Document:-
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Summary record of the 3167th meeting

Topic:
Immunity of State officials from foreign criminal jurisdiction

Extract from the Yearbook of the International Law Commission:-
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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. Candioti, 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.

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

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 Rapporteur[39] 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

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[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).

could consider including other ministers or members of government among those who enjoyed such immunity. The beginning of draft article 5, paragraph 2, and paragraph 1 of draft article 6 were very similar. Some clarification was therefore needed. In conclusion, he was in favour of referring all the draft articles to the Drafting Committee.

5. Mr. SABOIA endorsed the Special Rapporteur's cautious approach consisting in a step-by-step examination of a complex, controversial subject. That method would help the Commission to advance towards the goals related to the principles of contemporary international law which had been outlined in the preliminary report—first and foremost, combating the impunity of perpetrators of international crimes—and to examine the extent to which exceptions to immunity were possible. There appeared to be merit in dealing first with preliminary questions such as the draft articles' scope and the definition of the terms employed, notwithstanding the criticism voiced of that method.

6. In view of the explanations provided by the Special Rapporteur in paragraphs 20 to 32 of the report, he supported the referral of draft articles 1 and 2 to the Drafting Committee. Mr. Murphy had proposed that express mention should be made in draft article 2 of treaties concerning military personnel, but that category of instruments could be regarded as being covered in subparagraphs (*c*) and (*d*). He endorsed draft article 3 (*a*), even though he supported proposals to also include acts performed by executive or administrative authorities. The last sentence of the subparagraph, which was somewhat unnecessary, should be placed in the commentary. Draft article 3 (*b*) was also acceptable; the answer to the question whether the adjective "certain" should be retained depended on what was meant by "officials". The term "*représentants*" employed in the French version might be misleading, since not all officials were State representatives. However, the Special Rapporteur had intimated in paragraph 32 of the report that those terms might be subject to subsequent revision. He also concurred with draft article 3 (*c*), where the phrase "which directly and automatically assigns them the function of representing the State in its international relations" was of particular significance, since it had a direct bearing on the subjective scope of immunity *ratione personae*. He likewise subscribed to draft article 4, which established that the latter kind of immunity was reserved for the members of the troika. He agreed with draft article 5—even if the use of the words "prior to" in paragraph 1 required more in-depth examination—and with draft article 6. He was in favour of referring all the draft articles to the Drafting Committee.

7. Mr. WISNUMURTI said that the six draft articles proposed by the Special Rapporteur attested to the substantial progress made in the work on the topic under consideration. Delegates in the Sixth Committee had approved of the general direction of the work and had endorsed the idea of a dual methodological approach combining codification and progressive development. In view of the disagreements that remained on some issues, he agreed with the Special Rapporteur's decision to begin with an examination of various aspects of the rules governing immunity *ratione personae* before moving on to the more sensitive, complex matter of exceptions to immunity. Draft articles 1 and 2, on the scope of the draft articles, were closely related and should be merged. Draft article 1 did not pose any particular problems: it faithfully reflected the consensus within the Commission and the Sixth Committee, but it should not begin with a "without prejudice" clause. While it was necessary clearly to delimit the scope of the draft articles, making a list of immunities which were excluded was not, perhaps, the best method. The scope of a treaty was rarely defined by a negative list, which would be better placed in the commentary to the draft article.

8. He remained unconvinced by the Special Rapporteur's arguments in favour of a draft article defining the terminology employed. In any event, the definition of "criminal jurisdiction" in draft article 3 (*a*) was rather cumbersome. More importantly, it did not capture the meaning or essence of the term in question and was at odds with the Special Rapporteur's intentions as set forth in paragraph 41 of the report. Draft article 3 (*b*), which contained the definition of "immunity from foreign criminal jurisdiction", did not call for any particular comments; however, it should also cover the police and other law enforcement officers who had to deal with claims to immunity presented by foreign officials at an early stage of proceedings. The definitions of immunity *ratione personae* in draft article 3 (*c*) and of immunity *ratione materiae* in draft article 3 (*d*) had been extensively discussed and called for no special comments.

