Provisional

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**International Law Commission**
**Seventy-third session (second part)**

**Provisional summary record of the 3606th meeting**
Held at the Palais des Nations, Geneva, on Tuesday, 2 August 2022, at 10 a.m.

# Contents

Draft report of the Commission on the work of its seventy-third session (*continued*)

*Chapter V. Protection of the environment in relation to armed conflicts* (*continued*)

*Chapter VI. Immunity of State officials from foreign criminal jurisdiction* (*continued*)

***Present***:

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| *Chair*: | Mr. Tladi |
| *Members*: | Mr. Argüello Gómez |
| | Mr. Aurescu |
| | Mr. Cissé |
| | Ms. Escobar Hernández |
| | Mr. Forteau |
| | Ms. Galvão Teles |
| | Mr. Grossman Guiloff |
| | Mr. Hassouna |
| | Mr. Huang |
| | Mr. Jalloh |
| | Mr. Laraba |
| | Ms. Lehto |
| | Mr. Murase |
| | Mr. Murphy |
| | Mr. Nguyen |
| | Ms. Oral |
| | Mr. Ouazzani Chahdi |
| | Mr. Park |
| | Mr. Petrič |
| | Mr. Rajput |
| | Mr. Ruda Santolaria |
| | Mr. Saboia |
| | Mr. Šturma |
| | Mr. Valencia-Ospina |
| | Mr. Vázquez-Bermúdez |
| | Sir Michael Wood |
| | Mr. Zagaynov |

***Secretariat***:

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| 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 seventy-third session** (*continued*)

*Chapter V. Protection of the environment in relation to armed conflicts* (*continued*) (A/CN.4/L.961 and A/CN.4/L.961/Add.1)

**The Chair** invited the Commission to resume its consideration of chapter V of its draft report, as contained in document A/CN.4/L.961/Add.1, beginning with the paragraphs of the commentary to draft principles 16 and 21 that had been left in abeyance.

*Commentary to draft principle 16 (Prohibition of pillage)* (*continued*)

*Paragraph (7)* (*continued*)

**Ms. Lehto** (Special Rapporteur) said that, contrary to the assertion made in the penultimate sentence of paragraph (7), the notion of illegal exploitation of natural resources had been defined in article 28L *bis* of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol). Accordingly, in that sentence, the words "in many instruments" should be inserted after the words "has not been defined". Footnote 376 would be updated to include a reference to and a quotation from the Malabo Protocol. She would provide the secretariat with the relevant wording.

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

*Commentary to draft principle 21 (Prevention of transboundary harm)* (*continued*)

*Paragraph (1)* (*continued*)

**Ms. Lehto** (Special Rapporteur) said that, following consultations with the members, she wished to propose that, in the first sentence of paragraph (1), the formulation "obligation not to cause significant harm to the environment" should be amended to read "obligation not to allow significant harm to be caused to the environment". In footnote 466, the references to the Stockholm Declaration and the Rio Declaration should be deleted.

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

*Paragraph (6)* (*continued*)

**Ms. Lehto** (Special Rapporteur) said that the first sentence of paragraph (6) should be amended to read: "Draft principle 21 reflects the obligation of prevention in customary international environmental law, which only applies to harm above a certain threshold, most often indicated as 'significant harm'". A new sentence incorporating wording from footnote 477 should be inserted immediately after it and should read: "At the same time, certain treaties incorporate the prevention obligation without the threshold of significant harm." Footnote marker 477 should appear at the end of that sentence. The original second sentence of the paragraph should begin with the words "The obligation of prevention". A number of references should be added to footnote 477.

**Mr. Forteau** said that footnote 479 should refer to paragraph (7), rather than paragraph (5), of the commentary to paragraph 2 of draft principle 19.

*Paragraph (6), as amended, was adopted with minor editorial changes.*

*Paragraph (7)*

*Paragraph (7) was adopted.*

*Commentary to draft principle 22 (Peace processes)*

*Paragraph (1)*

*Paragraph (1) was adopted with minor drafting changes.*

*Paragraph (2)*

**The Chair** said that the last sentence of paragraph (2) would be inserted between the third and fourth sentences.

*Paragraph (2) was adopted with that change.*

*Paragraphs (3) and (4)*

*Paragraphs (3) and (4) were adopted.*

*Paragraph (5)*

*Paragraph (5) was adopted with minor editorial changes.*

*Paragraph (6)*

*Paragraph (6) was adopted.*

*Paragraph (7)*

**Ms. Lehto** (Special Rapporteur) said that the second sentence of paragraph (7) should end after the word "environment". The remainder of that sentence would become a new sentence that should begin with the formulation "Such matters include prevention". In the sentence that followed, the words "which have been internationally promoted" should be deleted.

