refers to crimes” would be changed to “lists crimes” and “does not apply” would be changed to “shall not apply”. The phrase “under the present draft articles”, however, did not add anything to the commentary and might even cause confusion. Like most other members who had expressed an opinion, she did not agree with that proposal. The new sentence proposed by Mr. Murphy had also failed to garner much support. The Commission as a whole seemed to be in favour of adopting the paragraph on that basis and moving on.

73. The CHAIRPERSON said that three or four members had expressed support for the additional sentence proposed by Mr. Murphy.

74. Mr. GROSSMAN GUILOFF said that he agreed with Mr. Jalloh, Mr. Ruda Santolaria, Mr. Saboia, Mr. Tladi

and Mr. Vázquez-Bermúdez that no reference should be made to progressive development and codification in paragraph (1). There was no reason to fear that the draft article would be seen as an example of only codification, not progressive development, as the information in the documents on the topic would dispel that notion. The fact that the members’ views on draft article 7 were divided was very clear, since the results of the vote that had taken place were recorded in the portion of chapter VII that had just been adopted (A/CN.4/L.903/Rev.1).

75. Mr. PETRIČ said that he agreed with Mr. Rajput that the new sentence proposed by Mr. Murphy should be included. If ever the Commission had considered something that was typical of progressive development—and a rather arbitrary form of progressive development, at that—it was draft article 7, on which the Commission had not even reached a consensus.

76. Sir Michael WOOD said that, in the light of the comment made by the Special Rapporteur, he wished to propose a compromise solution whereby the words “under the present draft articles”, but not the proposed new sentence, would be included.

77. Mr. GÓMEZ ROBLEDO said that he agreed with Mr. Grossman Guiloff and other members that the position reflected in Mr. Murphy’s proposed amendment was amply covered in the summary records of the Commission’s debate; it was not necessary to repeat that position in the commentary.

78. Ms. GALVÃO TELES said that the wording proposed by Mr. Murphy was already in the statement made by the Chairperson of the Drafting Committee and in the relevant summary records. The issue was also addressed in paragraph (8) of the commentary, and was thus adequately reflected without the new sentence.

79. The CHAIRPERSON, speaking as a member of the Commission, said that paragraph (8) referred to the other side of the argument. The proposed new sentence specified the starting point agreed on by the Commission, which formed the minimum common ground on which the commentaries had been formulated. He had not heard any arguments that the sentence was wrong in substance. The function of the commentary was to explain the role and status of a particular draft article, and he thus supported the inclusion of the additional sentence.

80. Mr. ŠTURMA said that the proposed new sentence did not pose any substantive problems, but he preferred Sir Michael’s compromise proposal to retain the suggested addition to the first sentence and not include the proposed new sentence.

81. Mr. TLADI said that the content of the proposed new sentence was not incorrect in substance, but he had long believed that the Commission should not seek to clarify whether a given proposal represented codification or progressive development because the effect would be to stop the progressive development of international law. As a matter of principle, he did not support such language because the message it conveyed was that the draft article was not to be taken seriously. Moreover, the proposed addition of the words “under the present draft articles” to

the first sentence was unnecessary, since that was already made clear by the use of the treaty language “shall not apply” at the end of that sentence.

82. Mr. PETER said that the Commission’s difficulty in reaching agreement was due to the fact that the Chairperson had taken a position on the paragraph under discussion. The role of a presiding officer was to weigh the balance of opinions expressed in the discussion and try to build support for the majority position. By stating his own position, however, the Chairperson was not leading the debate in a manner that was likely to result in a consensus.

83. The CHAIRPERSON said that, while he did not wish to prolong the discussion, his role as Chairperson did not preclude him from expressing his opinion as a member of the Commission. He had, however, taken due note of the impression that he might have created, and would endeavour, as always, to be as neutral as possible and to help the Commission to achieve consensus.

84. Mr. PARK said that he did not object to the insertion of a third sentence as proposed by Mr. Murphy. Although it was unusual for a commentary to include a description of the Commission’s rationale, in the paragraph in question such detail served to highlight the importance of draft article 7.

