

Provisional

For participants only

7 September 2017

Original: English

International Law Commission
Sixty-ninth session (second part)**Provisional summary record of the 3389th meeting**

Held at the Palais des Nations, Geneva, on Friday, 4 August 2017, at 10 a.m.

ContentsDraft report of the Commission on the work of its sixty-ninth session (*continued*)*Chapter VI. Protection of the atmosphere (continued)**Chapter I. Introduction**Chapter VII. Immunity of State officials from foreign criminal jurisdiction (continued)**Chapter VIII. Peremptory norms of general international law (jus cogens)**Chapter X. Protection of the environment in relation to armed conflicts**Chapter IX. Succession of States in respect of State responsibility**Chapter XI. Other decisions and conclusions of the Commission**Chapter II. Summary of the work of the Commission at its sixty-ninth session**Chapter III. Specific issues on which comments would be of particular interest to the Commission*

Chairman's concluding remarks

Closure of the session

Corrections to this record should be submitted in one of the working languages. They should be set forth in a memorandum and also incorporated in a copy of the record. They should be sent *within two weeks of the date of the present document* to the English Translation Section, room E.6040, Palais des Nations, Geneva (trad_sec_eng@unog.ch).

GE.17-12782 (E) 140817 070917



* 1 7 1 2 7 8 2 *

Please recycle 

Present:

Chairman: Mr. Nolte

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

Secretariat:

Mr. Llewellyn Secretary to the Commission

The meeting was called to order at 10 a.m.

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

Chapter VI. Protection of the atmosphere (continued) (A/CN.4/L.902/Add.2)

The Chairman invited the Commission to resume its consideration of the portion of chapter VI of the draft report contained in document A/CN.4/L.902/Add.2.

Commentary to draft guideline 9 (Interrelationship among relevant rules)

Paragraph (12)

Mr. Murase (Special Rapporteur) said that, on the basis of consultations with a small group of members, he proposed to recast the first two sentences to read:

“(12) One of the difficulties in the interrelationship between the rules of international law relating to the atmosphere and human rights law is the ‘disconnect’ in their application. While the rules of international law relating to the atmosphere apply not only to the States of victims but also to the States of origin of the harm, the scope of application of human rights treaties is limited to the persons subject to a State’s jurisdiction.”

The main issue had been to avoid the expression “extra-jurisdictional application”, which had not found favour with the Commission. To that end, he proposed that the third sentence should be reworded to read: “Thus, where an environmentally harmful activity in one State affects persons in another State, the question of the interpretation of ‘jurisdiction’ in the context of human rights obligations arises.” The fourth sentence would be deleted.

Paragraph (12), as amended, was adopted.

Paragraph (13)

Mr. Murase (Special Rapporteur) said that the aforementioned small group had proposed that paragraph (13) should be recast to read:

“One possible consideration is the relevance of the principle of non-discrimination. It may be considered unreasonable that international human rights law would have no application to atmospheric pollution or global degradation and that the law can extend protection only to the victims of intra-boundary pollution. Some authors maintain that the non-discrimination principle requires the responsible State to treat transboundary atmospheric pollution or global atmospheric degradation no differently from domestic pollution. Furthermore, if and insofar as the relevant human rights norms are today recognized as either established or emergent rules of customary international law, they may be considered as overlapping with environmental norms for the protection of the atmosphere, such as due diligence (draft guideline 3), environmental impact assessment (draft guideline 4), sustainable utilization (draft guideline 5), equitable and reasonable utilization (draft guideline 6) and international cooperation (draft guideline 8), among others, which would enable interpretation and application of both norms in a harmonious manner.”

On the basis of further consultations with the group, he wished to propose that the phrase “some authors maintain that” should be added at the beginning of the second sentence in order to indicate that it was the opinion of only some authors. Consequently, at the start of the third sentence “some authors” should be altered to “they”. Footnote 64 would be deleted as it would become redundant, and the other footnotes would be renumbered accordingly.

Paragraph (13), as amended, was adopted.

The commentary to draft guideline 9, as a whole, as amended, was adopted.

The portion of chapter VI contained in document A/CN.4/L.902/Add.2, as a whole, as amended was adopted.

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

Chapter I. Introduction (A/CN.4/L.897)

The Chairman invited the members of the Commission to consider chapter I of the draft report contained in document A/CN.4/L.897.

Introduction

Paragraph 1

Paragraph 1 was adopted.

A. *Membership*

Paragraph 2

Paragraph 2 was adopted.

B. *Officers and the Enlarged Bureau*

Paragraphs 3 to 5

Paragraphs 3 to 5 were adopted.

C. *Drafting Committee*

Paragraphs 6 and 7

Paragraphs 6 and 7 were adopted.

D. *Working Groups*

Paragraphs 8 to 10

Paragraphs 8 to 10 were adopted.

E. *Secretariat*

Paragraph 11

Paragraph 11 was adopted.

F. *Agenda*

Paragraph 12

Paragraph 12 was adopted.

Chapter I of the draft report, as a whole, was adopted.

Chapter VII. Immunity of State officials from foreign criminal jurisdiction (continued) (A/CN.4/L.903/Add.2 and Add.3)

The Chairman invited the Commission to resume its consideration of the portion of chapter VII of the draft report contained in document A/CN.4/L.903/Add.2.

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

Paragraph (19)

Mr. Murphy said that some members would welcome the inclusion of wording at the end of the paragraph to reflect the view that there was very little support in case law or national laws for the non-application of immunity to apartheid, torture and enforced disappearance. The sentence capturing their doubts in that respect would read: "Some members noted, however, that no international court case, no national law for the crime of

apartheid or torture, only one national law for enforced disappearance, no national court cases for either the crime of apartheid or enforced disappearance, and only five national court cases for torture had been invoked as expressly supporting an exception to immunity *ratione materiae* in national criminal proceedings with respect to these three crimes.” The small group of members which had met to consider amendments to document A/CN.4/L.903/Add.2 had not discussed that issue.