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

*Paragraphs (8) and (9)*

*Paragraphs (8) and (9) were adopted with minor editorial changes.*

*Commentary to draft principle 23 (Sharing and granting access to information)*

*Paragraph (1)*

**Ms. Lehto** (Special Rapporteur) said that the first and second sentences of paragraph (1) should be redrafted to read: "Draft principle 23 addresses the obligation to share or grant access to relevant information to facilitate measures to remediate harm to the environment resulting from an armed conflict. It refers to 'States', as this term is broader than 'parties to an armed conflict'."

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

*Paragraphs (2) to (5)*

*Paragraphs (2) to (5) were adopted.*

*Paragraph (6)*

*Paragraph (6) was adopted with minor editorial changes.*

*Paragraphs (7) and (8)*

*Paragraphs (7) and (8) were adopted.*

*Paragraph (9)*

*Paragraph (9) was adopted with minor editorial changes.*

*Paragraphs (10) and (11)*

*Paragraphs (10) and (11) were adopted.*

*Paragraph (12)*

*Paragraph (12) was adopted with minor editorial changes.*

*Paragraph (13)*

*Paragraph (13) was adopted.*

*Paragraph (14)*

*Paragraph (14) was adopted with minor editorial changes.*

*Paragraph (15)*

**The Chair**, speaking as a member of the Commission, said that, in the third sentence of paragraph (15), the formulation "confidential information concerning" should be inserted before the words "international relations".

*Paragraph (15) was adopted with that change.*

*Commentary to draft principle 24 (Post-armed conflict environmental assessments and remedial measures)*

*Paragraph (1)*

*Paragraph (1) was adopted.*

*Paragraphs (2) to (4)*

*Paragraphs (2) to (4) were adopted with minor editorial changes.*

*Paragraph (5)*

*Paragraph (5) was adopted.*

*Paragraph (6)*

**Ms. Lehto** (Special Rapporteur) said that the last sentence of paragraph (6) should be deleted, as it was unnecessary.

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

*Commentary to draft principle 25 (Relief and assistance)*

*Paragraph (1)*

**Ms. Lehto** (Special Rapporteur) said that, in the second sentence of paragraph (1), the word "otherwise" should be inserted before the formulation "not available". The last sentence should be redrafted and divided into two sentences, which would read: "Environmental damage in armed conflict may moreover result from acts that are lawful under the law of armed conflict. While such difficulties do not exempt the responsible State from the obligation to make reparation, a situation may arise in which the responsible actor cannot be identified or there is no means of implementing the responsibility and obtaining reparation." After the formulation "obligation to make reparation", a footnote should be inserted with a reference to and a quotation from the judgment of the International Court of Justice in the case concerning *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*. The proposed amendments were intended to make it clear that draft principle 25 did not imply an understanding that differed from that of draft principle 9.

**Mr. Murphy** said that an obligation to make reparation could not arise from an act that was lawful under the law of armed conflict. It would be more logical to reverse the order of the two sentences proposed by the Special Rapporteur.

**Mr. Forteau** said that damage resulting from an act that was lawful under the law of armed conflict could still give rise to an obligation of reparation under *jus ad bellum*. Rather than reversing the order of the two sentences, the Commission should introduce a useful

nuance by inserting the word “necessarily” before the word “exempt” in the second of the two sentences.

**Mr. Park** said that he could not accept the radical changes proposed by the Special Rapporteur. If the Commission could not reach a consensus, the second of the two proposed sentences should be deleted in its entirety.

**Mr. Murphy** said that the proposed wording and footnote did not appear to be referring to *jus ad bellum* violations that led to environmental harm.

**Mr. Grossman Guiloff** said that he supported Mr. Forteau’s proposal. To address Mr. Murphy’s concern, an alternative formulation should be found for the beginning of the first sentence of footnote 524, which currently read “This would arguably be the case with most environmental harm in conflict”.

**Ms. Lehto** (Special Rapporteur) said that she agreed to the reversal of the order of the two sentences she had proposed. There was no need to insert the word “necessarily”.

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

*Paragraph (2)*

*Paragraph (2) was adopted with minor drafting changes.*

*Paragraph (3)*

**Ms. Lehto** (Special Rapporteur) said that, in the first sentence of paragraph (3), the formulation “in which the establishment or implementation of State responsibility is not possible” should be replaced with the formulation “envisaged in the draft principle”.

*Paragraph (3), as amended, was adopted.*

*Paragraphs (4) and (5)*

*Paragraphs (4) and (5) were adopted.*

*Commentary to draft principle 26 (Remnants of war)*

*Paragraphs (1) to (6)*

*Paragraphs (1) to (6) were adopted.*

*Paragraphs (7) and (8)*

*Paragraphs (7) and (8) were adopted with minor editorial changes.*

*Paragraph (9)*

*Paragraph (9) was adopted.*

*Commentary to draft principle 27 (Remnants of war at sea)*

*Paragraph (1)*

*Paragraph (1) was adopted.*

*Paragraph (2)*

**Ms. Lehto** (Special Rapporteur) said that the beginning of the third sentence of paragraph (2) should be amended to read “There may be a legal obligation”. In the second sentence of footnote 545, the formulation “territorial waters” should be expanded to read “internal waters, the territorial sea, archipelagic waters”.