85. Mr. RAJPUT said that it would be helpful for the Commission to clarify that it was engaging in the progressive development of international law. Otherwise, an adjudicating body might infer that the list in draft article 7, paragraph 1, was intended to be a closed list. For that reason, he supported the inclusion of the additional sentence.

86. Mr. JALLOH said that the issue of codification versus progressive development had already been referred to by the Chairperson of the Drafting Committee, among others. The question was whether that idea needed to be emphasized in the commentary. In a spirit of compromise, he was willing to leave aside his substantive concerns over the proposals made by Mr. Murphy and Sir Michael, so as to enable the Commission to proceed with its work.

87. Mr. GROSSMAN GUILOFF said that, in his experience, cases involving the immunity of State officials from foreign criminal jurisdiction, in which international relations were at stake, were referred to a high court. It was therefore not accurate to claim that judges dealing with such cases would be reliant on guidance from the Commission. In his view, it was unnecessary, if not excessive, to indicate so extensively in the commentary to draft article 7 the reasons of principle underlying its content. The Commission should retain the text as it stood and be flexible in acknowledging differing opinions.

88. Mr. RAJPUT said that, in India, the rule was that cases must first be referred to the lowest level of criminal prosecution, as every criminal case was subject to an appellate procedure. Unless that procedure was followed, judicial decisions could not be confirmed, which would have obvious implications for the exhaustion of domestic remedies. It would thus be incorrect, in the case of India, to state that criminal cases were referred to the highest court.

89. Mr. GROSSMAN GUILOFF, speaking in exercise of the right of reply, said that he had actually been involved in a case in India in respect of which an extradition request had been made by Chile, where the topic of immunity had been discussed among the jurists consulted, but he would take note of the learned position expressed by Mr. Rajput and revise his own opinion accordingly. In any case, it seemed that a superior court would always end up being involved.

90. Mr. CISSÉ said that a compromise had to be reached as soon as possible to overcome the impasse in which the Commission found itself.

91. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that, as she understood it, most members, herself included, were opposed to the insertion of the new sentence proposed by Mr. Murphy. On the other hand, although the proposed insertion of the phrase “under the present draft articles” at the end of the first sentence was unnecessary and added nothing, she would not stand in the way of its addition if that was how the Commission wished to proceed.

92. Mr. AURESCU proposed that the first sentence of paragraph (1) be redrafted to read: “Draft article 7 lists crimes under international law in respect of which immunity from foreign criminal jurisdiction *ratione materiae* shall not apply, based on the premise that international law rules on this matter may further evolve in the future.” There would then be no need for the third sentence proposed by Mr. Murphy.

93. Mr. MURPHY said that his understanding of the views expressed was that those members who were opposed to his proposal for a third sentence objected to its placement rather than its content. He was prepared to withdraw the proposal in the interest of moving forward, even though it appeared to reflect the majority view of the Commission.

94. The CHAIRPERSON suggested that the Commission adopt the paragraph with the amendment to the first sentence proposed by Sir Michael. The paragraph would read: “Draft article 7 lists crimes under international law in respect of which immunity from foreign criminal jurisdiction *ratione materiae* shall not apply under the present draft articles. The draft article contains two paragraphs, one that lists the crimes (para. 1) and one that identifies the definition of those crimes (para. 2).”

Paragraph (1), as amended, was adopted.

Paragraph (2)

95. Sir Michael WOOD said that, in the first sentence, the terms “part three” and “part two” should be capitalized and the word “apply” should be used instead of “produce effects”. The second sentence was not entirely accurate. One option would be to redraft it to read: “The Commission decided on this approach in view of the fact that it is widely recognized that, under customary international law, a Head of State, Head of Government and Minister for Foreign Affairs is immune from foreign criminal jurisdiction during his or her term of office, even when he or

she has been accused or suspected of having committed a crime under international law.” It would be simpler, however, to delete the sentence altogether, particularly as the Commission had already dealt with the subject matter of the sentence at length in its report on the work of its sixty-fifth session.⁴³⁰

96. Mr. TLADI said that he agreed, in substance, with the changes proposed by Sir Michael. However, if the second sentence was retained and amended, it would be preferable to refer to exceptions to immunity rather than to immunity itself, as it was such exceptions that were the subject of draft article 7.

