Document:-
A/CN.4/3113

Summary record of the 3113th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
2011, **vol. I**

85. The proposals made on what the Commission should do and how it should proceed—either to abandon the work on the topic or to suspend its consideration pending the conclusions of the Sixth Committee's Working Group on universal jurisdiction—seemed somewhat excessive and unjustified, since States had not yet clearly and unequivocally disavowed the topic. He endorsed Mr. Pellet's proposal to ask States for their opinion on whether the mandate of the Commission on the topic should be enlarged to include universal jurisdiction.

The meeting rose at 1 p.m.

3113th MEETING

Wednesday, 27 July 2011, at 10 a.m.

Chairperson: Mr. Maurice KAMTO

Present: Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escobar Hernández, Mr. Fomba, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kolodkin, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

The obligation to extradite or prosecute (*aut dedere aut judicare*) (*continued*) (A/CN.4/638, sect. E, A/CN.4/648)

[Agenda item 6]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRPERSON invited the Commission to resume its consideration of the fourth report of the Special Rapporteur on the topic of the obligation to extradite or prosecute (*aut dedere aut judicare*) (A/CN.4/648).

2. Mr. PETRIČ said that he agreed with the view that no general rule existed under customary international law embodying the obligation to extradite or prosecute. He also agreed that the Special Rapporteur's treatment of the topic did not sufficiently address the concept of universal jurisdiction and that more attention should be given to the progressive development of international law, in accordance with article 15 of the Commission's statute. In general, the issues raised in the Special Rapporteur's fourth report warranted further consideration.

3. With regard to draft article 2 and the serious reservations expressed by some Commission members concerning the duty to cooperate, he supported the suggestion that it might be more productive if the Commission identified the categories of crimes that fell within the scope of the obligation to extradite or prosecute. Although the duty to cooperate was well established in international law, including in the Charter of the United Nations, draft article 2, as it was currently worded, appeared to have no practical impact, and he doubted whether it was necessary or useful.

4. Regarding draft article 3, he concurred with the assessment that it was essentially a restatement of the principle *pacta sunt servanda*. Because draft article 3 did not codify an existing customary rule or create a new rule but merely recalled that a State which was bound by a treaty must apply that treaty, it appeared to be of questionable value.

5. With regard to draft article 4, he shared the view that the wording of the text was too conditional and that it was not yet ready for serious consideration or adoption. As it was currently worded, draft article 4 had no binding component and should therefore be reformulated.

6. The Commission's main problem was how to proceed, given that, despite past efforts—including those of the Working Group on the obligation to extradite or prosecute (*aut dedere aut judicare*)[385] over the past two years—it had still not made significant progress on the topic. He could not support Mr. Murase's suggestion to suspend or terminate consideration of the topic, as its subject matter was important, timely and relevant. To terminate its consideration would mean that the Commission had not only failed to meet the expectations of Member States to produce worthwhile results after several years' work but had also abandoned the topic prematurely.

7. Since it could be argued that there was no *lex lata* on the obligation to extradite or prosecute, the Commission should deal with the topic for the purpose of developing *lex ferenda*. The Commission's mandate was to both codify existing international customary law and progressively develop it, particularly when the Commission was confronted with a topic of contemporary relevance. The Commission should therefore deal more proactively with the obligation to extradite or prosecute. There was no need to focus on the sources of the obligation, which were uncertain, owing to the lack of any clear *lex lata* on the subject. The Commission should instead direct its attention to the implications of a general obligation to extradite or prosecute and to the practical modalities of its enforcement.

8. The Commission's approach should also reflect the widespread international trend towards guaranteeing the rule of law at both the international and national levels. That trend was reflected, *inter alia*, in activities conducted by the United Nations, such as the establishment of the Rule of Law Unit in the Executive Office of the Secretary-General and the inclusion of an item on the rule of law at the national and international levels in the agenda of the sixty-sixth session of the General Assembly.[386] The interconnection between the rule of law, impunity and the obligation to extradite or prosecute should also be reflected in the Commission's future work on the topic.

9. In his view, the Commission should clearly indicate in its report to the General Assembly on the work of

---

[385] *Yearbook ... 2009*, vol. II (Part Two), pp. 143–144, para. 204.

[386] General Assembly resolution 65/32 of 6 December 2010, para. 14.

its sixty-third session the problems it had encountered in dealing with the topic, mentioning the possibility of approaching it from the standpoint of progressive development. It would be unusual and counterproductive to submit the draft articles to the Sixth Committee before the Commission had finalized or adopted them. Rather, the Commission should keep the topic of the obligation to extradite or prosecute in its programme of work. At the beginning of the new quinquennium, a newly constituted working group could once again consider how best to proceed with that important topic.

10. Ms. ESCOBAR HERNÁNDEZ said that, with regard to draft article 2, she endorsed the Special Rapporteur's approach linking the principle *aut dedere aut judicare* and the duty to cooperate to efforts made by the international community in the fight against impunity. Curiously, however, the wording of draft article 2 was too broad in one place and too restrictive in another. It was too broad in paragraph 1, where it proclaimed a general duty to cooperate—whose general outlines and spirit she, of course, shared—but went beyond the scope of the principle *aut dedere aut judicare*; what was needed was to define the duty to cooperate in relation to that principle. In her view, the cooperation with international courts and tribunals mentioned in paragraph 1 lay outside the scope of draft article 2, since the application of the principle *aut dedere aut judicare*—in the classic sense at least—to cooperation with those courts and tribunals was clearly open to debate.

11. On the other hand, the wording of draft article 2 seemed excessively restrictive in that in paragraph 2, it limited the application of the principle *aut dedere aut judicare* to the fulfilment of several very general conditions, defined by the expression "wherever and whenever appropriate", without specifying the circumstances in which those conditions would apply. It would therefore be advisable for the Special Rapporteur to propose at the Commission's next session a new version of draft article 2 that defined more precisely the scope of the duty to cooperate as it specifically applied to the obligation to extradite or prosecute.

