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Summary record of the 3195th meeting

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

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3195th MEETING

Wednesday, 7 August 2013, at 10.05 a.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)

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

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

1. The CHAIRPERSON invited the members of the Commission to resume their consideration, paragraph by paragraph, of document A/CN.4/L.820/Add.2.

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

Paragraph (10)

2. Mr. NOLTE proposed, in the third sentence, to delete the word “individually”, since the reference in question was to a category, not to individuals. He also proposed, in the fourth sentence, to delete the phrase “with no interference between the two”.

3. Mr. MURPHY proposed that, in the third sentence, the words “certain State officials” should be replaced with “persons connected with” in order to mirror the terminology found in draft article 1. In addition, the phrase “who are mentioned individually in view of the fact that they carry out their” should be deleted so that the end of the third sentence would read, “the immunity from foreign criminal jurisdiction of persons connected with activities in specific fields of international relations”.

Paragraph (10), as amended, was adopted.

Paragraph (11)

4. Sir Michael WOOD proposed, in the third sentence, to delete the word “defence”, which did not appear in the 1969 Vienna Convention and which seemed out of place. He also proposed, in the penultimate sentence, to replace the word “establishment” with “stationing” in the English version and to delete the adjective “permanent”. In the final sentence, the word “non-permanent” should be deleted from the English version, and the term “*no permanentes*” should be deleted from the Spanish version of the text.

5. Mr. MURPHY proposed that, for the sake of consistency with paragraph (10), the phrase “State officials” in the third sentence, the phrase “individuals carrying out” in the fifth sentence and the words “members of” in the antepenultimate sentence should all be replaced with “persons connected with”.

6. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that the concept of “defence ... of the interests of the State” had a precise meaning in Spanish, but that that concept was covered by the term “protection”, which meant that the term “defence” could be deleted. She proposed that, in the Spanish version, the words “*no permanentes*” should be replaced with “*de corta estancia*”.

Paragraph (11), as amended, was adopted.

Paragraph (12)

7. Sir Michael WOOD proposed deleting the second sentence, whose meaning seemed obscure.

8. Mr. FORTEAU (Rapporteur) agreed that the second sentence was not very clear and proposed adding to the end of the first sentence the phrase “in order to indicate that the ‘without prejudice’ clause is not necessarily restricted to the persons expressly mentioned in the clause”.

9. Mr. NOLTE said that the final sentence gave the impression that the Commission regarded certain categories of immunity as unimportant; he therefore proposed deleting the words “these cases in practice are not sufficiently significant, so”. The end of the sentence would then read: “it has considered that there is no need to mention them in paragraph 2”.

It was so decided.

10. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that, in order to take into account the concerns expressed by Sir Michael and Mr. Forteau, the first sentence should be redrafted so that it would read: “The list of the special rules described in the previous paragraph is preceded by the words ‘in particular’ to indicate that the saving clause does not apply exclusively to those special rules.”

Paragraph (12), as amended, was adopted.

Paragraph (13)

11. Mr. FORTEAU (Rapporteur) proposed deleting the words “and freely”, whose meaning was unclear.

It was so decided.

12. Mr. PARK said that, since he found the question of immunity that was granted on a unilateral basis to be a very important one, he proposed, at the end of the paragraph, adding a sentence that would read something along these lines: “This type of situation will be revisited at a later stage in the work on the topic.”

13. Mr. MURPHY proposed replacing the phrase “in view of the nature of such acts” with “since States remain free to provide additional immunities in accordance with their national law”.

14. Mr. SABOIA said that the phrase proposed by Mr. Murphy gave the impression that a State could, if it considered its law to permit it, grant refugee status to a criminal who was wanted for serious international crimes. In his view, the question of immunity that was granted on a unilateral basis warranted in-depth consideration before the Commission took a position on the matter.

15. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that she endorsed Mr. Park's proposal. With regard to the question raised by Mr. Murphy and Mr. Saboia, she recalled that the two opinions they had expressed had been conveyed to the Drafting Committee but that the Commission had not settled the matter. She would therefore propose, in the last sentence, to simply replace the verb "include" with that of "mention" and to add the sentence proposed by Mr. Park.

It was so decided.

16. Sir Michael WOOD asked whether the Commission had already agreed to revisit that point in the course of its work on the topic or whether it was simply a possibility.

17. Mr. HMOUD said that the question of immunity granted on a unilateral basis was extremely important, and he hoped that the Special Rapporteur would fairly reflect the two opinions that had been expressed in the Commission.

18. Ms. JACOBSSON said that she shared the opinions stated by Mr. Saboia and Mr. Hmoud and was of the view that the Commission should consider that question in any event.

19. Mr. PETRIČ said that he had always been convinced that the question of immunity that was granted on a unilateral basis would be taken up at a later stage since failure to do so would leave a gap in the Commission's work, in addition to the fact that States would step into the breach. He wished to know whether that question would indeed be taken up.

