

Document:-
A/CN.4/3174

Summary record of the 3174th meeting

Topic:
Immunity of State officials from foreign criminal jurisdiction

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Commission would receive the visit of the President of the International Court of Justice. The Working Group on the obligation to extradite or prosecute (*aut dedere aut judicare*) would meet on Thursday afternoon.

4. In accordance with the Commission's practice, the programme of work would be applied with the requisite flexibility, and any changes would be announced in advance in a plenary meeting.

The programme of work for the first two weeks of the second part of the session was adopted.

The meeting rose at 10.15 a.m.

3174th MEETING

Friday, 7 June 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. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kittichaisaree, Mr. Laraba, Mr. Murase, Mr. Murphy, 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.

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

[Agenda item 5]

REPORT OF THE DRAFTING COMMITTEE

1. Mr. TLADI (Chairperson of the Drafting Committee) said that the Drafting Committee had devoted nine meetings to its consideration of the six draft articles proposed by the Special Rapporteur and referred to it by the Commission. The Committee had provisionally adopted three draft articles, contained in document A/CN.4/L.814, which read as follows:

PART I. INTRODUCTION

Draft article 1. Scope of the present draft articles

1. The present draft articles apply to the immunity of State officials** from the criminal jurisdiction of another State.

2. The present draft articles are without prejudice to the immunity from criminal jurisdiction enjoyed under special rules of international law, in particular by persons connected with diplomatic missions, consular posts, special missions, international organizations and military forces of a State.

...

* Resumed from the 3170th meeting.

** The use of the term "officials" will be subject to further consideration.

PART II. IMMUNITY *RATIONE PERSONAE*

Draft article 3. Persons enjoying immunity ratione personae

Heads of State, Heads of Government and Ministers for Foreign Affairs enjoy immunity *ratione personae* from the exercise of foreign criminal jurisdiction.

Draft article 4. Scope of immunity ratione personae

1. Heads of State, Heads of Government and Ministers for Foreign Affairs enjoy immunity *ratione personae* only during their term of office.

2. Such immunity *ratione personae* covers all acts performed, whether in a private or official capacity, by Heads of State, Heads of Government and Ministers for Foreign Affairs prior to or during their term of office.

3. The cessation of immunity *ratione personae* is without prejudice to the application of the rules of international law concerning immunity *ratione materiae*.

2. The two paragraphs of draft article 1 reflected the substance of draft articles 1 and 2, as originally proposed by the Special Rapporteur, but contained a number of modifications. In draft article 1, paragraph 1, the phrase "Without prejudice to the provisions of draft article 2" had been deleted in view of the comments made in plenary. The qualifier "certain" in reference to "State officials" had also been deleted: the question of whether certain officials or all State officials were covered would be dealt with in specific draft articles elaborating the substantive content of immunity *ratione personae* and immunity *ratione materiae*. Furthermore, it had been agreed that the use of the term "officials" would be subject to further discussions on the precise meaning of the term and how best to convey that meaning in all the official languages of the United Nations.

3. There had been a detailed discussion on whether the draft articles should apply to the immunity of State officials "from the exercise of criminal jurisdiction by another State", as proposed by the Special Rapporteur, or more simply, "from the criminal jurisdiction of another State". Some members had considered that the words "in the exercise of" were crucial, and there was some concern that their deletion might give the impression that the scope of immunity was being broadened, while others felt that the phrase might appear to limit the scope of the draft articles. Some members had considered that those aspects could be dealt with in subsequent draft articles, as they involved substantive considerations that went beyond defining the scope of the draft articles. In the end, the phrase had been deleted, and it was understood that subsequent draft articles would address the substantive and procedural aspects of the topic.

4. A long road had been travelled before the Drafting Committee had settled on the current formulation of draft article 1, paragraph 2. It had ultimately been decided to incorporate draft article 2, using a succinct formulation. The Special Rapporteur had prepared a revised text, drawing upon the language of the original draft article 2, which listed the immunities not included in the scope of the draft articles. There had been broad agreement that this included immunities established in the context of diplomatic and consular relations and special missions

and in connection with missions to international organizations and delegations to international conferences. There had been a divergence of views on whether reference should be made to the immunity of international organizations and their agents. Although such immunity was governed by its own separate regime, which should not be prejudiced, situations might arise in which State officials were seconded to an international organization, and the two regimes might then overlap.

