

Document:-
A/CN.4/3115

Summary record of the 3115th meeting

Topic:
Immunity of State officials from foreign criminal jurisdiction

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

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(<http://legal.un.org/ilc/>)*

rule on invocation was to apply, but it might be helpful for accused persons to be aware that they should bring their putative status to the attention of the court at an early stage in the proceedings.

89. On a related point, the Special Rapporteur noted, partly in reliance on *Certain Questions of Mutual Assistance in Criminal Matters*, that the court of the forum State was not obligated to consider the question of immunity *proprio motu*. He agreed with that conclusion and asked whether there were any guidelines which could be recommended concerning the circumstances in which the court in the forum State could exercise its *proprio motu* discretion. That would not necessarily undermine the main rule that the court could choose to rely only upon the invocation of immunity by the official's State.

90. On the whole, he was in agreement with the Special Rapporteur on the procedure to be adopted by the official's State in notifying the forum State of the invocation of immunity, and in particular the idea that it was not necessary for such notification to be given to the foreign court, but could go through diplomatic channels. However, it would be good not to have a hard and fast rule to the effect that, in the case of the troika, the forum State must consider the question of immunity on its own and without regard to the invocation of immunity by the official's State.

91. As to waiver, he agreed with the approach recommended by the Special Rapporteur. Waiver for members of the troika must be express, with due note taken of the case in which the official's State requested that another State take criminal procedure measures. For other officials, waiver could be express or implied. The technical issues raised by implied waiver could be addressed when the Commission considered the draft articles.

92. In paragraph 61 (*r*) and in the section of the report preceding the summary, the Special Rapporteur examined the relationship between the official's immunity and the responsibility of the official's State and asserted that a State which invoked the immunity of its official in relation to a charge recognized that the act constituted an act by that State itself and that this established the prerequisites for the international legal responsibility of the State. He disagreed with the Special Rapporteur on that point. As noted by Mr. Singh, there might be a variety of reasons that explained the invocation of immunity by the official's State, including the desire of the official's State to investigate the matter that formed the basis for the criminal charge. The official's State might also wish to invoke immunity quickly in order to avoid undue embarrassment for the official, and it might do so before forming a clear view as to its responsibility. In the circumstances, the invocation of immunity might be a factor to be considered in determining whether the prerequisite of attribution had been satisfied with respect to the invoking State, but he did not support the strict rule that appeared to be contemplated by the Special Rapporteur in paragraph 61 (*r*).

93. Finally, he noted that there were important matters outstanding from the second report, including the nature and extent of the immunity to be enjoyed by members of the troika. He agreed with Mr. McRae and others that the issue should be sent to a working group in 2012 for

further consideration in the light of the different opinions expressed in the Commission. The Commission might also consider appointing a new special rapporteur first, who would be given the opportunity to formulate a position on the question before its referral to a working group. Drawing attention to the chapter on jurisdictional immunities of States and their property in the *Yearbook of the International Law Commission, 1989* (vol. II, Part Two), he recalled that article 4, paragraph 2, of the draft articles provisionally adopted by the Commission stated the following: "The present articles are likewise without prejudice to the privileges and immunities accorded under international law to heads of State *ratione personae*."⁴⁰⁸ Why not also Heads of Government and Ministers for Foreign Affairs? The Special Rapporteur, Mr. Sucharitkul, responded by saying that "the privileges and immunities enjoyed by these persons as well as by members of the families of heads of State were granted on the basis of international comity rather than in accordance with established rules of international law".⁴⁰⁹ However, the Special Rapporteur had been pressed further, because he noted the following: "With regard to paragraph 2, several members suggested that the scope of the provision be extended to heads of State in their private capacity, as well as to heads of Government, Ministers for Foreign Affairs and other persons of high rank."⁴¹⁰ The Special Rapporteur said that he would not object to adding a reference to Heads of Government, Ministers for Foreign Affairs and other high-ranking officials, but he would not do so for families of the Head of State, as he still doubted that families had special status "on the basis of established rules of international law".⁴¹¹ That implied that the Special Rapporteur had changed his mind on whether the members of the troika had immunity *de lege lata*.