20. Mr. KITTICHAISAREE said that he also considered it necessary to address that question.

21. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that she wished to assure Mr. Petrič that the Commission would not fail to consider the question. The addition of the sentence proposed by Mr. Park consequently seemed to be both useful and necessary.

Paragraph (13) was adopted, subject to amendments to be made in accordance with the approved proposals and to a minor editorial amendment to the English text.

Paragraphs (14) and (15)

Paragraphs (14) and (15) were adopted.

22. The CHAIRPERSON invited the Commission to consider, paragraph by paragraph, document A/CN.4/L.820/Add.3, which contained the text of draft article 3 and the commentary thereto.

*Commentary to draft article 3 (Persons enjoying immunity *ratione personae*)*

Paragraph (1)

23. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur), referring to the fact that some members were wondering what was meant by the "significance" of immunity *ratione personae*, proposed to refer instead to the "substantive scope" of that category of immunity.

Paragraph (1) was adopted, subject to that amendment and to a minor editorial amendment to the English text.

Paragraph (2)

24. Mr. NOLTE said that it was unclear what the difference was between the two reasons for granting immunity *ratione personae* to certain individuals, which were that they *personified* the State and that they *represented* it by virtue of their functions. He was of the view that, if the Commission wished to say that immunity was historically linked to the person of the sovereign, it should substantiate that affirmation by means of appropriate footnote references.

25. Mr. KITTICHAISAREE said that, in paragraph (2) of the commentary to draft article 4 (A/CN.4/L.820/Add.1), the Commission justified the grant of immunity *ratione personae* on the basis of only one of the two reasons cited in the present paragraph.

26. Mr. TLADI proposed deleting the entire reference to personification. There had never been any question of considering that Heads of Government, much less Ministers for Foreign Affairs, personified the State, even symbolically. The Commission had historically considered that only the Head of State should be granted immunity *ratione personae*. However, it presently considered that such immunity should also be granted to the two other members of the troika, owing to the dual functional and representative nature of their functions and taking into account the judgment of the International Court of Justice in the *Arrest Warrant* case. That was the consensus that had been reached by the members of the Commission. The idea of personification was a new one that the Commission could not introduce at the present stage.

27. Sir Michael WOOD shared that view. The Commission had extended immunity *ratione personae* to the three members of the troika, owing to their dual representative and functional links to the State, as stated at the end of the paragraph. On the other hand, the irrelevance of their nationality was a secondary point that should be placed in a separate sentence.

28. Mr. PETRIČ said that he, too, felt that the Commission was going too far in claiming that the three members of the troika personified the State. Ministers for Foreign Affairs, in particular, enjoyed special status only by virtue of their functions; in certain countries, such as the United States of America, he or she personified the State certainly to a lesser extent than did the Vice President.

29. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) recalled that opinions had been divided both within the plenary Commission and among the members of the Drafting Committee on the question of whether the troika personified the State. It was for that reason that she had

chosen to include the concept of “personification”, while nevertheless employing the adverb “symbolically” in order to show that it was not a question of identification with the State. That said, she proposed to reformulate the paragraph so as to incorporate the views expressed and to submit a new version of it to the members at the next meeting.

It was so decided.

Paragraph (2) was left in abeyance.

Paragraph (3)

At the request of Mr. Nolte, Sir Michael and Mr. Forteau (Rapporteur), it was decided to include in the footnote at the end of the second indentation the source of the decisions cited, and to delete the reference to two irrelevant cases.

Paragraph (3), as amended, was adopted.

Paragraph (4)

30. Mr. NOLTE said that it was not necessary to state that, at a later date, it had been recognized that Heads of Government and Ministers for Foreign Affairs likewise enjoyed immunity *ratione materiae*. He therefore proposed to delete that statement.

It was so decided.

31. Mr. TLADI, referring to the second indentation, which mentioned the various conventions in which some form of immunity *ratione personae* of members of the troika was recognized, said that the varying treatment of such immunity from one instrument to another could give rise to uncertainty. In particular, the fact that the three offices were referred to in separate paragraphs could lead to the conclusion that the immunity granted to the individuals concerned was also different. In addition, in the third indentation, when citing the commentary to article 3 of the draft articles on jurisdictional immunities of States and their property, it would be useful also to cite the following sentence, in which the Commission pointed out that “[a] proposal ... to add after ‘heads of State’ ... heads of government and ministers for foreign affairs ... was not accepted by the Commission”.¹⁹¹

32. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that, in the commentary, the Commission could restrict itself to mentioning the three conventions that recognized the immunity *ratione personae* of the Head of State, the Head of Government and the Minister for Foreign Affairs, and to specify in a footnote the way in which each one defined that immunity. She proposed, once again, to draft a new version of the entire text of paragraph (4) for submission to the Commission at the next meeting.

It was so decided.

Paragraph (4) was left in abeyance.

Paragraph (5)

33. Mr. TLADI proposed, at the end of the last sentence, to replacing the phrase “the functions the Minister for Foreign Affairs performs in international relations” with “because the findings of the Court in the *Arrest Warrant* case was not opposed by States”.

