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Summary record of the 3221st meeting

Topic:
Immunity of State officials from foreign criminal jurisdiction

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“Draft article 5. *Persons enjoying immunity*
ratione materiae

“State officials who exercised elements of governmental authority enjoy immunity *ratione materiae* from foreign criminal jurisdiction.”

57. Mr. HUANG, observing that the fundamental divisions of principle among the members of the Commission on the topic seemed to be narrowing, expressed concern that the approach being followed continued to focus too much on progressive development and not enough on codification, despite the agreement reached at the previous session. Disputes concerning the relationship between immunity and impunity were connected to that problem. The Commission should focus on codification rather than progressive development, with a view to achieving consensus on what was a complicated and sensitive subject and producing articles that would enjoy wide recognition and application.

58. There was no intrinsic link between immunity and impunity. Immunity from foreign criminal jurisdiction was not intended to absolve officials of their substantive responsibilities; rather, it was a neutral, procedural mechanism. Tackling impunity required political measures, such as those mentioned in the *Arrest Warrant of 11 April 2000* case.

59. Immunity of State officials was closely related to the immunity and responsibility of States. In that context, particular attention should be paid to the Commission’s previous discussions on the responsibility of States for internationally wrongful acts. Articles 4 and 5 of the articles on responsibility of States for internationally wrongful acts gave a basis for determining who was an official for the purposes of immunity *ratione materiae*, and the Special Rapporteur had formulated logical criteria in that regard in paragraph 111 of her third report, with which he agreed. In specific cases, more weight should be given to domestic law in determining who counted as an official, as legislation and practice differed widely among States. That said, the definition of an official should not be expanded so far as to include private contractors, for example.

60. The distinction between immunity *ratione materiae* and immunity *ratione personae* should be applied to specific aspects of the topic such as the subjective, material and temporal scope of immunity. Immunity *ratione materiae* stemmed from the principle of the sovereign equality of States and could therefore be considered an extension of State immunity. Denying the possibility of immunity *ratione materiae* would be to deny State immunity, which was unacceptable. High-level officials needed to enjoy immunity in order to discharge their duties effectively. Removing that immunity would constitute serious interference in a country’s internal affairs, undermining friendly relations among States and jeopardizing democracy and stability. The fundamental nature of immunity must be preserved, with only a few exceptions for situations in which they were genuinely warranted.

61. The focus on terminology in the Special Rapporteur’s third report reflected the particular importance of

defining “official” for the purposes of the topic, from the perspective of both immunity *ratione materiae* and immunity *ratione personae*. In the former context, the definition would need to focus on the functions fulfilled, while in the latter, the term would need to designate specific holders of public office who represented the State. In selecting the most appropriate terms, the nature of the office held by a person enjoying immunity must be known, and domestic and international judicial practices must be taken into account. In English, the term “State official” seemed appropriate. The term “organ”, suggested by the Special Rapporteur, most commonly referred to entities. In addition to English, French and Spanish, consideration should be given to terminology in the Commission’s other three working languages so as to ensure consistency. Using “organ” to refer to individuals would cause problems of translation in Chinese, for instance.

62. Given the importance of the topic, the Commission should strive to complete its work within the current quinquennium. He expressed support for the suggestion to transmit draft article 5, as formulated by the Special Rapporteur, to the Drafting Committee.

The meeting rose at 12.55 p.m.

3221st MEETING

Thursday, 10 July 2014, at 3 p.m.

Chairperson: Mr. Kirill GEVORGIAN

Present: Mr. Caffisch, Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Mr. Huang, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrić, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

Immunity of State officials from foreign criminal jurisdiction (*continued*) (A/CN.4/666, Part II, sect. B, A/CN.4/673, A/CN.4/L.850)

[Agenda item 5]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRPERSON invited the Commission to resume its consideration of the third report of the Special Rapporteur on immunity of State officials from foreign criminal jurisdiction (A/CN.4/673).

2. Mr. VÁZQUEZ-BERMÚDEZ said that, as the Special Rapporteur had pointed out, the three normative elements of the immunity *ratione materiae* of State officials from foreign criminal jurisdiction, namely the subjective, material and temporal scopes, should be considered together in order to define the legal regime for that type of immunity.

3. With regard to terminology, in particular the search for a term that could be used interchangeably in the various language versions to refer to all persons to whom immunity might apply, he said that the Special Rapporteur's proposal to employ the term "organ" rather than "official" was problematic. According to article 4 of the articles on responsibility of States for internationally wrongful acts,²⁰¹ the term "State organ" included both persons and entities. However, the present topic concerned only natural persons, not legal persons or entities. Furthermore, in the domestic legislation of various States, the term "organ" was always employed to refer to State entities and not to natural persons having a connection with the State. A case in point was the Constitution of the Republic of Ecuador.

