Document:-
A/CN.4/3168

Summary record of the 3168th meeting

Topic:
Immunity of State officials from foreign criminal jurisdiction

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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.

7. He was pleased to note the Special Rapporteur's recognition that a structured approach required due account to be taken of the common features among the different facets of the rules on immunity. The most basic point of departure was that all rules on immunity, whether *ratione personae, ratione materiae*, procedural, criminal or civil, ultimately derived from State immunity and had been shaped by State practice. The statement that a person or an official enjoyed immunity should therefore not be taken too literally: it was ultimately the State that possessed immunity and its officials only enjoyed that immunity in a derivative way.

8. The report provided a good working basis for formulating general rules pertaining to the immunity *ratione personae* of officials from foreign criminal jurisdiction. However, formulating unnecessary definitions might prejudice the work on the topic. That matter and the various specific drafting suggestions made could be taken up in the Drafting Committee.

9. Mr. CANDIOTI said that he wished to reserve his position on two points raised by Mr. Nolte. First, the fight against impunity was not an end in itself, but an extension of the fight against grave violations of human rights. It was not being suggested that there should be immunity for heinous crimes, but rather that the Commission should not focus too much on the fight against impunity; that would be oversimplifying the debate, which was about upholding the values enshrined in international law and recognized as human rights.

10. Second, to his recollection, the Commission had never drawn such a clear distinction between *lex lata* and *lex ferenda* as was now being advocated. The Commission's mandate under its statute was the promotion of the progressive development of international law and its codification, and it had always worked on the basis that the two were complementary. All codification was essentially progressive development, although the latter implied taking account of new trends in the law.

11. Mr. GÓMEZ ROBLEDO said that, in general, he concurred with the Special Rapporteur's analysis of the scope of the topic and with the draft articles, in particular draft article 2. While he in no way questioned the Special Rapporteur's approach, outlined in paragraph 21, of excluding immunity before international criminal courts and specific immunity regimes from the scope of the study, he thought that surely, now that the international community had placed some normative restrictions on immunity before international criminal tribunals, that fact should be taken into account. As Mr. Caflisch had remarked, immunities were on the decline *lato sensu*. The Special Rapporteur's plan to consider immunity within the system of values and principles of contemporary international law should meet with no objection. He had strong reservations, however, about ideas based on the doctrine of self-contained regimes, which had done so much harm in international law.

12. The purpose of the immunity regime was to achieve stable and secure international relations—a notion that should be taken up in a preamble to the draft articles. Both immunity *ratione personae* and immunity *ratione materiae* were pre-eminently functional, in that they safeguarded the successful interaction of States. Hence the strong need for jurisdiction to be exercised and immunity to come into play as soon as a representative of the State was likely to be affected by an act of any type. The definition of "criminal jurisdiction" in draft article 3 (*a*) did not adequately emphasize the nature of the acts that might trigger the exercise of such jurisdiction. In draft article 3 (*b*), the description of the protection enjoyed by certain State officials should be expanded to include the inviolability of the person. Reference should perhaps also be made to the notions of respect and dignity mentioned in article 29 of the Vienna Convention on Diplomatic Relations.

13. In the light of the judgment in the *Arrest Warrant* case and United Nations treaty practice, he had now abandoned his view that immunity *ratione personae* might be enjoyed by any officials other than the members of the troika. He also thought that draft article 3 (*c*) should be revised to refer to a presumption that certain officials by virtue of their status had the function of representing the State. Like other members, he thought that there was no need for an official to be a national of the State represented.

14. He agreed with the concern expressed about draft article 5, paragraph 1, which might be interpreted as providing immunity for acts committed prior to holding office. Another important factor was the time that elapsed between an official's election and assumption of office, which in some States could be several months.

15. As for draft article 6, mention should be made, in the commentary, of monarchs, whose reign by definition was not subject to time limitations. Finally, in the definitions, he recommended that the Spanish term "*agente*" should be used instead of "*funcionario*".

16. Mr. HASSOUNA said that in general, he endorsed the scope of the draft articles and the approach taken in the second report. He looked forward to the Special Rapporteur's dealing in a future report with such complex issues as the definitions of "official" and "official act" and the question of international crimes.

17. In draft article 1, the word "certain", before "State officials", could be deleted, since "officials" did not refer to all State officials. In addition, greater clarity would be provided by replacing the verb "deal with" with "apply to" and deleting the opening "[w]ithout prejudice" clause.

18. For draft article 2, he suggested a more direct title such as "Privileges and immunities not affected by the present draft articles", followed by the "without prejudice" clause. The deletion of the word "Criminal" before "immunities" in draft article 2 (*a*) and (*b*) would emphasize the fact that the draft articles were not applicable when a more specific immunity regime was operative.

