

Document:-
A/CN.4/3166

Summary record of the 3166th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
2013, vol. I

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Special Rapporteur's efforts to define the concepts of immunity and jurisdiction in draft article 3. One of the not insignificant contributions the Commission could make was in defining, wherever necessary, the terms that it used in order to foster a better understanding of the law. Nevertheless, each definition should be supported by an analysis of the relevant international conventions, case law and scholarly writings. The Special Rapporteur had not taken the latter sufficiently into account, and she could also have relied more on authoritative legal dictionaries. As a result, the definitions she proposed were not sufficiently well focused, their wording was somewhat cumbersome and they showed a tendency towards circular reasoning—indeed, some of the underlying reasoning was debatable. For example, it was hard to see why she insisted on the idea that criminal jurisdiction existed prior to immunity from criminal jurisdiction, when immunity actually appeared to exist *per se*, independently from criminal jurisdiction.

15. He shared the view expressed by Mr. Murase at the previous meeting that the definition of immunity from foreign criminal jurisdiction given in paragraph 45 (c) of the report might result in the exclusion of one whole aspect of the topic, namely immunity for international crimes. The topic of immunity could not be dealt with from the procedural standpoint alone, ignoring the consequences of the obligation to combat impunity. The precedents on that matter, both national and international, were far from perfectly clear and called for an in-depth analysis that was lacking in the report. A rapid survey of national practice showed the disparities that existed. For example, according to a study of civil liability in the United States published in the *Netherlands International Law Review*, foreign States could successfully invoke the immunity granted to their representatives or agents who were accused of international crimes.³⁶ On the other hand, in other jurisdictions, specifically the Netherlands and Spain, the commission of very serious international crimes was not assimilated to the duties of the Head of State, and the immunity argument was not valid where such crimes were concerned. As for international case law, it, too, did not always point in the same direction. Thus, in the *Blaškić* case in 1997, the International Tribunal for the Former Yugoslavia had clearly stated that functional immunity, which the Special Rapporteur termed immunity *ratione materiae*, did not apply to international crimes, although a chamber of that Tribunal had taken a much more reserved position in the *Krstić* case in 2003.

16. Although it was too early to draw final conclusions from that rapid overview, one could justifiably assert that there was currently a trend in international law towards recognizing individual responsibility for international crimes, independently of whether their perpetrators had the status of State official. Such immunity, which lasted as long as the person held office, did not cover acts performed prior to taking office, in contrast to what the Special Rapporteur suggested in draft article 5, paragraph 1. Immunity protected the State official in that capacity, but did not exonerate him or her of responsibility;

instead of erasing the offence by ruling out any possibility of prosecution, it merely deferred prosecution. In short, he felt that further consideration was required for draft article 4. While the Head of State, Head of Government and Minister for Foreign Affairs certainly enjoyed immunity from foreign criminal jurisdiction, it was an open question whether other State officials should be entitled to immunity. As to whether immunity from foreign criminal jurisdiction should be valid with respect to international crimes, the question must be dealt with now, probably in draft article 5. Lastly, the temporal factor must be clarified by clearly indicating that the expiration of immunity *ratione materiae* opened the door to foreign criminal jurisdiction for the most serious crimes committed before, during and, *a fortiori*, after an official's term of office.

17. In view of what he had just said, he was in favour of referring draft articles 1 and 2 to the Drafting Committee but thought it would be premature to do so for draft articles 3 to 6.

The meeting rose at 11.30 a.m.

3166th MEETING

Friday, 17 May 2013, at 10 a.m.

Chairperson: Mr. Bernd H. NIEHAUS

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

Organization of the work of the session (*continued*)*

[Agenda item 1]

1. The CHAIRPERSON drew attention to the programme of work for the next two weeks of the session.
2. Ms. ESCOBAR HERNÁNDEZ, Mr. NOLTE, Mr. CANDIOTI and Sir Michael WOOD proposed amendments to enable the Drafting Committee to complete its work on time.
3. The CHAIRPERSON said he took it that the Commission wished to adopt the proposed programme of work, as amended.

It was so decided.

³⁶ R. van Alebeek, "National courts, international crimes and the functional immunity of State officials", *Netherlands International Law Review*, vol. 59, No. 1 (2012), pp. 5–41, at p. 8.

* Resumed from the 3163rd meeting.

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)

4. Mr. MURPHY said that in future reports, the Special Rapporteur should provide a more detailed analysis of State practice and case law in support of her conclusions. The Commission itself must be clear about its general methodology in simultaneously engaging in codification and progressive development. It should pay rigorous attention to *lex lata* in the first instance. If the law was relatively well established, the Commission should codify it; if it was not, but it appeared to be supportive of a particular rule, the Commission should articulate the rule, as a matter of progressive development.