94. As the extract showed, the question was not new, and it was not the first time that the Commission had had to address it. Thus, it was difficult to imagine that the reputation of the Commission would turn on the way it sought to resolve the issue.

The meeting rose at 1 p.m.

3115th MEETING

Friday, 29 July 2011, at 10 a.m.

Chairperson: Mr. Maurice KAMTO

Present: Mr. Caffisch, 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. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

⁴⁰⁸ *Yearbook ... 1989*, vol. II (Part Two), p. 102, para. 443.

⁴⁰⁹ *Ibid.*, pp. 102–103, para. 446.

⁴¹⁰ *Ibid.*, p. 103, para. 448.

⁴¹¹ *Ibid.*, para. 450.

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

[Agenda item 8]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (concluded)

1. Mr. FOMBA congratulated the Special Rapporteur on the substantial amount of research and analysis he had done in order to provide the Commission with a logical, coherent framework for its discussion of the topic. It was regrettable that no draft articles had been formulated, although it would have been premature to do so prior to the consideration of the Special Rapporteur's second report,⁴¹² since the approach adopted for substantive issues would have a bearing on the procedural aspects addressed in the third report.

2. With regard to the fundamental question of exceptions to immunity, he said that in paragraph 94 (o) of his second report, the Special Rapporteur asserted that there was no norm of international law that had developed for such exceptions nor any trend towards the establishment of such a norm. Such an assertion should be substantiated by a methodical, rigorous examination of the relevant practice. In the absence of such substantiation, international law should be progressively developed by providing for an exception to immunity relating to serious international crimes.

3. Moving on to the third report (A/CN.4/646), he said that as far as knowing the identity of the “threesome” or troika was concerned, the words “as a rule”, in paragraph 19, were quite appropriate, since it could also be the case that the identity of those persons was not known. Breakdowns in protocol did occur, after all.

4. He agreed with the conclusion in paragraph 55 of the report on the form to be taken by the waiver of immunity. Paragraph 60 contained an excellent description of the dilemma faced by a State in deciding whether to acknowledge an official's conduct as official, thereby establishing the premises for its own potential responsibility for such conduct.

5. Generally speaking, a distinction had to be drawn between personal and functional immunity. As far as personal immunity was concerned, it was also necessary to distinguish between what might be termed “primary immunity”, namely that enjoyed by the troika, and “secondary immunity”. A second distinction had to be made between cases where the issue of immunity must or must not be raised *proprio motu* by the State exercising jurisdiction. A third distinction was between cases where the official's State had or had not been informed of its official's situation.

6. It would be logical to infer from the argument that immunity must be brought up *in limine litis* that it could be invoked only before a court of first instance and not at the

appeal stage. But that was an absolutist approach: thought should be given to allowing immunity to be invoked at the appeal stage, if that proved necessary in certain cases. In any event, the function of immunity must be taken into account and it would be necessary to work out how immunity would operate in courts at various levels.

7. The 18 points contained in the summary of the report (para. 61) reflected the main issues raised by the topic. Paragraph 61 (c) suggested that the invocation of immunity by the official himself was not of legal relevance; nevertheless, it would be wise to take that situation into account when drawing up draft articles, especially as, in paragraph 15, the Special Rapporteur indicated that such a declaration of immunity by an official was not without significance in judicial proceedings. The third sentence of paragraph 61 (f) was perhaps too categorical when it stated that the State exercising jurisdiction was not obliged to consider the question of immunity *proprio motu*. It might be wise to give more thought to the matter.

8. He agreed with the descriptions of a situation in which a waiver of immunity might not need to be express and of the non-invocation of immunity in paragraph 61 (l).

9. In conclusion, he said he was in favour of taking note of the conclusions contained in the reports and of passing the torch to a newly elected Commission in 2012. It would be the latter's responsibility to consider whether a working group should be set up to examine the crucial question of exceptions to immunity.

