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Summary record of the 3164th meeting

Topic:
Immunity of State officials from foreign criminal jurisdiction

Extract from the Yearbook of the International Law Commission:-
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3164th MEETING

Wednesday, 15 May 2013, at 10.05 a.m.

Chairperson: Mr. Bernd H. NIEHAUS

Present: Mr. Caflisch, Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Gevorgian, Mr. Gómez Robledo, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Ms. Jacobsson, Mr. Kamto, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Nolte, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Wisnumurti, Sir Michael Wood.

Immunity of State officials from foreign criminal jurisdiction (A/CN.4/657,[26] sect. C, A/CN.4/661,[27] A/CN.4/L.814[28])

[Agenda item 5]

SECOND REPORT OF THE SPECIAL RAPPORTEUR

1. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur), introducing her second report (A/CN.4/661), drew attention to a number of translation errors that would necessitate the issuance of corrigenda in some of the language versions.

2. With regard to the content of the second report, she noted that the report followed the methodological approach and timetable proposed for the work on the topic during the current quinquennium, in particular, the treatment of the various issues step by step. On that basis, the report focused on the preliminary questions that needed to be addressed at the outset of the Commission's work and on a set of issues on which the greatest degree of consensus had emerged among members of the Commission.

3. The report was divided into four parts devoted, respectively, to establishing the scope of the topic and of the draft articles; defining the concepts of immunity and jurisdiction; differentiating between immunity *ratione personae* and immunity *ratione materiae*; and identifying the normative elements of immunity *ratione personae*. In each of those parts, there were draft articles of various types. The draft articles on scope (draft articles 1 and 2), the concepts of immunity and jurisdiction and the concepts of immunity *ratione materiae* and immunity *ratione personae* (draft article 3) were introductory in nature. The draft articles on the normative elements of immunity *ratione personae* (draft articles 4, 5 and 6) embodied elements whose purpose was to establish the legal regime applicable to that category of immunity. They were accordingly set forth in Part Two of the draft articles, which dealt with immunity *ratione personae*. Draft article 3 (Definitions) would be supplemented with new definitions as the Commission's work progressed. She noted that, for the time being, she had not included a draft article on exceptions, which would all be addressed jointly at a later stage. If, at that point, it was decided to include a provision on exceptions to immunity *ratione personae*, it would be included in Part Two of the draft articles.

4. She also wished to make two points of a general nature. First, she had opted in her second report to continue, on a provisional basis, to use the term "*funcionario*" in Spanish, as the Commission had been doing so far. However, she recalled that that term and the ones used in English ("official") and French ("*représentant*") were not equivalents and therefore called for further consideration. In 2014, the Commission would have to take up the definition of the term, and, depending on the results, its use might have to be reviewed at some time in the future. Similarly, the title of the topic and of the draft articles might have to be reviewed to ensure consistency between the English, French and Spanish versions.

5. The second general point related to the treatment given in the second report to practice and the literature. Since the report took full account of the valuable information contained in the reports of the previous Special Rapporteur[29] and the memorandum by the Secretariat,[30] she had not thought it necessary to reproduce that information in the report. Instead, in order to make the report more readable and clear, she had chosen to consign all that information to footnotes. That had allowed for a new, systematic structuring of the report, unencumbered by tedious and unnecessary repetition of sufficiently well-known and still-valid information. References to new practice and to earlier practice and codification had been included in the body of the report only when absolutely necessary.