Ms. Escobar Hernández (Special Rapporteur) said that, since the above-mentioned proposal had never been discussed at any point by the group, it could not be regarded as a proposal which had been accepted by the group and it should therefore be deemed invalid. She drew attention to her own proposal which read: “Some members noted, however, that the inclusion of those crimes in draft article 7 found no support in practice”. [*Algunos miembros señalaron, sin embargo, que la inclusión de estos crímenes en el proyecto de artículo 7 no encuentra fundamento en la práctica.*] As the commentary was that of the Commission to a draft article which it had already adopted, it was sufficient to reflect the fact that there had been members who considered that there was no basis in practice for the draft article. The commentary could not be transformed into a sort of reproduction of the summary record or a set of statistics.

The Chairman asked Mr. Murphy whether there was a footnote to the sentence which he had proposed.

Mr. Murphy said that he was intending to propose a footnote to that sentence. To the best of his knowledge, there was no rule against the inclusion of a statement to the effect that there was no national law or international case law in support of the draft article. He did not understand the Special Rapporteur’s objection to capturing in a single sentence the opinion of some members of the Commission that there was a dearth of relevant practice.

Ms. Escobar Hernández (Special Rapporteur) said that she wished to hear members’ opinions on the wording which she had proposed and on that which Mr. Murphy had proposed.

The Chairman invited members to comment on the two proposed sets of wording.

Mr. Saboia said that the Special Rapporteur had made a reasonable proposal, which should be submitted to the Commission for a decision.

Sir Michael Wood said that, as a compromise, a sentence like the sentence proposed by the Special Rapporteur could be included in the body of paragraph (19) and the wording proposed by Mr. Murphy could be placed in a footnote to it.

Ms. Escobar Hernández (Special Rapporteur) said that it appeared that the Commission was about to turn something which was not a commentary into a commentary. An attempt was being made to impose a viewpoint contrary to that of the Special Rapporteur and to the general stance adopted by the Commission. As a compromise, she proposed the addition of the sentence “Some members noted, however, that the inclusion of those crimes in draft article 7 found no support in practice, in national and international jurisprudence or in national legislation.” [*Algunos miembros señalaron, sin embargo, que la inclusión de estos crímenes en el proyecto de artículo 7 no encuentra fundamento en la práctica ni en la jurisprudencia nacional o internacional ni en la legislación nacional.*] That was absolutely as far as she was prepared to go.

Mr. Vázquez-Bermúdez and **Mr. Ruda Santolaria** said that they supported the proposal made by the Special Rapporteur and saw no need for the footnote suggested by Mr. Murphy in the non-paper.

Mr. Park said that he also supported the wording proposed by the Special Rapporteur, but asked whether the sentence proposed by Mr. Murphy would be included as a footnote.

The Chairman said that, under the Special Rapporteur’s proposal, the sentence put forward by Mr. Murphy would not be placed in a footnote.

Mr. Murphy said that, rather than there being no grounds for the inclusion of the above-mentioned crimes in draft article 7, there were few, if any, grounds for doing so, because there were some cases which could be cited.

Ms. Escobar Hernández (Special Rapporteur) said that she could agree to the replacement of the wording “found no support in practice” with “found little if any support in practice”.

Paragraph (19), as amended, was adopted.

Paragraph (20)

Mr. Murphy proposed that the first sentence should read: “While some members of the Commission suggested that the list should include other crimes such as slavery, human trafficking, child prostitution and child pornography, and piracy, which are also the subject of international treaties that establish special legal regimes for each crime for the purposes of prevention, suppression and punishment, the Commission decided not to include them.” The words “people smuggling” should be deleted because it was synonymous with human trafficking. The second clause in the sentence made it clear that the reason why some members wanted to put those crimes on the list was that they also formed the subject of a treaty.

Mr. Rajput suggested that the word “terrorism” should be inserted between the words “slavery” and “human trafficking”.

Ms. Escobar Hernández (Special Rapporteur) said that she agreed with the proposed changes.

Paragraph (20), as amended, was adopted.

Paragraph (21)

Mr. Murphy said that paragraphs 21 to 24 should probably be deleted, because they referred to matters which were not covered by draft article 7. They alluded to corruption and the territorial tort exception. While those subjects had been discussed in the Special Rapporteur’s fifth report (A/CN.4/701), ultimately, after the debates in plenary meetings and in the Drafting Committee, they had been omitted from draft article 7 for a variety of reasons. The Commission had not, however, decided on any specific criteria for excluding those matters. It might be possible to rework those paragraphs in an attempt to reach consensus on the grounds for the inclusion or exclusion of a particular crime, but that would be complicated and time-consuming. The simplest solution would therefore be to delete those paragraphs, because an explanation of sorts could be found in the report of the Chairman of the Drafting Committee, which touched on those issues.

Mr. Park said that paragraphs 21 to 24 were important and should therefore be retained. The Commission’s discussion of those matters was of significance and should be reflected in the commentary.

Mr. Saboia said that he, too, disagreed with Mr. Murphy. Paragraphs 21 to 24 were indeed very important. Moreover, it was traditional to refer in the commentary not only to the content of provisions which had been adopted, but also to the arguments that had led to the exclusion of certain matters from them. The history of the adoption and consideration of provisions was valuable, since it resembled *travaux préparatoires* and reference was frequently made to that process when the evolution of subjects was studied. The paragraphs in question should therefore be retained.

Paragraph (21) was adopted.

