International Law Commission
Sixty-sixth session (second part)

Provisional summary record of the 3242nd meeting
Held at the Palais des Nations, Geneva, on Thursday, 7 August 2014, at 3 p.m.

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Identification of customary international law (continued)
Present:

Chairman: Mr. Gevorgian

Members:
Mr. Caflisch
Mr. Candioti
Mr. El-Murtadi
Ms. Escobar Hernández
Mr. Forteau
Mr. Hassouna
Mr. Hmoud
Ms. Jacobsson
Mr. Kamto
Mr. Kittichaisaree
Mr. Laraba
Mr. Murase
Mr. Murphy
Mr. Niehaus
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

Secretariat:

Mr. Korontzis Secretary to the Commission
The meeting was called to order at 3.05 p.m.

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

Chapter IX. Immunity of State officials from foreign criminal jurisdiction (continued)
(A/CN.4/L.842/Add.1)

The Chairman invited the Commission to resume its consideration of document A/CN.4/L.842/Add.1, paragraph by paragraph.

Draft article 5 (Persons enjoying immunity ratione materiae) (continued)

Commentary

Paragraph (4)

Ms. Escobar Hernández (Special Rapporteur) said that the quotation marks at the end of the first sentence had not been included in the English version, which should read: “… and Ministers for Foreign Affairs ‘when they have acted in the capacity of State officials’”.

Paragraph (4) was adopted with that correction to the English text.

Paragraphs (5) and (6)

Paragraphs (5) and (6) were adopted.

The Chairman invited the members of the Commission to resume their consideration of paragraphs (1) and (7) of the commentary to draft article 2, which had been held in abeyance.

Draft article 2 (Definitions) (continued)

Paragraph (1)

Ms. Escobar Hernández (Special Rapporteur) said that paragraph (1), which had been reworded to take account of the views of Commission members and circulated in Spanish and English, now read: “The purpose of draft article 2, paragraph (e), is to define the persons to whom the present draft articles apply, namely ‘State officials’. Defining the concept of State official helps to understand one of the normative elements of immunity: the individuals who enjoy immunity. Most members of the Commission thought it would be useful to have a definition of State official for the purposes of the present draft articles, given that immunity from foreign criminal jurisdiction is applicable to individuals. Several members of the Commission expressed doubts about the need to include this definition.”

Paragraph (1) was adopted.

Paragraph (7)

Ms. Escobar Hernández (Special Rapporteur) said that, although several members had suggested that paragraph (7) should be deleted, she had chosen to propose a simplified version instead. Footnotes 3, 4, 5 and 6 had been merged into a single footnote in which all the comments on the judgements cited had been deleted. The revised paragraph, which had been circulated in Spanish and English, would read: “Nevertheless, below are some examples of several ‘State officials’ that have appeared in national and international judicial case law regarding immunity of jurisdiction: a former Head of State; a Minister of Defence and a former Minister of Defence; a Vice-president and Minister of Forestry; a Minister of Interior; an Attorney-General and a General Prosecutor; a Head of National
Sir Michael Wood proposed rewording the beginning of the sentence, in the English version, to read: “Nevertheless, by way of example, the following ‘State officials’ have appeared in national and international case law regarding immunity from jurisdiction: …”.

The proposal was adopted.

Mr. Nolte pointed out that in the United States v. Noriega case, the question of whether Mr. Noriega had been a State official or not had never been examined, because in its judgment, the Court of Appeal had stated that Mr. Noriega had never served as the constitutional leader of Panama. The reference to that case in the footnote was accordingly not relevant and should be deleted.

Mr. Saboia said that to bring up the Noriega case at that stage of the discussions was to be deliberately provocative. The Noriega case was not a typical case of a Head of State being prosecuted despite his or her status as Head of State; Mr. Noriega had been kidnapped by foreign military forces, and many lives had been lost during the operation. The members of the Commission could not ignore history on the grounds that they were dealing exclusively with the law.