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

*Paragraph (3)*

*Paragraph (3) was adopted with minor editorial changes.*

*Paragraphs (4) and (5)*

*Paragraphs (4) and (5) were adopted.*

*Paragraph (6)*

*Paragraph (6) was adopted with minor editorial changes.*

**The Chair** invited the Commission to resume its consideration of the portion of chapter V of the draft report contained in document A/CN.4/L.961.

*C. Recommendation of the Commission*

*Paragraph 11*

**The Chair** drew attention to the proposed text of the Commission's recommendation to the General Assembly, which had been circulated to the members in writing. The proposal was that the Commission should recommend that the Assembly should take note of the draft principles, annex them to a resolution and encourage their widest possible dissemination, and that it should commend the draft principles and the commentaries thereto to the attention of States and international organizations and all who might be called upon to deal with the subject.

*Paragraph 11 was adopted.*

*D. Tribute to the Special Rapporteur*

*Paragraphs 12 and 13*

*Paragraphs 12 and 13 were adopted.*

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

**The Chair** invited the Commission to pay tribute to the Special Rapporteur.

**Ms. Lehto** (Special Rapporteur) said there was no doubt that the topic of protection of the environment in relation to armed conflicts was of current relevance and addressed a pressing concern of the international community as a whole. While it was not for the Commission to assess how the final product responded to that concern, it was worth noting that the Director of the Environmental Law Institute, as one of the three institutions that had initiated the topic, had commented that the adoption of the draft principles was the most important event regarding the protection of the environment in relation to armed conflicts since the adoption, in 1977, of Protocol I Additional to the Geneva Conventions of 1949. She was grateful to the Commission for having assigned her the task of bringing its work on the topic to a conclusion, and to the members for their support in that regard. As she had not sought a further term in the Commission, she also wished to take the opportunity to thank all colleagues for their cooperation, collegiality and friendship during the quinquennium.

*Chapter VI. Immunity of State officials from foreign criminal jurisdiction* (*continued*) (A/CN.4/L.962 and A/CN.4/L.962/Add.1)

**The Chair** invited the Commission to resume its consideration of chapter VI of its draft report, as contained in document A/CN.4/L.962/Add.1.

*2. Text of the draft articles and commentaries thereto*

*Paragraph 1*

*Paragraph 1 was adopted.*

*General commentary to the draft articles*

*Paragraph (1)*

**Ms. Escobar Hernández** (Special Rapporteur) proposed that the word "concern" should be replaced with "address" and that a second sentence should be added, which would read: "As is always the case with the Commission's outputs, the draft articles are to be read together with the commentaries."

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

*Paragraph (2)*

**Ms. Escobar Hernández** (Special Rapporteur) proposed that, in the second sentence, the words "has taken" should be replaced with "has addressed" and the words "into consideration" should be deleted.

**Sir Michael Wood** suggested that "has taken" should be replaced with "has considered" and that the word "especially" should be replaced with "including".

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

*Paragraph (3)*

**Ms. Escobar Hernández** (Special Rapporteur) proposed that, to address concerns about clarity that several members had raised, the first sentence should be amended to read: "The present draft articles take a different approach than the above, by addressing the immunity of State officials from foreign criminal jurisdiction separately and comprehensively."

**Mr. Forteau** proposed that, in item (b) in the second sentence, the words "that is, the authorities, courts and tribunals of a State other than the State of the official" should be inserted after "foreign jurisdiction".

**Mr. Murphy** proposed that the words "separately and comprehensively" should be deleted. It was incorrect to state that the draft articles addressed immunity "comprehensively", since a number of situations in which foreign officials enjoyed immunity were expressly excluded from the scope of the topic pursuant to draft article 1 (2). The idea conveyed by "separately", meanwhile, could be captured more simply by inserting the word "specifically" earlier in the sentence, between "by" and "addressing".

**Sir Michael Wood**, expressing doubt about the addition proposed by Mr. Forteau, said that, as he recalled, the Commission had deliberately refrained from defining the term "foreign jurisdiction", which was used throughout the document, as it did not wish to limit the scope of the term to the courts and judicial authorities, "jurisdiction" being a somewhat broader notion in the context of the draft articles. In the second sentence, the word "criminal" should be inserted between the words "foreign" and "jurisdiction". In addition, in the last line, the word "already" should be deleted in order to make allowance for any new special regimes that might emerge in the future.

*Paragraph (3), as amended, was adopted.*

*Paragraph (4)*

**Sir Michael Wood** said that paragraph (4) effectively served as an introduction to paragraphs (5) to (10), which, as he had stated previously, he found speculative and generally problematic. Accordingly, he would be in favour of their deletion. However, assuming those paragraphs were retained, paragraph (4) should be shortened so that it ended after the words "different elements".