12. In draft article 3, paragraph 1 contained an obvious and therefore unnecessary affirmation, and should be deleted. Conversely, paragraph 2 contained an important provision, namely, that States parties to a treaty embodying the obligation *aut dedere aut judicare* must take measures to give effect to that obligation in their internal law. Consequently, the text proposed by the Special Rapporteur in paragraph 2 should constitute the core of draft article 3. However, at the Commission's next session, the Special Rapporteur should propose a new formulation of draft article 3, eliminating any ambiguities and taking due account of differences in the legal systems of monist and dualist States.

13. Draft article 4 referred to an essential element of the principle *aut dedere aut judicare*, namely the identification of crimes and offences of international concern to which the obligation to extradite or prosecute should apply under customary law. In that connection, she supported the proposal for the obligation *aut dedere aut judicare* to be applied in respect of genocide, crimes against humanity and war crimes, since a broad consensus had formed among States concerning the need to strengthen the suppression of all three at both the national and international levels.

14. Nonetheless, draft article 4 contained a number of elements that required substantive revision. In paragraph 1, the expression "alleged offender" [*presunto delincuente*] should be deleted or a replacement found since, at least in Spanish, the expression was incompatible with full respect for the principle of the presumption of innocence. In paragraph 2, it was necessary to find an alternative formulation to the expression "may derive" [*puede proceder*]. That wording diminished the role that should be played by the core crimes [*crimines nucleares*] mentioned in the paragraph in defining the scope of the principle *aut dedere aut judicare*. In paragraph 3, the wording and syntax used in the reference to *jus cogens* norms was not quite right, particularly in the expression "in the form of international treaty or international custom" [*en forma de tratado internacional o de costumbre internacional*]. Overall, subject to the submission of a revised proposal by the Special Rapporteur, she believed that draft article 4 should be retained in a future set of draft articles on the topic.

15. Lastly, with respect to the issue raised by Mr. Murase concerning the future of the topic, she was in favour of its retention in the Commission's programme of work. It was an important topic, of great interest to States and relevance to State practice, and was consequently precisely the kind of topic that fell under the mandate of the Commission. That did not mean, however, that it was necessary to pursue it as it was currently structured. The Commission might need to give further consideration to its approach to the topic and to take into account the relationship between the obligation to extradite or prosecute and the principle of universal jurisdiction.

16. In any event, those were tasks to be entrusted to the Commission in its future composition following the elections to be held in November 2011. It was therefore not appropriate for the current members of the Commission either to refer the three proposed draft articles to the Drafting Committee, since they required substantive revision, or to include them in the report of the Commission to the General Assembly on the work of its sixty-third session.

17. The CHAIRPERSON, speaking as member of the Commission, said that he joined with other members in commending the Special Rapporteur for his pioneering work on the difficult topic "The obligation to extradite or prosecute (*aut dedere aut judicare*)".

18. With regard to the title of draft article 2, "Duty to cooperate", he wondered whether the word "duty" had been selected instead of "obligation" because the provisions of the draft article were considered to express a moral rule, given that "duty" had stronger moral connotations than "obligation". However, if those provisions merely expressed a requirement associated with inter-State relations—since cooperation was a necessary component of such relations—then they were in fact describing a general obligation. Various examples of legal instruments that established that kind of obligation existed as positive law or as products of the work of the Commission. It seemed to him that what was at issue in draft article 2 was the obligation—not the duty—to cooperate.

19. In paragraph 1 of the same draft article, in the French version at least, the expression "*les États coopèrent comme il y a lieu les uns avec les autres*" [States shall, as appropriate, cooperate among themselves] was a rather infelicitous formulation and should be reconsidered.

20. With regard to draft articles 3 and 4, it seemed unusual for the Commission to begin an exercise of codification or progressive development with a rule on relevant sources of law. Usually when the Commission studied the sources of a particular rule, it did so in order to confirm that the rule was established in international law, so that it could then proceed to codify secondary rules on that basis. It did not establish the source itself, as draft articles 3 and 4 attempted to do. Thus, while it was indeed necessary to determine whether the obligation *aut dedere aut judicare* existed as a rule of treaty law and/or of customary international law, that did not mean that the Commission should produce a draft article on the subject.

21. Perhaps the Commission might avoid the problem by reformulating paragraph 1 of draft article 3 along the following lines: "Each State is obliged either to extradite or to prosecute an alleged offender whether such an obligation is contained in a treaty or arises from a rule of customary international law" [*Un État est tenu d'extrader ou de poursuivre une personne accusée d'une infraction qu'une telle obligation soit contenue dans un traité ou qu'elle découle d'une règle de droit international coutumier*]. In other words, if the Commission's research revealed that there was a sufficient basis in international law to support the obligation *aut dedere aut judicare*, then it should be concerned with drafting rules that enabled States to comply with it, not with demonstrating the existence of the sources of that obligation by means of a draft article. As his own proposal was worded, it did not presuppose any certainty concerning the existence of a treaty or customary basis but simply stipulated that, if such an obligation was provided for in a treaty or under customary law, States should comply with it. Such a solution would enable the Special Rapporteur and the Commission to make progress on the topic. He had been prompted to make that proposal because all the members who had spoken previously on the topic had expressed doubts concerning the existence of a customary basis for the obligation *aut dedere aut judicare*, and he agreed with them that it was not established that the obligation existed in customary international law.

22. Draft article 3 embodied a basic obligation to respect treaties to which States were parties; however, to establish that obligation in a draft article was to weaken the general treaty obligation to which the draft article referred and which arose out of the principle *pacta sunt servanda*. The inclusion of such an obligation in draft article 3 could be interpreted to mean that the parties to a treaty would perhaps not have had to fulfil their treaty obligations if the draft article had not explicitly required them to do so. For that reason, he was of the view that paragraph 1 of draft article 3 should be deleted.

23. With regard to draft article 4, he was of the opinion that the Special Rapporteur had not succeeded in demonstrating the existence of a customary basis for the obligation *aut dedere aut judicare*. In addition, there was a mistake in translation in paragraph 82 of the French version of the Special Rapporteur's report, where the English phrase "made by Eric David in the aforementioned case"[387] had been translated as "*dans l'ouvrage d'Éric David déjà mentionné*". That mistake was not insignificant because the arguments presented constituted the position of counsel in a court case in which the interests of the client took precedence, not the scholarly opinion of a noted legal expert, which would be more instructive to the Commission in pursuing its work.