Ms. Escobar Hernández (Special Rapporteur) said that she saw no reason to delete the reference to the Noriega case, as it had been analysed in the second report on the immunity of State officials from foreign criminal jurisdiction (A/CN.4/661) and in the commentaries adopted by the Commission at its previous session (A/CN.4/L.820). She therefore called on Mr. Nolte to withdraw his proposal.

Mr. Nolte said that his intention had certainly not been to be provocative, much less to deny history, but simply to highlight the incongruity of citing, among the examples of cases in which the courts had determined which individuals had the status of State officials for the purpose of invoking immunity, a case in which that question had not been addressed. In the interest of consensus, however, he agreed to withdraw his proposal.

Paragraph (7) was adopted, with the amendment proposed by Sir Michael Wood to the English version.

Chapter VI. The obligation to extradite or prosecute (aut dedere aut judicare)

(A/CN.4/L.839)

The Chairman invited the Commission to consider chapter VI, contained in document A/CN.4/L.839, paragraph by paragraph.

Mr. Kittichaisaree (Chairman of the Working Group) said that in assembling the final document, the section headings had been mislabelled: sections D (Gaps in the existing conventional regime and the “third alternative”), E (The priority between the obligation to prosecute and the obligation to extradite, and the scope of the obligation to prosecute), F (The relationship of the obligation to extradite or prosecute with erga omnes obligations or jus cogens norms), G (The customary international law status of the obligation to extradite or prosecute) and H (Other matters of continued relevance in the 2009 General framework) were to be renamed paragraphs (c), (d), (e), (f) and (g) and inserted after paragraphs (a) (Typology of provisions in multilateral instruments) and (b) (Implementation of the
obligation to extradite or prosecute) under item 3 (Summary of work) in section C (Final report on the topic).

A. Introduction

Paragraphs 1 to 4

Paragraphs 1 to 4 were adopted.

B. Consideration of the topic at the present session

Paragraphs 5 to 7

Paragraphs 5 to 7 were adopted.

Paragraph 8

Mr. Tladi proposed that a sentence should be added at the end of the paragraph, to read: “It also expressed its deep appreciation to the Chairman of the Working Group, Mr. Kriangsak Kittichaisaree, for his very valuable contribution and the work done in an efficient and expeditious manner.”

The proposal was adopted.

Mr. Hmoud proposed also adding an expression of thanks to the former Special Rapporteur, Mr. Zdzislaw Galicki.

The proposal was adopted.

Paragraph 8 was adopted, with the additions proposed by Mr. Tladi and Mr. Hmoud.

C. Final report on the topic

Paragraph 9

Paragraph 9 was adopted.

1. Obligation to fight impunity in accordance with the rule of law

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

2. The importance of the obligation to extradite or prosecute in the work of the International Law Commission

Paragraph (3)

Paragraph (3) was adopted.

3. Summary of work

Paragraph (4)

Mr. Murphy proposed adding an introductory sentence at the beginning of the paragraph, to read: “The following summarizes several key aspects of the Commission’s work on this topic.”

The proposal was adopted.
Mr. Forteau proposed replacing the words “of the Working Group” with “of the Commission” at the beginning of the last sentence.

Mr. Kittichaisaree (Chairman of the Working Group) proposed instead that the beginning of that sentence should be reworded to read: “The Commission decided to proceed on the understanding that …”.

The proposal was adopted.

Paragraph (4), as amended, was adopted.

Paragraph (5)

Mr. Murphy proposed amending the beginning of the paragraph to read: “The Commission considered useful to its work a wide range of materials, particularly: the Survey …”.

Mr. Kittichaisaree (Chairman of the Working Group) said that he supported the proposal and that, as a consequence, the words “useful in its work” at the end of the paragraph should be deleted.

Paragraph (5), as amended, was adopted.

Paragraphs (6) to (10)

Paragraphs (6) to (10) were adopted.

Paragraph (11)

Mr. Murphy proposed replacing the words “The first category comprised …” with “The first category of international conventions contained …”.

Paragraph (11), as amended, was adopted.