10. Mr. KOLODKIN (Special Rapporteur), summing up the debate on his second and third reports, said he was glad to have set off a lively discussion and welcomed the comments and sometimes sharp criticism that had been proffered. The central issues that had emerged were which State officials enjoyed, did not enjoy, or should not enjoy, immunity from foreign criminal jurisdiction; the scope of immunity; whether immunity was a recognized international legal norm and, if so, whether there were or should be any exceptions to or restrictions upon it; and whether the approach to immunity should be graduated, based on the type of offence committed by State officials—ordinary offences or the most serious ones that were a matter of concern to the entire international community.

11. Members of the Commission who favoured a minimalist approach had emphasized the need to fight impunity, considering immunity to be an institution of the past that was out of phase with current trends in international law. They had reproached him for paying insufficient attention to facts; falsely assessing some facts; taking an absolutist approach to State sovereignty; and being an apologist for sovereign equality and non-interference in internal affairs. Some members of the Commission had drawn a distinction between immunity and responsibility and identified it with impunity, by reference to the principle of equality of all before the law. Thus, the main conclusions and even the conceptual basis of his second report had been vigorously challenged.

12. Other members of the Commission had generally supported his point of view. Without playing down either the significance of fighting impunity or current trends in

⁴¹² *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.

international law, they had underscored the importance of immunity in ensuring proper international and inter-State relations and preventing their abuse.

13. A third line of thought espoused by some members of the Commission had been that his analysis of international law *de lege lata* might be largely justified, but that, in the interests of progressive development of international law *de lege ferenda*, and of striking an appropriate balance between combating impunity and ensuring stability and predictability in international relations, immunity and the circle of people who enjoyed it must be further restricted.

14. In response to certain general and specific criticisms of his second and third reports, he had the following points to make.

15. In defence of his assertion that most attempts to establish universal or extraterritorial jurisdiction were made by developed countries against officials or former officials of developing States, he listed 18 countries whose officials had been or were currently the subjects of attempts to exercise foreign criminal jurisdiction, 15 of which were developing countries. Among the countries launching such proceedings were Argentina, Belgium, France, Germany, Italy, the Netherlands, Spain, Switzerland, the United Kingdom and the United States. Perhaps he should simply have included the lists in one of his reports.

16. He could not accept the criticism levelled against his supposed neglect of the facts in favour of a legalistic approach. While law was of course meaningless without facts, it was hardly difficult to find out such facts in relation to attempts to exercise criminal jurisdiction over specific officials. Facts could be viewed from different angles, however, and the Commission was not a fact-finding body. Its members had different world views and legal and personal backgrounds, which naturally influenced their positions on the matters they considered. Such a diversity of views was beneficial, even if it complicated the search for consensus.

17. Contemporary notions of international law in general and of sovereignty in particular differed markedly from the views that had prevailed 20 or 30 years ago. Fighting impunity now occupied a key place on the contemporary international agenda. Individual criminal responsibility for serious crimes under international law and international criminal jurisdiction had become facts of life. All those statements were truisms. Yet it was also obvious, at least to him, that the development of human rights had deeply affected, but had not undermined, the principles of sovereign equality of States and of non-interference in their internal affairs. The problem that merited consideration was not the extent to which changes in the contemporary world and in international law had influenced State sovereignty in general, but more specifically, how the immunity of State officials in general and immunity from the national criminal jurisdiction of other States in particular had been affected.

18. The current trend in international law was clearly towards the emergence of international criminal jurisdiction and against immunity from such jurisdiction.

However, a distinction must be drawn between the immunity of State officials from foreign criminal jurisdiction and immunity in the context of international criminal jurisdiction. Article 27 of the Rome Statute of the International Criminal Court, which had been cited as evidence of changing attitudes towards immunity, was not really relevant to the topic, dealing as it did with immunity from the jurisdiction of the International Criminal Court, not from foreign criminal jurisdiction. Since that Statute had been mentioned, however, it was worth recalling article 98, which confirmed that obligations under international law arising from the immunity in States parties to the Statute of officials of States not parties to it must still be met, even if the officials were suspected of offences that fell under the jurisdiction of the Court.