9. He fully approved of draft article 4, stipulating that immunity *ratione personae* was reserved for the members of the troika, a position which reflected customary international law. As the Special Rapporteur stated in paragraph 63 of the report, extending immunity *ratione personae* to other senior officials would amount to giving them the direct, automatic function of representing the State in international relations, a function accorded only to the members of the troika. Generally speaking, draft article 5 did not pose any particular problems, even though the words "prior to" in paragraph 1 were not quite appropriate. The Special Rapporteur should explain what was meant in paragraph 2 by the "other forms of immunity" that might be enjoyed by former Heads of State, Heads of Government and Ministers for Foreign Affairs after they had left office. Draft articles 5 and 6 should be merged. He was in favour of referring the six proposed draft articles to the Drafting Committee.

10. Mr. PARK said that the Commission had to safeguard two conflicting interests: the need to protect State sovereignty and the inviolability of persons holding State office, on the one hand, and the need to punish the perpetrators of international crimes, based on dramatic changes in international law and the international community, on the other. He concurred with the Special Rapporteur's two-stage approach consisting in first analysing *lex lata* before formulating proposals *de lege ferenda*. He was also a proponent of maintaining the distinction between immunity *ratione materiae* and immunity *ratione personae* and, in principle, of restricting the latter to the troika.

11. The topic covered immunity from foreign criminal jurisdiction but excluded international criminal jurisdiction. The question remained whether two kinds of

special tribunals also lay outside the scope of the topic, namely mixed or hybrid courts, such as the Special Court for Sierra Leone, and courts set up under domestic law to deal with international crimes, such as the International Crimes Tribunal in Bangladesh or the War Crimes Chamber of the Court of Bosnia and Herzegovina.

12. While there might be no need to define all the notions covered in the draft articles, as the Special Rapporteur had scrupulously done, the term "official" ("*représentant*", "*fonctionnaire*") had to be clarified at the earliest opportunity, for it could mean different things depending on language and country. Another moot point was whether the link of nationality was indispensable to the enjoyment of immunity by a State official; one question which arose in that respect was whether the Vienna Convention on Diplomatic Relations, which did not extend diplomatic immunity to a national of the receiving State, applied *mutatis mutandis* to a person representing a State of which he or she was not a national.

13. In draft article 1, the reference to the immunity of "certain" State officials rendered the scope somewhat vague. In draft article 2, the affirmative statement that some types of immunity were outside the scope of the draft articles would be preferable to stating that they were "not included". The term "protection" in draft article 3 (*b*) should be spelled out or simply be replaced to convey, for example, the idea that immunity from foreign criminal jurisdiction was a "mechanism under international law that prevented" [the exercise of criminal jurisdiction by the judges and courts of another State]. Draft article 4 must take account of the fact that the status of a State official under national law was not sufficient for purposes of immunity *ratione personae* and that there could be *de facto* leaders, as one member of the Commission had pointed out. In draft article 5, it would be useful to clarify—for example by means of a saving clause—that immunity *ratione personae* remains likely to incur exceptions. In draft article 6, account must be taken of the fact that time might elapse between the expiry of a term of office and the cessation of immunity, including when an extension became necessary.

14. Mr. PETRIČ pointed out that the aim of the Commission's work on the topic under consideration was not only to reaffirm and codify the existing immunity of State officials under customary international law, but also to ascertain the limitations on immunity based on emerging State practice, even if the latter was insufficient to turn such limitations into customary rules. That was why it was inadvisable to tackle the codification and progressive development of the law separately. The two approaches had to proceed simultaneously, starting from the stage at which definitions were established. It was plain from developments in law, judicial precedent and practice that there should be no immunity for certain crimes. Such limitations formed an integral part of the contemporary understanding of immunity and, for that reason, they must not be treated as exceptions, even if they concerned only a narrow circle of international crimes. That in no way detracted from the essential nature of immunity as a manifestation of State sovereignty and guarantor of harmonious relations between States. As several members had already said, in order to prove the existence of a rule of customary international law, State practice had to be established *in concreto*.