Paragraph (22)

Mr. Tladi said that, while he largely agreed with the views expressed by Mr. Murphy, he disagreed with the solution which he had proposed. Rather than deleting paragraph (22), it would be better to amend the text by inserting, after the third sentence, a new sentence to read: “Other members questioned whether corruption met the test of gravity of the other crimes listed in draft article 7.” In the last sentence, the replacement of

the words “a large majority of members” with “some members” would clearly indicate that the opinion expressed in that sentence had been the view of a number of members but not of the Commission as a whole.

Ms. Oral said that it would be more true to say that many members of the Commission held the view described in the last sentence of that paragraph.

The Chairman said that it was usual in such situations to use the expression “many members”. It would be unwise to engage in an exercise in grading the level of support for that view.

Ms. Galvão Teles said that she agreed with Ms. Oral. The main argument put forward in the debate in plenary session for excluding corruption from the list of crimes included in draft article 7 had been that corruption should not be considered an official act. She agreed with Mr. Saboia that it was vital to clarify in the commentary what had been retained and what had not been retained in the draft article and the arguments underpinning that choice, as that was a matter for States’ delegations to consider in the Sixth Committee. In the last sentence of the paragraph, she therefore proposed replacing “a large majority of members” with “several members”.

Mr. Cissé said that he supported the amendment proposed by Ms. Galvão Teles. While the general opinion had been that corruption could not be regarded as an official act, during the debate in plenary meetings and in the Drafting Committee he had drawn attention to the fact that some officials used their status as such to commit acts of corruption. It would be a good idea to reflect that argument in that paragraph.

Mr. Ruda Santolaria said that he strongly supported the views expressed by Ms. Oral and Ms. Galvão Teles. The formula suggested by the latter was a good one. Its inclusion was very important because the draft article proposed by the Special Rapporteur had referred to one specific effect of corruption. It had been removed from the text because the majority of members had felt that acts of corruption could not be deemed official acts. Paragraph (23) addressed the concerns expressed by Mr. Cissé.

Mr. Murphy asked what was meant by “grand corruption” and said that he thought that it would be helpful to clarify that term.

The Chairman said it was his understanding that those words could possibly be regarded as an exercise in progressive development and as a means of showing the direction that such development should take.

Mr. Cissé said that several members of the Commission had commented that grand, or particularly serious, corruption could undermine the interests and stability of a State. It was synonymous with transnational corruption on such a large scale that it destabilized national economies, especially those of developing countries.

Ms. Escobar Hernández (Special Rapporteur) said that the term “grand corruption” had been used throughout debates in plenary meetings and in the Drafting Committee in order to make it plain that it did not refer to small bribes to an official to expedite the processing of a document, but to corruption that destabilized a State and caused serious harm to that State and its population. There was therefore no doubt that the phrase in brackets should be retained.

Mr. Rajput, supported by **Mr. Petrič**, said that he understood “grand corruption” to be corruption on a large scale.

Paragraph (22), as amended by Mr. Tladi and Ms. Galvão Teles, was adopted.

Paragraph (23)

Mr. Tladi said that, in the second and final sentences, the phrase “the Commission takes the view” should be amended to read “several members of the Commission take the view”.

Ms. Escobar Hernández (Special Rapporteur) said that she had no problem with Mr. Tladi’s proposal but she simply wished to place on record the fact that the Commission had already decided that the acts in question were not acts performed in an official capacity.

Paragraph (23), as amended, was adopted.

Paragraph (24)

The Chairman, noting that the very important question of the territorial tort exception had not been extensively discussed within the Drafting Committee and that relevant jurisprudence was nuanced, said that the Commission should be wary of making such a sweeping statement as that contained in the final sentence. He therefore proposed the addition, at the end of the paragraph, of a sentence to read: “The view was expressed that the applicable rules are more nuanced”, to be accompanied by a footnote referring to the judgment of the International Court of Justice in the case concerning *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*. In that case, the Court had determined that, even if an act had taken place on the territory of another State, that other State did not have jurisdiction because of immunity. As currently formulated, the final sentence clearly went beyond the judgment of the Court.

Mr. Murphy said that the claim made in the paragraph — that whenever a State did not consent to a particular activity in its territory, there was no immunity — was extraordinary and wholly unsubstantiated as a matter of international law. He proposed therefore that the paragraph should be either deleted or amended on the basis of the proposals made by him in the non-paper circulated at the previous meeting. If members of the Commission preferred, nonetheless, to go ahead and make a claim of that type, which in his view completely undermined the entire project, they could of course do so. However, in his opinion, that would be a huge mistake.

Ms. Escobar Hernández (Special Rapporteur) said that the territorial tort exception had been debated in the Drafting Committee on the basis of an amended proposal presented by her which had been developed in response to views expressed in the plenary to the effect that the proposal in her fifth report (A/CN.4/701) was excessively broad in terms of the scope of exceptions and that the hypothetical formulation proposed by Mr. Kolodkin in his second report (A/CN.4/631) was more appropriate. Various members of the Committee had indicated that the issue was not the existence or otherwise of immunity but the fact that the acts in question, which basically concerned acts of espionage and sabotage, could not be considered as acts performed in an official capacity and that consequently immunity did not apply and the principle of territoriality prevailed. Under no circumstances would any rules envisaged in that regard apply to, for example, persons enjoying diplomatic immunity or other persons enjoying immunity granted to them under relevant treaties. For her part, she was not in favour of deleting the paragraph; the proposal made by Mr. Murphy in his non-paper could form a basis for addressing the matter, however. Regarding the *Jurisdictional Immunities* case, the Court had not pronounced on the immunity of State officials but on the immunity of the State in relation to a very specific type of acts, namely, acts committed within the framework of an armed conflict. Such acts were, however, not relevant in the current context, since it had been agreed that questions relating to armed forces were outside of the scope of the project. She was, nevertheless, open to the proposal made by the Chairman in that connection.