5. It had been recognized that there were other agreements between States that provided immunity from criminal jurisdiction, including those of a military nature relating to visiting and stationed armed forces. Although the immunity of visiting forces was established under customary international law, some members had expressed reluctance to do anything that might seem to broaden the scope of the “without prejudice” clause set out in draft article 1, paragraph 2. Similarly, while the practice of granting immunities unilaterally on an *ad hoc* basis had been recognized, the majority of the Drafting Committee had been reluctant to address that practice specifically in the text.

6. The Drafting Committee had devoted some time to the question of how best to draft the “without prejudice” clause. Since the draft articles dealt with the immunity of individuals, there had been some support for casting the formulations about the regimes left untouched by the draft articles in such a way that they also referred to individuals. Some members, however, had felt that the focus should be more on the source of the immunities than on the beneficiaries thereof.

7. In the course of further discussion, two options had been presented by the Special Rapporteur. One option had described the scope of the “without prejudice” clause in detail, while the second had been more concise. Although the second option had ultimately been considered too concise to allow for a proper understanding of the issues involved, it had been selected by the members of the Drafting Committee as the basis for further discussion. Following the preparation of a new text by the Special Rapporteur, some members had expressed concern that account had not been taken of regimes such as agreements on economic, cultural and technical assistance, while other members had been opposed to any additions that might appear to expand the provision. In the final analysis, the current text had been agreed upon, although some members had expressed reservations. The commentary would explain what was meant by persons connected with diplomatic missions, consular posts, special missions, international organizations and military forces of a State. An explanation would also be provided for the phrase “in particular”.

8. Turning to Part II of the draft articles, he noted, with reference to draft article 3, that the word “subjective” in the original title had been viewed by some members as confusing. It had been suggested that reference should be made to the “beneficiaries of” or “those covered by” immunity *ratione personae*, but the Drafting Committee had settled on the present title, “Persons enjoying immunity *ratione personae*”, as it best captured the specific purpose of the draft article.

9. Concern had been expressed in plenary with regard to the original reference to nationality. The Drafting Committee’s view was that the members of the troika enjoyed immunity *ratione personae* not on the basis of nationality, but because they held certain specific offices to which the draft article referred. It had therefore decided to omit the phrase “of which they are not nationals”. The word “foreign” had been added before “criminal jurisdiction”, and the commentary would explain what was understood by that term.

10. Although those were the only substantive changes made to the wording, the provisional adoption of draft article 3 had been preceded by a detailed discussion concerning the content. It had been proposed to reframe the text entirely or to include a “without prejudice” clause to indicate that the identification of the persons enjoying immunity in draft article 3 was without prejudice to the adoption in the future of exceptions to such immunity. Ultimately, the Drafting Committee had rejected those proposals, since the draft article merely identified the persons to whom immunity *ratione personae* applied, rather than what that immunity entailed.

11. As in the discussion on draft article 1, some members had expressed concern that the reference to immunity “from the exercise of” might prejudice the material scope of immunity from foreign criminal jurisdiction that was to be elaborated upon in other draft articles. Other members had favoured retaining the phrase, as it indicated that immunity from jurisdiction referred only to immunity from the exercise of jurisdiction, not to immunity from a State’s prescriptive jurisdiction. The Drafting Committee had in the end decided to retain the phrase, on the understanding that it might come back to the issue as the topic progressed. The commentary would further explicate those aspects.

12. Regarding the question raised in plenary as to whether the troika really constituted the sole State officials who enjoyed immunity *ratione personae*, he said that in provisionally adopting the text of draft article 3, which referred only to the troika, the Drafting Committee had recognized that other high-ranking officials of the State might benefit from immunity under rules of international law relating to special missions. The commentary to draft article 3 would clarify that point.

13. A reservation had been expressed on draft article 3 as a whole, and in particular, on whether the list of officials therein accurately reflected the state of the relevant international law. Although some members had favoured excluding Ministers for Foreign Affairs from the list, while others had favoured expanding the list to include officials such as ministers for defence, it had ultimately been decided that the list in draft article 3 was appropriate. The commentary would provide examples of State practice and reflect the divergence of opinions expressed in the debate in plenary.