Paragraphs (12) to (14)

Paragraphs (12) to (14) were adopted.

Paragraph (15)

Paragraph (15) was adopted, with a minor drafting change proposed by Mr. Murphy.

Paragraphs (16) to (21)

Paragraphs (16) to (21) were adopted.

Paragraph (22)

Mr. Forteau said that the reference in footnote 63 to the adoption of the draft articles on the expulsion of aliens must be amended to indicate that they had been adopted on second reading rather than on first reading at the current session.

Paragraph (22), as thus amended, was adopted.

Paragraphs (23) to (30)

Paragraphs (23) to (30) were adopted.
Paragraph (31)

Mr. Murphy proposed indicating at the end of the paragraph that the Commission had decided at the current session to include the topic of crimes against humanity in its programme of work; the Secretariat could insert a reference in the section of the annual report that mentioned that decision.

Paragraph (31) was adopted subject to the amendments proposed by Mr. Murphy.

Paragraphs (32) to (59)

Paragraphs (32) to (59) were adopted.

Document A/CN.4/L.839 as a whole, as amended, was adopted.

Chapter XI. Protection of the environment in relation to armed conflicts (A/CN.4/L.845)

The Chairman invited the members of the Commission to consider chapter XI, contained in document A/CN.4/L.845, paragraph by paragraph.

A. Introduction

Paragraph 1

Paragraph 1 was adopted.

B. Consideration of the topic at the present session

Paragraph 2

Paragraph 2 was adopted.

1. Introduction by the Special Rapporteur of the preliminary report

Paragraphs 3 to 6

Paragraphs 3 to 6 were adopted.

2. Summary of the debate
   (a) General comments

Paragraph 7

After a discussion in which Mr. Murphy, Ms. Jacobsson (Special Rapporteur), Mr. Vázquez-Bermúdez, Mr. Forteau, Mr. Saboia and Sir Michael Wood took part, the Chairman proposed amending the penultimate sentence to read: “It was suggested that the legal entity to be protected under this topic was the environment itself.”

Paragraph 7, as amended, was adopted.

(b) Scope and methodology

Paragraphs 8 to 14

Paragraphs 8 to 14 were adopted.

(c) Use of terms
Paragraphs 15 to 18
Paragraphs 15 to 18 were adopted.

(d) Sources and other material to be consulted

Paragraphs 19 and 20
Paragraphs 19 and 20 were adopted.

(e) Environmental principles and obligations

Paragraphs 21 to 24
Paragraphs 21 to 24 were adopted.

(f) Human rights and indigenous rights

Paragraphs 25 and 26
Paragraphs 25 and 26 were adopted.

(g) Future programme of work

Paragraphs 27 and 28
Paragraphs 27 and 28 were adopted.

3. Concluding remarks of the Special Rapporteur

Paragraphs 29 to 34
Paragraphs 29 to 34 were adopted.

Paragraph 35

Mr. Kittichaisaree proposed that the beginning of the first sentence should be amended to read: “On the availability of evidence of State practice”.

Paragraph 35, as amended, was adopted.

Paragraphs 36 and 37
Paragraphs 36 and 37 were adopted.

Document A/CN.4/L.845, as a whole, as amended, was adopted.

Chapter XIII. The Most-Favoured-Nation clause (A/CN.4/L.847)

The Chairman invited the Commission to consider chapter XIII, as contained in document A/CN.4/L.847, paragraph by paragraph.

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.
1. Draft final report

Paragraphs 6 to 10

Paragraphs 6 to 10 were adopted.

2. Discussions of the Study Group

Paragraphs 11 to 14

Paragraphs 11 to 14 were adopted.

Document A/CN.4/L.847, as a whole, as amended, was adopted.

Chapter VIII. Protection of the atmosphere (A/CN.4/L.841)

The Chairman invited the Commission to consider chapter VIII, as contained in document A/CN.4/L.841, paragraph by paragraph.

A. Introduction

Paragraphs 1 and 2

Paragraphs 1 and 2 were adopted.