19. In draft article 3 (*a*), the wording "an act established as a crime or misdemeanour" might exclude from the scope of the draft articles offences that were not categorized as crimes or misdemeanours. That phrase should be deleted and a more general formulation used,

such as "acts which are needed in order for a court to establish and enforce individual criminal responsibility under the law of the State that purports to exercise jurisdiction". The term "court" should be defined in order to ensure that the draft articles applied to any organ of a foreign State entitled to exercise judicial functions. The specification that "[f]or the purposes of the definition of the term 'criminal jurisdiction', the basis of the State's competence to exercise jurisdiction is irrelevant" appeared to be implied by the definition itself and could be moved to the commentary.

20. The inclusion of the phrase "[i]mmunity from foreign criminal jurisdiction" in draft article 3 (*b*), a provision relating to the use of terms, was questionable. Given that it was the very subject of the draft articles, the implications of immunity from foreign criminal jurisdiction should instead be addressed in an operative provision. In draft article 3 (*d*), he suggested that the words "on the basis of the acts" should be replaced with "with respect to the acts".

21. In draft article 4, the reference to "States of which they are not nationals" could have problematic consequences if an official had more than one nationality, as had been the case with former Peruvian President Alberto Fujimori. A formulation such as "other States" would be preferable.

22. The Special Rapporteur's decision to limit the subjective scope of immunity *ratione personae* to Heads of State, Heads of Government and Ministers for Foreign Affairs appeared well founded in view of the lack of consistent practice establishing that other high-ranking officials were also entitled to such immunities. However, given the support shown during the most recent session of the Sixth Committee for the possible extension of such immunity beyond the troika, it would seem advisable to delineate in further detail the kind and number of cases justifying the adoption of the stricter approach.

23. In draft article 5, although granting members of the troika immunity for acts committed "prior to" their term of office might seem unjustified, there was international case law in which the immunity enjoyed by serving members of the troika was referred to as "full" immunity, irrespective of the nature of the act, its timing or where it was performed. The rationale for such a rule should be explained in the commentary to the draft articles. Given that draft article 5, paragraph 2, and draft article 6, paragraph 1, both addressed the temporal scope of immunity *ratione personae*, they should be merged. The word "may" should be deleted in draft article 6, paragraph 2.

24. He did not think that the controversial issues in the draft articles should be settled in the plenary in preference to the Drafting Committee. The Committee had found acceptable solutions to similarly controversial issues in the past.

25. Mr. SINGH endorsed the Special Rapporteur's methodology, as outlined in paragraph 7 (*b*) of her report, and agreed with her reasoning about the scope of the topic. However, he would prefer it to be expressly stated that the draft articles did not apply to military personnel. He agreed on the need to avoid references to the nationality of the official; what mattered was the State that the official represented.

26. He shared the view that it might not be desirable to include definitions of the terms "criminal jurisdiction" and "immunity from criminal jurisdiction". He did not agree with the statement in paragraph 48 of the report that immunity *ratione personae* and immunity *ratione materiae* had a common basis: the two types of immunity differed in their basis and components.

27. He agreed with the Special Rapporteur that the granting of immunity *ratione personae* to the members of the troika was now a rule of customary international law, but he was not convinced by her discussion of why other high-ranking officials should not benefit from such immunity. She seemed to base that conclusion on the presumption that, simply by virtue of their office, the members of the troika had full powers to act on behalf of their State. However, international practice did not rule out the possibility of granting immunity *ratione personae* to other high-ranking officials who would, of course, need to be confined to a narrow circle. The Special Rapporteur seemed open to considering criteria for membership in that circle but at the same time seemed to think that some special kind of immunity *ratione personae* would apply to the members. The suggestions in paragraph 68 of the report that a "new territorial element" characterized that specific type of immunity and that the concept of "official visit" needed to be taken into account required further explanation.

28. He agreed with the report's conclusions on the material scope of immunity *ratione personae*. As to the temporal scope, although the words "prior to" in draft article 5 had led to some confusion, he agreed with the Special Rapporteur's analysis.

29. He would be happy to see all of the draft articles referred to the Drafting Committee.

30. Ms. JACOBSSON endorsed the Special Rapporteur's approach of providing an "operational tool", as she put it in paragraph 13 of her report, to enable the Commission to move forward at the current session. The analysis of national court cases, which were of particular relevance to the work on the topic, needed to be carried out in the course of that work.

31. She raised two general points: First, she endorsed the Special Rapporteur's choice of the expression "full immunity" (instead of "absolute"). Second, she believed that it was relevant to refer to "norms" and "values" as, for example, Judges Higgins, Kooijmans and Buergenthal had in their joint separate opinion in the *Arrest Warrant* case.

