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Summary record of the 3194th meeting

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

Extract from the Yearbook of the International Law Commission:-
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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. Caflisch, 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

depth and a comparison drawn with article 3 of the United Nations Convention on Jurisdictional Immunities of States and Their Property. The second part of the paragraph was therefore substantive in nature and should be retained. The best way to facilitate the Sixth Committee's comprehension of the draft articles was to chart the evolution of the Commission's reasoning about them.

5. Sir Michael WOOD, Mr. CANDIOTI and Mr. VÁZQUEZ-BERMÚDEZ expressed support for retaining the second half of the paragraph.

6. Mr. MURPHY withdrew his proposal to delete the second sentence and the last half of the paragraph.

Paragraph (1), as amended by the Special Rapporteur, was adopted.

Paragraph (2)

7. Mr. TLADI said that, in the footnote to the end of the second sentence, the draft article in question should be identified, namely draft article 1 of the text on expulsion of aliens.[190]

8. Mr. FORTEAU proposed an editorial correction to the French text of the footnote at the end of the paragraph.

Paragraph (2) was adopted with those amendments to the footnotes.

Paragraph (3)

9. Mr. TLADI queried the use of direct questions and the presentation of the paragraph in general.

10. Mr. HUANG said that the basis for immunity was international law, the equality of sovereign States and the representative function of the officials who enjoyed immunity. It was therefore not appropriate to say that State officials were the beneficiaries of immunity.

11. Mr. CANDIOTI said that, although paragraph (3) was extremely clear, the Spanish wording should be aligned on the English text.

12. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that the paragraph was not solely formulated as questions: it also identified the issues covered in the draft article, in order to make it easy for both specialists and non-specialists to understand them. She agreed with Mr. Candioti's suggestion to align the Spanish text on the English version. In response to Mr. Huang, she said that, as State officials enjoyed immunity in the interests of the State, the State was entitled to confer or revoke immunity. The term "State official" was being used provisionally, pending a more thorough consideration of the notion at the next session.

13. Sir Michael WOOD, supported by Mr. PETRIČ, suggested that, in the English version of the text, the term "beneficiaries" should be replaced with "persons enjoying immunity", which echoed the language used in draft article 3. The term "beneficiaries" was inappropriate in the light of the preamble to the Vienna Convention on Diplomatic Relations, which stated that the purpose of privileges and immunities "is not to benefit individuals".

Paragraph (3), as amended by Mr. Candioti and Sir Michael Wood, was adopted.

Paragraph (4)

14. Sir Michael WOOD suggested that, in the fifth sentence, the words after "apply" should be deleted, as they were superfluous.

Paragraph (4), as amended, was adopted.

Paragraph (5)

15. Mr. NOLTE said that, as the paragraph was designed to explain the term "criminal jurisdiction", it might be helpful to refer to the extensive jurisprudence of the European Court of Human Rights. He was somewhat surprised that, according to the fifth sentence, the reference to foreign criminal jurisdiction was to be understood as "the set of judicial processes whose purpose is to determine whether an individual bears criminal responsibility, including for coercive acts". The *Arrest Warrant* case had been cited to support that proposition, but he had always interpreted that case as referring to an act that infringed on immunity but was not coercive in any respect. He would therefore propose either deleting the last part of the fifth sentence or amending it to read "… including for non-coercive acts with respect to the beneficiaries of immunity in this context". In the next sentence, the words "the mere circulation of" should be inserted before "an arrest warrant".

16. Mr. TLADI pointed out that, in the English version, the reference to the "draft articles" in the third sentence should be in the singular, not the plural.

17. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that there were diverging views on the necessity of a definition of criminal jurisdiction, and she had endeavoured to find a middle ground. If a more detailed definition were to be given, the Commission could refer, not only to European case law, but also to the jurisprudence of the Inter-American Court of Human Rights and the Human Rights Committee. Paragraph (5) indicated that the understanding of the term would be developed later in the Commission's treatment of the topic. A preliminary description of criminal jurisdiction was necessary in the commentary to the text on the scope of the draft articles, however, since foreign criminal jurisdiction was one of the elements of the scope. The inclusion of coercive acts among the processes whose purpose was to determine whether an individual bore criminal responsibility reflected points raised in the debates in plenary and in the Drafting Committee. In the judgment of the International Court of Justice in the *Arrest Warrant* case, the Court had noted that although the warrant had not been executed, in and of itself it had been coercive in nature. She would therefore propose maintaining the paragraph as currently drafted.

