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Summary record of the 3193rd meeting

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

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73. Mr. MURPHY opposed that position, since the incorporation of the Working Group's report would create the impression that it reflected the views of the Commission as a whole. Moreover, placing the Working Group's report in an annex would give it greater visibility.

74. Mr. CANDIOTI pointed out that the composition of the Working Group, which was a working group of the whole, was the same as that of the plenary. Given the extensive delays in the work on the topic and the expectations in the Sixth Committee, the Working Group's report must not be relegated to an annex.

75. Sir Michael WOOD said that as he understood it, it had already been agreed in the Working Group and in the plenary that the report would be annexed. It would be more prominent as a separate annex, facilitating its consideration by the members of the Sixth Committee.

76. Mr. SABOIA said that he supported the views expressed by Mr. Candiotti. The Commission had made substantial progress on the topic, and that progress should be well publicized.

77. Mr. PETRIČ suggested that, as in similar situations in the past, the Commission should take an indicative vote.

Following an indicative vote, paragraph 5 was adopted.

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

The meeting rose at 6.05 p.m.

3193rd MEETING

Tuesday, 6 August 2013, at 10 a.m.

Chairperson: Mr. Bernd H. NIEHAUS

Present: Mr. Caflisch, Mr. Candiotti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gevorgian, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Ms. Jacobsson, Mr. Kittichaisaree, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

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

1. Mr. CANDIOTI said that, at the previous meeting, the Commission had decided that the report of the Working Group on the obligation to extradite or prosecute (*aut dedere aut judicare*), contained in document A/CN.4/L.829, should be annexed to the report of the Commission on the work of its sixty-fifth session, which was not its usual practice and should not set a precedent.

CHAPTER XI. The most-favoured-nation clause (A/CN.4/L.826)

2. The CHAIRPERSON invited the members of the Commission to consider, paragraph by paragraph, chapter XI of the draft report, as contained in document A/CN.4/L.826.

A. Introduction

Paragraphs 1 and 2

Paragraphs 1 and 2 were adopted.

B. Consideration of the topic at the present session

Paragraph 3

3. Mr. FORTEAU (Rapporteur) said that the last sentence should be aligned with the English text.

Paragraph 3 was adopted subject to the necessary amendments to the French text.

Paragraphs 4 and 5

Paragraphs 4 and 5 were adopted.

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

CHAPTER IV. Subsequent agreements and subsequent practice in relation to the interpretation of treaties (continued) (A/CN.4/L.819 and Add.1-3)

C. Text of the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, as provisionally adopted by the Commission at its sixty-fifth session (continued)

2. TEXT OF THE DRAFT CONCLUSIONS AND COMMENTARIES THERETO PROVISIONALLY ADOPTED BY THE COMMISSION AT ITS SIXTY-FIFTH SESSION (continued)

Document A/CN.4/L.819/Add.2

Commentary to draft conclusion 4 (Definition of subsequent agreement and subsequent practice)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

4. Following a debate in which Sir Michael WOOD and Mr. FORTEAU, speaking both as Rapporteur and in his capacity as an expert, took part, Mr. NOLTE (Special Rapporteur) proposed, in response to Sir Michael's concern about the inaccuracy of the term "conclusion", that the third sentence should be reworded: "Various provisions in the Vienna Convention (for example, article 18) show that a treaty may be 'concluded' before its actual entry into force." The next sentence should read: "For the purpose of the present topic, 'conclusion' is whenever the text of the treaty has been established as definite"; and the reference to the existing footnote should be retained. Lastly, the problem raised by Sir Michael could be resolved by adding the following sentence at the end of the paragraph: "The possibility that subsequent agreements and subsequent practice can occur before the entry into force of a treaty implies that the word 'parties' is used in a wider sense than the definition in article 2 (g) of the Vienna Convention."

Paragraph (2), as amended, was adopted.

Paragraph (3)

5. Sir Michael WOOD said that the expression in the second sentence “‘in connection with the treaty’” needed to be more clearly defined; he would leave it to the Special Rapporteur to amend the paragraph along those lines.

6. The CHAIRPERSON suggested that the Commission should defer its consideration of the paragraph and invited the Special Rapporteur to submit a new version at a later date.

Paragraph (3) was deferred.

Paragraph (4)

Paragraph (4) was adopted.

Paragraph (5)

7. Mr. NOLTE (Special Rapporteur) said that, in his view, customary international law had no requirement that treaties should be in written form; however, to meet the concern of Mr. Forteau who held a different view, he endorsed the deletion of the reference to *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* in the footnote at the end of the third sentence.

Paragraph (5), as amended, was adopted.

Paragraphs (6) to (8)

Paragraphs (6) to (8) were adopted.

Paragraph (9)

8. Mr. NOLTE (Special Rapporteur) proposed that, in the last sentence, the words “an ... interpretation” should read “an ... means of interpretation”.