Paragraph (5), as amended, was adopted.

Paragraph (6)

34. Mr. SABOIA proposed deleting the last two sentences since the Commission was not obliged to give an account of the various points of view expressed by its members in the commentaries to the draft articles.

Paragraph (6), as amended, was adopted.

Paragraph (7)

35. Mr. TLADI pointed out an error in the final sentence: the words “draft article 4” should be replaced with “draft article 3”.

Paragraph (7), as corrected, was adopted.

Paragraph (8)

36. Mr. TLADI pointed out an error in the third sentence: the words “draft article 4” should be replaced with “draft article 3”.

37. Sir Michael WOOD proposed, in the third sentence, replacing the phrase “opening to extend the regime of immunity *ratione personae* to high-ranking State officials” with “as including within the regime of immunity *ratione personae* high-ranking officials other than the troika”.

38. Mr. NOLTE proposed deleting the adverb “precisely” in the penultimate sentence.

Paragraph (8), as amended, was adopted, with the correction made by Mr. Tladi.

Paragraph (9)

Paragraph (9) was adopted.

Paragraph (10)

39. Mr. MURPHY proposed, in the first sentence of the antepenultimate footnote, inserting the word “only” after “not” and inserting the word “especially” between “but” and “because”.

40. Mr. GEVORGIAN proposed replacing the adjective “small” with “narrow”.

41. Sir Michael WOOD said that, in the seventh sentence of the penultimate footnote, the words “federal bodies” should be replaced with “federal units”.

Paragraph (10), as amended, was adopted.

Paragraph (11)

Paragraph (11) was adopted.

¹⁹¹ Paragraph (7) of the commentary to article 3 of the draft articles on jurisdictional immunities of States and their property adopted by the Commission at its forty-third session (*Yearbook ... 1991*, vol. II (Part Two), p. 22).

Paragraph (12)

42. After an exchange of views in which Sir Michael WOOD, Mr. NOLTE, Mr. HMOUD, Ms. JACOBSSON and she herself had taken part, Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) proposed adding the words “for the purposes of the present draft articles” after “*ratione personae*”.

Paragraph (12), as amended, was adopted.

Paragraph (13)

Paragraph (13) was adopted.

Paragraph (14)

43. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) proposed the deletion of paragraph (14) in view of the fact that the Commission had decided not to reflect individual reservations expressed by Commission members in its draft commentaries.

Paragraph (14) was deleted.

44. The CHAIRPERSON invited the Commission to consider, paragraph by paragraph, document A/CN.4/L.820/Add.1, which contained the text of draft article 4 and the commentary thereto.

Commentary to draft article 4 (Scope of immunity ratione personae)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

45. Mr. MURPHY proposed, in the second sentence, deleting the words “in fact”. He also proposed deleting the footnote at the end of the first indentation and, after the sixth sentence, adding a new sentence that would read: “The strict temporal scope of immunity is confirmed by a variety of national court decisions.” In addition, he proposed the insertion of a footnote that would refer to the relevant decisions listed in the memorandum by the Secretariat on immunity of State officials from foreign criminal jurisdiction.¹⁹²

46. Mr. TLADI proposed, in the sixth sentence, deleting the word “solution”.

47. Sir Michael WOOD, endorsing Mr. Murphy’s proposal, said that, if the Commission referred to national court decisions, it should delete the seventh sentence, which would be rendered superfluous. In the final sentence, the words “to a great extent” should also be deleted.

The amendments proposed by Mr. Murphy, Mr. Tladi and Sir Michael Wood were adopted.

The meeting rose at 1.05 p.m.

3196th MEETING

Wednesday, 7 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 (concluded)* (A/CN.4/L.820 and Add.1–3)

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

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

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

Commentary to draft article 4 (Scope of immunity ratione personae) (concluded)

Paragraph (2) (*concluded*)

2. Mr. NOLTE proposed rewording the fifth sentence to read: “The same applies, *a fortiori*, to the Head of State and the Head of Government, since no practice to the contrary is evident”, to be followed by the footnote proposed by Mr. Murphy at the previous meeting.

Paragraph (2), as amended, was adopted.

Paragraph (3)

3. Sir Michael WOOD suggested that the second footnote to the paragraph should simply list the names of the cases rather than describe them. He also proposed that the word “precedents” in the second sentence of the footnote should be replaced by “cases”.

4. Mr. FORTEAU, also referring to that footnote, suggested that the first sentence of the analysis of the judgment by the Paris *Cour d’appel* dated 13 June 2013 should be retained.

5. Mr. MURPHY proposed that the first sentence of the footnote in question should be replaced with a list of the cases mentioned in paragraphs 137 to 140 of the memorandum by the Secretariat.¹⁹³

That proposal was adopted.

¹⁹² A/CN.4/596 and Corr.1 (mimeographed; available from the Commission’s website, documents of the sixtieth session).

¹⁹³ A/CN.4/596 and Corr.1 (mimeographed; available from the Commission’s website, documents of the sixtieth session).