19. Obviously, he had firm views on the subject of immunity, and he had thought it better to express them in his reports, rather than simply to list possible approaches, something that had been done comprehensively in the Secretariat's excellent memorandum.⁴¹³ His views had been formed, not *a priori*, but through empirical study. His personal and legal background, particularly his long experience with the legal department of the Russian Ministry of Foreign Affairs, had naturally had a bearing on his largely positivist outlook on the law, an outlook that offered some valuable insights.

20. His analysis of the practice and position of States, rulings of the ICJ and national courts and the literature did not indicate that State sovereignty and the immunity of State officials had lost their significance in the context of foreign criminal jurisdiction. The interaction between sovereignty and immunity was particularly important in respect of foreign criminal, as opposed to civil, jurisdiction. Measures taken during criminal investigations often involved constraint, deprivation of liberty or the questioning of officials, including about acts carried out in an official capacity. Officials, including high-level officials, could be detained or arrested. All those factors directly affected the exercise of State sovereignty and domestic competence. Hence the significance of the consent of the State, expressed in one form or another, to the exercise by a foreign State of criminal jurisdiction over its officials. The changes in international law had not yet altered those basic foundations of the international system.

21. Various opinions had been expressed regarding the scope of immunity and his "generalist" approach. He had proceeded on the assumption that all serving and former State officials enjoyed functional immunity from foreign criminal jurisdiction, in other words, immunity for acts undertaken in their official capacity. Sufficient grounds for that assumption were provided in his second report, particularly paragraphs 21 and 23. In such instances, the acts of officials were not theirs alone but were in fact acts of the State.

22. Opinions had varied on who should enjoy personal immunity. Claims that Ministers for Foreign Affairs or even the troika did not or should not enjoy immunity could not, in his view, be supported by objective political and

⁴¹³ Document A/CN.4/596 and Corr.1; mimeographed, available from the Commission's website (documents of the sixtieth session).

legal analysis. The debate had revealed little support for such a position within the Commission. Several members had said that the group of officials who enjoyed personal immunity should be restricted to the troika. However, he had already drawn attention to a ruling of the ICJ suggesting that, in addition to the troika, other high-level officials enjoyed personal immunity. Several rulings of national courts which recognized that personal immunity was enjoyed not only by the troika, but also by other high-level officials, such as ministers of defence and ministers of trade, were based on that ruling. The favourable disposition of Governments had been taken into account by national courts in reaching such decisions, which were now facts of law. The logic behind those decisions resulted in part from global changes: important State functions, including representation of the State in international relations, were no longer the exclusive preserve of the troika. He was not aware of any legal rulings to the effect that absolutely no officials other than the troika enjoyed personal immunity. To what extent, then, was a restrictive approach grounded in law?

23. Several members of the Commission had underscored the need for care and rigour in addressing the issue, and that was obviously the right approach. Indeed, he had applied it in formulating the proposals in his preliminary report⁴¹⁴ on establishing the criteria that high-level officials other than the troika had to meet in order to enjoy personal immunity and in the suggestion in his third report that a distinction should be made between such individuals and the troika for procedural aspects of immunity, despite the fact that personal immunity was the same for both groups.

24. The most serious differences of opinion related to exceptions to immunity. The proposition that the immunity of State officials from foreign criminal jurisdiction was a firmly established rule of international law and that exceptions to immunity must be proven, particularly where the most serious crimes were concerned, had generated much debate. When some said that immunity was a rule, while others disagreed, perhaps they were simply looking at different issues and situations. The right of States to exercise jurisdiction in respect of crimes committed in their territory was undoubtedly a rule, but the fact that particular individuals, such as foreign officials, were protected from territorial jurisdiction by their immunity was an exception to the rule. On the other hand, as to whether one State could take criminal procedural measures that imposed an obligation on another State's official or were coercive, he would reply no, in general, but yes in certain cases; immunity would be the rule, and lack of immunity the exception.