B. Consideration of the topic at the present session

Paragraph 3

Paragraph 3 was adopted.

1. Introduction by the Special Rapporteur of the first report

Paragraphs 4 to 8

Paragraphs 4 to 8 were adopted.

2. Summary of the debate

(a) General comments

Paragraph 9

Mr. Nolte proposed that in the final sentence, the words “was not so much what needed to be done to protect the atmosphere but rather” should be deleted.

Paragraph 9, as amended, was adopted.

Paragraphs 10 and 11

Paragraphs 10 and 11 were adopted.

Paragraph 12

Mr. Nolte proposed that in order to avoid confusion, the beginning of the first sentence should be amended to read “Some other members”.

Paragraph 12, as amended, was adopted.

Paragraphs 13 to 16

Paragraphs 13 to 16 were adopted.
Paragraphs 14 to 16

Paragraphs 14 to 16 were adopted.

(b) Comments on draft guideline 1: Use of terms

Paragraph 17

Following an exchange of views between Mr. Nolte and Mr. Murase (Special Rapporteur), the Chairman proposed amending the last sentence to read: “The point was also made that the definition ought to be simplified, without mentioning such terms as troposphere and stratosphere.”

Paragraph 17, as amended, was adopted.

Paragraph 18

Paragraph 18 was adopted.

Paragraph 19

Mr. Forteau proposed that in footnote 7, the link to the website should simply be provided, without any further details.

Paragraph 19, as amended, was adopted.

Paragraphs 20 to 22

Paragraphs 20 to 22 were adopted.

(c) Comments on draft guideline 2: Scope of the guidelines

Paragraphs 23 to 26

Paragraphs 23 to 26 were adopted.

(d) Comments on draft guideline 3: Legal Status of the Atmosphere

Paragraph 27

Mr. Nolte proposed inserting the word “certain” before “members” at the beginning of the second sentence.

Paragraph 27, as amended, was adopted.

Paragraph 28

Paragraph 28 was adopted.

Paragraph 29

Mr. Nolte proposed merging paragraphs 29 and 30 to better highlight the different points of view expressed by members during the debate.

The proposal was adopted.

Paragraph 30

Mr. Kittichaisaree proposed replacing the word “despite” with “taking into account” in the first sentence.

Paragraph 30, as amended, was adopted.
Paragraph 31

Mr. Murase (Special Rapporteur) proposed transposing the first sentence to paragraph 32.

Paragraph 31, as amended, was adopted.

Paragraphs 32 to 34

Paragraphs 32 to 34 were adopted.

(e) Other considerations

Paragraphs 35 to 38

Paragraphs 35 to 38 were adopted.

3. Concluding remarks of the Special Rapporteur

Paragraphs 39 to 42

Paragraphs 39 to 42 were adopted.

Document A/CN.4/L.841, as a whole, as amended, was adopted.

Identification of customary international law (agenda item 9) (continued)

Interim report of the Drafting Committee on the identification of customary international law

The Chairman invited the Chairman of the Drafting Committee to present the fifth report made by the Drafting Committee at the sixty-sixth session of the Commission, concerning the identification of customary international law.

Mr. Saboia (Chairman of the Drafting Committee) said that the Drafting Committee had examined 9 of the 11 draft conclusions proposed by the Special Rapporteur in his second report (A/CN.4/672) and had provisionally adopted 8 of them, which he himself was now presenting for information only. The last two draft conclusions, which dealt with the second element of practice (opinio juris), would be examined at the next session.

With regard to draft conclusion 1 (Scope), the Drafting Committee had considered that the term “methodology” should be avoided and, for the sake of simplicity, had decided to delete the original second paragraph of the draft conclusion, which had contained a “without prejudice” clause.

The former draft conclusion 2 on the use of terms had been set aside for the moment: the expression “for the purposes of the present draft conclusions” had been considered somewhat odd, as the draft conclusions were concerned with customary international law in general, and the definition in the draft conclusion was superfluous in the light of the new draft conclusion 2.