[190] Draft articles on the expulsion of aliens adopted by the Commission on first reading in 2012, *Yearbook … 2012*, vol. II (Part Two), paras. 45–46.

18. Sir Michael WOOD suggested that a solution might be to retain the first four sentences of paragraph (5), which seemed to contain the essence, and to delete the remainder. In the English text, the term "judicial processes" was problematic. In his country, for example, the police and prosecution services were not part of the judicial process.

19. Mr. FORTEAU said that the paragraph was very useful in describing the current stage of the Commission's work on the topic. Given that, in its judgment in the *Arrest Warrant* case, the International Court of Justice had described the warrant as "enforceable" (para. 63), he suggested that the fifth sentence could refer to "enforceable or coercive acts".

20. Mr. GEVORGIAN said that he agreed with Sir Michael: the term "judicial processes" was problematic in Russian as well, since it did not cover certain pretrial stages of the judicial process under the legal system of the Russian Federation. He agreed with Mr. Nolte that the link between the decision in the *Arrest Warrant* case and coercive acts was not entirely justified, and he was not convinced that Mr. Forteau's proposal would resolve the problem.

21. Mr. PETRIČ said that perhaps Sir Michael's suggestion would provide the best solution. To ensure consistency, the reference to "beneficiaries" should be amended, as in previous paragraphs. If the *Arrest Warrant* case was cited, the Commission's reasoning must be solid enough to preclude any misunderstandings; Mr. Nolte's cautions should therefore be heeded. He agreed that the term "judicial processes" was problematic. While it was not necessary to define what was understood by criminal jurisdiction now, that would have to be done sometime in the future, as it would be crucial whenever there were disputes concerning immunity. He agreed that, in the English text, the third sentence must refer to "This draft article" rather than "The draft articles".

22. Mr. NOLTE said that he agreed with the proposal by Sir Michael to delete the latter part of the paragraph. Given that the readers of the Commission's commentaries were not necessarily experts in international law, they would not immediately identify the reference to "enforceable" acts proposed by Mr. Forteau. If the sixth sentence were retained, it should be specified very clearly that the Court had taken into account the "international circulation" of the arrest warrant (paras. 62 and 64), thus indicating the way in which the warrant affected immunity.

23. Mr. KITTICHAISAREE said that he agreed fully with the views expressed by Mr. Petrič. He proposed that only the first two sentences should be retained, and the footnote at the end of the third sentence, which captured the main of what the Special Rapporteur was trying to explain, should be moved to the end of the first sentence. In that footnote, he would replace the word "progressively" with "gradually" and insert the word "criminal" between "the concept of" and "jurisdiction".

24. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that while she understood the intention behind the latter proposal, she was concerned that it would oversimplify the commentary. If only the first two sentences were maintained, the Commission would be saying little of substance to describe the issues it had debated, including what "criminal jurisdiction" should be understood to mean. While consideration could be given to deleting the references to the judgments of the International Court of Justice, she believed they were both relevant. The concerns with regard to the term "judicial processes" could be resolved by choosing an alternative translation for the Spanish wording "*actuaciones vinculadas a la actividad judicial*". She agreed with Mr. Petrič that it was necessary to exercise caution in choosing terminology. The proposal by Mr. Forteau would make the reference to the *Arrest Warrant* judgment more precise.

25. The CHAIRPERSON suggested that the Commission should revert to paragraph (5) at its next meeting.

Paragraph (6)

26. Sir Michael WOOD said that the phrases "international criminal jurisdictions" and "internationalized criminal jurisdictions" should be replaced with "international criminal tribunals" in the third and fourth sentences.

27. Mr. MURPHY, referring to the fourth to seventh sentences, said that he found the references to "a member" and "another member" to be unfortunate. He would suggest reformulating them as "some members". He also proposed inserting the words "immunity from" before the words "the so-called mixed or internationalized criminal jurisdictions" in the fourth sentence, and "under national law" after "cooperate" in the fifth sentence. The final sentence might be replaced with a simpler formulation: "As such, the Commission has decided to exclude these issues from the scope of this topic."

28. Mr. CAFLISCH said that, in keeping with the general practice, the word "norms" ["*normes*"] should be replaced with "rules" ["*règles*"] throughout the text.

29. Mr. VALENCIA-OSPINA, supported by Mr. NOLTE, Mr. SABOIA and Sir Michael WOOD, said that he shared Mr. Murphy's position on the words "a member" and "another member". As to the substantive points, paragraph (6) should simply indicate that the Commission was aware of the problems posed by the so-called mixed or internationalized criminal tribunals and the potential effect on the present draft articles of the application of certain rules of international law. The final sentence could then outline the Commission's conclusion on those points.

30. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that in drafting the commentary to the draft articles, the Commission was transmitting information to the Sixth Committee, and more generally, to the international law community. If it was considered preferable not to mention that a particular point had been raised by an individual Commission member but rather to reflect members' views more generally, she could agree to do so, but only if that was to be a general policy for all the texts produced by the Commission. Although she could not endorse the proposal to delete the last sentence which, in her view, expressed the most important point of the paragraph, she could agree to the inclusion of a more specific

statement to the effect that what was excluded from the scope of the draft articles was immunity from the jurisdiction of international criminal tribunals.

31. Sir Michael WOOD said that it was unclear whether the "mixed or internationalized criminal jurisdictions" referred to in the fourth sentence were the same as the international criminal tribunals mentioned in the second. That made it difficult to know whether the exclusion of international criminal jurisdictions to which reference was made in the final sentence also applied to mixed or internationalized criminal courts. The final sentence was not merely stating that the Commission was excluding international criminal tribunals from the scope of the current topic, but rather that their exclusion from the scope of the topic meant that neither the rules that governed their functioning nor immunity with respect to the jurisdiction of an international criminal tribunal was affected by the present draft articles.

32. Mr. MURPHY said that the final sentence referred only to the exclusion of international criminal courts and tribunals from the scope of the topic, whereas the paragraph as a whole covered two issues: the so-called mixed or internationalized criminal tribunals and the international obligations towards those courts and tribunals with which States might have to comply under their national laws.

33. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that, in order to address the various concerns expressed, she was prepared to propose a number of amendments to the text.

34. The CHAIRPERSON said that the Commission would defer consideration of paragraph (6) pending its reformulation by the Special Rapporteur.

Paragraph (7)

Paragraph (7) was adopted.

Paragraph (8)

35. Mr. NOLTE asked for clarification regarding the meaning of the phrase in the second sentence "criminal responsibility based on primary rules in the criminal domain" and queried the final sentence.

36. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that the phrase referred to by Mr. Nolte could be paraphrased to read: "criminal responsibility based on the substantive rules of criminal law". With regard to the last sentence, several members of the Commission had expressed the view that, in addition to its procedural nature, immunity from foreign criminal jurisdiction also had a substantive or material component. Its application could, in certain circumstances, produce effects that would make it impossible to attribute individual criminal responsibility to a State official.

37. Mr. ŠTURMA proposed that, in the second sentence of the Spanish version, the phrase "*normas primarias de naturaleza penal*" should be replaced with "*normas substantivas de naturaleza penal*", which might be translated into English as "substantive rules of a criminal nature".

38. Mr. SABOIA pointed out that even where immunity was procedural in nature, it could produce substantive effects on the attribution of criminal responsibility. For example, alleged offenders could die or the statute of limitations could expire, thus resulting in impunity for criminal acts.

39. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) endorsed Mr. Šturma's new wording for the second sentence of the Spanish text. The final sentence reflected a concern that had been raised in the debate, but if the rest of the Commission wished to delete it, she would have no objection.

40. Ms. JACOBSSON said that the views expressed by Commission members were reflected in the commentaries to many of its texts for ease of reference, and in particular, for consultation by members of the Sixth Committee. In her view, the last sentence was important and worth retaining.

Paragraph (8), as amended by the Special Rapporteur, was adopted.

Paragraph (9)

41. Mr. TLADI, referring to the third sentence, said that the marker for the footnote in the third sentence should be positioned after the term "treaty-based", since the footnote contained only examples of treaty-based practice. Failing that, the footnote should include examples of custom-based practice.

42. Mr. FORTEAU suggested that a better solution would be to delete the phrase "both treaty-based and custom-based" in the third sentence and, at the beginning of the footnote in question, to delete the phrase "To cite only examples of treaty practice".

43. Sir Michael WOOD said that it was important to retain the phrase "both treaty-based and custom-based" in the text of paragraph (9), but he endorsed the proposal to move the footnote marker to appear after "treaty-based", since the footnote gave examples only of such practice. In the second sentence, the expression "to a lesser degree", which was ambiguous and superfluous, should be deleted.

44. After additional discussion in which Mr. MURASE, Mr. PETRIČ and Mr. MURPHY participated, Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that she had no problem with deleting the words "to a lesser degree" in the second sentence. With regard to the footnote in the third sentence, she could agree to delete it since it added little to the text.

45. Sir Michael WOOD proposed that the footnote in question should simply be deleted.

Paragraph (9), as thus amended, was adopted.

The meeting rose at 6 p.m.