25. In spite of the differing views expressed, he found it difficult to imagine, even with respect to core crimes, how the Commission could depart from the legal position of the ICJ in its rulings concerning the *Arrest Warrant* case and, six years later, in the case concerning *Certain Questions of Mutual Assistance in Criminal Matters*. Not only did the two rulings refer to the inalienable personal immunity of high-level officials from foreign criminal jurisdiction, but the latter stated: "In international law

it is firmly established that ... certain holders of high-ranking office in a State, such as the Head of State ... enjoy immunities from jurisdiction in other States, both civil and criminal" (para. 170). Thus, two rulings adopted within the space of six years treated immunity as a firmly established rule, at least with regard to the personal immunity of the troika. Moreover, according to the Court, there could be no exceptions to that rule, and its position enjoyed wide support from States, in the rulings of national courts and in the literature, although the literature naturally presented other viewpoints.

26. He agreed that he had been wrong to use the term "absolute" immunity, for although it was frequently encountered, it was out of place when applied to personal immunity. Personal immunity was time-bound. It pertained only while a person occupied one of the highest positions within a State. Like functional immunity, personal immunity provided protection, not from all criminal procedural measures, but only from those that imposed an obligation on the official or were coercive.

27. Thus, if the Commission were to consider the question of exceptions to immunity, it would most likely have to do so only with respect to immunity *ratione materiae*. Even proponents of exceptions to immunity could not agree on the grounds for possible exceptions: much ink had been spilled on that score. Furthermore, neither the practice of States, nor the rulings of national courts, revealed a trend towards such exceptions, although, as he had mentioned in his second report, in certain circumstances functional immunity might not apply during the exercise of territorial jurisdiction by a State where an offence had been committed. In the light of the debate on the subject, it would be useful to consider further the circumstances in which territorial jurisdiction could be exercised.

28. For an emerging rule restricting immunity to be posited, the corresponding practice must predominate. His analysis had shown that it did not. However, there was room to consider certain exceptions that were not mentioned in the second report—for instance, when immunity was suspended as a countermeasure.

29. If the Commission received no new information from States that shed new light on the possible exceptions to immunity, then it would be hard to argue, *de lege lata*, that there were no exceptions to either personal or functional immunity, apart from the one mentioned in his second report. That would not preclude the Commission from drafting international legal standards, for example in the form of an international treaty, if it considered that that was appropriate.

30. Turning to the context in which many members of the Commission had considered the subject, namely the grounds for further restrictions on immunity, he said that the idea that immunity from foreign criminal jurisdiction should be minimized, in line with the principle of equality of all before the law, was not viable. The principle of equality notwithstanding, officials and members of parliament in a great many countries continued to enjoy immunity from criminal prosecution in domestic courts. Why, then, should officials not enjoy immunity from foreign criminal jurisdiction?

⁴¹⁴ *Yearbook ... 2008*, vol. II (Part One), document A/CN.4/601.

31. Immunity from foreign criminal jurisdiction had been contrasted with the fight against impunity and with responsibility. That was also not a viable position, in his view. It had rightly been said that at the international level, the struggle against impunity took place on a very broad front, in the vanguard of which were bodies with international criminal jurisdiction and States that were cooperating to fight crime. International law had made huge strides in recent years in that particular area. As for the prosecution of officials of one State under the jurisdiction of another, there, the emerging concept of universal criminal jurisdiction had come up against serious problems, and not only on account of immunity. That type of prosecution was a fairly discrete and limited aspect of the international efforts to combat impunity, and was not overly popular among States themselves. There was little merit in the argument that State officials should be prosecuted for the most serious international offences in other States. If States had considered such an approach to be appropriate, then there would have been no need to set up the International Criminal Court.

32. Overall, his third report had been less controversial than his second, although the conceptual similarities between the two had given rise to similar differences of opinion, particularly with regard to how prerogatives were apportioned between the State of the official and the State exercising jurisdiction.

33. Some of his conclusions enjoyed fairly wide support. That was true of the idea that the issue of the immunity of a State official from foreign criminal jurisdiction must in principle be addressed at an early stage of court proceedings or even earlier, at the pretrial stage. On that subject, the view had been expressed that failure to do so could not always be taken as a violation of the obligations arising from immunity—an observation with which he agreed. Useful comments had also been made concerning the pertinence of the issue of the inviolability of officials, particularly in the early stages of criminal proceedings.