15. With regard to draft article 1, he believed that it was unusual to begin an international instrument with a "without prejudice" clause. Like a number of other members, he thought that the reference to "certain" State officials was inappropriate because the draft articles covered both immunity *ratione personae* and immunity *ratione materiae*. Draft article 2 (*c*), which excluded immunities established under *ad hoc* international treaties from the scope of the draft articles, posed a problem, for once the draft articles became an integral part of international law it was rather unlikely that a State would be able to grant immunity for crimes covered by an exception to immunity. It would be preferable to examine the types of immunity which were not covered at the same time as exceptions to immunity. The two first draft articles could nonetheless be referred to the Drafting Committee if the majority of members so wished. The same was true of draft articles 5 and 6.

16. Draft article 3, however, lacked some important components. Several elements of the definitions that it contained depended on the important decisions to be taken about exceptions to immunity. In particular, as had just been seen, the contemporary definition of immunity from foreign criminal jurisdiction must include the definition of exceptions to that immunity. For subparagraph (*a*), it had to be borne in mind that omission could constitute a criminal act. In subparagraph (*b*), was it really the Commission's intention to speak of "protection"? Was not the purpose of immunity more that of "precluding" the exercise of foreign criminal jurisdiction, as the report suggested?

17. More thought also had to be given to draft article 4. There was not enough State practice to prove that the troika's immunity *ratione personae* was already a rule of customary international law. Nor was that immunity confirmed by the role played by members of the troika in international relations. Other State officials had a similar role, and Heads of State were not the officials who travelled the most frequently. In the *Arrest Warrant* case, the International Court of Justice had left the door open, and the Commission did not have sufficient reason to close it by restricting immunity *ratione personae* to the troika.

18. Sir Michael WOOD remarked that the previous Special Rapporteur's reports and the memorandum by the Secretariat, to which the Special Rapporteur made frequent reference in her report, were now rather dated. It was necessary to take account of more recent State practice, case law and legal writings as well as the cases mentioned by Mr. Kamto, Mr. Murphy and other members. It would not be helpful to approach the topic by referring to some imagined "system of values and principles of contemporary international law", as that might lead to an unproductive dialogue. Generally speaking, it would be wise to avoid vague and subjective notions, such as those encountered in paragraphs 7 (*c*) and 17 of the report, as well as hazy references to "trends" which often existed only in the eye of the beholder. In any event, he was pleased to note that the Special Rapporteur did not consider it necessary to consider such issues "at this

time", as she made clear in paragraph 17 of her report. He was also in favour of the methodological approach outlined in paragraphs 7 (*b*) and 10.

19. He agreed that the scope of the topic and of the draft articles should be limited to immunity from criminal jurisdiction, which he supposed encompassed the inviolability of the person. The scope should be limited to specifically foreign criminal jurisdiction, to the exclusion of immunity before international courts or tribunals. As Mr. Forteau had suggested, it might be necessary to examine the manner in which the "common law of immunities" or the "general law of immunities" applied to actions by States in connection with international courts, although as Mr. Murphy had pointed out, some interesting and not uncontroversial case law already existed in that respect. The Commission would have to be cautious about taking account of immunity before international criminal courts and tribunals: the Special Rapporteur herself seemed to indicate as much in paragraph 30 of her report. The law and practice of international criminal courts and tribunals was unique to them and the considerations at play were quite different. He endorsed the comments made by Mr. Huang and Mr. Wisnumurti in that respect. Like Mr. Murase, Mr. Murphy and others, he believed that the Commission should expressly state that the draft articles did not apply to military personnel. He also agreed with Mr. Forteau that an official's nationality was immaterial. On the other hand, further thought should be given to the question of whether nationality might have a bearing on the scope of immunity in the State of nationality.