Mr. Saboia said that the Special Rapporteur’s explanation, which had made clear that the paragraph was not so sweeping as Mr. Murphy feared, should meet his and others’ concerns. In his view, the Commission should either adopt the paragraph as it stood or on the basis of the proposal presented by Mr. Murphy in his non-paper.

Mr. Šturma said that, in order to allay fears such as those expressed by Mr. Murphy, it would be helpful to reflect in the commentary some of the clarifications provided by the Special Rapporteur, for example that the crimes in question concerned such acts as espionage and that the paragraph was without prejudice to the immunity enjoyed by diplomats and by members of stationed forces under status-of-forces agreements, among others. It would also be useful to include a reference to the *Jurisdictional Immunities* case.

The Chairman said that the implication of what Mr. Šturma had said was that, as currently formulated, the paragraph dealt with a complicated issue in an oversimplified way. For instance, the exceptions in question were not merely treaty based exceptions, as shown by the example he had referred to. The matter addressed in the paragraph was a very

important one, and the Commission should seek a formulation that would be acceptable to all. He therefore suggested that it should defer adoption of the paragraph to allow interested members to formulate a proposal to that end. If he heard no objection, he would take it that the Commission wished to proceed on that basis.

It was so decided.

Paragraph 2 and annex

Paragraph (25)

Sir Michael Wood proposed that the opening phrase of the first sentence should be amended to read: “Paragraph 2 of draft article 7 establishes a link ...”.

Paragraph (25), as amended, was adopted.

Paragraphs (26) and (27)

Paragraphs (26) and (27) were adopted.

Paragraph (28)

Sir Michael Wood proposed that, in the final sentence, the words “and solely for the purposes of draft article 7” should be inserted after the phrase “reasons of convenience and appropriateness”.

Paragraph (28), as amended, was adopted.

Paragraph (29)

Paragraph (29) was adopted.

Paragraph (30)

Sir Michael Wood proposed that the words “and has the same meaning” should be added at the end of the last sentence.

Paragraph (30), as amended, was adopted.

Paragraphs 31 to 35

Paragraphs 31 to 35 were adopted.

Paragraphs (5) and (8) (continued)

Ms. Escobar Hernández (Special Rapporteur) said that, following a suggestion by the Chairman at the previous meeting, a small informal group of interested members had met in order to resolve various outstanding issues relating to footnotes to paragraph (5), which set out the position of the Commission regarding draft article 7, and to paragraph (8), which set out the views of those who had opposed its adoption, and had formulated a number of proposals to that end, which had been circulated to the Commission for its consideration.

Regarding paragraph (5), it was proposed that the opening phrase of footnote 4 should be amended to read: “See the following cases which are presented in support of such trend: ...”. In footnote 5, it was proposed that the opening phrase should be amended to read: “In support of this position, attention has been drawn to Organic Act No. 16/2015 of 27 October, ...”. Footnote 6 remained unchanged.

Regarding paragraph (8), Mr. Murphy had in his non-paper proposed the addition of three footnotes referring respectively to national case law, national statutes and treaty law. The text of those footnotes, as amended by the informal group, was contained in the proposals circulated to the Commission.

The Chairman, expressing his appreciation for the work done by the group, said that he took it that the Commission wished to adopt the proposals regarding paragraphs (5) and (8), as developed by the group and circulated in writing to the Commission.

It was so decided.

Paragraphs (5) and (8), as amended, were adopted.

Mr. Tladi, referring to a comment made by Ms. Escobar Hernández in connection with paragraph (23) concerning a previous decision by the Commission, said that he had been unable to find in the previous four reports of the Commission on its work any reference to a decision by it to the effect that there was no immunity for corruption.

Paragraph (17) (continued)

Mr. Murphy proposed that paragraph (1) should be amended in line with the amendment to paragraph (19) that had been adopted earlier.

Paragraph (17), as amended, was adopted.

Paragraph (18)

Mr. Tladi, recalling that at the previous meeting he had proposed a footnote to accompany the new penultimate paragraph that had been adopted, said that he had circulated in writing a new restructured proposal for that footnote that took into account comments made by members, in particular regarding its length.

The Chairman said that he took it that the Commission wished to adopt the amended footnote proposed by Mr. Tladi.

It was so decided.

Paragraph (18), as amended, was adopted.

The Chairman invited the members of the Commission to consider the portion of chapter VII of the report contained in document A/CN.4/L.903/Add.3.

Sir Michael Wood said that the subparagraphs in draft article 7 should be identified consistently using either Roman numerals or letters, not both. Moreover, in paragraphs 9 and 58, for example, reference was made to the expression “does not apply”, yet the language used in the draft article was “shall not apply”. The Secretariat should amend the text accordingly.

Ms. Escobar Hernández (Special Rapporteur) said that the Secretariat should ensure that all references were based on the text of draft article 7 as proposed in her fifth report.

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

...

1. Introduction by the Special Rapporteur of the fifth report

Paragraphs 1 to 12

Paragraphs 1 to 12 were adopted.

2. Summary of the debate

Paragraph 13

Paragraph 13 was adopted.