5. With respect to draft article 1, he suggested deleting the superfluous word “certain”. As to draft article 2, he agreed with other speakers that if other areas of immunity were to be identified, it would be appropriate to expressly mention immunities relating to the status of military forces. Other drafting points to be addressed were why the word “criminal” preceded “immunities” in paragraph 1 (a) and (b) but not in 1 (c) and (d) and whether the words “*ad hoc*” were necessary in paragraph 1 (c).

6. With regard to draft article 3, it would be useful to know whether the definitions had their origins in existing treaties on international criminal law and, if so, what those origins were, in order to see how they had operated in other contexts. If the definitions had simply been developed by the Special Rapporteur, it was fair to ask whether some of them were actually needed. The question of whether the phrase “all of the forms of jurisdiction” in draft article 3 (a) encompassed extradition proceedings should be expressly addressed. With respect to draft article 3 (b), he joined other speakers in asking why “Immunity from foreign criminal jurisdiction” was limited to the exercise of jurisdiction by “judges and courts”, when immunity from compulsory acts by police, investigators and prosecutors was also relevant. Did the “criminal jurisdiction” of a State include an order from that State compelling testimony by an official who was not a party in a case? Article 3 (b) did not read well in comparison with article 3 (a) and with the breadth of conduct, including “executive acts”, described in paragraph 38 of the report.

7. The second half of the definition in draft article 3 (c) was potentially confusing and unnecessary. In draft article 3 (d), the phrase “perform in the discharge of their mandate” was unclear—did it suggest that illegal or irregular acts were not subject to immunity? The definition of immunity *ratione materiae* in that paragraph should not be sent to the Drafting Committee.

8. Noting that draft article 4 presented the most important aspect of the topic by identifying the troika of persons entitled to immunity *ratione personae*, he agreed with other members that the Special Rapporteur failed to discuss fully the relevant practice. The analysis focused primarily on the judgment of the International Court of

Justice in the *Arrest Warrant* case, which was important in that it had been informed by extensive pleadings regarding existing State practice. The analysis also focused on the distinctiveness of the troika in international relations, yet some relevant treaty regimes did not see the troika as distinctive. The most obvious example was the United Nations Convention on Jurisdictional Immunities of States and Their Property, which safeguarded the immunities accorded to Heads of State *ratione personae* but did not mention Heads of Government, Ministers for Foreign Affairs or other State officials. To convincingly advance the proposition set forth in draft article 4, the Special Rapporteur should have provided a thorough analysis of relevant national court cases. Such an analysis would begin with the Secretariat’s 2008 memorandum³⁷ and then consider in detail cases since 2008.

9. There appeared to be a consensus in the Commission that both Heads of State and Heads of Government enjoyed immunity *ratione personae*, but opinions differed on Ministers for Foreign Affairs. The dissenting opinions of some of the judges in the *Arrest Warrant* case and some of the academic literature supported the view that Ministers for Foreign Affairs should be denied such immunity. Yet the majority in the *Arrest Warrant* case had found that the Minister for Foreign Affairs of the Democratic Republic of the Congo was immune from the arrest warrant issued by Belgium. He himself was not aware of any national court case in which a sitting Minister for Foreign Affairs had been denied such immunity. It appeared that sitting Heads of State, Heads of Government and Ministers for Foreign Affairs were simply not prosecuted in national courts: that led many States and scholars to take the position that immunity *ratione personae* was enjoyed by all the members of the troika.

10. As for other senior officials, a review of national court cases revealed that many national courts declined to extend immunity *ratione personae* beyond the troika. He cited cases in Italy, the United Kingdom and the United States as examples. On the other hand, a few national courts had recognized immunity *ratione personae* as going beyond the troika, although that was often asserted as *dicta*. Cases in France, Switzerland and the United Kingdom could be adduced in support of that point. He himself thought that the overall practice of States supported the proposition that immunity *ratione personae* was enjoyed solely by the troika. He endorsed the substantive proposition set forth in draft article 4, but if the intention was that only the troika should be entitled to immunity, then the word “only” should be inserted in the text.

11. Consideration should be given to whether immunity *ratione personae* should extend to the family members or entourage of the individual entitled to immunity *ratione personae*. Examples of national statutes granting such immunity had been provided in the memorandum by the Secretariat on the topic. The Commission could discuss in due course, and even after agreement was reached on draft article 4, whether contemporary practice demonstrated that there were exceptions to immunity *ratione personae*.