Paragraph (9), as amended, was adopted.

Paragraphs (10) and (11)

Paragraphs (10) and (11) were adopted.

Paragraph (12)

9. Sir Michael WOOD proposed that, in the first sentence, the word “normally” should be inserted between the words “is not” and “‘a’ subsequent agreement”, so as not to exclude the case where a series of separate subsequent agreements was deliberately intended to constitute a subsequent agreement under article 31, paragraph 3 (a).

Paragraph (12), as amended, was adopted.

Paragraph (13)

Paragraph (13) was adopted.

Paragraph (14)

10. Sir Michael WOOD said that he was neither sure about the meaning nor the usefulness of the footnote at the end of the paragraph and proposed its deletion. He noted that in the last sentence of the paragraph, the word “parties” was used in a different sense from in the Vienna Convention, which could give rise to confusion.

11. Mr. NOLTE (Special Rapporteur) said that the footnote could be deleted and that he would like to draft a brief explanation to clarify the meaning of the word “parties” in the context.

Paragraph (14), as amended, was adopted, subject to the inclusion of the explanation to be drafted by the Special Rapporteur.

Paragraph (15)

Paragraph (15) was adopted with an editorial amendment to the Spanish text.

Paragraph (16)

Paragraph (16) was adopted.

Paragraph (17)

12. Sir Michael WOOD proposed that the words “court judgments” should be replaced with “court proceedings”.

13. Mr. NOLTE (Special Rapporteur) asked whether Sir Michael was trying to exclude the decisions of national courts from subsequent practice.

14. Sir Michael WOOD said that it was precisely the term “court judgments” that seemed to refer exclusively to the decisions of international courts.

15. Mr. MURPHY proposed, for the sake of clarity, that the words “court judgments” should be replaced with “judgments of domestic courts”.

It was so decided.

Paragraph (17), as amended, was adopted.

Paragraph (18)

16. Sir Michael WOOD proposed the deletion of the words “clearly intentional or otherwise”.

Paragraph (18), as amended and with an editorial amendment to the Spanish text, was adopted.

Paragraphs (19) and (20)

Paragraphs (19) and (20) were adopted.

Paragraph (21)

17. Mr. FORTEAU (Rapporteur) proposed that, in the second sentence, the term “primarily” (“*avant tout*”) should be replaced with the words “in principle” (“*en principe*”).

18. Mr. NOLTE (Special Rapporteur) said that it would be preferable to redraft the sentence: “It is, however, the parties *themselves*, acting through their organs *or by way of conduct which is attributed to them*, who engage in practice ...”. That would introduce the notion of attribution, which was important.

Paragraph (21), as amended, was adopted.

Paragraph (22)

19. Ms. ESCOBAR HERNÁNDEZ proposed the deletion of the brackets around the adjective “all”.

Paragraph (22), as amended, was adopted.

Paragraphs (23) to (33)

Paragraphs (23) to (33) were adopted.

Paragraph (34)

Paragraph (34) was adopted with an editorial amendment to the English text.

Paragraph (35)

20. Sir Michael WOOD proposed that the adjective “agreed”, which appeared in brackets, and the phrase “in the sense of any particular instance of application of a treaty” should be deleted.

Paragraph (35), as amended, was adopted.

Paragraph (36)

Paragraph (36) was adopted.

Document A/CN.4/L.819/Add.3

Commentary to draft conclusion 5 (Attribution of subsequent practice)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

21. Mr. FORTEAU (Rapporteur) proposed, in order to reflect more accurately the opinion of the International Court of Justice in the *Kasikili/Sedudu Island* case, that the first sentence should be expanded by replacing the phrase “is not (only) performed by State parties” (“*n’est pas (seulement) la conduite des États parties*”) with “does not directly arise from the conduct of State parties, but nevertheless constitutes an example of subsequent practice” (“*ne découle pas directement de la conduite des États parties mais constitue tout de même une pratique ultérieure*”).

Paragraph (3), as amended, was adopted.

Paragraphs (4) to (7)

Paragraphs (4) to (7) were adopted.

Paragraph (8)

22. Sir Michael WOOD proposed, for the sake of consistency in the English text, that the words “an intentional or clear” should be replaced with “a manifest”.

Paragraph (8) was adopted with that amendment to the English text.

Paragraphs (9) and (10)

Paragraphs (9) and (10) were adopted.

Paragraph (11)

23. Sir Michael WOOD said that he did not understand the meaning of the phrase “for example by supervision” and proposed its deletion.

24. Mr. NOLTE (Special Rapporteur) said that while he was in favour of deleting the phrase, he would like to keep the footnote; since, in the case cited,¹⁸⁹ one judge had considered that the application of a treaty could be attributed to a State party when it was the conduct of non-State actors under the strict supervision of that State.

Paragraph (11), as amended, was adopted.

Paragraph (12)

Paragraph (12) was adopted.