34. There had also been reasonably broad agreement with his idea that, in order to have legal significance, immunity must be invoked by the State of the official, not by the official himself. It had been pointed out, however, that the invocation of immunity by an official should nevertheless have some sort of consequences. He agreed with that position: in fact, paragraph 15 of his third report indicated that a declaration by an official that he or she enjoyed immunity had a certain significance. It could not be simply ignored by the State exercising jurisdiction, which could, on the basis of such a declaration, consider the question of the official's immunity. It might even be obliged to do so under its domestic legislation. Nevertheless, from the point of view of international law, a declaration of immunity by the individual concerned could not be accorded the same significance as a declaration by the State of the official, as the official was merely the beneficiary of immunity, which actually belonged to the State.

35. Substantial support had been expressed for the idea that waiving immunity was the prerogative of the State of the official, not of the official himself.

36. With regard to the burden of invoking immunity, there had been some support for differentiating between

persons who enjoyed immunity as members of the troika and other officials. The view had also been expressed, however, that such a distinction was meaningless, since it was just as easy for a State to invoke immunity for officials belonging to the troika as for other officials. He did not entirely agree with that observation. It was true that States often raised the issue of immunity of high-ranking officials themselves, but that did not mean they should be obliged to do so.

37. It had also been said that the police and other authorities of the State exercising jurisdiction did not always know who were the highest-ranking officials of certain States, and that they should not have to be responsible for raising the issue of immunity in relation to the troika. He was not convinced that ignorance by one State's police of the fact that it had detained the President of another State released the first State from responsibility for that act. The issue was really one of coordination between law enforcement agencies and Ministries of Foreign Affairs. The importance of communication between States had been emphasized, with particular stress laid on the need for the State exercising jurisdiction to inform the official's State of the measures being taken.

38. The question of grounds for functional immunity had given rise to disagreements. He agreed that further elaboration of the finer points was needed in order to ensure a balance between the prerogative of the official's State to declare that a person was acting in an official capacity and the prerogative of the State exercising jurisdiction not to accept such a declaration blindly. Much would depend on the specific circumstances of the case. It might happen that an official's conduct was so obviously official in nature that the State exercising jurisdiction could draw that conclusion for itself, although that did not mean it should be obliged to do so.

39. Disputes had also arisen over the extent to which it was necessary to give grounds for the functional or personal immunity of officials not belonging to the troika. The very idea that the troika existed had been repeatedly disputed. However, it had been pointed out, and he agreed, that the purpose of the obligation to provide grounds for functional immunity was solely to determine whether an official had acted in an official capacity, not to force a State to defend its interests in a foreign court. A fair amount of support had been expressed for the proposition that grounds for immunity did not have to be presented in a foreign court, diplomatic channels sufficing for the purpose.

40. Various views reflecting divergent conceptual approaches had been expressed in connection with paragraphs 44 and 45 of his report, which discussed whether the signature by a State of an international agreement criminalizing certain acts implied a waiver of the immunity of officials who committed such acts.

41. Overall, he had the impression that, aside from the issues raised in paragraphs 44 and 45, the waiver of the personal immunity of individuals outside the troika and the existence of such a category *per se*, there had been fairly good support for his ideas about the ways in which immunity could be waived.

42. The concept of dual responsibility, or dual attribution, seemed to have garnered significantly more support after having been explained in more detail in his third report. The remaining differences of view related to the finer points of the issue, rather than the underlying principle.

43. The question of balance had been raised in relation to both his second and third reports.

44. As the ICJ had rightly confirmed, immunity from foreign criminal jurisdiction implied neither impunity nor the absence of responsibility. It was therefore inaccurate to draw a distinction between responsibility and impunity. The correct distinction was between immunity and foreign criminal jurisdiction, and indeed, not jurisdiction in general, but only criminal procedural measures that imposed an obligation on the official or were coercive. Immunity provided protection only from such measures, not from foreign criminal jurisdiction as a whole.

45. The balance sought by many, himself included, would be found, not when the maximum number of officials of one State could be subjected to the jurisdiction of another, but perhaps using the following reasoning.