*(a) General comments**Paragraph 14**Paragraph 14 was adopted.*

Methodology and treatment of State practice

*Paragraphs 15 to 24**Paragraphs 15 to 24 were adopted.*

Progressive development of international law and its codification

*Paragraphs 25 to 29**Paragraphs 25 to 29 were adopted.*

International law as a system

*Paragraphs 30 to 32**Paragraphs 30 to 32 were adopted.*

Procedural aspects of immunity

*Paragraphs 33 to 38**Paragraphs 33 to 38 were adopted.**(b) Specific comments on draft article 7**Paragraphs 39 to 52**Paragraphs 39 to 52 were adopted.**(c) Future work**Paragraph 53**Paragraph 53 was adopted.**3. Concluding remarks of the Special Rapporteur**Paragraphs 54 to 62**Paragraphs 54 to 62 were adopted.**The portion of chapter VII contained in document A/CN.4/L.903/Add.3 as a whole was adopted, subject to the necessary editorial amendments.*

Ms. Escobar Hernández (Special Rapporteur) recalled, in relation to the adoption of chapter VII, that it was the undoubted and unquestioned practice of the Commission, when adopting draft articles with commentaries, not to include a summary of its debate in the relevant chapter of its annual report. However, that practice had not been followed in the chapter of the current report dealing with the topic “Immunity of State officials from foreign criminal jurisdiction”, which included both draft article 7 and the commentary thereto and a summary of the debate. In support of the decision to include that summary, it had been argued that the Commission was dealing with an unprecedented and exceptional case, in that the consideration of her fifth report had straddled two sessions. She wished to place on record that the topic was neither unprecedented or exceptional, inasmuch as reports on other topics had in the past been considered over more than one session, and that, on those occasions, no summary of the corresponding debate had been included, even when draft articles with commentaries had been adopted. She had not objected to the inclusion of

a summary only because a member of the Commission had drawn attention to paragraph 209 of the Commission's 2016 report on the work of its sixty-eighth session (A/71/10), in which it had been stated that a summary of the full debate would be made available after the debate had been concluded in 2017. Although that paragraph could be interpreted in more than one way, she wished to avoid any misunderstanding when the topic was considered by the General Assembly. Furthermore, she had taken into account the fact that some Commission members, in particular those new members who had joined the Commission at the current session, had conveyed to her their interest in seeing their views reflected in the Commission's report. Consequently, and although she had concerns about a number of issues contained in the summary of the debate, she had not opposed the adoption of that summary.

At its seventieth session, in 2018, the Commission, through its Working Group on Methods of work, would need to address the issue of chapters devoted to topics and decide on the approach that it wished to take with regard to the form and content of its commentaries. In that connection, she intended to submit a paper on that issue to the Working Group.

The Chairman said that paragraph 209 of the Commission's 2016 report had indeed been an important factor in the decision to include a summary of the debate on immunity of State officials from foreign criminal jurisdiction.

Chapter VIII. Peremptory norms of general international law (jus cogens) (A/CN.4/L.904)

The Chairman invited the Commission to consider chapter VIII of the report, as contained in document A/CN.4/L.904.

A. *Introduction*

Paragraphs 1 and 2

Paragraphs 1 and 2 were adopted.

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

Paragraphs 3 to 5

Paragraphs 3 to 5 were adopted.

Paragraph 6

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

1. *Introduction by the Special Rapporteur of the second report*

Paragraphs 7 to 20

Paragraphs 7 to 20 were adopted.

2. *Summary of the debate*

(a) *General comments*

Paragraphs 21 and 22

Paragraphs 21 and 22 were adopted.

Paragraph 23

The Chairman suggested that, in the first sentence, the words "as such" should be added after "treaty rules should not".

Paragraph 23, as amended, was adopted.

Paragraph 24

Paragraph 24 was adopted.

Paragraph 25

The Chairman, referring to the second sentence, said that it was his understanding that fundamental values were not a descriptive element of *jus cogens* and that the reference to them in the first set of parentheses should perhaps be deleted.

Mr. Saboia, supported by **Sir Michael Wood**, said that the three elements in the first set of parentheses constituted the essence of *jus cogens* and should not be separated; the current wording should be retained.

Sir Michael Wood said that the second sentence could, in fact, be deleted altogether.

Mr. Vázquez-Bermúdez said that, if the second sentence was deleted, the words “fundamental values, hierarchical superiority and universal application” should be inserted, in parentheses, after the reference to “paragraph 2 of draft conclusion 3” in what was currently the third sentence.

Paragraph 25, as amended, was adopted.

Paragraphs 26 to 30

Paragraphs 26 to 30 were adopted.

Paragraph 31

Mr. Murphy said that, to reflect the debate within the Commission, the following sentence should be inserted at the beginning of the paragraph: “As for the bases of *jus cogens*, several members agreed that customary international law was the most common basis.”

Paragraph 31, as amended, was adopted.

Paragraph 32

The Chairman, speaking as a member of the Commission, proposed that, in the second sentence, the words “did constitute principles for the purposes of *jus cogens*” should be replaced with “could form the basis for *jus cogens*”.

Paragraph 32, as amended, was adopted.

Paragraphs 33 and 34

Paragraphs 33 and 34 were adopted.

Paragraph 35

Ms. Lehto proposed that, at the end of the first sentence, the words “several members cautioned against such an approach” should be replaced with “and some others saw it as a useful analytical tool”. The following sentence would read: “Several members pointed out, however, that the formation of *jus cogens* did not have to take two distinct steps in practice”.

Paragraph 35, as amended, was adopted.

Paragraph 36

Mr. Murphy proposed that the clause “As to the second criterion” should be inserted at the start of the first sentence.

Paragraph 36, as amended, was adopted.

Paragraph 37

Paragraph 37 was adopted.

Paragraph 38

The Chairman said that he wished to propose that, in the second sentence, the words “universal or not” should be replaced with “within the scope of the topic”. In the final sentence, the words “the question of the possibility of” should be added before “regional *jus cogens*”.

Paragraph 38, as amended, was adopted.

Paragraph 39

Paragraph 39 was adopted.

(b) *Specific comments on the draft conclusions*

(i) General comments on the structure of the draft conclusions

Paragraph 40

Paragraph 40 was adopted.

(ii) Draft conclusion 4

Paragraph 41

Paragraph 41 was adopted with a minor editorial amendment.

(iii) Draft conclusion 5

Paragraph 42

Paragraph 42 was adopted.

(iv) Draft conclusion 6

Paragraph 43

Paragraph 43 was adopted.