24. The Special Rapporteur stated in paragraphs 39 and 40 of his report that the principle *aut dedere aut judicare* was related to the duty—he himself would say "obligation"—of each State to cooperate in the fight against impunity. That did not appear to be a customary rule but rather a logical rule implicit in the *ratio legis* of an explicit rule. Even the principle of *pacta sunt servanda* had not originally been a customary rule. Rather, it had been an implicit logical rule expressing the idea that, if States undertook obligations—notably treaty obligations—they were required to respect them. It was only after the passage of time that that principle had come to be regarded as a customary rule. To a certain extent, the same could be said of the principle *aut dedere aut judicare*, since, fundamentally, it was a logical rule that could possibly become—or was in the process of becoming—a customary rule, in other words, a customary rule *in statu nascendi*. The Special Rapporteur's fourth report fundamentally concerned the emergence of new obligations, which themselves arose from the emergence of a category of international crimes the commission of which constituted a grave violation of international law.

25. The establishment of a rule that States were under the obligation to extradite or prosecute crimes against humanity or genocide did not depend on the existence of a customary obligation to extradite or prosecute but rather on the fact that the obligation to punish perpetrators of crimes against humanity or genocide was implicit in the prohibition against committing them. Thus, in essence, the principle *aut dedere aut judicare* was an implicit rule.

26. In conclusion, it was possible to envisage the formulation of provisions based on the actual nature of the obligations in question. That would, however, require refining the consideration of the topic, including its general orientation and the main aspects that the Special Rapporteur proposed to tackle, as he in fact had outlined in his paper entitled "Bases for discussion in the Working Group on the topic 'The obligation to extradite or prosecute (*aut dedere aut judicare*)' ".[388]

27. The question of whether to suspend the consideration of the topic or withdraw it from the Commission's programme of work could be answered only after determining the main thrust of the topic and the main interconnections between the planned draft articles. The preparation by the Special Rapporteur of a proposed

[387] ICJ, Public sitting held on Monday, 6 April 2009, at 10 a.m., at the Peace Palace, President Owada presiding, in the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, verbatim record (CR2009/8), pp. 42–44, paras. 19–23 (available from the website of the ICJ: www.icj-cij.org).

[388] *Yearbook … 2010*, vol. II (Part One), document A/CN.4/L.774.

workplan would allow the Commission to envisage the subsequent stages of its work on the topic and give the new membership of the Commission, following elections in November 2011, what it needed to choose the best course of action.

28. Mr. MELESCANU said that he wished to clarify some comments he had made at a previous meeting concerning his proposal to attach the draft articles to the Commission's report. First, doing so would ensure that the General Assembly was informed of the Commission's progress on the topic. Secondly, it would offer Member States the opportunity to comment on the draft articles. However, he had never said that it was up to the Sixth Committee to take a final decision on how the Commission should proceed with the topic.

Immunity of State officials from foreign criminal jurisdiction (*continued*)[*] (A/CN.4/638, sect. F, A/CN.4/646)

[Agenda item 8]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*continued*)[*]

29. The CHAIRPERSON invited the Commission to resume its consideration of the third report on immunity of State officials from foreign criminal jurisdiction (A/CN.4/646). He understood that some members would also like to comment on the second report.[389]

30. Mr. MURASE, referring to the Special Rapporteur's second report, said that he wished first to address the question of the range of State officials to be covered. The Special Rapporteur indicated that the status of all State officials should be considered—but was such a maximalist approach justified? Sufficiently clear immunity rules already existed, under the relevant conventions, for members of diplomatic and consular missions and for members of special missions. With regard to immunity for military officers and personnel in time of peace, a distinction must be made between two categories: members of forces stationed abroad and members of forces visiting a country temporarily. The immunity of stationed forces was based on specific treaty instruments, such as status-of-forces agreements, while the immunity of visiting forces was based on customary international law. The latter category was probably no longer of particular importance, and given that the former category was not really regulated by customary law, he believed that diplomats and military personnel should be excluded from the scope of the topic.

31. Article 27, paragraph 1, of the Rome Statute of the International Criminal Court provided that "official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility". Still, it was unclear how far down the line in the hierarchy of government officials immunity could be assigned. The focus of the topic should be a limited category of officials, not all State officials. The persons covered should be Heads of State, Heads of Government, Ministers for Foreign Affairs and other high-ranking officials. In any event, work could not begin on elaborating draft articles unless the scope of the project was clearly defined.

32. Turning to the methodology used to determine the legal grounds for immunity, he said that the Special Rapporteur had started from the premise that State officials generally enjoyed immunity; he had then tried to clarify the exceptions to the general rule. However, the opposite approach could also be taken: everybody should be treated equally, regardless of whether they were a Head of State or a private individual, and State officials did not have immunity unless there were particular reasons for exceptions to be made. In the past, the Commission had taken the latter approach, at least for crimes under international law. Paragraph (6) of the commentary to article 7 of the draft code of crimes against the peace and security of mankind indicated that the article was intended to prevent an individual from invoking his or her official position as a circumstance conferring immunity.[390] Similarly, article 27, paragraph 1, of the Rome Statute of the International Criminal Court applied equally to all persons, without distinction based on official capacity.

33. However, such provisions were open to abuse by excessively zealous prosecutors at both the international and domestic levels. State officials who were prosecuted by foreign or domestic prosecutors would find it very difficult to continue with their official functions, even if they were presumed innocent until final sentencing. If their innocence was clear beyond all doubt in their own country, then the actions of foreign prosecutors ought to be regarded as interference in the State's domestic affairs and therefore a breach of sovereignty. That might explain the Special Rapporteur's rationale for adopting an approach that conferred broad immunity on State officials. Still, there was no demonstrated evidence for the general proposition that State officials enjoyed immunity—it was only so assumed. The validity of that assumption should be examined in the light of contemporary practice and the legal literature.