46. First, personal immunity might be enjoyed by officials not belonging to the troika; however, their number must be limited, and the time frame restricted to when they held office.

47. Secondly, functional immunity provided protection only in respect of actions undertaken in one's official capacity. Actions undertaken in a personal capacity, including while holding high-ranking government positions, were not covered.

48. Thirdly, restrictions on personal immunity limited the protection enjoyed by officials in respect of actions undertaken prior to taking up office.

49. Fourthly, the burden of invoking and providing grounds for functional immunity fell to the State of the official, which must declare that the conduct concerned had been official in nature and that the person in question was or had been an official of that State, acting on its instructions. Such a declaration established the premises for that State's responsibility to be invoked under international law. The need to make such a declaration often left the State with a difficult choice.

50. Fifthly, if the State of an official made no declaration of immunity, and consequently of the official nature of its official's conduct, it would be silently or implicitly waiving that official's functional immunity.

51. Sixthly, immunity provided protection only from criminal procedural measures that imposed an obligation on the official or were coercive. A State exercising jurisdiction could bring criminal proceedings against an official; gather appropriate evidence on the official's conduct and wait until his or her personal immunity expired, if it was a high-ranking official, and then institute criminal proceedings; forward the evidence to the International Criminal Court; suggest to the foreign State

that it waive the official's immunity; or present it with the evidence gathered and suggest that it bring criminal proceedings itself. States often preferred to deal with their own former officials independently.

52. Finally, if an action had been carried out in an official capacity, the possibility arose of invoking the responsibility of the official's State under international law.

53. Obviously, there were other options. The debate had alerted him to the lack of any reference in his reports to the importance of cooperation between States in matters relating to the immunity of foreign officials and the exercise of criminal jurisdiction. In its future work, the Commission might devote some attention to obligations relating to cooperation. His reports also said nothing about settlement of disputes between States with regard to specific aspects of the immunity of officials from foreign criminal jurisdiction. If such a dispute arose, it should be examined by an international court or arbitration body, not a national court, since such disputes were regulated by international law. The Commission might also consider that issue.

54. He hoped that his three reports and the debate thereon, including within the Sixth Committee, would provide a useful foundation on which to build. The ideas that he had formulated, particularly at the end of his second and third reports, were in no way intended to be taken as the basis for draft articles. They were simply a summary of his reports, setting out the conclusions he had reached in his work on the subject to date, primarily for the reader's convenience. He would not object to their being used to develop draft articles in the future, but he thought that more work on the topic was required first in order to resolve basic issues.

55. The Commission could already approach States on two matters, requesting them, first, to pay particular attention to the issues raised in his second report and in the Commission's debate on it; and, secondly, to provide information on their legislation and practice, including judicial practice, with respect to the matters covered in his second and third reports and in the Commission's debate thereon.

56. The issue of the Commission's reputation had been raised—ever a pertinent question. He wished in turn to speak about the responsibility of the Commission, and indeed of all who wrote about international law. To illustrate his thoughts on the matter, he cited an article by Professor A. Gattini⁴¹⁵ showing how successive editions of the most popular Italian textbook on international law had, at different historical moments, taken diametrically opposed views on the questions of State immunity, with a consequent influence—adverse in the case in question—on a ruling by an Italian court. As Professor Gattini pointed out, the *Ferrini v. the Federal Republic of Germany* case and its aftermath should be a reminder for international lawyers of their responsibility as subsidiary sources of international law.

⁴¹⁵ A. Gattini, "The dispute on jurisdictional immunities of the State before the ICJ: is the time ripe for a change of the law?", *Leiden Journal of International Law*, vol. 24, No. 1 (March 2011), pp. 173–200.

57. Mr. DUGARD welcomed the Special Rapporteur's fair-minded summing up of the debate, in which he acknowledged the existence of views contrary to his own and provided an excellent exposition of the subject. He suggested that, together with the three reports prepared by the Special Rapporteur, it should form the basis for further consideration of the topic.

58. The CHAIRPERSON expressed appreciation to the Special Rapporteur for his excellent work in laying the foundations for future study of the question of immunity.

The meeting rose at 11.25 a.m.

