Document:-
A/CN.4/3147

Summary record of the 3147th meeting

Topic:
Immunity of State officials from foreign criminal jurisdiction

Extract from the Yearbook of the International Law Commission:-
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72. He supported the proposal made by the Special Rapporteur in paragraph 63 of her report that the Commission should consider the question of whether immunity *ratione personae* could be extended to persons other than the troika. That circle could certainly be widened, not by listing the persons in question, but by establishing particular categories. As far as immunity *ratione materiae* was concerned, the Commission would have to look for objective criteria for determining what constituted an "official act".

73. As to whether the topic should be approached from the perspective of codification or progressive development, he agreed with Mr. Murphy that the formulation of rules *de lege ferenda* was a very serious matter of legal policy that called for an extraordinarily careful approach, and he also agreed with Mr. Huang and Sir Michael that the Commission must be extremely cautious about any progressive development of international law in that respect. As there had been no unanimity in the Sixth Committee or in the Commission as to whether the latter should consider the topic with a view to progressive development, it would be sensible, as suggested in the report, to start by codifying existing rules of international law and only then to move on to the progressive development of "grey areas" or issues that were insufficiently regulated but on which there was consensus or wide agreement.

The meeting rose at 12.40 p.m.

3147th MEETING

Friday, 20 July 2012, at 10.05 a.m.

Chairperson: Mr. Lucius CAFLISCH

Present: Mr. Candioti, 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. Kittichaisaree, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Wako, Mr. Wisnumurti.

Immunity of State officials from foreign criminal jurisdiction (*concluded*) (A/CN.4/650 and Add.1, sect. A, A/CN.4/654)

[Agenda item 5]

PRELIMINARY REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

1. The CHAIRPERSON invited the Commission to continue its consideration of the preliminary report of the new Special Rapporteur on the immunity of State officials from foreign criminal jurisdiction. He gave the floor to Ms. Escobar Hernández to resume the debate on that topic.

2. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) thanked the members of the Commission for their reception of her preliminary report and for their constructive comments. Before turning to methodological considerations and the workplan, she would first summarize the points made with regard to substantive issues.

3. At the outset, it should be emphasized that all the members were in favour of maintaining a distinction between immunity *ratione personae* and immunity *ratione materiae*. At the same time, they recognized that both had a functional dimension, which was founded on the desire to preserve the sovereign equality of States and the stability of international relations. As far as some members were concerned, the attribution of immunity *ratione personae* to the highest-ranking State officials or representatives was justified by the fact that the latter represented or even personified the State, but at least one member contested that argument on the reasoning that the concept of State personification was no longer compatible with the modern principle of State sovereignty based on the people.

4. With regard to immunity *ratione personae*, a number of members were in agreement that its scope must be limited to the so-called troika: Heads of State, Heads of Government and ministers for foreign affairs. However, some members had reservations about granting immunity to ministers for foreign affairs; others, conversely, did not rule out the possibility of extending immunity to other high-level government officials whose mandates involved foreign relations. On the other hand, reservations were expressed about such an extension itself, in view of the difficulty of categorizing persons whose functions were governed by the national law of each State. In any event, there was general agreement that a system of lists was not workable and that it was preferable to establish criteria for the possible extension of immunity *ratione personae* to persons other than the troika, since such an extension could, moreover, be limited to specific periods or circumstances, such as special missions. A large number of members felt that the main criterion for determining who could enjoy immunity *ratione materiae* was the official or non-official nature of the act in question. In addition, the use of the expression "State officials" to designate those who enjoyed immunity appeared to have garnered the most votes.

5. The concept of an "official act" had itself elicited particular attention, and some members were of the view that it had implications not only for immunity *ratione materiae* but also for immunity *ratione personae*. It was emphasized that an official act was necessarily carried out on behalf of the State and in the exercise of the functions assigned to one of its representatives. All were in agreement that it was important to define the term "official act" in order to determine the scope of immunity, yet the definition itself was controversial. It was therefore necessary to identify which criteria could be used to characterize an act as "official". To that end, several members recommended using the criteria set out in the articles on responsibility of States for internationally wrongful acts[289] and the United Nations

[289] General Assembly resolution 56/83 of 12 December 2001, annex. The draft articles adopted by the Commission and commentaries thereto appear in *Yearbook … 2001*, vol. II (Part Two), paras. 76–77.