**Mr. Murphy** said that, although he would accept that suggestion, if a longer version of the sentence was retained, the words "served as guiding principles for" could be replaced with "guided". It was not entirely clear, in his view, what the "different elements" were. Paragraph (5) was focused on the "first of these elements" but there were no further

references to specific elements thereafter. The Commission might wish to adjust the text to clarify that point when considering paragraphs (5) to (10).

**Mr. Jalloh** said that he strongly opposed the suggestion that paragraphs (4) to (10) should be deleted; they were important paragraphs that added a great deal of value. He was not opposed to discussing their content, although his understanding was that the Special Rapporteur had endeavoured to find a balance between the differing views of the Commission members, and the changes proposed might give rise to a string of time-consuming amendments. Furthermore, the deletion proposed by Sir Michael Wood would leave the sentence hanging, with a question mark, as Mr. Murphy had noted, as to precisely what elements were being referred to. He agreed that adjustments would be needed in subsequent paragraphs to clarify that question.

**Sir Michael Wood** proposed that, to address Mr. Jalloh's concern, the sentence should be amended to read: "In preparing the present draft articles, the Commission has taken into account the following different elements."

**Ms. Escobar Hernández** (Special Rapporteur) said that she could accept that amendment. More generally, she wished to emphasize that paragraphs (4) to (10) were the result of extensive consultations and established the context in which the Commission's work on the topic should be understood. It was therefore important that they should be retained.

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

*Paragraph (5)*

**Ms. Escobar Hernández** (Special Rapporteur) proposed the insertion of a new second sentence that would read: "Providing immunity under international law to a State official generally seeks to ensure their ability to represent their State or to exercise State functions." At the end of the paragraph, the previous penultimate and final sentences had been replaced with the two sentences that had previously constituted paragraph (6). Those sentences read: "In the light of the above considerations, the present draft articles embrace a notion of the immunity of State officials from foreign criminal jurisdiction, which finds its sole justification in the fact that the official represents the State or exercises official functions. Moreover, in view of the different positions that different State officials may hold, the draft articles distinguish between two legal regimes, namely immunity *ratione personae* and immunity *ratione materiae*."

**Mr. Rajput** proposed that, in the new penultimate sentence, which was the first of the two sentences moved from paragraph (6), the qualifier "sole" before "justification" should be deleted because the circumstances described constituted just one possible justification, not the only justification.

**Mr. Forteau** said that, in the same sentence, he found the formulation "embrace a notion" ambiguous, as it implied that there might be other "notions" of immunity. To avoid the need for redrafting, he suggested that the entire sentence should simply be excluded.

*Paragraph (5), as amended, was adopted.*

*Paragraph (6)*

**Ms. Escobar Hernández** (Special Rapporteur) explained that the new paragraph (6) consisted of the two sentences previously placed at the end of paragraph (5). As suggested by Sir Michael Wood, the first word, "Furthermore", should be replaced with the word "Second".

**Sir Michael Wood** said that, as a general rule, phrases such as "the Commission has found that", "the Commission recognizes that" and similar formulations were unnecessary and best avoided when a simple statement of the Commission's position would suffice. On that basis, the words "the Commission has borne in mind that" should be deleted. He found the final sentence somewhat complicated and proposed that it should be shortened to end after the words "pre-existing criminal jurisdiction". The footnote, however, should be retained.

**Mr. Rajput** said that paragraph (6) was predicated on paragraph 46 of the judgment of the International Court of Justice in the case concerning the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* and that the point made in paragraph 46 was that jurisdiction should be established before the question of immunity was even addressed. However, that idea was not captured clearly in paragraph (6). The reference to "a pre-existing criminal jurisdiction" was particularly confusing, as it gave the impression that jurisdiction already existed, whereas in fact it needed to be established in each specific case. He proposed that the words "provided it is established" should be added at the end of the first sentence and that the second part of the final sentence, which would then be unnecessary, should be deleted. The paragraph would end with the phrase "there is a close relationship between jurisdiction and immunity".

**Mr. Forteau** said that, in the second sentence, the full title "International Court of Justice" should be included to prevent confusion. He disagreed with the argument that jurisdiction should be established before questions of immunity were even considered; that argument was contrary to draft article 14, on determination of immunity, and also to the practice of criminal justice authorities, many of which determined immunity before taking a position on the existence of jurisdiction. He was therefore uncomfortable both with the term "pre-existing" and with the amendment proposed by Mr. Rajput. A simpler formulation that circumvented the need to enter into such complex issues should be found for paragraph (6).

**Mr. Jalloh** said that, as discussed earlier, the sentence should begin with a reference to the second of the "elements" referred to in paragraph (4). He agreed with Mr. Forteau that the text was complicated, but suggested that, precisely for that reason, amendments should be kept to a minimum.

**Mr. Murphy** said that, in view of the significant amendments made to the general commentary, detailed discussion was necessary despite the time implications. He noted that, applying the rule mentioned by Sir Michael Wood, in the second sentence the words "the Commission has been fully aware that" should be deleted.

**Mr. Rajput**, responding to Mr. Forteau's observations, said that his proposal reflected both State practice and the content of paragraph 46 of the *Arrest Warrant* judgment. It did not change the substance of paragraph (6) and was intended simply to clarify its content.