4. He agreed with other members of the Commission that the English word "official" appeared to cover adequately all the various categories of persons who might enjoy immunity from foreign criminal jurisdiction, whereas the ordinary meaning of the Spanish word *funcionario* was more limited in scope. The suggestion made during the debate to use the dual terms *representante* and *agente* as equivalents of the English term "official" did not seem to him to be the most appropriate solution, because the word *agente* was restrictive in the domestic law of various States, whereas its use in the articles on responsibility of States for internationally wrongful acts covered both natural persons and entities. Similarly, the term *representante del Estado* was potentially restrictive and might be interpreted as referring mainly to the so-called "troika" of Head of State, Head of Government and Minister for Foreign Affairs.

5. As to the elements that identified State officials, the Special Rapporteur had stated that the first of the identifying criteria was the person's connection with the State. With regard to immunity *ratione personae*, that connection was clear in the case of the troika; the Commission had concluded that, under international law, members of the troika enjoyed that type of immunity simply by virtue of their office, with no need for specific powers to be granted by the State.²⁰² With respect to the subjective scope of immunity *ratione materiae*, those persons to whom immunity might apply in a specific case also had to have a connection with the State, meaning that they were in a position to perform acts that involved the exercise of governmental authority.

6. That said, for the purposes of the draft articles, State officials did not enjoy immunity *ratione materiae* simply by virtue of being officials and in a position to exercise governmental authority. Another normative element of immunity *ratione materiae* also had to apply, for example, the requirement that the act with respect to which immunity was invoked had been performed in an official, and not a private, capacity.

7. As to draft article 2 (e), the definition of "State official" should cover both the troika and any other persons

²⁰¹ General Assembly resolution 56/83 of 12 December 2001, annex, article 4. See the draft articles on responsibility of States for internationally wrongful acts adopted by the Commission at its fifty-third session and the commentaries thereto in *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 26 *et seq.*, paras. 76–77.

²⁰² See *Yearbook ... 2013*, vol. II (Part Two), p. 43 (para. (2) of the commentary to draft article 3).

acting on behalf of the State. However, in his view, there was no need for the subparagraph to be divided into two separate clauses.

8. Referring to draft article 5 regarding immunity *ratione materiae*, he said that, there again, a person's status as a State official did not entail automatic enjoyment of that type of immunity. Rather, the enjoyment of immunity *ratione materiae* depended in each specific case on a combination of all the normative elements. Accordingly, such categorical wording as that contained in draft article 5 did not seem appropriate, given that State officials entitled to exercise governmental authority were in fact persons only potentially entitled to enjoy immunity *ratione materiae*, rather than persons who actually enjoyed that immunity.

9. The various issues raised during the debate concerning the two draft articles could be dealt with by the Drafting Committee. He was therefore in favour of their referral to the Committee.

10. Mr. SINGH said that he agreed with the Special Rapporteur's conclusion that the topic should cover all individuals who acted on the behalf of the State, regardless of their official position, and all individuals who might enjoy immunity *ratione materiae* with respect to certain acts. However, he questioned whether it was in fact necessary, or even helpful, to attempt to specify a category or categories of persons who might enjoy immunity *ratione materiae*. He agreed with other members that if the Commission were to focus on the acts with respect to which immunity might arise—namely acts performed not in a private capacity, but on behalf of the State—rather than on the person concerned, then it would be unnecessary to define a category or categories of persons who enjoyed immunity *ratione materiae*. Persons might enjoy immunity when acting on behalf of the State, irrespective of who they were and of the position they might or might not hold. They did not need to be *fonctionnaires*, "officials" or "civil servants", however those terms might be defined in domestic law. Furthermore, as the Special Rapporteur had pointed out, the terms were not defined in general international law.

11. He did not agree with the Special Rapporteur's view that a definition of the concept of official was essential for the topic, or with her conclusion that persons covered by immunity *ratione materiae* could be determined only by using identifying criteria. In his opinion, attention should be given to the act performed rather than the status of the person performing it. Such a position was in fact supported by the Special Rapporteur's conclusion in paragraph 38 of her third report that, as a general rule, national courts did not set out criteria for identifying a person as an "official".

12. As to the Special Rapporteur's assertion in paragraph 54 of her third report that certain elements in the Vienna Convention on Diplomatic Relations made it possible to identify State officials, it was unclear how that special regime, which covered persons with a special relationship with the State, would be of help in defining the meaning of "State official" for other purposes.