(v) Draft conclusion 7

Paragraph 44

Paragraph 44 was adopted.

(vi) Draft conclusion 8

Paragraph 45

Paragraph 45 was adopted.

(vii) Draft conclusion 9

Paragraph 46

Paragraph 46 was adopted.

(viii) Title of the topic

Paragraph 47

Paragraph 47 was adopted, subject to minor editorial amendments.

(ix) Future work

Paragraph 48

Paragraph 48 was adopted.

3. *Concluding remarks of the Special Rapporteur*

Paragraphs 49 to 58

Paragraphs 49 to 58 were adopted.

Paragraph 59

The Chairman suggested the deletion of the word “duly” in the first sentence.

Paragraph 59, as amended, was adopted.

Paragraph 60

Paragraph 60 was adopted.

Paragraph 61

The Chairman said that he wished to propose that, in the first sentence, the words “were not part of” should be replaced with “could not be part of”. In the same sentence, the phrase “concluding that treaties were part of general international law” should be replaced with “concluding that a particular treaty reflected a rule of general international law”.

Mr. Tladi (Special Rapporteur) proposed that the words “treaties were part” should be replaced with “treaties, as such, could be part”.

Paragraph 61, as amended, was adopted.

Paragraphs 62 to 66

Paragraphs 62 to 66 were adopted.

Paragraph 67

The Chairman said that he wished to propose that, in the second sentence, the word “possible” should be inserted before “evidence”, as not everything in a national constitution counted as evidence of customary international law. The content of each constitution needed to be assessed in order to determine its relevance.

Mr. Tladi (Special Rapporteur) said that the point made by the Chairman was true of all evidence and that the word “possible” would therefore be superfluous.

Paragraph 67 was adopted.

Paragraphs 68 and 69

Paragraphs 68 and 69 were adopted.

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

Chapter X. Protection of the environment in relation to armed conflicts (A/CN.4/L.906)

The Chairman invited the Commission to consider chapter X of the report, as contained in document A/CN.4/L.906.

A. *Introduction*

Paragraphs 1 and 2

Paragraphs 1 and 2 were adopted.

B. Consideration of the topic at the present session

Paragraphs 3 to 8

Paragraphs 3 to 8 were adopted.

The Chairman said that, following consultations within the Bureau and among members, he understood that there was agreement that a Special Rapporteur should be appointed for the topic protection of the environment in relation to armed conflicts and that the Special Rapporteur should be Ms. Marja Lehto. If he heard no objection, he would take it that the Commission so agreed.

It was so decided.

The Chairman said that, to reflect the decision that had just been made, two additional paragraphs should be inserted at the end of document A/CN.4/L.906.

New paragraph 9

The Chairman suggested the insertion of a new paragraph 9, which would read: "At the 3385th meeting, on 2 August 2017, the Commission received the oral report of the Chairman of the Working Group." The Secretariat would finalize the wording, if necessary.

New paragraph 9 was adopted on that understanding.

New paragraph 10

The Chairman suggested the insertion of a new paragraph 10, which would read: "Following consultations within the Bureau and among members, the Commission decided, at its 3389th meeting, on 4 August 2017, to appoint Ms. Marja Lehto as Special Rapporteur."

New paragraph 10 was adopted.

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

Ms. Lehto said that she wished to thank the members of the Commission for the confidence that they had placed in her. She counted on their support in bringing the topic to a successful conclusion.

Chapter IX. Succession of States in respect of State responsibility (A/CN.4/L.905)

The Chairman invited the Commission to consider chapter IX of its draft report, as contained in document A/CN.4/L.905.

A. Introduction

Paragraph 1

Paragraph 1 was adopted.

B. Consideration of the topic at the present session

Paragraphs 2 to 5

Paragraphs 2 to 5 were adopted.

1. Introduction by the Special Rapporteur of the first report

Paragraphs 6 to 10

Paragraphs 6 to 10 were adopted.

Paragraph 11

Mr. Reinisch proposed that, in the first sentence, the words “regime concerning” should be inserted between the words “universal” and “succession”. He had obtained the Special Rapporteur’s approval for that proposal prior to the latter’s departure.

Paragraph 11, as amended, was adopted.

Paragraph 12

Mr. Reinisch proposed that, as approved by the Special Rapporteur, the word “illiquid” in the first sentence should be deleted but that the quotations marks around the word “debts” should be maintained.

Paragraph 12, as amended, was adopted.

Paragraphs 13 to 17

Paragraphs 13 to 17 were adopted.

2. *Summary of the debate*(a) *General comments**Paragraphs 18 to 21*

Paragraphs 18 to 21 were adopted.

Paragraph 22

Mr. Reinisch proposed that, as approved by the Special Rapporteur, in the fifth sentence, the word “general”, between the words “the” and “rule”, should be replaced with the word “traditional”.

Paragraph 22, as amended, was adopted.

Paragraphs 23 and 24

Paragraphs 23 and 24 were adopted.

(b) *Specific comments*

(i) Draft article 1 — Scope

Paragraphs 25 and 26

Paragraphs 25 and 26 were adopted.

(ii) Draft article 2 — Use of terms

Paragraphs 27 and 28

Paragraphs 27 and 28 were adopted.

Paragraph 29

Mr. Llewellyn (Secretary to the Commission) said that the Special Rapporteur had suggested that the word “transfer” should be replaced with “compensation”.

Paragraph 29, as amended, was adopted.

- (iii) Draft article 3 — Relevance of the agreements to succession of States in respect of responsibility

Paragraphs 30 and 31

Paragraphs 30 and 31 were adopted.

- (iv) Draft article 4 — Unilateral declaration by a successor State

Paragraphs 32 and 33

Paragraphs 32 and 33 were adopted.

- (c) *Final form*

Paragraph 34

Paragraph 34 was adopted.