20. As to the chapter of the report on the concepts of immunity and jurisdiction, it might not be necessary, or even desirable, to include definitions of "criminal jurisdiction" and "immunity from criminal jurisdiction". Generally speaking, it was premature to consider elaborate definitions at the current stage of work, especially since, as paragraph 43 of the report noted, the notions of jurisdiction and immunity were not defined in the international instruments which had already emerged from the Commission's work. As to the following chapter, while he agreed with the distinction drawn between immunity *ratione personae* and immunity *ratione materiae*, he was not sure that the Special Rapporteur was doing justice to it when she said in paragraph 48 of her report that those two types of immunity did not have the same basis and purpose.

21. Turning to the chapter entitled "Immunity *ratione personae*: normative elements", and beginning with paragraphs 56 to 68, he said he agreed with the Special Rapporteur's arguments in paragraphs 58 and 66. Unlike Mr. Tladi, he did not think that the Special Rapporteur's proposed formulation was "overly generous", and he disagreed with Mr. Forteau's assertion that it was necessary to address the phenomenon of persons who held the office of Head of State for life, which was usually the position only in monarchies. The commentary should, however, cover the situation of heirs to the throne and Heads of State-elect.

22. For the reasons already given by Mr. Huang and Mr. Kamto, among others, he was not persuaded by the Special Rapporteur's treatment of the question of which high-ranking officials, other than the troika, might benefit from immunity *ratione personae*. She seemed to depart, without any real explanation, from the opinion of the International Court of Justice in the *Arrest Warrant* case that State officials other than the members of the troika might also enjoy that kind of immunity. It was hardly an answer to say that that was a "literal reading" of that judgment. The Special Rapporteur did not examine recent State practice that supported the Court's opinion, for example, court decisions such as that of the England and Wales High Court in the *Khurts Bat* case. Nor, as Mr. Huang had pointed out, did she take full account of the opinions expressed in the Sixth Committee in 2012. If, as she stated, it should be only the members of the troika who enjoyed immunity *ratione personae*, on the grounds of a presumption that, simply by virtue of their office, they had full powers to act on behalf of the State, then it was permissible to ask why those powers of representation should be the criterion, or the sole criterion, for immunity *ratione personae*. Immunity did not follow from the State official's power to represent or bind his or her State, but rather from that person's functions and resultant role. Furthermore, even if that criterion was adopted, were the members of the troika necessarily the only persons covered? The last half of paragraph 60 seemed to raise that issue, at least as a theoretical matter.

23. In any event, the presumption that, simply by virtue of their office, members of the troika had full powers to act on behalf of their State did not seem to have been the principal or sole criterion in the *Arrest Warrant* case. With regard to the nature of the functions performed by a Minister for Foreign Affairs, in addition to the excerpts of the judgment cited by the Special Rapporteur in the first footnote to paragraph 59, the Court had found that "he or she is frequently required to travel internationally, and thus must be in a position freely to do so whenever the need should arise. He or she must also be in constant communication with the Government, and with its diplomatic missions around the world, and be capable at any time of communicating with representatives of other States" (*Arrest Warrant*, para. 53). While members of the troika did have a special position, as had been recognized in article 7 of the 1969 Vienna Convention, it could be argued that in today's world, there were other holders of high-ranking office to whom immunities had to be granted "to ensure the effective performance of their functions on behalf of their respective States" (*ibid.*). Domestic courts in Switzerland and the United Kingdom had taken the view that those persons might include ministers of defence and ministers of foreign trade.

24. It went without saying that those "holders of high-ranking office" had to be confined to what the former Special Rapporteur had called "a narrow circle of high-ranking State officials".[41] Although in paragraphs 64, 66 and 68 of her report, the Special Rapporteur seemed ready to consider criteria for that "narrow circle", she also seemed to think that some kind of special immunity *ratione personae* would apply and that it should be addressed "independently of and separately from" that of the troika. He would therefore welcome clarification of paragraph 68, the last sentence of which seemed in

[41] *Yearbook … 2010*, vol. II (Part One), document A/CN.4/631, p. 426, para. 94 (*i*).

particular to be rather obscure. Lastly, he agreed with the Special Rapporteur's conclusions in paragraphs 69 to 74 of her report and her analysis of the temporal scope of immunity *ratione personae*.