**Mr. Forteau** said that the problem he had highlighted would be resolved if the end of the final sentence was amended to read "immunity from foreign criminal jurisdiction can only be understood *vis-à-vis* the exercise of criminal jurisdiction, which is prevented by such immunity in a given case". That formulation would circumvent the issues of timing and the order in which questions of immunity and questions of jurisdiction were or should be examined.

**Ms. Escobar Hernández** (Special Rapporteur) proposed that, on the basis of the suggestions made, paragraph (6), as amended, should read: "Second, under the principle of the sovereign equality of States, the forum State has the right to exercise its own criminal jurisdiction. As the International Court of Justice has pointed out, there is a close relationship between jurisdiction and immunity, since immunity from foreign criminal jurisdiction can only be understood *vis-à-vis* the exercise of criminal jurisdiction."

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

*Paragraph (7)*

**Ms. Escobar Hernández** (Special Rapporteur) said she wished to propose that the word "Third" should be inserted at the beginning of paragraph (7). In the first sentence, the phrase "the present draft articles are meant to be part of" should be replaced with the phrase "the immunity of State officials applies in" and the word "single" should be inserted before the word "system". The first sentence would thus read: "Third, the immunity of State officials applies in an international legal order that forms a single system." In the third sentence, the words "crucial, non-negotiable" in front of the word "goal", and the words "in the twenty-first century" at the end of the sentence, should be deleted. In the light of requests by Commission members that the text should highlight the legal nature of the principle of accountability and the fact that the fight against impunity was an objective of the international

community, a new footnote containing references to General Assembly resolution 67/1 and Human Rights Council resolution 27/3 should be inserted at the end of the third sentence. The footnote would also contain references to relevant passages of the judgment of the International Court of Justice in the case of *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* and of the joint separate opinion of Judges Higgins, Kooijmans and Buergenthal in the *Arrest Warrant* case.

**Mr. Rajput** said that the insertion of the word "single", which implied that there was a single system of immunity, would contradict draft article 1, which contained two "without prejudice" clauses that acknowledged the existence of different regimes. The original wording of the first sentence of paragraph (7) should be retained, as it made the point that the system was coherent and not fractured.

**Mr. Jalloh** said that, in order to meet Mr. Rajput's concerns, the word "unified" could be used instead of the word "single". He noted that the word "system" in the context of paragraph (7) referred to the international legal system.

**Sir Michael Wood** said that, while he generally approved of the revised wording proposed by the Special Rapporteur, he wished to suggest that the phrase "in an international legal order that forms a single system" should be amended to read "bearing in mind that international law is a single legal system". That wording would reflect the Commission's conclusions in its 2006 report on the topic "Fragmentation of international law". In the second sentence, in the English text, the word "norms" should be replaced with the word "rules", and the clause "with a view to avoiding any negative impact on them" should be deleted. Likewise, the words "In particular" should be deleted from the beginning of the third sentence. He was concerned about the final sentence, in particular the phrase "the need to guarantee that the immunity of State officials from foreign criminal jurisdiction does not result in impunity for the most serious crimes under international law". The Commission was not in a position to "guarantee" anything. The entire final sentence would be hard to justify and should be deleted.

**Mr. Park** said that he supported Sir Michael Wood's proposed amendment to the first sentence of the paragraph.

**Mr. Murphy** said that he supported Sir Michael Wood's proposed amendment to the end of the first sentence. In the proposed new footnote, the phrase "fight against impunity" should be replaced with the phrase "ending impunity", which more closely tracked the wording of General Assembly resolution 67/1.

**Mr. Forteau** said that the Spanish word "*normas*", which was used in the original version of the text, should be translated as "*normes*" in the French text, not as "*règles*". The English-speaking members should indicate their preferred translation to the secretariat.

**Mr. Murase** said that he was opposed to the use of the words "single system". He had repeatedly expressed the opinion that, in its work on the current topic, the Commission had been creating rules that differed from those laid down in article 27 of the Rome Statute of the International Criminal Court. He proposed that the first sentence of the paragraph should be deleted.

**The Chair**, speaking as a member of the Commission, said that Sir Michael Wood's proposed amendment to the second half of the first sentence addressed Mr. Murase's and Mr. Rajput's concerns by clarifying that the words "single system" referred to the single system of international law and not to a single system of immunity.

**Mr. Jalloh** said that he supported Sir Michael Wood's proposed amendment to the second half of the first sentence. However, he preferred the word "norms" to the word "rules" and was opposed to the deletion of the clause "with a view to avoiding any negative impact on them" in the second sentence, since that phrase referred to the international community's efforts to take a balanced approach to the question of immunity, as described in the proposed new footnote. He was in favour of retaining the words "In particular" at the beginning of the third sentence because they highlighted the reference to international criminal law, which was at the core of the paragraph. Moreover, he was opposed to the deletion of the final sentence, given the importance of retaining the reference to the contrast between "immunity" and "impunity". Perhaps the word "guarantee" should be replaced with the word "ensure".