3116th MEETING

Tuesday, 2 August 2011, at 10 a.m.

Chairperson: Mr. Maurice KAMTO

Later: Ms. Marie G. JACOBSSON (Vice-Chairperson)

Present: Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escobar Hernández, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hmoud, Mr. Huang, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, 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*) (concluded)* (A/CN.4/638, sect. E, A/CN.4/648)

[Agenda item 6]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)*

1. The CHAIRPERSON invited the Special Rapporteur on the topic of “The obligation to extradite or prosecute (*aut dedere aut judicare*)” to summarize the debate on his fourth report (document A/CN.4/648).

2. Mr. GALICKI (Special Rapporteur) expressed his sincere gratitude to all the members of the Commission who had so actively participated in the debate on his fourth report. He was grateful for their constructive and friendly criticism, which was more valuable than traditional congratulations for moving ahead on a topic that had proved to be so complex, as most speakers had stressed. The topic had entailed an in-depth analysis of international norms, both conventional and customary, and of national regulations, which had grown more numerous in recent years and had changed significantly, as confirmed in 2009⁴¹⁶ and 2010⁴¹⁷ by the Working Group on the obligation to extradite or prosecute.

Although one member of the Commission had suggested that consideration of the topic should be suspended or even terminated, the overwhelming majority of speakers had argued that the work should continue without interruption. Its suspension could create the false impression that the Commission believed that the topic was inappropriate, that it was not ready for a codification exercise or that it should be discontinued for other reasons. Some speakers had been of the view that the topic should be linked to and addressed together with the question of universal jurisdiction, which had already been discussed in a number of United Nations bodies. In his preliminary report,⁴¹⁸ he had proposed a joint analysis of the two questions, but that proposal had been criticized and had not received sufficient support from the Commission or from the Sixth Committee. As the question of universal jurisdiction was now on the agenda of other United Nations bodies, it seemed inevitable that the Commission should again consider, and the sooner the better, whether and to what extent the two topics should be examined together or separately.

3. Most of the new draft articles introduced in the fourth report had been approved. There had been agreement that, at the current stage, the Commission should simply take note of the draft articles and should not adopt them or submit them officially to the Sixth Committee for consideration. He suggested, however, that the draft articles could be quoted for information only in a footnote in the relevant chapter of the Commission's annual report.

4. The new draft article 2 (Duty to cooperate) had given rise to numerous comments, most speakers having agreed that States had such a duty and that the draft article should be included in the draft articles on the obligation *aut dedere aut judicare*. However, there had been differences of opinion on whether such a provision should be the subject of a separate draft article or should be contained in the preamble. Moreover, several speakers had criticized the use of the word “duty” and preferred “obligation”, and others had expressed doubts as to whether the duty to cooperate could be considered to be a primary source of the obligation *aut dedere aut judicare*. A number of members had also argued that the phrase “the fight against impunity” was not appropriate for a legal text. However, the Commission had already stressed the importance of the duty to cooperate in the fight against impunity, which was one of the most important legal bases of the obligation to extradite or prosecute in the proposed general framework for the Commission's consideration of the topic “The obligation to extradite or prosecute (*aut dedere aut judicare*)” prepared by the Working Group in 2009 and included in the report of the Commission of that year.⁴¹⁹ That argument had been confirmed in 2010 in the discussions in the Working Group, in which it had been pointed out that “the duty to cooperate in the fight against impunity seemed to underpin the obligation to extradite or prosecute”.⁴²⁰ Moreover, the words “fight against impunity” or “combat impunity” appeared in many international legal documents and did not weaken the legal value of draft

* Resumed from the 3113th meeting.

⁴¹⁶ *Yearbook ... 2009*, vol. II (Part Two), pp. 143–144, para. 204.

⁴¹⁷ *Yearbook ... 2010*, vol. II (Part Two), pp. 191–192, paras. 337–340.

⁴¹⁸ *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/571.

⁴¹⁹ *Yearbook ... 2009*, vol. II (Part Two), pp. 143–144, para. 204.

⁴²⁰ *Yearbook ... 2010*, vol. II (Part Two), pp. 191–192, para. 339.