13. In various places in the third report, the Special Rapporteur had emphasized two separate criteria for

identifying persons who might enjoy immunity, namely a connection with the State and the fact that they were acting on behalf of the State. However, it was sufficient to demonstrate that the acts were done on behalf of the State, and no other connection with the State needed to be shown, although such a connection might constitute a factual element to assist in determining whether the acts had been done on behalf of the State.

14. As to the Special Rapporteur's proposal to replace the term "official" with the word "organ", he agreed with other members of the Commission that such a change of terminology was unnecessary.

15. Regarding draft article 2 on the definition of "State official", he agreed with those members who had stated that subparagraph (e) (ii) should be greatly simplified. It currently contained a series of qualifiers of doubtful relevance and could be interpreted as excluding acts that were not done as part of any official function but which were nevertheless done on behalf of the State. He also agreed that the current wording was unduly restrictive with regard to the persons who enjoyed immunity *ratione materiae*.

16. As to draft article 5, he said that limiting the persons who enjoyed immunity *ratione materiae* to officials who exercised elements of governmental authority blurred the distinction between the persons who might enjoy such immunity and the acts with respect to which immunity was enjoyed. He agreed with the view that draft article 5 should be modelled on draft article 3 and read: "State officials enjoy immunity *ratione materiae* from the exercise of foreign criminal jurisdiction."

17. He supported referral of the two draft articles to the Drafting Committee.

18. Mr. KAMTO said that he agreed with Mr. Vázquez-Bermúdez that legal persons should not be included among those persons that enjoyed immunity *ratione materiae*, since that would inevitably give rise to intractable problems, and there was currently an insufficient basis in international law for such a position. Unfortunately, however, that view was not shared by all members. He agreed with Mr. Singh that due account should be taken of the act with respect to which immunity might arise, but there should nevertheless be some element demonstrating that the person had performed the act in the name or on behalf of the State in question.

19. Mr. CANDIOTI said that he shared Mr. Kamto's concerns and thought that it should be made clear in the definition of terms that "State official" referred to a natural person or individual. The issue of the immunity of legal persons could be dealt with under the topic of the jurisdictional immunity of international organizations, which was currently on the Commission's long-term programme of work.²⁰³ Likewise, the current topic did not cover immunity for individuals employed by private companies contracted by a State to perform certain functions, such as security operations.

20. Mr. FORTEAU said that it might be useful to consider article 58 of the articles on the responsibility of States for internationally wrongful acts, which said that the text was without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a State.

21. The CHAIRPERSON, speaking as a member of the Commission, said that he endorsed the Special Rapporteur's approach of addressing immunity *ratione materiae* through a consideration of three key questions, namely who enjoyed immunity, what types of acts were covered and what the period of time was over which immunity could be invoked.

22. Paragraph 14 of the third report provided an answer to the last of those questions when it stated that there was broad consensus on the unlimited nature of the temporal scope of immunity *ratione materiae*. However, that important element was not reflected in the set of draft articles proposed by the Special Rapporteur. One might assume that the absence of a reference in that regard could be taken to mean that immunity was unlimited in its duration. Nonetheless, he would prefer an express reference to be made thereto in a future draft article.

23. Turning to the definition of the persons that enjoyed immunity, he said that he supported the Special Rapporteur's general conclusion that immunity should cover all persons who were, in the words of the Appeals Chamber of the International Tribunal for the Former Yugoslavia in *Prosecutor v. Blaškić*, "mere instruments of a State" (para. 38 of the decision). However, the question facing the Commission was how that very important conclusion could be turned into a specific definition to be eventually included in the draft articles. The Special Rapporteur had carried out a wide-ranging survey of factual material, and had also analysed the terminology involved. However, it seemed to him that the factual material was of greater relevance to defining an official act than to defining the persons covered by immunity. If, as had been proposed in the third report, the definition of an official were to be based on the definition of an official act, then it would be redundant and unnecessary. Accordingly, some members had proposed abstaining from defining the concept of an official. While he understood that viewpoint, he thought that at the current stage it would be worthwhile for the Commission to seek a definition that would be of use for later work on the topic and, more importantly, for the subsequent application of any rules that were developed.

24. As noted in paragraph 24 of the third report, the concept of an "official" had not been defined in international law, because each country's legal system had its own definition. The judgment in the *Prosecutor v. Blaškić* case was significant in that context, since it referred to the freedom of the State under customary international law to determine its internal structure and to designate the individuals acting as its agents or organs. Any definition prepared at the international level should not curtail that freedom.