With regard to the proposed new footnote, he was not in favour of replacing the phrase “fight against impunity” with the phrase “ending impunity”, since the latter reflected a level of idealism that was better suited to the preambles of resolutions than to the Commission’s work.

**Sir Michael Wood**, building on his previous proposal, said that the second half of the first sentence should be amended to read “bearing in mind that international law is a system” and that a new footnote containing a reference to the first conclusion of the Commission’s 2006 study on fragmentation of international law should be inserted at the end of the sentence.

**Mr. Vázquez-Bermúdez** said that he agreed with the proposal to amend the second half of the first sentence to read “bearing in mind that international law is a single legal system” and to replace the word “guarantee”, in the final sentence, with the word “ensure”.

**Mr. Jalloh** said that, on the basis of the proposals made thus far, the first sentence of paragraph (7) would read: “Third, the immunity of State officials applies bearing in mind that international law is a system.” A new footnote citing the relevant conclusion of the Commission’s 2006 report on fragmentation of international law would be inserted at the end of the sentence.

**Ms. Escobar Hernández** (Special Rapporteur) said that she supported the proposed new wording of the first sentence, as read out by Mr. Jalloh. She also supported the replacement of the word “guarantee” with the word “ensure” in the final sentence. However, she did not support the deletion of the clause “with a view to avoiding any negative impact on them” in the second sentence or of the words “In particular” in the third sentence. Like Mr. Jalloh, she preferred to retain the original wording of the new footnote that she had proposed.

**Mr. Park** said that the word “legal” should be inserted before the word “system”, to bring the proposed new wording into line with the language used in the first conclusion of the 2006 report on fragmentation of international law.

**Ms. Escobar Hernández** (Special Rapporteur) said she agreed that the use of the word “*normas*” was appropriate in the Spanish text.

**Sir Michael Wood** said that he had proposed the deletion of the phrase “with a view to avoiding any negative impact on them” and of the words “In particular” because, without such amendments, the text seemed to give priority to “existing rules in different areas” over immunity and distorted the reference to the notion, in the first sentence, of a single legal system, the different elements of which had to be reconciled. That was also why he had proposed the deletion of the final sentence, which appeared to give absolute priority to avoiding impunity, implying that there was no immunity in certain cases. The replacement of the word “guarantee” with the word “ensure” would not be sufficient.

**The Chair**, speaking as a member of the Commission, proposed that the phrase “with a view to avoiding any negative impact on them” should be replaced with new language that emphasized the need to ensure coherence among existing rules.

**Mr. Murphy** said that the final sentence was problematic insofar as its claim regarding the need to ensure that there was no impunity for the most serious crimes was in tension with the Commission’s acknowledgement of, for example, the immunity of serving Heads of State. If the final sentence was retained, it should be amended to read: “While the terms ‘immunity’ and ‘impunity’ are neither equivalent nor interchangeable, there is a need to address the immunity of State officials from foreign criminal jurisdiction for the most serious crimes under international law.”

**Mr. Forteau** said that Mr. Murphy’s proposal was at odds with existing practice. In paragraph 60 of the judgment of the International Court of Justice in the *Arrest Warrant* case, the Court stated that: “Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility.” That was a strong statement that should be reflected in the commentaries; immunity was limited when its application would result in impunity.

**Ms. Lehto** said that, while she was willing to support Mr. Murphy’s proposed amendments to the first half of the final sentence, she did not support his proposal to amend

the second half of the sentence to delete the statement that the immunity of State officials should not result in impunity for the most serious crimes, especially since draft article 7 clearly stated that immunity *ratione materiae* from the exercise of foreign criminal jurisdiction did not apply in respect of the most serious crimes under international law, as identified in that draft article. There was a need, however, to make the sentence less categorical.

**Ms. Oral** said that she supported the original wording of the final sentence, which accurately reflected a position that had been taken by many Commission members.

**Mr. Grossman Guiloff** said that he saw no need to delete the reference to impunity in the second half of the final sentence. In his view, the position expressed in that sentence was not overly categorical.

**Mr. Vázquez-Bermúdez** said that, on the basis of Mr. Murphy's proposed amendment to the final sentence, he wished to propose the wording: "While the terms 'immunity' and 'impunity' are neither equivalent nor interchangeable, it is important to ensure that the immunity of State officials from foreign criminal jurisdiction does not result in impunity for the most serious crimes under international law."

**Mr. Zagaynov** said that he wished to echo the concerns expressed by some colleagues with regard to the insufficient time allowed to review the new text proposed by the Special Rapporteur, which was quite different from the previous version.

He supported Mr. Murphy's proposed amendment to the final sentence of paragraph (7); the proposed language was more appropriate because the text is question was intended to explain the methodology used by the Commission in its work on the topic, rather than the outcome of that work.