14. Draft article 4 combined the substance of draft articles 5 and 6, as originally proposed by the Special Rapporteur. Initial comments in plenary had suggested that those two draft articles might be merged. In response to

those comments, the Special Rapporteur had prepared a new text, which read as follows:

“The immunity *ratione personae* from the exercise of foreign criminal jurisdiction that is enjoyed by Heads of State, Heads of Government and Ministers for Foreign Affairs covers all acts, whether private or official, that are performed by such persons prior to or during their term of office.”

15. Reservations had been expressed in the Drafting Committee as to whether all persons who enjoyed immunity *ratione personae* should be treated equally, and there were divergent views on the question of how the acts of the persons enjoying immunity should be characterized. In its judgment in the *Arrest Warrant* case, the International Court of Justice had stated that no distinction could be drawn for purposes of immunity *ratione personae* between acts performed by a Minister for Foreign Affairs in an “official” capacity and those claimed to have been performed in a “private capacity”, or between acts performed before the person concerned assumed office as Minister for Foreign Affairs and acts committed during the period of office.

16. As to the question of whether the acts should be described as “private or official” or as “acts performed in an official or private capacity”, the latter wording was viewed as being more faithful to the language of the *Arrest Warrant* judgment. Despite the fact that analogous instruments, such as the Vienna Convention on Diplomatic Relations, did not qualify the acts they described as being “private” or “official”, it was felt that there would be value added to the provision if the acts were so qualified. It had also been noted that the material scope of immunity *ratione personae* could best be captured if it was preceded by a description of the temporal scope.

17. While the substance of draft article 6, paragraph 2, was generally considered useful in the overall scheme of the draft articles, its relevance to Part II had been questioned. It had been noted that the wording of the draft article seemed to prejudice matters that had a bearing on immunity *ratione materiae*. A suggestion had thus been made to include a brief “without prejudice” clause relating to immunity *ratione materiae*.

18. To advance the discussions further, another new text had been prepared by the Special Rapporteur. It read:

“1. Heads of State, Heads of Government and Ministers for Foreign Affairs enjoy immunity *ratione personae* only during their term of office.

“2. The immunity *ratione personae* covers all acts, [whether private or official performed by] [whether performed in a private or official capacity by] Heads of State, Heads of Government and Ministers for Foreign Affairs prior to or during their term of office.

“3. The expiration of immunity *ratione personae* is without prejudice to the fact that a former Head of State, Head of Government or Minister for Foreign Affairs may, after leaving office, enjoy immunity *ratione materiae* in respect of official acts performed while in office.

“or

“3. The expiration of immunity *ratione personae* is without prejudice to the application of the rules of international law concerning immunity *ratione materiae*.”

19. Paragraph 1 had generally been viewed favourably. In paragraph 2, a clear preference for following the language used in the *Arrest Warrant* case had tilted the scale towards the formulation “acts ... whether in a private or official capacity”. Of the two alternatives for paragraph 3, a preference had been expressed for the second, since it did not prejudice the outcome of the discussion on immunity *ratione materiae*.

20. The formulation of draft article 4 reflected those discussions. Paragraph 1 stressed the important point that immunity *ratione personae* was enjoyed only during the term of office of the holder. The commentary would explain that the word “acts”, which was considered better for the purposes of the draft articles than “conduct”, encompassed “omissions”.

21. Regarding draft article 2, on definitions, the Special Rapporteur had proposed for definition the terms “criminal jurisdiction”, “immunity from foreign criminal jurisdiction”, “immunity *ratione personae*” and “immunity *ratione materiae*”. In addition, suggestions had been made in plenary to define the terms “official” and “official acts”, which coincided with the Special Rapporteur’s plans to focus primarily on those two particularly complex issues in her third report. In the general exchange of views on draft article 2, some members had doubted the need to define all of those terms. It was observed that the Vienna Convention on Diplomatic Relations, the Vienna Convention on Consular Relations and the Convention on special missions all dealt with criminal jurisdiction and immunity from criminal jurisdiction without defining the term “criminal jurisdiction”. However, the view was expressed that the particularity of the present topic might warrant a different approach.