25. The judgment also referred to the right of each State to claim that acts or transactions performed by one of its organs in its official capacity should be attributed to

²⁰³ See *Yearbook ... 2006*, vol. II (Part Two), p. 19, para. 22; and *Yearbook ... 2011*, vol. II (Part Two), pp. 175–176, para. 369.

the State, so that the individual organ might not be held accountable for those acts or transactions. In other words, it stressed the fact that immunity belonged to the State. In his opinion, those two elements had a direct bearing on the definition of an official. For example, it would be possible to define an official as a person designated by the State to be its agent or organ in accordance with internal law and confirmed as such by that State. What was important about such a definition was the distinction made between persons covered by immunity and acts or situations that gave rise to the enjoyment of immunity.

26. In the context of the application of privileges and immunities, notifications regarding the status of a person were of particular importance. For example, in the 1946 Convention on the Privileges and Immunities of the United Nations, the question of defining officials was resolved in quite a simple manner. Article V, section 17, of the Convention provided: “The Secretary-General will specify the categories of officials to which the provisions of this Article and Article VII shall apply. ... The names of the officials shall from time to time be made known to the Governments of Members.” While such a procedure could not be applied in the present context, it would be useful to include in the definition of an official the procedural element involving the confirmation by the State of the relevant status of a person.

27. Even though he was of the opinion that all individuals through whom the State acted should enjoy immunity *ratione materiae*, at the same time, for the purposes of the present draft articles, it would be useful to distinguish between officials in the narrow understanding of the word, namely persons who were part of the structure of the State, and persons who were agents of the State in the broad understanding of that term. That could be achieved by defining an “official” and an “agent” separately in the draft articles. The definition of an agent could be similar to that contained in the articles on the responsibility of international organizations,²⁰⁴ with the key element being “charged by” the State “with carrying out one of its functions and thus through whom” the State acts. Defining “official” and “agent” separately would have the merit of highlighting the connection between the official and his or her office. It would also permit the subsequent inclusion in the definition of the procedural difference between applying immunity to officials of a State *stricto sensu* and to agents of a State. Clearly, confirming the official status of a person holding office in a State structure was a relatively simple matter, which automatically created the presumption that the person had or enjoyed immunity. As far as agents of the State were concerned, the procedure would be somewhat different, since establishing their connection with a State was a bit more complicated.

28. Turning to draft article 5, he said that he agreed with the main idea but thought that further work was needed on the formulation, since the words “governmental authority” and “benefit” were inappropriate in that context.

²⁰⁴ See the draft articles on the responsibility of international organizations adopted by the Commission at its sixty-third session and the commentaries thereto in *Yearbook ... 2011*, vol. II (Part Two), pp. 40 *et seq.*, paras. 87–88. See also General Assembly resolution 66/100 of 9 December 2011, annex.

29. In conclusion, he supported referral of the draft articles to the Drafting Committee.

The meeting rose at 3.55 p.m.

3222nd MEETING

Friday, 11 July 2014, at 10.05 a.m.

Chairperson: Mr. Kirill GEVORGIAN

Present: Mr. Cafilisch, Mr. Candioti, Mr. Comissário Afonso, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Mr. Hmoud, Mr. Huang, 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. Wako, Mr. Wisnumurti, Sir Michael Wood.

Immunity of State officials from foreign criminal jurisdiction (*continued*) (A/CN.4/666, Part II, sect. B, A/CN.4/673, A/CN.4/L.850)

[Agenda item 5]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

1. The CHAIRPERSON invited the Special Rapporteur on the topic of immunity of State officials from foreign criminal jurisdiction to summarize the debate on her third report.

2. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) recalled that, in her previous report, she had examined each of the three normative elements (who, what, when) of immunity *ratione personae*²⁰⁵ and had therefore done the same for immunity *ratione materiae*. That approach had been well received. While most members had agreed that it was necessary to define the persons who enjoyed immunity, not only generally, but also specifically in relation to immunity *ratione materiae*, some members had not seen the need to define that form of immunity, as it depended on the act rather than the person. That was true, and even those in favour of dealing separately with subjective scope had agreed with the relevance of the act itself, which in that context was much more important than when determining immunity *ratione personae*. However, that did not imply that the act superseded the actor, particularly since, as had been stressed on numerous occasions, immunity from foreign criminal jurisdiction applied specifically to persons. The only difficulty that might arise would be in determining which normative element, the act or the person, carried more weight, but that would also be true of immunity *ratione personae*. For that reason, it appeared necessary to define the concept

²⁰⁵ *Yearbook ... 2013*, vol. II (Part One), document A/CN.4/661, chap. V.