**Ms. Escobar Hernández** (Special Rapporteur) said that the proposal made by Mr. Vázquez-Bermúdez, which was based on Mr. Murphy's proposal, offered a good solution for the final sentence of paragraph (7). She would be willing to accept the deletion of the words "with a view to avoiding any negative impact on them" in the second sentence provided that the first sentence was amended to read: "Immunity of State officials applies bearing in mind that international law is a legal and congruent system."

**Mr. Murphy** said that he had no objection to retaining the reference to impunity at the end of the final sentence, but was not convinced that "ensure" was the appropriate word to use earlier in that sentence. He therefore proposed that the final sentence should read: "While the terms 'immunity' and 'impunity' are neither equivalent nor interchangeable, it is important to avoid that the immunity of State officials from foreign criminal jurisdiction results in impunity for the most serious crimes under international law."

**Sir Michael Wood** said that he was agreeable to Mr. Murphy's proposal. It might also be helpful to add a footnote at the end of the final sentence with a reference to the key paragraph in the *Arrest Warrant* case, which provided an explanation of that point. He would provide the exact reference to the secretariat.

*Paragraph (7), as amended, was adopted on that understanding.*

*Paragraph (8)*

**Mr. Forteau** said that it was not clear to which specific draft article the phrase "the establishment of mechanisms for the prosecution of State officials, either by the courts of their own State or, where possible, by an international tribunal" referred.

**Ms. Escobar Hernández** (Special Rapporteur) proposed that, in that phrase, the word "enabling" should be added after "mechanisms" and the word "potential" should be added before "prosecution". The phrase was linked in particular to draft article 14, "Determination of immunity", and draft article 15, "Transfer of the criminal proceedings".

**Sir Michael Wood** said that, if the word "enabling" was added, it should be placed after the word "for" rather than before. He proposed that the word "Therefore" at the beginning of the paragraph should be deleted and that the rest of the first part of the sentence should read: "The Commission has included several provisions in the draft articles that

address exceptions to the immunity *ratione materiae* of State officials in respect of certain crimes under international law." That formulation reflected the wording of draft article 7 and was simpler and clearer than "when a State official may have committed a crime under international law".

**Mr. Jalloh** said that, if paragraph (8) was linked to draft article 14 on determination of immunity, as explained by the Special Rapporteur, he was concerned that Sir Michael Wood's proposal, particularly the deletion of the words "may have committed", would remove too much of the substantive link to that draft article.

**The Chair** said that, as he understood it, Sir Michael Wood's proposal was not substantive in nature.

**Mr. Murphy** said that he did not agree with the proposed deletion of the word "Therefore" at the beginning of the sentence, as that conjunction served to link paragraph (8) to the end of paragraph (7) on the need to fight impunity. In his view, the addition of punctuation might help clarify the paragraph. He also had a more substantive change to propose in the second clause. The paragraph would thus read: "Therefore, the Commission has included several provisions in the draft articles that: address exceptions to immunity *ratione materiae* of State officials in respect of certain crimes under international law; the separation between the present draft articles and the rules applicable to international criminal tribunals; and the establishment of mechanisms for enabling the potential prosecution of State officials, either by the courts of their own State or, where possible, by an international tribunal."

**Mr. Grossman Guiloff** said that, for the sake of expediting the adoption process, the English-speaking members of the Commission should perhaps discuss and make changes that concerned only the drafting directly with the Special Rapporteur. As to the substance of the paragraph, he agreed with Mr. Jalloh that the formulation "exceptions to immunity *ratione materiae* when a State official may have committed a crime under international law" should be retained, as the proposed alternative was overly broad.

**The Chair** said that the proposed formulation by Sir Michael Wood would use the language of draft article 7, which referred to immunity *ratione materiae* "in respect of the following crimes".

**Mr. Forteau** said he agreed that the Commission should not spend so much time on drafting issues in English. Given that the last part of the paragraph was connected to draft articles 14 and 15, he proposed that it should refer to "the existence or the establishment of mechanisms for enabling the potential prosecution of State officials", since draft article 14 also referred to existing mechanisms.

**Mr. Jalloh** said it had been his understanding that the paragraph referred to draft article 14 rather than draft article 7. He would have no objection to the proposed changes if it was in fact the latter.

**Ms. Escobar Hernández** (Special Rapporteur) said she agreed that drafting issues should be resolved more efficiently. Based on the various proposals made, she suggested that the paragraph should read: "Therefore, the Commission has included several provisions in the draft articles that address: exceptions to immunity *ratione materiae* of State officials with respect to several crimes under international law; the separation between the present draft articles and the rules applicable to international criminal tribunals; and the existence or the establishment of mechanisms for enabling the potential prosecution of State officials, either by the courts of their own State or, where possible, by an international tribunal."

**Mr. Forteau** said that, as draft article 14 (3) (b) (ii) made reference to the criminal jurisdiction of a State other than the State of the official or the forum State, the end of the paragraph should be amended to read "either by the courts of their own State or of a third State or, where possible, by an international tribunal". That change would reflect the principle of *aut dedere aut judicare* in draft article 14.