32. She agreed with the scope as set out in draft article 1, although the meaning of the word "certain" was not entirely evident. The "[w]ithout prejudice" clause was unnecessary in that article if the listing in draft article 2 was retained. In draft article 2 (*c*), she considered the formulation "other *ad hoc* international treaties" somewhat

imprecise and thought that the exclusion of military personnel covered by status-of-forces agreements should be mentioned. If agreements relating to special missions were not to be part of the topic, then an essential aspect of immunity, namely the right of States to issue guarantees of immunity unilaterally or *inter partes*, would be passed over in silence. Rather than the expansion of the categories of persons that enjoyed immunity *ratione personae*, it was the *ad hoc* agreements that should be encouraged. For example, a new procedure had been instituted, initially on an experimental basis, in the United Kingdom to clarify the cases when the Government consented to an official visit as a special mission.

33. She supported the inclusion of the definitions in draft article 3. The last sentence in draft article 3 (*a*) seemed redundant and could be dealt with in the commentary. In draft article 3 (*b*), the expression "by the judges and courts" did not cover all of the official acts that needed to be addressed. In some countries, criminal enforcement procedures were carried out by the police, the coast guard and prosecutors. Expanding the wording beyond "the judges and courts" would also address immunity from pretrial proceedings. In draft article 3 (*c*), the meaning of "certain" needed to be clarified.

34. She accepted the subjective scope of immunity *ratione personae* as reflected in draft article 4, but she agreed with others that the use of the term "nationals" was unfortunate. Given the close connection between the material scope and the temporal scope in immunity cases, she saw no need to transpose the reference to temporal scope from draft article 5, paragraph 2, to draft article 6.

35. As to the words "prior to" in draft article 5, paragraph 1, the question was whether the concerns raised could be resolved through the draft articles on immunity or had to be mitigated by other means, such as exceptions to immunity, tighter provisions on temporal scope or restricted categories of persons who could enjoy such immunity.

36. She supported sending all six draft articles to the Drafting Committee.

37. Mr. NOLTE said that while the distinction between *lex lata* and *lex ferenda* might not be so important when elaborating draft conventions, the current project was designed to be taken into account by national courts, which would need to know whether the text was to be viewed as customary international law.

38. Mr. CANDIOTI said that, in general, he agreed with the approach taken by the Special Rapporteur. The meaning of "*ad hoc*" in draft article 2 (*c*) could be clarified, and although he was not certain that explicit reference needed to be made to status-of-forces agreements, the text of the provision could be improved.

39. The definitions in draft article 3 were an important element of the project and reflected the Commission's general practice. Definitions of "official" and "official act" in the upcoming third report would be extremely useful. Regarding draft article 3 (*c*), he agreed with Mr. Forteau that immunity *ratione personae* was an exception to the sovereignty of the forum State. It should not be indiscriminately extended to all State agents.

40. The difference between immunity *ratione personae* and immunity *ratione materiae* was that the former flowed from the status of the person under international law, whereas the latter stemmed from his or her function. Immunity *ratione personae* was a vestige of the past: formerly the divine right of the king, it had subsequently been extended to the Head of State or Head of Government during their term of office, because they personified the State. He doubted whether Ministers for Foreign Affairs enjoyed such immunity, although they had immunity *ratione materiae* because they performed certain important functions and international acts. He would not, however, block the growing consensus on that point within the Commission. In draft article 4, the reference to nationality should be deleted. Immunity *ratione personae* should be confined to the troika, notwithstanding examples of national case law where it had been extended to other high-ranking State officials, including those on special missions.

41. All the draft articles proposed by the Special Rapporteur should be referred to the Drafting Committee.

42. Mr. GEVORGIAN said that he generally supported the approach outlined in paragraph 7 (*b*) but thought that care should be taken to retain a judicious balance in the formulation of proposals *de lege ferenda*. The idea expressed in paragraph 7 (*c*), namely that the relevant principles and values of international law should be taken into account, required clarification.

43. He agreed with Mr. Forteau that the State of nationality of the official was outside the scope of the topic and of the draft articles. Paragraphs 24 and 25 of the report seemed to be mutually contradictory. A balanced approach had to be taken to immunity from criminal jurisdiction, taking into account, when necessary, State practice concerning immunity from civil or administrative jurisdiction. In principle, given the different nature of national and international jurisdiction, immunity from international criminal jurisdiction lay outside the scope of the topic. Unlike the Special Rapporteur, he himself thought that the term "official" needed to be defined at the current stage of work on the draft articles, not later, when immunity *ratione materiae* was addressed.