34. Heads of State were said to enjoy immunity by virtue of their status, perhaps based on an old theory of national honour or dignity, a legacy of the nineteenth century. Such concepts might still be important for the normal relations of States, but the Commission was dealing with criminal responsibility for serious crimes under international law that might have been committed by a Head of State. If it were to apply the ancient idea of national dignity to the modern world, it would be criticized for pedantry.

35. Nor could the rationale for official immunity be based on the ambiguous concept of sovereignty, which had undergone considerable change since the latter half of the twentieth century. It was now conceived not only as a combination of prerogatives and rights but also as a set of obligations entailing a responsibility to ensure the welfare and security of a nation. If a sovereign Head of State was no longer able or willing to fulfil that responsibility, then he or she should be denied immunity.

[*] Resumed from the 3111th meeting.

[389] *Yearbook … 2010*, vol. II (Part One), document A/CN.4/631. For the consideration of the second report at the present session, see the 3086th, 3087th and 3088th meetings above.

[390] *Yearbook … 1996*, vol. II (Part Two), p. 27.

36. Lastly, it was important to ensure that adequate safeguards were put in place to avoid abuse of prosecutorial discretion. That was easier said than done, even though prosecutors in both international and national criminal systems were now required to exercise their discretionary powers transparently. In that regard, he drew attention to paragraph 17 of the United Nations Guidelines on the role of prosecutors,[391] which stated that in countries where prosecutors were vested with discretionary functions, guidelines should be provided to enhance fairness and consistency of approach in taking decisions in the prosecution process. Arbitrary or aggressive exercise of prosecutorial discretion against foreign Heads of States could be prevented most effectively through guidelines for domestic prosecutors, in the form of laws or regulations, and international guidelines to prevent the abuse of prosecutorial discretion by international prosecutors.

37. Mr. SINGH said that he would first like to comment on the Special Rapporteur's second report. He expressed appreciation for its comprehensive, in-depth examination of the topic and said he generally agreed with the conclusions set out in paragraph 94.

38. The principle of immunity, which was well established in customary international law, was based on comity and reciprocity and the imperative need to remove the risk of politically motivated criminal proceedings. It ensured that State officials could function independently while representing their State in the conduct of its international relations. The immunity *ratione personae* of the troika, namely the Head of State, Head of Government and Minister for Foreign Affairs, was well recognized in customary international law. However, in view of the growing range of areas in which international cooperation now took place, there was a need to examine whether immunity *ratione personae* should be considered as also extending to other high officials such as ministers of trade and defence.

39. Turning to the Special Rapporteur's third report, he said that he was in broad agreement with the conclusions set out in paragraph 61. He shared the view that immunity needed to be considered at an early stage of judicial proceedings because the outcome determined the forum State's continued ability to exercise criminal jurisdiction over the foreign official. The State claiming immunity must notify the authorities of the forum State, not the court before which the proceedings were being conducted, as immunity could be invoked through diplomatic channels. In the case of a foreign Head of State, Head of Government or Minister for Foreign Affairs, the State exercising criminal jurisdiction must itself raise the question of immunity. The official's State was not obliged to invoke immunity, unlike the situation in respect of other officials enjoying personal immunity. The right to waive the immunity of an official was vested in the State and not in the official. Waiver of immunity must always be express.

40. A State's invocation of immunity on the grounds that a wrongful act was an official act did not in itself imply that it acknowledged responsibility for that wrongful act. A State might invoke immunity to avoid the possibility of a serious intrusion into its internal affairs if a foreign State was investigating the acts of its officials. Indeed, the State itself might wish to investigate and, if warranted, prosecute its own official for an alleged wrongful act.

41. Mr. DUGARD thanked the Special Rapporteur for his excellently researched and informative third report. Although he did not always agree with the Special Rapporteur, in the present instance he generally concurred with his conclusions regarding procedural matters. He agreed, in particular, that the issue of immunity should be raised at an early stage and that immunity belonged to the State and not to the official, and he generally endorsed the discussion of waiver, with the exception of the material presented in paragraphs 44 and 45.

42. Referring to paragraph 15 of the report, he said the Special Rapporteur had indicated that a declaration of immunity by a State official himself did not appear to have much legal significance. That brought to mind the contemporary case involving the former Managing Director of the International Monetary Fund, Mr. Dominique Strauss-Kahn. It would be interesting to know what would have happened if he had asserted his own immunity when taken into custody by the New York police. Similar problems could well arise for a Head of State or Head of Government from a relatively unknown State. Should States be obliged to inform their police authorities of the presence of all visiting Heads of State? In the first footnote to paragraph 19, the Special Rapporteur said that members of the troika were known to the authorities of all other States—but that was by no means always true. Some significance thus had to be attached to a claim of immunity on his or her own behalf by a Head of State or Government.

43. In his third report, as in earlier ones, the Special Rapporteur failed to distinguish between ordinary crimes and core crimes. He referred repeatedly to the immunity of the troika, as if by asserting often enough that Ministers for Foreign Affairs should be included among the officials who enjoyed personal immunity, it would be accepted as custom. The immunity of Ministers for Foreign Affairs was disputed, however. In its judgment in the *Arrest Warrant* case, the ICJ had failed to provide any evidence of State practice, and Judge Al-Khasawneh and Judge *ad hoc* Van den Wyngaert had written important dissenting opinions. The judgment had also received considerable academic criticism. In the first footnote to paragraph 58 of the report, the Special Rapporteur drew attention to an article by Akande and Shah,[392] but he failed to mention their views on the inclusion of the Minister for Foreign Affairs in the troika. They accepted that the Head of State and Head of Government enjoyed immunity *ratione personae*, but they declared that extending such broad immunity to other ministers, including the Minister for Foreign Affairs, was erroneous and unjustified.

[391] Report of the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August–7 September 1990 (A/CONF.144/28/Rev.1, United Nations publication, Sales No. E.91.IV.2), Guidelines on the role of prosecutors, p. 193 (available from www.unodc.org/documents/congress//Previous_Congresses/8th_Congress_1990/028_ACONF.144.28.Rev.1_Report_Eighth_United_Nations_Congress_on_the_Prevention_of_Crime_and_the_Treatment_of_Offenders.pdf, accessed 31 March 2017).