With regard to the new draft conclusion 2 [3] (Two constituent elements), the original title had been kept in order to reflect the fact that the identification of international customary law was based on a two-element approach. The provision was at the core of the draft conclusions, which reaffirmed the approach followed in State practice and in the jurisprudence of international courts and tribunals, and was largely supported in the doctrine. For that reason, the Drafting Committee had considered it preferable to use “Basic approach”, which covered both the two-element approach and the assessment of evidence for the two elements, as the title for Part II. It had also decided to add the term “opinio juris” in parentheses after “accepted as law”.

A/CN.4/SR.3242
With regard to draft conclusion 3 [4] (Assessment of evidence for the two elements), the words “for the two elements” had been added to the title for the sake of clarity, and the wording of the draft had been refined. The principle mentioned in the draft conclusion was an overarching one which applied to many of the draft conclusions that followed, such as the one concerning the forms of practice. The draft conclusion indicated that evidence for the determination of the two elements should not be assessed in isolation.

Regarding draft conclusion 4 [5] (Requirement of practice), the title of the former text had been amended. An extensive discussion had taken place in the Drafting Committee regarding the importance of State practice in the process of formation of rules of customary international law and on the relevance of the practice of other subjects of international law, especially international organizations. The question of the role, if any, of non-State actors had also been raised. The Drafting Committee had eventually opted for a formulation that first addressed the role of State practice and then the role of the practice of international organizations (and only of the international organizations themselves), on the understanding that the draft conclusion would be revisited in the future.

With regard to draft conclusion 5 [6] (Conduct of the State as State practice), the title of the former draft had been refined and, following a discussion on the issue, it had been decided to no longer refer to the concept of “attribution”, the prevailing opinion being that the language used in the draft conclusions should be accessible.

In relation to draft conclusion 6 [7] (Forms of practice), the concept of inaction, which had originally been dealt with in a separate paragraph, had been moved to the end of the first paragraph. The non-exhaustive nature of the list of forms of practice contained in paragraph 2 was emphasized by the words “but are not limited to”. The formulation “executive conduct, including operational conduct ‘on the ground’” had been discussed at length. It referred generally to the conduct of the executive authorities and included the physical conduct of governments, such as military operations in the context of a conflict. The “decisions of national courts” were to be understood broadly, as covering also relevant interlocutory decisions. The commentary to the draft conclusions would discuss other forms of practice not expressly included in the text. Paragraph 3, which contained the text of paragraph 1 of the former draft conclusion 8, had been placed after the list of forms of practice, the order of which had been chosen only as a matter of drafting.

With regard to draft conclusion 7 [8] (Assessing a State’s practice), the Drafting Committee had included in the first paragraph the statement that State practice should be taken as a whole, a requirement that had recently been recalled by the International Court of Justice. In the second paragraph, it was indicated that the weight given to a practice “may” be reduced. The use of the word “may” meant that the issue needed to be approached with caution, since the weight given to a practice that varied did not necessarily have to be reduced in all cases – for instance, when the lower and higher organs of the same State did not follow the same practice, it did not necessarily follow that less weight should be given to the practice of the higher organs.

With regard to draft conclusion 8 [9] (The practice must be general), its title emphasized the key aspect of the assessment of the material element of custom, which was a “general practice”. It had been stated in paragraph 4 of the former draft conclusion 9 that “[d]ue regard should be given to the practice of States whose interests are specially affected”. Bearing in mind the concerns that had been raised, there was no reference to that subject in the current draft conclusion and it would be further examined at the next session. The requirement that practice must be consistent was mentioned in the first paragraph, as it was inherent in the concept of generality of practice. Although, as it emerged from the jurisprudence of the International Court of Justice, no particular duration was required for a practice to be conclusive, paragraph 2 should not be interpreted as a recognition of “instant custom”.
In conclusion, he said that the Drafting Committee hoped to formally submit a set of draft conclusions for adoption at the sixty-seventh session.

The meeting rose at 6.15 p.m.