6. Having made those general points, she turned to the draft articles contained in the second report.

7. Draft articles 1 and 2 delimited the scope of the text. Draft article 1 defined the scope in positive terms and was to be read together with draft article 3, subparagraphs (*a*) and (*b*). Draft article 2 listed the situations in which, even where a foreign official enjoyed criminal immunity, such immunity was subject to a special regime or had been granted by a State unilaterally, in the absence of any international legal rule compelling it to do so. It was a clause on exceptions referring to the various special cases of immunity that were to be found in practice. The two aspects of the scope of the draft articles, inclusive and exclusive, positive and negative, had been presented in two separate draft articles, primarily for the sake of clarity. Draft articles 1 and 2 resulted from the application of the following criteria: (*a*) the draft articles dealt only with criminal jurisdiction, not civil or administrative jurisdiction; (*b*) they dealt only with foreign jurisdiction, not jurisdiction exercised by the official's own State of nationality; (*c*) they dealt only with domestic criminal jurisdiction, not international criminal jurisdiction; (*d*) they dealt only with the general regime of immunity

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[26] Mimeographed; available from the Commission's website.

[27] Reproduced in *Yearbook … 2013*, vol. II (Part One).

[28] Mimeographed; available from the Commission's website.

[29] *Yearbook … 2008*, vol. II (Part One), document A/CN.4/601 (preliminary report); *Yearbook … 2010*, vol. II (Part One), document A/CN.4/631 (second report); and *Yearbook … 2011*, vol. II (Part One), document A/CN.4/646 (third report).

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

from foreign criminal jurisdiction, not special immunity regimes; and (*e*) they dealt only with the immunity of State officials from foreign criminal jurisdiction.

8. Draft article 3 contained the definitions that were deemed necessary for the purposes of the present draft articles. In her second report, she had incorporated two sets of definitions concerning the concepts of jurisdiction and immunity, on the one hand, and immunity *ratione personae* and immunity *ratione materiae*, on the other.

9. With regard to the concepts of jurisdiction and immunity, she noted that those two categories were not usually defined in the various international instruments that dealt with immunity, even though successive Special Rapporteurs on the topic of immunity had proposed definitions for both concepts. However, a definition of those terms would be especially useful in the present topic owing to the diversity of the acts intrinsic to the exercise of criminal jurisdiction and the special nature of immunity from criminal jurisdiction as applying to a specific individual (an official).

10. She pointed out that the proposed definitions of immunity and criminal jurisdiction were intrinsically interrelated, since it was meaningless to speak of immunity from jurisdiction in the absence of the jurisdiction whose exercise was to be precluded. The aim of immunity was to prevent an official from being subjected to any action intended to establish his or her criminal responsibility before a foreign court. Jurisdiction was to be understood as all of the forms of jurisdiction, processes, procedures and acts that would normally come into play in order to establish such responsibility under the applicable law of the State that had jurisdiction. She pointed out that both definitions had been formulated with reference to the proceedings of national courts, since it was ultimately they that were empowered to establish criminal responsibility. However, she noted that the concepts of jurisdiction and immunity were not limited to judicial proceedings but also included acts and procedures that were needed to establish an individual's criminal responsibility and that were not, strictly speaking, judicial acts. The concepts of immunity and jurisdiction would be supplemented at a later stage with a list of specific acts to which immunity applied. She also noted that, for the purposes of the present draft articles, the basis or nexus of the competence of national courts to exercise jurisdiction was irrelevant.

11. With regard to the difference between immunity *ratione personae* and immunity *ratione materiae*, she pointed out that it was one of the few aspects of the present topic on which there was broad consensus. Although both categories had the same purpose and a clear functional basis, it was possible to identify significant differences between them which must be spelled out in the present draft articles. Immunity *ratione personae*: (*a*) was granted only to certain State officials who played a prominent role in that State and who, by virtue of their functions, represented it in international relations automatically under the rules of international law; (*b*) applied to all acts, whether private or official, that were performed by the representatives of a State; and (*c*) was clearly temporary in nature and was limited to the term of office of the person who enjoyed immunity. Immunity *ratione materiae*, on the other hand: (*a*) was granted to all State officials; (*b*) was granted only in respect of acts that could be characterized as "official acts"; and (*c*) was not time-limited, since immunity *ratione materiae* continued even after the person who enjoyed such immunity had left office. The definitions provided in draft article 3, subparagraphs (*c*) and (*d*), corresponded to those criteria and placed special emphasis on the distinction between the persons who were protected and the functions and acts that they performed. Although it was unusual to find explicit definitions of immunity *ratione personae* and immunity *ratione materiae* in legal instruments, whether international or national, she noted that it would be useful to include such definitions in the present draft articles, especially since they might be relevant in identifying the applicable legal regime for each of those categories of immunity.