[392] D. Akande and S. Shah, "Immunities of State officials, international crimes, and foreign domestic courts", *European Journal of International Law*, vol. 21, No. 4 (2010), pp. 815–852.

44. He was not asking the Special Rapporteur to abandon his position, but just to consider such criticism carefully and to research the question of State practice a bit better than the ICJ had done. If the Commission included the Minister for Foreign Affairs in the troika, it would send out the message that it wished to expand immunity, at a time when there was a demand for more accountability and less impunity.

45. His second comment related to the Special Rapporteur's failure to consider the interesting procedural problem that would arise when local or national law prohibited immunity in the case of core crimes. South Africa, for instance, had incorporated in its legislation the provision of the Rome Statute of the International Criminal Court that excluded immunity for Heads of State and Government and other senior officials. Was South Africa, or any State with similar legislation, obliged to follow the ruling in the *Arrest Warrant* case, despite the fact that Article 59 of the Statute of the International Court of Justice said that States were not bound by decisions of the Court? Or would it be bound instead by its obligations under the Rome Statute of the International Criminal Court? Surely the treaty obligation prevailed. The Commission should provide some guidance on how a State was to proceed in such situations.

46. His third and most important comment was on the issue of whether a court of the State exercising jurisdiction could examine a foreign official's entitlement to claim immunity *ratione materiae* and whether a State that invoked immunity must substantiate or justify such a claim. As paragraph 25 of the report indicated, in the case concerning *Certain Questions of Mutual Assistance in Criminal Matters*, France had argued that it was incumbent upon the State invoking immunity to justify its claim. But the Special Rapporteur disagreed with that position, as was clear from his conclusion in paragraph 61 (*i*) of his third report that: "[i]t is the prerogative of the official's State, not the State exercising jurisdiction, to characterize the conduct of an official as being official in nature or to determine the importance of functions carried out by a high-ranking official for the purpose of ensuring State sovereignty". In support of that conclusion, the Special Rapporteur relied on certain elements of the case concerning *Certain Questions of Mutual Assistance in Criminal Matters* and the advisory opinion of the ICJ concerning the *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*. But since neither of those cases had been concerned with serious or core crimes, they were not relevant to the issue of immunity in respect of such crimes.

47. The Special Rapporteur also relied on a decision of a United States court of appeal in the *Belhas* et al. *v. Ya'alon* case, which had concerned the bombing by Israel in 1996 of a compound in Lebanon that had been protected by the United Nations. The bombing had been ordered by a former general, General Ya'alon, who had been serving at the time as head of military intelligence. The court had found in favour of the general's immunity based on a letter in which the Israeli Ambassador to the United States had written that anything the general did had been done in the course of his official duties. Interestingly enough, the court had also examined the question of whether an official continued to enjoy immunity after he or she had left office—a question that the Special Rapporteur had not addressed. The court had also considered whether the *jus cogens* exception applied, and had found that it did not.

48. The Special Rapporteur went even further than had the United States court, however. In paragraph 30 of his report, he acknowledged that the State exercising jurisdiction was not obliged to "blindly accept" a claim by the official's State that he or she had acted under its authority and therefore enjoyed immunity. Apparently, however, the obligation not to "blindly accept" a claim related only to acts that were inherently personal or private. In cases where an official had committed some act in furtherance of State policy, immunity was absolute and the claim of immunity might not be questioned by the court exercising jurisdiction. That absolutist approach was further evidenced by the Special Rapporteur's references to sovereignty and the prerogatives of the State in paragraph 61 (*i*) and in paragraph 31, where he had written that "[t]he question of an official's status, functions and importance for the exercise of State sovereignty, and the question of whether the person is acting in an official capacity, fall within the domestic competence of the official's State".

49. He wished to ask the Special Rapporteur the following hypothetical question: what if Mr. Ratko Mladić had gone to the Russian Federation in disguise, had been identified by the Russian police and had been brought before a Russian court, but the Government of Serbia had submitted to the court a letter similar to that of Israel in the *Belhas* et al. *v. Ya'alon* case, stating that anything done by Mr. Mladić had been done in the course of his official duties? What should the Russian court then do? Should it accept the assertion by Serbia of functional immunity for Mr. Mladić; seek further information on his conduct to ascertain whether he had actually been a Serbian official; or, in line with the argument advanced by Akande and Shah and cited in paragraph 58, rule that there could be no immunity for serious international crimes subject to extraterritorial jurisdiction?

50. The Special Rapporteur would probably reply that that was a *sui generis* case. However, many similar cases could be adduced. The main point was that the crimes with which the Commission was concerned were very serious crimes, and when such crimes were involved, a State claiming the immunity of its official must be required to justify its plea of immunity. It was not enough to say that the act was official in nature.

51. If the Special Rapporteur considered that the Commission should approve the detailed conclusions contained in the second and third reports, that would be unfortunate, as it would unduly tie the hands of the next Special Rapporteur. The Commission should simply take note of those interesting, albeit controversial, conclusions.

52. Reputations were long in the making but could be lost overnight. The Commission had adopted many progressive instruments over the years, but its good reputation could be damaged if it leaned too far, with regard to immunity, towards the interests of the State, if it did not find a balance between the old legal traditions and new expectations.

53. Mr. KOLODKIN (Special Rapporteur) said that he would reflect on and respond later to Mr. Dugard's hypothetical question. The South African legislation implementing the Rome Statute of the International Criminal Court, to which Mr. Dugard had referred, had been mentioned in the second footnote to paragraph 74 of the second report on the topic (A/CN.4/631). Mr. Dugard's second question, on what action South Africa should take in view of the existence of such legislation, missed the point. The issue was not whether South Africa should follow the reasoning of the ICJ in the *Arrest Warrant* case—which had nothing to do with South Africa—or abide by its obligations under the Rome Statute of the International Criminal Court—which it obviously must do as a party thereto. The point was that all States—South Africa included—had certain obligations under general international law and had to act in accordance with them in certain circumstances. Whether or not South Africa deemed the findings of the ICJ to concord with general international law was a separate matter. He personally believed that they did.