22. Some members considered that there was no need to define immunity *ratione personae* and immunity *ratione materiae*, as the content and meaning of those terms would be determined in the substantive provisions of the draft articles. Furthermore, it was suggested that any attempt to define immunity *ratione materiae* at the current stage might prejudice the consideration of substantive matters in respect of that type of immunity, or that the definition of certain terms might preclude a meaningful discussion of possible exceptions to immunity. Other members considered that it would be useful to define immunity *ratione materiae* and, in order to maintain symmetry, also to define immunity *ratione personae*.

23. If definitions were to be included in the draft articles, a preference had been expressed for a “use of terms” text, rather than one entitled “definitions”. Attention was also drawn to the desirability of using as a model article 2, paragraph 3, of the United Nations Convention on Jurisdictional Immunities of States and Their Property, which provided that the use of terms in the Convention was without prejudice to the use of those terms or to the meanings that might be given to them in other international instruments or in the internal law of any State.

24. It was observed that certain aspects of the proposed definitions could be used in the commentary or could form the substance of future draft articles. That could be the case with regard to inviolability which, according to some members, was a term that warranted definition. In view of the fact that immunity and inviolability were distinct concepts, some expressed the need for caution, while others were opposed to the consideration of inviolability in the context of the present topic.

25. The Drafting Committee had embarked on a preliminary exchange of views regarding the various definitions proposed by the Special Rapporteur, but views had remained divided. Specific comments had included suggestions on how the definitions might be improved and on alternative approaches to introducing the key concepts relating to the topic. Those proposals would be the subject of further reflection.

26. The CHAIRPERSON invited the Commission to adopt, on first reading, the text of draft articles 1, 3 and 4, as provisionally adopted by the Drafting Committee and as contained in document A/CN.4/L.814.

PART I. INTRODUCTION

Draft article 1 (*Scope of the present draft articles*)

Draft article 1 was adopted.

PART II. IMMUNITY *RATIONE PERSONAE*

Draft article 3 (*Persons enjoying immunity ratione personae*)

27. Mr. PETRIČ said that, in keeping with the views he had expressed in plenary and in the Drafting Committee, he was opposed to draft article 3, which was absolutely contrary to his understanding of immunity *ratione personae*.

Draft article 3 was adopted, having noted the comment by Mr. Petrič.

Draft article 4 (*Scope of immunity ratione personae*)

Draft article 4 was adopted.

Draft articles 1, 3 and 4, contained in document A/CN.4/L.814, were adopted.

28. The CHAIRPERSON said that the Special Rapporteur would prepare commentaries to the draft articles in time for their inclusion in the Commission's report to the General Assembly on the work of its sixty-fifth session.

29. Mr. CANDIOTI suggested that, given the many substantive matters to be clarified in the commentaries, Commission members should be provided with the text, for review and possible comment, well in advance of the end of the current session.

30. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that she had no objection to that proposal but that if the Commission adopted such a practice with regard to the current topic, it should do the same with regard to all other topics.

31. Mr. CANDIOTI said that he shared the Special Rapporteur's view that the same practice should be followed with regard to all topics. During the sixty-third session, it had been suggested that the Commission should reconsider the practice of discussing commentaries to draft articles only at the time of the adoption of the Commission's annual report, when it was under pressure, and without sufficient time for members to study the commentaries carefully.⁶⁰

32. Mr. VALENCIA-OSPINA said that while he supported the view that a change in the approach to draft commentaries should be applied across the board, the fact that some topics were discussed in the first part of the session and others in the second inevitably resulted in inequality, since the work on topics in the latter part of the session was subject to narrower time constraints.

33. Mr. KITTICHAISAREE said he agreed that it would be useful to be given an advance copy of the draft commentaries for review; however, members could not make anything other than general recommendations on substantive points, and the special rapporteurs should be given sufficient leeway as to how to incorporate those recommendations.

The meeting rose at 11.05 a.m.

⁶⁰ *Yearbook ... 2011*, vol. II (Part Two), para. 379.