12. Draft article 4, the first of those included in Part Two of the draft articles in which immunity *ratione personae* was addressed, identified the persons who enjoyed such immunity as Heads of State, Heads of Government and Ministers for Foreign Affairs. The choice of those three categories of officials had been made on the basis of the functions the officials performed by virtue of the rules and principles of international law that empowered them to represent a State in general terms and automatically in the main fields of international law. Although she recognized that other high-level State officials were participating more frequently in international relations, such "international activity" was carried out on the basis of unilateral and internal decisions of the State in which they performed certain functions, and it was not possible to identify rules or principles of international law that conferred on officials other than the "troika" a function identical, or even similar, to that accorded by international law to Heads of State, Heads of Government and Ministers for Foreign Affairs. For that reason, she stated that to grant those other high-level officials a form of immunity *ratione personae* that was identical or similar to that enjoyed by the members of the troika would constitute an unwarranted extension that did not have a legal basis in contemporary international law. Furthermore, she noted that the immunity of other senior State officials could be governed by other rules, such as the separate regime that applied to special missions. Lastly, she drew attention to the fact that any proposal to grant a general immunity *ratione personae* to other senior State officials would be a proposal *de lege ferenda*.

13. With regard to draft article 5, she said that it reflected a position undisputed in the literature and in practice, as well as in case law: immunity *ratione personae* applied to all acts, both private and official, performed by persons who enjoyed this immunity. Paragraph 2 of the draft article added a temporal aspect to that assertion with reference to the time period in which the acts were carried out; it made it clear that no act performed by a former Head of State, Head of Government or Minister for Foreign Affairs was covered by immunity *ratione personae*. She noted that draft article 5, paragraph 2, should be distinguished clearly from draft article 6, paragraph 2, which took the temporal aspect into account in establishing when immunity *ratione personae* could be invoked, irrespective of when the acts had been performed. Lastly, she drew attention to the fact that the description of immunity

ratione personae as "full" immunity had no implications whatsoever in respect of exceptions to immunity, which would be addressed at a later stage.

14. Draft article 6 delimited the temporal scope of immunity *ratione personae* and differentiated it in that respect from immunity *ratione materiae*. She noted that, although there was broad consensus regarding the assertion that immunity *ratione personae* applied only while the person who enjoyed it held office, terminological ambiguity still persisted in some cases, given the frequent use of the expression "residual immunity", in other words, the assertion that immunity extended beyond the term of office of the person who enjoyed it in respect of official acts performed by them while in office. In her view, such an assertion was ambiguous and created confusion about the nature of the immunity that applied. Furthermore, it was methodologically incompatible with the very notion of immunity *ratione personae*—an immunity that, because it was full immunity, excluded any categorization of the acts in respect of which it applied, since it was irrelevant whether those acts were private or official. In the case of immunity *ratione materiae*, on the other hand, the categorization of the acts as "official" was indeed relevant. Accordingly, immunity in respect of official acts carried out by a member of the troika during his or her term of office but invoked after the person had left office, and which had to be characterized as official acts in order to produce effects, must be regarded as immunity *ratione materiae*. Those were the issues that were addressed in draft article 6, paragraph 2.

15. Mr. MURASE said that the report ignored the most essential aspect of immunity, namely the nature of the crimes that should be covered. From the outset, the Commission had had in mind the most serious crimes such as genocide, war crimes and crimes against humanity. However, in draft article 3, it had been given merely crimes and misdemeanours. International crimes should be addressed, not as exceptions to immunity and at a later stage in its work, but rather as the general rule and at the outset.