54. The Commission was dwelling on one "unfortunate" ruling by the ICJ on the personal immunity of the troika—the *Arrest Warrant* case. In fact, however, that ruling had been clearly confirmed by the Court in paragraph 170 of the judgment in the case concerning *Certain Questions of Mutual Assistance in Criminal Matters*. There were thus two rulings, not just one, on the personal immunity of the troika.

55. Mr. PELLET said that he agreed on most points with Mr. Dugard, but wondered why he wished to exclude the Minister for Foreign Affairs from the troika. If the other State officials in the troika enjoyed personal as opposed to functional immunity for their acts, Ministers for Foreign Affairs obviously ought to be included also, since their function was to represent the State. Good arguments in support of that position could be found in treaty law and in case law. Nevertheless, he agreed with Mr. Dugard that Heads of State, Heads of Government and Ministers for Foreign Affairs did not enjoy immunity if they committed serious crimes.

56. Mr. SABOIA said he agreed with Mr. Pellet that Ministers for Foreign Affairs should not be excluded from the troika but said that he nonetheless shared most of Mr. Dugard's views on the report, especially those on the inadvisability of extending immunity *ratione personae* to officials beyond those in the troika and on using the summary in paragraph 61 of the report as the Commission's conclusions on the topic.

57. Mr. DUGARD said that his main point was that the Commission should look very closely at the issues of accountability and impunity when serious, core crimes had been perpetrated. An exception to immunity should be made in such cases. The case concerning *Certain Questions of Mutual Assistance in Criminal Matters* had not involved such crimes and, for that reason, it did not support the *Arrest Warrant* case on the facts. In any event, if a court was wrong on one occasion and then repeated itself, it was wrong on the second occasion as well.

58. Mr. PETRIČ said he agreed with Mr. Dugard that to unduly enlarge the circle of people enjoying personal immunity would militate against efforts to ensure that everyone should be punishable if they committed core crimes. He also shared Mr. Dugard's concerns regarding the substantiation of a claim of immunity.

59. Mr. PERERA, referring to the Special Rapporteur's third report, said that it showed a high degree of scholarship in its treatment of the timing for the intervention of considerations of immunity, the invocation of immunity and the waiver of immunity, all of which were well supported by case law, State practice and academic opinion.

60. The Special Rapporteur rightly emphasized the fact that the immunity of a State official from foreign criminal prosecution should be examined at an early stage of judicial proceedings, or even at the pretrial stage. His conclusion that failure to consider the issue of immunity *in limine litis* might be viewed as a violation of the obligations of the forum State under the norms governing immunity was correct and was supported, *inter alia*, by the advisory opinion of the ICJ in the case concerning the *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*.

61. In the treatment of the invocation of immunity, a carefully structured and balanced approach was taken to the different categories of State officials. The Special Rapporteur started from the proposition that, in order to be "legally relevant"—in other words, to have legal consequences—immunity had to be invoked by the official's State and not by the official. For that purpose, the official's State must be informed of criminal proceedings undertaken or planned against the official concerned. In the case of the troika, however, the official's State did not bear the burden of raising the issue of immunity, since the authorities of the State exercising criminal jurisdiction were expected to know the person's status and the capacity in which he or she had been acting. On the other hand, the burden of invoking the immunity of an official enjoying functional immunity must lie with the official's State, since only that State was well placed to testify as to the official's status and the fact that the acts were performed in an official capacity. In the event of a failure to discharge that burden, the State exercising jurisdiction was not obliged to consider the question of immunity *proprio motu* and it might therefore continue with criminal prosecution.

62. The position with regard to other high-ranking persons enjoying functional immunity, apart from the troika, was more complex. Part of the difficulty was due to the absence of agreed criteria for determining such categories. The importance of the functions performed by such officials from the perspective of State sovereignty and relevance to the conduct of international affairs might be possible criteria. It would be reasonable to require that the invocation of immunity in respect of that category of officials be supported by cogent material confirming that the official concerned, by reason of his or her status and functions and their connection to the sovereign functions of the State, did in fact satisfy the criteria for asserting personal immunity. Much would depend on the circumstances of each case and on the available material justifying that claim. As noted in paragraph 31 of the third report, while the State

exercising jurisdiction could not ignore the invocation of the personal immunity of such officials—to which he would add the caveat "in appropriate instances"—such a State was not obliged to "blindly accept" any such claim. In short, the category of high-ranking officials, apart from the troika, who enjoyed functional immunity deserved very careful consideration.

63. He maintained his position that a Minister for Foreign Affairs should be considered to be part of the troika. He or she acted as the intermediary between the State and the international community and had standing authority, conferred by the Head of State or Government, to commit the State to certain acts, an authority recognized in the 1969 Vienna Convention.

64. As for the modalities of informing a court of an official's immunity, he agreed that there was ample State practice to show that such information could be communicated through diplomatic channels, so that the State need not assert the immunity of its official before a foreign court.

65. He was in broad agreement with the Special Rapporteur that the right to waive immunity was vested in the State and that the waiver of immunity in respect of officials forming part of the troika must be expressly stated, whereas a waiver of immunity with regard to all other categories of officials could be express or implied.

66. Concerning the difficult question, addressed in paragraph 44 of the report, of whether a State party to a treaty for the defence of certain human rights implicitly waived the immunity of its officials if they committed violations of such rights, his view was that, in the absence of express provisions on waiver of immunity, an inference of implicit waiver should not be drawn lightly. In that connection, he referred to the memorandum by the Secretariat,[393] cited in paragraph 46 of the report, which indicated that there was a general reluctance to accept an implied waiver based on the acceptance of an agreement. As the resolution of the Institute of International Law[394] mentioned in paragraph 47 of the report stated, the emphasis must be on the clarity and lack of ambiguity of the waiver of immunity.

67. Lastly, as to the responsibility of the State that had invoked the immunity of the official, he was in broad agreement with the Special Rapporteur that this constituted an act on the part of the State that could establish grounds for its international responsibility. However, he also shared Mr. Singh's view that that was only one aspect, and not necessarily a conclusive one, in the establishment of responsibility.

68. In conclusion, he commended the Special Rapporteur for his work on the topic, as reflected in his three reports.

69. Mr. PELLET said that from his own personal experience, he knew that special rapporteurs were often fair game for the hunters lurking among the ranks of Commission members. For his part, he would certainly try to trap the Special Rapporteur on a number of points because, like Mr. Dugard, he thought that some of his views were a bit dangerous.