³⁷ A/CN.4/596 and Corr.1 (mimeographed; available from the Commission’s website, documents of the sixtieth session).

One such exception might be the waiver of immunity by the official's State. When considering the issue of exceptions, the Special Rapporteur should rigorously assess the relevance of the *Arrest Warrant* case and other international and national case law. Relevant, too, was the fact that the International Criminal Court had essentially affirmed that immunity *ratione personae* existed with respect to prosecution for serious crimes in national courts, as contrasted with its unavailability with regard to the arrest and surrender to an international criminal tribunal of a person suspected of such crimes. However, the Court did not interpret article 27 of the Rome Statute of the International Criminal Court as having the effect suggested by Mr. Murase.

12. Turning to draft articles 5 and 6, he proposed that the Drafting Committee should consider merging them. If it was decided to retain them as separate draft articles, then consideration should be given to deleting the second paragraph of draft article 5.

13. The reference in draft article 6, paragraph 2, to the enjoyment of immunity *ratione materiae* alone was too narrow and should be reformulated as the enjoyment of "any other available immunity".

14. He would be interested to know the Special Rapporteur's views on what happened with ongoing proceedings if a person moved in or out of a high-level position. If a person was indicted before becoming President, for example, was he or she immune from foreign criminal jurisdiction after becoming President? Conversely, if an official was indicted while serving as President, did he or she remain immune from an indictment after leaving office?

15. With the exception of draft article 3 (*d*), he was in favour of referring the draft articles to the Drafting Committee.

16. Mr. TLADI, referring to Mr. Murphy's remark that he was not aware of a single case in which a Minister for Foreign Affairs had been prosecuted in a national court, said that, while it might be an accurate reflection of reality, the more pertinent question was what to make of that negative practice. One might also ask whether any cases existed in which a national court had declined to exercise jurisdiction over a Minister for Foreign Affairs owing to his or her immunity *ratione personae*. In his view, Mr. Murphy's intervention suggested that there was a need to assess State practice more extensively before submitting draft article 4 to the Drafting Committee. As to whether the Commission had to agree on draft article 4 before discussing whether practice showed that there were exceptions to the rule of immunity *ratione personae*, he pointed out that there seemed to be a dearth of relevant practice, concerning both the enjoyment of immunity *ratione personae* by Ministers for Foreign Affairs and exceptions to immunity, which was a reason for considering the two questions jointly.

17. Mr. HMOUD said that, nevertheless, there were sufficient grounds for considering that *opinio juris* had developed around the entitlement to immunity *ratione personae* of Ministers for Foreign Affairs. He endorsed

the Special Rapporteur's reasoning that members of the troika shared the common feature of representing the State in its international relations, which, in turn, provided the basis for the establishment of a positive rule on immunity. No customary international law existed for granting immunity *ratione personae* to any State official other than those included in the troika.

18. Mr. ŠTURMA said that the decisions of the International Court of Justice furnished answers to specific questions *in concreto*, not general rules. The Commission, on the other hand, had to prepare draft articles on assigned topics *in abstracto*, to draft restatements of general rules. That was all the more important where the case law of the Court and of other international tribunals and national courts was far from uniform.

19. The draft articles must further the objective of granting immunity from foreign criminal jurisdiction to certain State officials in order to safeguard the sovereign equality of States and peaceful relations among them. That objective did not extend to protecting such officials from prosecution for the most serious crimes under international law. While the Special Rapporteur planned to address restrictions on and exceptions to immunity at a later stage, he would welcome a brief reference in the current draft to the concept of crimes under international law, at least in the form of a "without prejudice" clause.

20. He generally endorsed draft articles 1 and 2 but requested clarification as to what was meant in article 2 (*c*) by "Immunities established under other *ad hoc* international treaties".

21. Draft article 3, on definitions, must be viewed as provisional, in order to allow for changes and additions to the definitions over the course of the Commission's debate on the topic. A definition of "official acts" should be added to those set out in draft article 3. He agreed, in principle, with the fundamental distinction drawn between immunity *ratione personae* and immunity *ratione materiae*. The definition of the term "criminal jurisdiction" could benefit from a reformulation that would broaden it sufficiently to cover all measures and procedures necessary for the establishment and enforcement of individual criminal responsibility.

22. Draft articles 4, 5 and 6 constituted an interrelated set of rules on immunity *ratione personae*. On draft article 4, he shared the view that personal immunity was enjoyed by the members of the troika. Although the decisions of the International Court of Justice did not clearly indicate that this constituted an established rule of customary international law, such a rule was at least in the process of formation. After all, the three high-ranking State officials making up the troika were presumed to represent the State in international relations—a presumption that was reflected in article 7 of the 1969 Vienna Convention. Furthermore, the International Court of Justice had not given any precise indication, and national courts had not been consistent in their decisions, about which other officials, if any, enjoyed such immunity. While some national courts recognized that immunity was enjoyed by other officials, that was insufficient grounds for the formulation of a general rule.