44. He concurred with the distinction between immunity *ratione personae* and immunity *ratione materiae* outlined in paragraphs 47 to 53 of the report. The troika's immunity *ratione personae* was a clearly established norm of international law, but the report did not contain enough factual evidence to support the view that immunity *ratione personae* was confined exclusively to the troika. Consideration should be given to including a number of senior State officials in the subjective scope of immunity *ratione personae*, on the basis of certain criteria. That approach would be consistent with the case law of the International Court of Justice and with State practice. The interesting issue of *de facto* Heads of State raised by Mr. Park could be addressed in the commentary to the draft articles.

45. In draft article 1, the word "certain" should be deleted, as had been suggested. He agreed with the approach taken in draft article 2, although there was a need for terminological consistency throughout the text. Accordingly, the word "Criminal", in draft article 2 (*a*) and (*b*), should be deleted. The expression "*ad hoc*" in draft article 2 (*c*) was unnecessary. Although that provision must be understood as excluding military personnel from the scope of the draft, that important issue should be dealt with in a separate paragraph.

46. The definitions of "criminal jurisdiction" and of "[i]mmunity from criminal jurisdiction" in draft article 3 (*a*) and (*b*) were superfluous and might not include all the important elements. For example, why did draft article 3 (*b*) refer only to the exercise of criminal jurisdiction by judges and courts? Such jurisdiction was also exercised by law enforcement agencies which were entitled to initiate stages in criminal proceedings such as pretrial detention. The phrase "which directly and automatically assigns them the function of representing the State in its international relations" in draft article 3 (*c*) could be deleted. He questioned the formulation of the entire phrase after the words "by State officials" in draft article 3 (*d*). It might be advisable for the Special Rapporteur to clarify the normative elements of immunity *ratione materiae* in her third report. As for draft article 5, paragraph 2 clearly overlapped with article 6 and could be deleted or the two draft articles could be merged.

47. He had no objection to the referral of the draft articles to the Drafting Committee.

48. Mr. VÁZQUEZ-BERMÚDEZ noted that the scope of the topic should be limited to immunity from foreign criminal jurisdiction, although where feasible, State practice regarding immunity from civil or administrative jurisdiction should be taken into consideration. While immunity before international criminal tribunals or courts lay outside the scope of the topic, that did not mean that interpretative principles based on their case law had to be ignored. Similarly, while specific regimes did not come within the scope of the topic, the Commission could bear them in mind when that would be useful for its work.

49. Draft article 1 should be streamlined and the "[w]ithout prejudice" clause should be deleted. The term "certain" was problematical and should be deleted, leaving just a general reference to officials, with the following draft articles to specify which officials enjoyed immunity, for which acts and during which time frame. The definition of the term "official" was vital and should not be linked to the person's nationality. Indeed, the reference to nationality in draft article 4 should be deleted.

50. Draft article 2 should be reformulated as a "without prejudice" clause. It would be better to speak, not of "other *ad hoc* international treaties", but of the application of *lex specialis*, which would cover all the regimes listed in draft article 2. The Drafting Committee should be allowed some flexibility when dealing with the definitions of "criminal jurisdiction" and "[i]mmunity from criminal jurisdiction" in draft article 3. The last phrase of draft article 3 (*a*) would be better placed in the commentary. He understood paragraph 45 (*c*) of the report to mean that, while a State official who enjoyed immunity could not be prosecuted in the forum State, that person was not exempt from individual criminal responsibility, and he or she could be prosecuted once immunity *ratione personae* had been lifted or had ended. However, if the forum State's criminal laws covered crimes against humanity, they could be applied in specific cases as limitations on immunity. At some point the Commission would have to discuss such crimes as factors limiting immunity from criminal jurisdiction.

51. Turning to paragraphs 47 to 53 of the report, he concurred with the distinction made between immunity *ratione materiae* and immunity *ratione personae*. He also agreed that the basis of the troika's immunity *ratione personae* was their function as representatives of the State in international relations, which they exercised without any need to produce express authorization from the State they represented. The list of persons who had immunity *ratione personae* was exhaustive, and such immunity could not be extended to other State officials, even those who held high office, who also played a role in international relations or travelled frequently. The troika's representative function, with its basis in international law, should be expressly recognized in the definition of immunity *ratione personae*.

52. He agreed with draft article 4, subject to the deletion he had mentioned earlier. Draft article 5, paragraph 1, had to be read together with draft article 6, paragraph 1. Draft article 5, paragraph 2, seemed to be redundant in the light of the contents of draft article 6.

53. He supported the referral of all six draft articles to the Drafting Committee.

The meeting rose at 1.05 p.m.

3169th MEETING

Thursday, 23 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. Forteau, Mr. Gevorgian, 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.

Statement by the Under-Secretary-General for Legal Affairs, United Nations Legal Counsel

1. The CHAIRPERSON welcomed Ms. Patricia O'Brien, Under-Secretary-General for Legal Affairs, United Nations Legal Counsel, and invited her to inform the Commission members of developments since the previous session in legal areas of interest to the Organization.