- (d) *Future programme of work*

Paragraph 35

Paragraph 35 was adopted.

3. *Concluding remarks of the Special Rapporteur*

Paragraphs 36 to 42

Paragraphs 36 to 42 were adopted.

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

Chapter XI. Other decisions and conclusions of the Commission (A/CN.4/L.896 and Add.1)

The Chairman invited the Commission to consider chapter XI of its draft report, beginning with the text contained in document A/CN.4/L.896.

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

Paragraphs 1 and 2

Paragraphs 1 and 2 were adopted.

1. *Working Group on the long-term programme of work*

Paragraphs 3 and 4

Paragraphs 3 and 4 were adopted.

2. *Work programme of the Commission for the remainder of the quinquennium*

Paragraph 5

Sir Michael Wood proposed that, in subparagraph (e), under the heading “2019”, the word “text” should be replaced with “principles”. The same replacement should be made under the heading “2021”.

Mr. Murphy proposed that, in subparagraph (g), the first word “Fifth” should be replaced with “Fourth”.

Sir Michael Wood proposed that, in subparagraph (i), under the heading “2018”, the word “original” should be replaced with “predecessor”, and under “2020”, the words

“the draft articles on” should be inserted between the words “Completion of” and “first reading”.

Paragraph 5, as amended, was adopted.

3. *Consideration of General Assembly resolution 71/148 of 13 December 2016 on the rule of law at the national and international levels*

Paragraphs 6 to 15

Paragraphs 6 to 15 were adopted.

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

Paragraphs 16 to 18

Paragraphs 16 to 18 were adopted.

5. *Honoraria*

Paragraph 19

Paragraph 19 was adopted.

6. *Working Group on methods of work of the Commission*

Paragraph 20

Paragraph 20 was adopted.

7. *Documentation and publications*

Paragraphs 21 to 26

Paragraphs 21 to 26 were adopted.

8. *Yearbook of the International Law Commission*

Paragraphs 27 and 28

Paragraphs 27 and 28 were adopted.

9. *Assistance of the Codification Division*

Paragraph 29

Paragraph 29 was adopted.

10. *Websites*

Paragraph 30

Paragraph 30 was adopted.

11. *United Nations Audiovisual Library of International Law*

Paragraph 31

Paragraph 31 was adopted.

C. *Date and place of the seventieth session of the Commission*

Paragraph 32

Paragraph 32 was adopted.

The Chairman invited the Commission to consider the portion of chapter XI contained in document A/CN.4/L.896/Add.1.

A. *Succession of States in respect of State responsibility*

Paragraph 1

Paragraph 1 was adopted.

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

...

C. *Date and place of the seventieth session of the Commission*

...

D. *Cooperation with other bodies*

Paragraphs 2 to 7

Paragraphs 2 to 7 were adopted.

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

Paragraph 8

Paragraph 8 was adopted.

F. *International Law Seminar*

Paragraphs 9 to 21

Paragraphs 9 to 21 were adopted.

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

Chapter II. Summary of the work of the Commission at its sixty-ninth session (A/CN.4/L.898)

The Chairman invited the Commission to consider chapter II of its draft report contained in document A/CN.4/L.898.

Paragraph 1

Paragraph 1 was adopted.

Paragraph 2

Mr. Murphy said that, in the second sentence, the date “1 January 2019” should be replaced with “1 December 2018”.

Paragraph 2, as amended, was adopted.

Paragraphs 3 to 9

Paragraphs 3 to 9 were adopted.

Paragraph 10

The Chairman said that the Secretariat would ensure that a sentence was added concerning the appointment of Ms. Lehto as the new Special Rapporteur for the topic “Protection of the environment in relation to armed conflicts”.

With that addition, paragraph 10 was adopted.

Paragraph 11

Mr. Murphy suggested that there should be an indication of the two new topics that had been placed on the Commission's long-term programme of work.

The Chairman said the Secretariat would ensure the addition of a paragraph to that effect.

Paragraph 11, as amended, was adopted.

Paragraphs 12 and 13

Paragraphs 12 and 13 were adopted.

Paragraph 14

Sir Michael Wood suggested that the paragraph should be recast using the opening formula "The Commission continued its exchange of information with", followed by a list of the various bodies concerned.

On that understanding, paragraph 14 was adopted.

Paragraph 15

Paragraph 15 was adopted.

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

Chapter VII. Immunity of State officials from foreign criminal jurisdiction (continued) (A/CN.4/L.903/Add.2)

The Chairman invited the Commission to pursue its consideration of the portion of chapter VII of the draft report contained in document A/CN.4/L.903/Add.2.

Draft article 7 (Crimes under international law in respect of which immunity ratione materiae shall not apply) (continued)

Commentary to paragraph 1 (continued)

Paragraph (24)

The Chairman recalled that adoption of paragraph (24) had been deferred pending consultations between Mr. Šturma, Mr. Murphy and the Special Rapporteur. He invited the Special Rapporteur to introduce her proposal.

Ms. Escobar Hernández (Special Rapporteur) said that, in response to amendments suggested by Mr. Šturma and Mr. Murphy, and in light of her own view that the reference in the first sentence to "(territorial tort exception)" should be retained because it served to explain the statement that preceded it and to act as a link to draft article 7, she proposed that paragraph (24) should be reformulated to read:

"(24) The Commission also considered the case of other crimes committed by a foreign official in the territory of the forum State without that State's consent to both the official's presence in its territory and to the activity carried out by the official that gave rise to the commission of the crime (territorial tort exception). This scenario differs in many respects from the crimes under international law included in paragraph 1 of draft article 7 or the crime of corruption. Although the view was expressed that immunity could exist in these circumstances and the exception should not be included in draft article 7 because there was insufficient practice to justify doing so, the Commission decided not to include it in the draft article for other reasons. The Commission considers that certain crimes such as murder, espionage, sabotage or kidnapping committed in the territory of a State in the aforementioned circumstances do not give rise to immunity from jurisdiction *ratione materiae*, and therefore there is no need to include them in the list of crimes for which this type of immunity does not apply. This is without prejudice to the immunity from criminal

jurisdiction enjoyed under special rules of international law, as set forth in draft article 1, paragraph 2.”