23. Draft articles 5 and 6, dealing with the material and temporal scope of immunity *ratione personae*, could be misleading if viewed separately. When read together, however, they added up to a satisfactory description of immunity *ratione personae*: immunity that was procedural in nature did not exclude criminal responsibility and only temporarily excluded the exercise of foreign criminal jurisdiction.

24. Notwithstanding the need to improve the wording of some draft articles, he recommended referring all of them to the Drafting Committee.

25. Mr. FORTEAU said that he agreed with the Special Rapporteur's objective approach, which would enable the Commission to examine the topic with no preconceived notions. It was important not to proceed as if immunity was the rule and prosecution the exception: actually, immunity was an exception that prevented the forum State from exercising its criminal jurisdiction in the normal way. Immunity was likewise an exception in respect of other legal principles such as the right of access to a court and the duty of States to cooperate in halting serious breaches of imperative norms.

26. The numerous references to the link of nationality were problematic. They seemed to imply that a person could not be an official of a State whose nationality he or she did not possess and accordingly could not claim immunity. That was inconsistent with positive law. What counted was not the bond of nationality, but the bond of function which connected the State official to the State. The references to nationality should therefore be deleted in draft articles 3 (c) and 4.

27. On the other hand, it was not unknown for nationality to come into play in certain cases. Under articles 8 and 38 of the Vienna Convention on Diplomatic Relations, diplomats who were nationals or permanent residents of the country in which they served were set apart, including in respect of immunity *ratione personae*. The special situation of such State officials therefore required particular scrutiny.

28. Regarding the scope of the draft articles, he was not sure that immunity before international criminal courts could be completely excluded. A provision should be included to clarify whether and to what extent the customary law on immunity would apply to an individual being prosecuted by the International Criminal Court, for example, in situations when his or her immunity was governed by both the Statute of the Court and customary law.

29. While draft article 1 was welcome in principle, the explanation for the restriction of immunity to "certain" officials, given in paragraph 32 of the report, was unconvincing. The potential beneficiaries of immunity should not be confused with real beneficiaries: any State official could potentially benefit from immunity. State officials must therefore be defined as persons through whom the State acts, and the draft articles should delineate the circumstances in which those officials, or only some of them, enjoyed immunity. It would be advisable, first, to indicate that the draft articles applied to the criminal immunity of State officials, then to define those officials

for the purposes of the draft articles and lastly to specify the officials, the circumstances and the kinds of acts covered by immunity from criminal jurisdiction.

30. Draft article 2 should be converted into a second paragraph of draft article 1 and be formulated as a "without prejudice" clause, because a person's immunity might be governed simultaneously by special rules and by the draft articles. The term "other *ad hoc* international treaties" was by no means clear and should be replaced with a reference to *lex specialis*. It should be specified whether "other immunities granted unilaterally by a State" meant an international unilateral act or the granting of immunity under domestic law.

31. The text of draft article 3 (a) and (b) dealt with such complex definitions and raised so many difficulties that it should be deleted or thoroughly recast. He disagreed with the premise set out in paragraphs 38 and 40 of the report that establishing the State's competence to exercise criminal jurisdiction was a precondition for invoking immunity. The issue of immunity could arise regardless of whether the State which intended to hear the case had the international jurisdiction to do so. Immunity might be all the more necessary if a State claimed criminal jurisdiction that it did not have under international law.

32. The term "jurisdiction" could have several meanings, but in the strictest sense, it meant the power to prosecute. In English, the meaning was broader, encompassing the sovereign powers of the State, and the French term "*jurisdiction*" was not the exact equivalent. The previous Special Rapporteur had subsumed executive and judicial jurisdiction under the notion of criminal jurisdiction, and the current Special Rapporteur appeared to have done likewise. In paragraph 38 of her report, she suggested that the term "jurisdiction" covered the various acts—judicial and executive—in respect of which immunity could be invoked. However, that definition might lead to confusion between immunity from jurisdiction and immunity from enforcement. Paragraph 3 (a) and (b) thus gave rise to doubts as to whether the scope of the draft articles encompassed not only immunity from jurisdiction, but also inviolability and immunity from enforcement.