Paragraph (13)

Paragraph (13) was adopted with an editorial amendment to the Spanish text.

Paragraphs (14) and (15)

Paragraphs (14) and (15) were adopted.

Paragraph (16)

25. Mr. PARK recalled that the ICRC was not only an NGO but had a unique status.

26. Sir Michael WOOD proposed, in order to remedy the problem, that the words “Non-governmental organizations (NGOs)” should be replaced with “Other non-State actors”.

Paragraph (16), as amended, was adopted.

Paragraph (17)

Paragraph (17) was adopted.

Paragraph (18)

27. Mr. FORTEAU (Rapporteur) said it seemed to be going too far to state that the assessments of non-State actors could be biased. The statement that they needed to be critically reviewed was sufficient.

Paragraph (18), as amended, was adopted.

Paragraphs (19) to (22)

Paragraphs (19) to (22) were adopted.

The commentary to draft conclusion 5, as a whole, as amended, was adopted.

28. The CHAIRPERSON invited the members of the Commission to resume consideration of a paragraph that had been held in abeyance.

Document A/CN.4/L.819/Add.1

Commentary to draft conclusion 1 (General rule and means of treaty interpretation) (concluded)

¹⁸⁹ *The United States of America, and others and The Islamic Republic of Iran, and others.*

Paragraph (14) (*concluded*)

29. Mr. NOLTE (Special Rapporteur), following up on the comments of some members, proposed that the words “object and purpose of a rule”, already used by the Commission in its 1966 commentary to the draft articles on the law of treaties, should be replaced with “the object and purpose of the treaty”, as in the Vienna Convention, and that a footnote should be added referring to various authors to show that the notion of “object and purpose” was not as simple and homogenous as it seemed. As for the expression “interactive process” that some members found too modern, it was also drawn from the 1966 commentary, which could be referred to in a new footnote. Lastly, in response to Sir Michael’s request, in the fourth sentence, the word “factors” should be replaced with “elements”.

Paragraph (14), as amended, was adopted.

The commentary to draft conclusion 1, as a whole, as amended, was adopted.

CHAPTER V. *Immunity of State officials from foreign criminal jurisdiction* (A/CN.4/L.820 and Add.1–3)

30. The CHAIRPERSON invited the members of the Commission to consider, paragraph by paragraph, the part of chapter V of the draft report contained in document A/CN.4/L.820.

A. Introduction

Paragraphs 1 to 3

Paragraphs 1 to 3 were adopted.

B. Consideration of the topic at the present session

Paragraph 4

Paragraph 4 was adopted.

Paragraph 5

31. Mr. NOLTE asked what were the “basic norms” of the regime of immunity *ratione personae*.

32. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that the exact words used in the original Spanish version were “*elementos normativos*” and that the translations should be aligned accordingly.

Paragraph 5 was adopted subject to that amendment and a minor editorial amendment to the English text.

The meeting rose at 1 p.m.

3194th MEETING

Tuesday, 6 August 2013, at 3 p.m.

Chairperson: Mr. Bernd H. NIEHAUS

Present: Mr. Cafilisch, Mr. Candioti, Ms. Escobar Hernández, Mr. Forteau, Mr. Gevorgian, Mr. Hassouna,

Mr. Hmoud, Mr. Huang, Ms. Jacobsson, Mr. Kittichaisaree, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

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

CHAPTER V. *Immunity of State officials from foreign criminal jurisdiction* (*continued*) (A/CN.4/L.820 and Add.1–3)

1. The CHAIRPERSON invited the Commission to resume its consideration of the portion of chapter V of the draft report contained in document A/CN.4/L.820.

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

Paragraphs 6 to 8

Paragraphs 6 to 8 were adopted.

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

1. TEXT OF THE DRAFT ARTICLES

Paragraph 9

Paragraph 9 was adopted.

2. TEXT OF THE DRAFT ARTICLES AND COMMENTARIES THERETO PROVISIONALLY ADOPTED BY THE COMMISSION AT ITS SIXTY-FIFTH SESSION

Paragraph 10

Paragraph 10 was adopted.

2. The CHAIRPERSON invited the Commission to consider the portion of chapter V of the draft report contained in document A/CN.4/L.820/Add.2.

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

Paragraph (1)

3. Mr. MURPHY said that, as at a later stage the Commission intended to adopt a draft article on definitions, it would be better not to employ the word “definition” in the first sentence. He therefore suggested the deletion of the phrase “the definition of”. He questioned the need for the second sentence and suggested that the fourth and fifth sentences should be deleted, since there was no need to overload the commentary with a description of the drafting history.

4. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur), responding to Mr. Murphy’s first proposal, said that it would be preferable to replace the words “the definition of” with “determining”. As for his second and third proposals, she drew attention to the fact that the decision to merge the two draft articles which she had originally proposed had been taken after lengthy debates in plenary meetings and in the Drafting Committee, during which the reasons for combining the two articles had been considered in