70. The third report was well argued, consistently interesting and, overall, far less provocative than the second report. It was somewhat disturbing, however, to see that the third report had been submitted for the Commission's consideration before any decision had been taken on the second report which, despite its indubitable technical merits, had been met with mixed reactions.[395] It seemed the Commission was being forced to embark on the codification of the modalities for granting or refusing immunity to State officials while still not having agreed on the grounds for, limits of and conditions surrounding such immunity. It could be argued that those matters hardly came into play in the third report, which dealt with procedural aspects, but the fact that the Commission's discussions during the first half of the session had been so inconclusive did have a direct bearing on certain aspects of the third report.

71. For instance, it was very difficult for the Commission to outline the conditions for waiving immunity without having established when and under what circumstances, if any, an official enjoyed such immunity, and without having resolved the crucial question of whether members of the troika enjoyed immunity for the most serious international crimes such as genocide, crimes against humanity and very grave human rights violations. He shared Mr. Dugard's views: immunity should not be allowed in such cases.

72. Paragraph 20 of the report quoted a statement that he himself had made as counsel for France in the oral pleadings in the case concerning *Certain Questions of Mutual Assistance in Criminal Matters*.[396] Although the quotation was correct, it was taken out of context. It might lead to the erroneous conclusion that, in his view, Heads of State, other members of the troika and heads of diplomatic missions enjoyed unlimited immunity. As he had said in the past and more recently, there was no immunity for grave international crimes: the State became transparent and could no longer shield its officials from international law. Furthermore, as Mr. Dugard had observed, the case involving Djibouti and France had dealt, not with grave crimes, but with much more trivial matters.

73. In the oral pleadings, he had acknowledged that the State did not need to prove that acts by members of the troika were performed as part of official duties, because their immunity was personal, and in that sense absolute. But the Special Rapporteur had not quoted the rest of his statement, which read: "*par contre, pour les autres fonctionnaires de l'État, cette présomption ne joue pas et l'octroi (ou le refus) des immunités doit être décidé au cas par cas, en fonction*

[393] Document A/CN.4/596 and Corr.1; mimeographed, available from the Commission's website (documents of the sixtieth session).

[394] Institute of International Law, *Yearbook*, vol. 69 (2000–2001), Session of Vancouver (2001), pp. 743 *et seq*.

[395] For the consideration of the second report (*Yearbook … 2010*, vol. II (Part One), document A/CN.4/631) at the present session, see the 3086th, 3087th and 3088th meetings above.

[396] ICJ, Public sitting held on Friday, 25 January 2008, at 10 a.m., at the Peace Palace, President Higgins presiding, in the case *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, verbatim record (CR2008/5), pp. 23 *et seq.* (available from the website of the ICJ: www.icj-cij.org).

de tous les éléments de l'affaire. Ceci suppose que c'est aux juges nationaux qu'il appartient d'apprécier si l'on se trouve face à des actes accomplis—ou non—dans le cadre des fonctions officielles" ["on the other hand, where the other officials of the State are concerned, that presumption does not operate and the granting (or refusal to grant) of immunities must be decided on a case-by-case basis, on the basis of all the elements in the case. This supposes that it is for national courts to assess whether we are dealing with acts performed—or not—in the context of their official functions"].[397]

74. From that passage it was clear that, while he agreed with the Special Rapporteur that the official's State had no need to formally request immunity for the official if he or she was a member of the troika, it did need to do so where other officials were concerned; in the latter case, moreover, the State must give reasons to support that request, but ultimately, the decision on whether to grant immunity rested with national courts.

75. There were certain aspects of the report that caused him concern in that regard. He found it difficult to accept that a State could invoke the immunity of its officials without stating the reasons for such immunity, as the Special Rapporteur seemed to assert in paragraph 27. That was hardly consistent with the statement in paragraph 30 that "[a] court may independently inquire into the reasonableness of such a claim". The inconsistencies culminated in the final sentence of paragraph 61 (*i*): "It is the prerogative of the official's State, not the State exercising jurisdiction, to characterize the conduct of an official as being official in nature or to determine the importance of functions carried out by a high-ranking official for the purpose of ensuring State sovereignty." He could not agree less: it was the responsibility of the State exercising jurisdiction, taking into account the explanations provided by the State of the official, to decide whether that official should be granted immunity.

76. He disagreed with the Special Rapporteur on another point related to the debate during the first half of the session, about which Mr. Dugard had also expressed concern. In paragraph 44, the Special Rapporteur indicated that treaties providing for universal jurisdiction in respect of certain conduct did not constitute implied waivers of immunity. That was certainly not true, particularly where a universal jurisdiction clause contained an obligation to prosecute or extradite. In addition, he took issue with the statement in the penultimate sentence of paragraph 44 that "an international agreement cannot be construed as implicitly waiving the immunity of a State party's officials unless there is evidence that that State so intended or desired". The objective was not to find out what was the intention or will of an individual State, but rather to determine the collective intention or will of all the States parties to a treaty or agreement, using the general rule of interpretation laid down in article 31 of the 1969 Vienna Convention. It could hardly be disputed that States parties to a treaty that established universal jurisdiction for certain crimes and imposed on States the obligation to extradite or prosecute, making no exception for a country's leaders, aimed to combat the impunity that was guaranteed by immunity. The collective will of such States must be interpreted as precluding the alibi of immunity.

77. Another point connected with the inconclusive debate during the first half of the session came up in the footnote to paragraph 60, which cited a comment made during the Commission's sixtieth session by Ms. Jacobsson.[398] She had argued that a State that refused either to prosecute one of its officials or to waive his or her immunity could incur responsibility for internationally wrongful acts. However, the problem might be addressed from a different angle, by stipulating that there were cases in which a State must waive the immunity of its officials, or, better still, by firmly establishing that, in respect of certain crimes, certain officials did not enjoy any form of immunity.