33. In international instruments and case law, a distinction was generally drawn between immunity from jurisdiction and measures of protection against acts of enforcement. However, rules on immunity from jurisdiction were always accompanied by rules on the related means of enforcement. On that basis, paragraph 3 (a) and (b) could be merged to state quite simply that immunity from criminal jurisdiction encompassed such immunity *per se*, as well as inviolability and immunity from coercive measures in relation to criminal proceedings. That would obviate the need for more precise definitions of "immunity" and "jurisdiction".

34. Definitions of immunity *ratione personae* and *ratione materiae* were certainly needed, but they must remain definitions and not deal with the substance of the respective immunity regimes. Accordingly, the last phrases in draft article 3 (c) and (d) should be deleted. On the other hand, it might be useful to highlight the fact

that immunity *ratione personae* flowed from the person's function, whereas immunity *ratione materiae* was linked to the act committed.

35. His earlier reservations about the idea of drawing up a list of persons enjoying immunity *ratione personae* had been dispelled by paragraphs 59 and 63 of the Special Rapporteur's second report, which made it clear that such immunity had to be restricted to the troika. Draft article 4 therefore seemed balanced and consistent with positive law. As Ghana had suggested at the previous year's Sixth Committee meetings, however, the question did arise as to whether the immunity of members of the troika who held office for life, or who were granted immunity by domestic law, might be tantamount to impunity.³⁸

36. Turning to draft articles 5 and 6, he said that the two paragraphs of draft article 5 appeared to say the same thing, and the first sentence of paragraph 2 could therefore be deleted. Draft article 6, or the commentary thereto, should explain how and when a term of office might be deemed to have expired. In some legal systems, the rules governing immunity allowed for a grace period between the expiry of a term of office and the effective end of immunity. Nevertheless, the Special Rapporteur's idea that immunity ended automatically when the term of office expired seemed perfectly acceptable.

37. He was in favour of referring draft articles 1 to 6 to the Drafting Committee.

38. Mr. KAMTO said that immunity was not just a procedural matter: in response to a claim of immunity, a court must examine the modalities for granting such a claim.

39. The extensive substantive changes being proposed would necessitate a reformulation of the draft articles by the Drafting Committee, a task that normally fell to the Special Rapporteur.

The meeting rose at 11.55 a.m.

3167th MEETING

Tuesday, 21 May 2013, at 10 a.m.

Chairperson: Mr. Bernd H. NIEHAUS

Present: Mr. Caflisch, Mr. Candiotti, Mr. Comissário Afonso, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gevorgian, Mr. Gómez Robledo, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Laraba, Mr. Murase, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, 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 the members of the Commission to resume their consideration of the Special Rapporteur's second report on the immunity of State officials from foreign criminal jurisdiction (A/CN.4/661).

2. Mr. COMISSÁRIO AFONSO congratulated the Special Rapporteur on her clear, well-argued and balanced report. She had taken the right approach to a very important topic. It was certainly necessary to take into account the reports by the previous Special Rapporteur³⁹ and the memorandum by the Secretariat,⁴⁰ which contained numerous examples drawn from State practice, case law and legal writings. The four clusters of issues identified by the Special Rapporteur and the six draft articles which she had proposed evidenced the progress made to date and offered a useful starting point.

3. The topic must indeed be approached from the perspective of both codification and progressive development, but it was perhaps unrealistic to start from the *lex lata* angle before weighing up the advisability of formulating proposals *de lege ferenda*. He looked forward to guidance from the Special Rapporteur on that matter. The Commission could uphold the relevance of immunity while rejecting impunity for the perpetrators of heinous crimes, provided that it took care to fulfil its dual mission of codification and progressive development throughout its work. A thorough analysis of the case law, in particular the *Arrest Warrant* case and *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, might help it to stay on course. The Special Rapporteur had been right to take into account new developments over the previous year, especially the precedents set by the International Court of Justice and domestic courts. The careful examination of State practice, case law and legal writings which the Commission had often undertaken with much success might prove to be of great value in its work on the topic under consideration.

4. Commenting on the draft articles themselves, he proposed that the phrase "Without prejudice to the provisions of draft article 2" at the beginning of draft article 1 should be deleted and that the remainder of that article should be merged with the text of draft article 2. He agreed with draft article 3 *in toto*, although the Drafting Committee would have to decide whether its title should be "Definitions" or "Use of terms", both being acceptable. Although he fully endorsed the wording of draft article 4, he thought the Commission should extend the scope of immunity *ratione personae* in the light of the case law of the International Court of Justice. As an exercise in progressive development, it

³⁹ *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).

⁴⁰ A/CN.4/596 and Corr.1 (mimeographed; available from the Commission's website, documents of the sixtieth session).

³⁸ *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee, 23rd meeting (A/C.6/67/SR.23)*, para. 5.