97. Mr. SABOIA, supported by Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur), Mr. RUDA SANTOLARIA and Mr. CISSÉ, said that he agreed with Sir Michael’s proposal to delete the second sentence altogether.

Paragraph (2), as amended, was adopted.

Paragraph (3)

98. Sir Michael WOOD proposed that, in the second sentence, the word “established” be replaced with “indicated”. The quotation in the third sentence should be completed with the addition of the phrase “during such term of office” after the words “official capacity”.

Paragraph (3), as amended, was adopted.

Paragraph (4)

99. Sir Michael WOOD said that, for the sake of consistency, the words “period in office” at the end of the first sentence should be replaced with “term of office”.

100. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that, in the second sentence, the word “foreign” should be inserted before “criminal jurisdiction”.

Paragraph (4), as amended, was adopted.

Paragraph (5)

101. Mr. MURPHY said that, although it was not the Commission’s normal practice, it would be useful to state, in the first sentence, that the Commission had decided to include draft article 7 “by a majority vote”, thereby linking the paragraph to an earlier part of chapter VII in which the Commission noted that a vote had taken place. In the second sentence, he would be in favour of inserting the words “it is considered that” before “there has been”.

102. The major issue concerning paragraph (5), however, was what to do with the three footnotes. Several members of the Commission had raised serious doubts about the accuracy of the descriptions of the cases cited in the first footnote to the paragraph, the relevance of the national laws mentioned in its second footnote and the approach to discussing international case law in its third footnote. There were, in his view, three options for addressing the problem. The first was not to include the footnotes. The second was to make a number of changes

to the footnotes; for example, some members of the Commission believed that the *Pinochet* case cited in the first footnote did not directly support the content of draft article 7. The third option was to insert a series of footnotes to paragraph (8) of the commentary to enable those members to set out their rationale for opposing the adoption of draft article 7. Proposed texts for those footnotes could be found in the informal paper that had been circulated in the meeting room.

103. Mr. JALLOH said that he was opposed to specifying, in the first sentence, that the Commission had decided to include draft article 7 “by a majority vote”, since there was no established practice in that regard. On the other hand, he had no objection to the addition of “it is considered that” in the second sentence. As to the footnotes, he wondered whether the concern expressed by Mr. Murphy about the first footnote was not suitably addressed in paragraph (5) by the words “even though they do not all follow the same line of reasoning”.

104. Mr. PETER said that, since commentaries were supposed to be comprehensive, and since it was a fact that the Commission had voted on whether to include draft article 7, he supported Mr. Murphy’s proposed amendment to the first sentence. He was opposed to deleting any of the footnotes, however, particularly bearing in mind that the Commission regularly urged States to provide it with examples of their practice.

105. Ms. GALVÃO TELES said that the Commission should follow its standard practice and that the first sentence of paragraph (5) should therefore be adopted as it stood. Regarding the first footnote to the paragraph, she agreed with Mr. Jalloh that the words “even though they do not all follow the same line of reasoning” addressed the concern expressed by Mr. Murphy.

106. Mr. MURPHY said that, unless a series of footnotes was inserted in paragraph (8) of the commentary to explain why some members had opposed the adoption of draft article 7, he would want to correct what he viewed as errors in the three footnotes to paragraph (5).

The meeting rose at 1 p.m.

3388th MEETING

Thursday, 3 August 2017, at 3.05 p.m.

Chairperson: Mr. Georg NOLTE

Present: Mr. Argüello Gómez, Mr. Aurescu, Mr. Cissé, Ms. Escobar Hernández, Ms. Galvão Teles, Mr. Gómez Robledo, Mr. Grossman Guiloff, Mr. Hassouna, Mr. Jalloh, Mr. Laraba, Ms. Lehto, Mr. Murase, Mr. Murphy, Mr. Nguyen, Ms. Oral, Mr. Ouazzani Chahdi, Mr. Park, Mr. Peter, Mr. Petrić, Mr. Rajput, Mr. Reinisch, Mr. Ruda Santolaria, Mr. Saboia, Mr. Šurma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Sir Michael Wood.

⁴³⁰ Yearbook ... 2013, vol. II (Part Two).