The Chairman recalled that he had proposed that reference should be made to a decision of the International Court of Justice that related to State immunity, but his impression was that the amended version of the paragraph might be read as contradicting that decision.

Mr. Murphy suggested that a footnote to paragraph (24) could be used to refer to that decision. He agreed that the amended paragraph reflected the language that had been negotiated through consultation, except for the reference in brackets to “territorial tort exception”. He had proposed to delete that term because he considered it confusing, since paragraph (24) referred to a situation of crime, not tort. It was also confusing in that the territorial tort exception, as it operated in the context of State immunity, was not conditioned in the way that it was in the current context. Thus, for example, the territorial tort exception did not in any respect relate to the consent or lack of consent on the part of the State, which was very much a part of what was being discussed in paragraph (24). Furthermore, that term had not been used in the draft article itself, so it was unclear why it was useful to have it in the paragraph. Deleting the word “tort” might solve the issue.

Ms. Escobar Hernández (Special Rapporteur) said that she could accept that proposal.

It was so decided.

The Chairman said that he wished to propose the addition of a footnote referring to the decision of the International Court of Justice in *Jurisdictional Immunities of the State (Germany v. Italy; Greece intervening)*, which was considered to be the leading case on territorial exception. The corresponding indicator would be placed after the word “*materiae*”.

Mr. Reinisch asked whether, given that the word “tort” would no longer appear in paragraph (24), the Chairman still considered it necessary to refer to a case that dealt with State immunity rather than criminal immunity.

The Chairman said that he still considered it necessary to include a reference to that case. In fact, by removing the word “tort”, the Commission had just broadened the scope of what it was stating in paragraph (24). Since the Court’s decision included general considerations of immunity that might or might not apply to the field covered in that paragraph, a simple reference should be made to the case without attributing any particular view to it.

Mr. Murphy proposed that the footnote indicator should be placed in the fifth sentence after the words “certain crimes” so as to avoid giving the erroneous impression that such crimes as espionage and sabotage were part of the Court’s decision.

Ms. Escobar Hernández (Special Rapporteur) said that she shared the concern expressed by Mr. Reinisch. She proposed that the footnote should be placed at the location suggested by Mr. Murphy; that it should refer to the case suggested by the Chairman; and that it should indicate that the reference was to an exception in the context of State immunity.

The Chairman said that he would not be opposed to that proposal.

Paragraph (24), as amended, was adopted.

Sir Michael Wood said that, since he was acting in a case in which the territorial exception was quite central, he had been careful not to take part in the debate on that issue, either in the Drafting Committee or in the current plenary meeting.

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

Chapter III. Specific issues on which comments would be of particular interest to the Commission (A/CN.4/L.899)

The Chairman invited the Commission to consider chapter III of its draft report, which was contained in document A/CN.4/L.899.

*Paragraph 1**Paragraph 1 was adopted.**Paragraph 2*

Sir Michael Wood proposed that the traditional deadline of “31 January 2018” mentioned in the paragraph should be brought forward in time, so as to read: “15 January 2018”.

*Paragraph 2, as amended, was adopted.*A. *Immunity of State officials from foreign criminal jurisdiction**Paragraph 3*

Ms. Escobar Hernández (Special Rapporteur) explained that the issues mentioned in paragraph 3 had been spelled out in detail in order to highlight them, given that procedural aspects were an essential element of the topic, and in order to remind States about the need to respond to that important issue. She would be grateful if the Chairman could draw the attention of States to that issue on the occasion of his presentation to the Sixth Committee during the 2017 International Law Week.

The Chairman said that he would be happy to do so.*Paragraph 3 was adopted.*B. *Succession of States in respect of State responsibility**Paragraph 4**Paragraph 4 was adopted.*C. *New topics**Paragraphs 5 and 6**Paragraphs 5 and 6 were adopted.*

Ms. Galvão Teles said that, in order to link the Commission’s request to States to provide it with proposals for new topics with the commemorative events to be organized by the Commission during its seventieth anniversary in New York and Geneva, as well as to provide an extra incentive for their involvement in the discussion of such new topics, she proposed the addition of a new paragraph to follow paragraph 6 that would read: “The Commission notes that the commemoration of its seventieth anniversary to be held during its seventieth session in New York and Geneva would provide an opportunity for an exchange of views between States and members of the Commission on possible topics that could be considered by the Commission in the future.”

*It was so decided.**Chapter III 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 sixty-ninth session had been a productive one. The Commission was submitting to the General Assembly the draft articles on crimes against humanity, which it had completed on first reading. It was also giving Member States in the Sixth Committee of the General Assembly plenty of material on which to comment in relation to the various other topics that the Commission had considered during the session. In addition, the Commission had successfully concluded the International Law Seminar, to which it attached great importance.

The Commission could be proud of its productivity, its creativity and the continued collegial spirit in which it worked and overcame differences of view. He noted that the session had been unusually intense and that history would tell whether the Commission had made a larger or a smaller contribution to the development of international law. Where the members of the Commission had not yet come to agreement, they had at least offered history two alternatives. He was grateful to his colleagues on the Bureau for their advice and guidance in managing the affairs of the Commission. He thanked the Secretariat from the Codification Division for their extraordinary, competent assistance and the Legal Liaison Office in Geneva for their efficient assistance. He also thanked the précis-writers, interpreters, editors, conference officers, translators and other members of the conference services who had 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-ninth session closed.

The meeting rose at 1.15 p.m.