16. The Special Rapporteur stated in paragraph 41 of her report that she considered the legal nature of immunity to be purely procedural: in other words, it pertained to secondary, not primary, rules. Yet the Commission had always viewed immunity from the substantive perspective as well. That difference in perspective had a bearing on the Special Rapporteur's definitions of immunity *ratione personae* and immunity *ratione materiae*, which showed some confusion in her understanding of the relationship between them. According to draft article 3, immunity *ratione materiae* was limited to acts performed in the exercise of official functions or "official acts", but in his own view, that was merely a subsidiary element of immunity *ratione personae*. The essential aspect of the concept of immunity *ratione materiae* was the crime itself, to which there was no reference in the definition.

17. He strongly disagreed with any suggestion that members of the troika should enjoy absolute immunity, especially if they had committed serious core crimes. The Commission would be severely criticized by the international community if it tried to widen the impunity gap by protecting dictators. It should not try to establish a regime diametrically opposed to the regime under the Rome Statute of the International Criminal Court. It should also be consistent with its past work, particularly article 7 of the draft Code of Crimes against the Peace and Security of Mankind adopted by the Commission at its forty-eighth session.[31] The judgments of the International Court of Justice on which the Special Rapporteur based her arguments were binding only on the parties and were limited to the particular cases.

18. He agreed with the Special Rapporteur that diplomatic agents and consular officials should be excluded from the scope of the exercise, but what about military personnel? He wondered whether *de facto* Heads of State might be included in the troika.

19. Lastly, he regretted that the report did not reflect developments in international law or the debates of the Commission, and would therefore be hesitant about sending the draft articles to the Drafting Committee.

20. Mr. TLADI said that the International Court of Justice, as the principle judicial organ of the United Nations, was endowed with unmatched authority. However, its primary mandate was the resolution of disputes between parties, and its rulings were binding only upon the parties. Even when the Court had ruled on an issue, therefore, the Commission had to conduct its own independent assessment of the relevant State practice.

21. Turning to the draft articles, he said that the overly generous formulation of the subjective scope of immunity *ratione personae* might be acceptable, provided that the material aspects sufficiently took into account the need to limit immunity, in view of the fight against impunity. On the whole, he endorsed draft articles 1 and 2 and supported sending them to the Drafting Committee, where they might be reworked using normative treaty language and where draft article 2 might be streamlined.

22. He questioned whether it was necessary to include all of the definitions contained in draft article 3. The definitions of "criminal jurisdiction" and "immunity from foreign criminal jurisdiction" were incongruent, as the former was given an expansive meaning while the latter appeared to be limited to the actions of "courts and judges". He wondered what the definition in draft article 3 (*a*) had been based on, as no source had been identified in the report. He would recommend deletion of draft article 3 (*a*) and (*b*). The definition of immunity *ratione personae* could be interpreted as applying to any number of officials; it should be narrowed to indicate that it applied to a distinct category of officials. Draft article 3 should be held in abeyance until the end of the work on the text.

23. The provision that he found most difficult was draft article 4. In terms of drafting, it was a statement of fact and not a normative statement. There was nothing in the language to suggest that immunity *ratione personae* applied only to the persons mentioned. In terms of substance, he maintained the view that immunity *ratione*

[31] *Yearbook … 1996*, vol. II (Part Two), pp. 17 *et seq*., in particular pp. 26–27.

personae should be extended only to Heads of State and possibly Heads of Government. He was troubled by the absence of State practice to support the conclusion in paragraph 58 of the report that the granting of immunity *ratione personae* to Heads of State, Heads of Government and Ministers for Foreign Affairs was established practice. Although the Special Rapporteur conceded that such immunity had originally been limited to Heads of State and had subsequently been extended to Heads of Government, she also suggested that its extension to Ministers for Foreign Affairs was not in doubt in the light of the judgment of the International Court of Justice in the case concerning the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*.