78. The Special Rapporteur had drawn his conclusions in the form of a summary rather than of draft articles, thereby skirting the problem of consigning texts to the scrutiny of the Drafting Committee. Despite the sometimes questionable nature of the Special Rapporteur's arguments, the extensive research he had done had enabled him to tackle important issues and to propose a certain number of solutions. He himself would therefore recommend that the new special rapporteur to be appointed start work on the topic from scratch and find some middle ground between the culture of impunity, towards which the Special Rapporteur inclined, and total rejection of immunity for State leaders, which was obviously not an option.

79. Mr. McRAE said that the Special Rapporteur's third report contained a great deal of convincing analysis, even though his conclusions, as he himself recognized, were extrapolations rather than clear-cut conclusions based on State practice.

80. The consideration of the third report highlighted the fact that some of the Commission's uncertainties concerning the first and second reports remained; as Mr. Pellet had pointed out, perhaps those matters should have been resolved before discussing the third report. For example, the issue of whether the troika should be enlarged to include other senior officials such as ministers of international trade or ministers of defence had resurfaced. The Special Rapporteur held that for persons with functional immunity, it was the responsibility of the State claiming immunity to raise the matter with the prosecuting State, whereas for members of the troika, who were entitled to personal immunity, it was the prosecuting State itself that was responsible for recognizing immunity. The reasons given by the Special Rapporteur seemed attractive: the fact that certain individuals were Heads of State or Government or Ministers for Foreign Affairs and enjoyed personal immunity was generally well known. He nevertheless endorsed Mr. Dugard's comment that, while that might be the case for large, prominent States, it was unlikely to be true for certain other States.

81. Since the Minister for Foreign Affairs was now only one among several who represented the State abroad, broadening the categories of officials for whom personal immunity was to be asserted seemed to make sense. Yet to

[397] *Ibid*., p. 51.

[398] *Yearbook ... 2008*, vol. I, 2985th meeting, p. 205, paras. 5–7.

enlarge the troika involved difficult decisions about which officials should be added, and, as a matter of policy, that was probably undesirable. Perhaps the responsibility for asserting immunity should in all cases be borne by the State claiming it, irrespective of whether or not the individual was a member of the troika. It seemed highly unlikely that a State would fail to notice that a Head of State was being prosecuted in a foreign court, unless it deliberately ignored the fact. In practical terms, requiring an official's State to assert immunity to the prosecuting State hardly seemed to be a great burden. Accordingly, the Special Rapporteur's conclusions in paragraph 61 (*e*), (*f*) and (*g*) of his report might merit reconsideration.

82. In addition, the assertion in paragraph 61 (*i*) that it was the prerogative of the official's State to characterize the conduct of an official as being the official conduct of the State went much too far. Surely the prosecuting State was also entitled to look into whether an act could be characterized as official: that was not solely the "prerogative" of the official's State. In paragraph 30, the Special Rapporteur recognized that the prosecuting State could inquire into the reasonableness of such a claim. Basing his argument on the advisory opinion of the ICJ in the case concerning the *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, he suggested that the appointment of an individual as an official created the presumption that he or she was acting in an official capacity. There, the Special Rapporteur went further than the Court, which had been referring to a presumption created by a claim of the Secretary-General of the United Nations that the individual concerned was acting as an official, not to a presumption based on the mere fact of appointment. It was really a question of how far the prosecuting State should go in looking into claims that an official was acting in an official capacity. Obviously each case would have to be assessed on its facts, but to suggest that there was a "presumption" arising out of the mere appointment of an official was to go too far and could not be substantiated.

83. The comprehensive series of reports[399] produced on the topic by the Special Rapporteur had provided an excellent basis for the Commission to move forward. However, there was one important issue on which the Special Rapporteur and many members of the Commission remained divided—the extent of possible exceptions to the immunity of State officials, particularly in respect of serious international crimes. It should be the first item to be considered at the sixty-fourth session and should be dealt with initially by a working group. Until the issue was resolved satisfactorily, the Commission would not be able to make real progress.

84. In conclusion, he thanked the Special Rapporteur for his most valuable contribution to the Commission's work.

The meeting rose at 12.50 p.m.

[399] The preliminary report is reproduced in *Yearbook … 2008*, vol. II (Part One), document A/CN.4/601.

3114th MEETING

Thursday, 28 July 2011, at 10 a.m.

Chairperson: Mr. Maurice KAMTO

Present: Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escobar Hernández, Mr. Fomba, Mr. Galicki, Mr. Hmoud, Ms. Jacobsson, Mr. Kolodkin, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

Immunity of State officials from foreign criminal jurisdiction (*continued*) (A/CN.4/638, sect. F, A/CN.4/646)

[Agenda item 8]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRPERSON invited the members of the Commission to continue their consideration of the third report on immunity of State officials from foreign criminal jurisdiction (A/CN.4/646).

2. Mr. PETRIČ noted with satisfaction that, in his third report, the Special Rapporteur had identified all the relevant rules *de lege lata*, which on the whole derived from customary law, and had set out the procedural aspects of the immunity of State officials. The Special Rapporteur's viewpoint was carefully based on relevant State practice and national and international judicial practice, as well as the doctrine, and his approach was characterized by sharp legal logic. As he had already indicated during the consideration of the Special Rapporteur's second report,[400] he personally continued to believe that the Commission should adopt a balanced approach to the topic. Immunity had been well established in past centuries as a reflection of State sovereignty and thus of the principle *par in parem non habet imperium*, from which immunity *ratione personae* was derived, and as a consequence of the greater need for safe international communications, which was a source of immunity *ratione materiae*. Today, and probably even more so in the future, the principle of non-impunity for crimes under international law, the concept of universal jurisdiction and efforts to establish the rule of law as a common value accessible to all peoples should have an impact on the concept of immunity and its applicability. Thus, when the Commission elaborated the draft articles on the immunity of State officials in the next quinquennium, it should codify existing customary rules, but it should also not hesitate to promote progressive development. Serious consideration should be given to the point made at the previous meeting by Mr. Dugard on the importance of distinguishing between ordinary crimes and core crimes.

[400] *Yearbook … 2010*, vol. II (Part One), document A/CN.4/631. For the consideration of the second report at the present session, see the 3086th, 3087th and 3088th meetings above.