25. In conclusion, he was in favour of referring all the draft articles to the Drafting Committee, on the understanding that the Committee should take into account all the comments made and, if necessary, defer returning to the Commission any draft articles which it might consider not to be ready for that.

The meeting rose at 12.25 p.m.

3168th MEETING

Wednesday, 22 May 2013, at 10 a.m.

Chairperson: Mr. Bernd H. NIEHAUS

Present: Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Ms. Escobar Hernández, Mr. Forteau, Mr. Gevorgian, Mr. Gómez Robledo, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Laraba, Mr. Murase, Mr. Murphy, 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. Mr. NOLTE said that although he agreed with the list in draft article 4 of the narrow circle of officials who enjoyed immunity *ratione personae*, he thought the Special Rapporteur should have undertaken a closer analysis of State practice to establish that result. Such an analysis would have revealed that there was recent State practice suggesting that other government officials might also enjoy immunity *ratione personae* due to their representative functions, but that such practice was not sufficiently confirmed to draw clear conclusions regarding *lex lata*. That point should be explained in the commentary to the future text.

2. In addition to the close analysis of State practice that should have been carried out, existing international and national case law should also have been subjected to a critical evaluation. The Special Rapporteur cited a judgment of the Swiss Federal Criminal Court[42] several times, but it was of uncharacteristically poor quality, the decisive argument for denying residual immunity *ratione materiae* having been that it would be contradictory to affirm the need to fight impunity and at the same time admit a wide interpretation of the rules on immunity *ratione materiae*. Just six months earlier, the International Court of Justice had rejected the same simplistic argument, in the case concerning *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*. The Swiss Court's failure to address that judgment considerably weakened the value of its own ruling.

3. A general argument not put forward by the Special Rapporteur but mentioned by several members of the Commission was that while a restriction of the rules on immunity facilitated the fight against impunity, it must not undermine the maintenance of sustainable and peaceful international relations. The likely consequences of such a restriction and whether and how it would support the fight against impunity needed to be assessed. If a general exception to immunity *ratione personae* and immunity *ratione materiae* was permitted in cases where the accused was suspected of having committed international crimes, strong States would probably protect their officials by arranging special missions for them, whereas weak States would not be in a position to do so. The result would be a two-tier system that would expose the fight against impunity to accusations of double standards. Was that a risk worth taking?

4. A further consideration was whether it could be assumed that all national jurisdictions were sufficiently independent to prevent a "core crimes" exception from being abused for political purposes. He fully agreed that the perpetrators of international crimes must not go unpunished, but he was sceptical that that could be achieved by recognizing a general exception to the rules on immunity *ratione personae* and immunity *ratione materiae* in the case of alleged international crimes.

5. The procedural rules concerning immunity were so important that they could not be developed separately from the substantive delimitation of the different forms of immunity. The previous Special Rapporteur, Mr. Kolodkin, had wisely placed particular emphasis on the need for a State to invoke immunity *ratione materiae*. That position seemed to be supported by the practice of national courts. Although matters of immunity *ratione materiae* and procedural rules were not addressed in the current Special Rapporteur's second report (A/CN.4/661), they exemplified the interdependence of the substantive and the procedural aspects of immunity.

6. He welcomed the Special Rapporteur's intention to distinguish between the *lex lata* and *lex ferenda* approaches and hoped that meant that when formulating draft articles and the corresponding commentaries, the Commission would clearly indicate whether they were statements of *lex lata* or *lex ferenda*. A distinction between *lex lata* and *lex ferenda* had been advocated by the majority of States in the Sixth Committee the previous year and was also an element of the structured approach favoured by the Special Rapporteur. In his view, that implied that where a particular rule could not be clearly identified, it was necessary either to reaffirm, as *lex lata*, the principle from which the rule was an exception, or to postulate the rule as *lex ferenda*.

[42] *A. v. Ministère public de la Confédération* [BB.2011.140], decision of 25 July 2012.