*Paragraph (8), as amended, was adopted.*

*Paragraph (9)*

*Paragraph (9) was adopted.*

*Paragraph (10)*

*Paragraph (10) was adopted with a minor drafting change.*

*Paragraph (11)*

*Paragraph (11) was adopted.*

*Paragraph (12)*

**Ms. Escobar Hernández** (Special Rapporteur) proposed that the last sentence of the paragraph should be deleted, as that point was now made in paragraph (1) of the general commentary.

*Paragraph (12), as amended, was adopted.*

*Paragraph (13)*

**Mr. Forteau** said that, at the end of the first sentence, the English version of the text made reference to the "negotiation of a future treaty on the topic". In the French version, however, the reference was to "*la négociation d'un futur instrument sur le sujet*". He would therefore welcome clarification from the Special Rapporteur as to whether she had intended to refer to a "treaty" or more broadly to an "instrument".

**Mr. Rajput** said that, as the Commission was still only on the first reading, it should not pre-empt the outcome of the entire project at that stage. He would therefore propose that paragraph (13) should be deleted altogether to avoid creating difficulties for the Commission in the future by tying it to a particular outcome.

**Ms. Escobar Hernández** (Special Rapporteur) said that, in the original Spanish version, she had used the word "*tratado*" (treaty). That choice had been made because it had been agreed during the debate in the Commission over the years that the only two options, for the recommendation to be addressed to the General Assembly, were either to simply present the draft articles for consideration or to propose that they should be used as the basis for the negotiation of a future treaty. In her view, the term "instrument" was too ambiguous. It was important to retain paragraph (13) for the sake of transparency, as it reflected the ongoing debate in the Commission as to whether it was working on a set of draft articles or on a draft treaty.

**Mr. Jalloh** said that he agreed with the Special Rapporteur on the importance of retaining paragraph (13) as currently formulated. The fact that the end of the second sentence contained an invitation to States to comment on the issue was a further reason to retain it.

**Mr. Murphy** said that he also shared the Special Rapporteur's view that paragraph (13) should be maintained. If the concern was to preserve the discretion of the Commission in the future, it might be helpful to add the words "*inter alia*" after "be it" in the first sentence.

**Ms. Galvão Teles** said that she agreed with the points made by the Special Rapporteur, Mr. Jalloh and Mr. Murphy.

**Ms. Escobar Hernández** (Special Rapporteur) said that, in her view, the addition of the words "*inter alia*" would only further complicate matters, as it was obvious that the Commission would be free to decide what it deemed appropriate in the future.

*Paragraph (13), as amended in the French text, was adopted.*

*Commentary to Part One (Introduction)*

*The single paragraph constituting the commentary was adopted.*

*Commentary to draft article 1 (Scope of the present draft articles)*

*Paragraph (1)*

**Ms. Escobar Hernández** (Special Rapporteur) proposed that the words "saving or" before "'without prejudice' clause" in the third sentence should be deleted to avoid any confusion between the two terms. The words "without prejudice" before "clause" in the fourth sentence should also be deleted, as some members had questioned whether the paragraph in question actually was a "without prejudice" clause. She believed that it was, as it was drafted in the same way as other similar provisions that the Commission had described as "without prejudice" clauses, but she had no objection to the deletion.

**Mr. Murphy** said that he would welcome clarification as to what was meant by the "dual dimension" referred to in the last sentence. In that same sentence, he proposed that the words "but in this case it has thought it preferable to" should be replaced with "but in this case it was preferable to" and that the word "provision" should be replaced with "draft article". The words "since this presents the advantage of facilitating the simultaneous treatment of both dimensions of scope under a single title" at the end of the sentence could be deleted, as they merely repeated what was already said in the first part of the sentence. Perhaps that final sentence might be better placed before the fourth sentence.

**Sir Michael Wood** said that he had no objection to Mr. Murphy's proposals. However, as much of the content of paragraph (1) had already been adopted many years previously, it would be helpful if the Special Rapporteur could indicate which elements of the text were new. Although many improvements could be made to the paragraph, there was no point in reopening the debate on elements that had previously been adopted, such as the notion of a "dual dimension".

**Ms. Escobar Hernández** (Special Rapporteur) said that the original text of paragraph (1), including the reference to the "dual dimension", had been adopted at the Commission's sixty-fifth session along with the other draft articles concerning the scope. The text had essentially remained the same, with the addition of the sentence on paragraph 3. The term "dual dimension" referred to the fact that both the cases to which the draft articles applied, covered in paragraph 1, and those to which they did not apply, covered in paragraphs 2 and 3, were addressed in the same draft article. She would have no objection to replacing the word "dimension" with "approach", for example. She agreed with the proposal to replace the word "provision" with "draft article" in the last sentence, but would otherwise be in favour of retaining the current formulation of paragraph (1).

**The Chair** said that the Commission would resume its consideration of paragraph (1) at the following meeting.

*The meeting rose at 1 p.m.*