24. He questioned the assertion (para. 59) that granting immunity *ratione personae* to Heads of State, Heads of Government and Ministers for Foreign Affairs was necessary because their functions included representing the State in international relations. First, that was a policy consideration and not a legal argument. Second, there was no *a priori* reason why representational status should imply only immunity *ratione personae* and not immunity *ratione materiae*. Third, if immunity *ratione personae* had to be accorded to the troika because of its representative function, he wondered why the Special Rapporteur was reluctant to see it extended to other officials who might play a similar role (para. 60).

25. It was an area that had not been sufficiently developed in the practice of States and was thus fit for progressive development. That process should take into account not only the fight against impunity, but also the general trend of the Commission's work. In both its draft articles on jurisdictional immunities of States and their property[32] and the draft Code of Crimes against the Peace and Security of Mankind,[33] the Commission had been reluctant to place the immunities of Ministers for Foreign Affairs on the same footing as those of Heads of State.

26. However, to help the Commission move forward, he was prepared to accept, as a matter of developing the law, the extension of immunity *ratione personae* to Ministers for Foreign Affairs on the basis that the reasoning in the *Arrest Warrant* judgment had not been rejected by States and provided that the extension was subject to some exceptions. It was difficult to accept the principle contained in draft article 4 before seeing the possible exceptions, however. He therefore could not endorse the Special Rapporteur's suggestion that the issue might be considered separately from the other draft articles and could not support the referral of draft article 4 to the Drafting Committee, although he would not stand in the way of consensus.

27. He supported the principles set forth in draft articles 5 and 6 and their referral to the Drafting Committee. However, draft article 6, paragraph 1, did not clearly reflect what he believed the Special Rapporteur wished to convey, namely that immunity *ratione personae* could not be invoked after the expiration of the term of office, even for acts committed while in office; the paragraph might need some redrafting. Moreover, in view of the Commission's debate during the previous session on the implications of the *Arrest Warrant* case judgment, he considered that further analysis of the judgment and the joint separate opinion of Judges Higgins, Kooijmans and Buergenthal would be useful.

28. Mr. PETER said that the topic was followed closely in Africa, where some State officials had been arrested under the Rome Statute of the International Criminal Court and the principle of universal jurisdiction.

29. Concerning the draft articles, he suggested that the "without prejudice" clause should not be used at the beginning of draft article 1, in order not to set a negative tone. Regarding draft article 4, more research was needed to justify the inclusion of Ministers for Foreign Affairs, to the exclusion of other government officials. Regarding draft article 5, paragraph 1, he questioned the appropriateness of the words "prior to or", implying that State officials would enjoy immunity for past offences.

The meeting rose at 11.45 a.m.

3165th MEETING

Thursday, 16 May 2013, at 10.05 a.m.

Chairperson: Mr. Bernd H. NIEHAUS

Present: Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Gevorgian, Mr. Gómez Robledo, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Ms. Jacobsson, Mr. Kamto, Mr. Laraba, Mr. Murphy, Mr. Nolte, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

Immunity of State officials from foreign criminal jurisdiction (*continued*) (A/CN.4/657, sect. C, A/CN.4/661, A/CN.4/L.814)

[Agenda item 5]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRPERSON invited members of the Commission to resume their consideration of the second report of the Special Rapporteur on immunity of State officials from foreign criminal jurisdiction (A/CN.4/661).

2. Mr. CAFLISCH said that he would like to start with a few comments on terminology. It would be preferable to replace the term "acts" with "conduct", since the reference in some instances was not to acts but to failure to act. Similarly, a more neutral term than "official"—perhaps "agent"—would be preferable, since all persons who acted on behalf of a State and who performed State functions were

[32] *Yearbook … 1991*, vol. II (Part Two), para. 28.

[33] See footnote 31 above.