Convention on Jurisdictional Immunities of States and Their Property, but others were opposed to making that transposition. The question also arose as to whether unlawful or *ultra vires* acts fell into the category of official acts. Lastly, a proposal had been made to use as a basis the distinction between *acta jure imperii* and *acta jure gestionis*, perhaps even including *acta jure gestionis* that might nevertheless be performed in an official capacity and that might engage the criminal responsibility of their author.

6. The subject that had clearly given rise to the liveliest debate was that of possible exceptions to the immunity of State officials from foreign criminal jurisdiction, in particular in the case of international crimes. Many members were categorically opposed to protecting those acts with immunity since doing so would counteract the effort to combat impunity under the terms in which such an effort was prescribed by contemporary international law. It was therefore necessary to determine which crimes fell outside the scope of immunity, possibly according to their seriousness; however, several members felt that that criterion was completely irrelevant in the present circumstances. The Special Rapporteur was of the opinion that crimes warranting derogation from immunity were those that the international community as a whole considered to be particularly grave or widespread, such as genocide, war crimes and crimes against humanity.

7. Generally speaking, it seemed difficult to overlook recent tendencies in international law relating to the international criminal responsibility of the individual. One member stressed that it was unacceptable to take into account trade issues in identifying exceptions to the immunity of the State while at the same time disregarding international crimes in identifying exceptions to the immunity of State officials. For some members, treaty regimes such as the Rome Statute of the International Criminal Court were not useful in identifying possible exceptions, but others expressed the contrary view that they reflected tendencies that the Commission could not afford to overlook. In any event, the question of exceptions should be handled with caution and by taking into account State practice and the previous work of the Commission.

8. The Special Rapporteur's proposal to refer to the values and principles of contemporary international law had also led to an intense exchange of views. A number of members found such an approach to be useful for striking the necessary balance between, on the one hand, the desire to preserve the sovereign equality of States and, on the other, the stability of international relations and the desire to combat impunity. However, others had disagreed, finding that a study based on metalegal aspects and "tendencies" in the international legal system was inappropriate. One member had suggested speaking of "legal policy". On the whole, however, no one had been expressly opposed to taking those values and principles into consideration; the more difficult problem lay in identifying them. In that regard, it was possible to identify two main schools of thought within the Commission. Some members felt that the relevant values and principles were limited to the sovereign equality of States, territorial integrity and the stability of international relations—precisely what immunity was intended to protect. Other members felt that the above-mentioned principles and values must be combined with other, newer ones that had emerged in recent decades and that had found expression in various norms of international law, one of which was the effort to combat impunity in respect of the most serious international crimes. At the same time, immunity placed a limitation on the sovereignty of the State in terms of the range of the latter's jurisdiction—a fact that must also be taken into account.

9. In summary, a non-restrictive reference to existing values and principles—strictly in relation to their legal aspects and taking into account their place in the international legal system—was thus endorsed by consensus, which the Special Rapporteur welcomed. Yet, in that instance as well, it was advisable to proceed with caution, using as a basis State practice, international norms and the evolution of international law. In particular, it was necessary to keep to the values and principles that were shared by the international community as a whole. It was not, in any circumstances, a matter of imposing "Western values"—a fear that had been expressed by one member of the Commission. In any case, no one appeared to exclude the effort to combat impunity from the values and principles to be taken into account, which was particularly important given the diversity of cultures and legal systems represented within the Commission.

10. Several members had expressed support for the Special Rapporteur's proposal to analyse the relationship between the responsibility of the State and that of the individual, as well as its implications for immunity, and particularly the relationship between the immunity of the State and that of the individual. In that connection, some members endorsed the idea of drawing on the judgment of the International Court of Justice in the case concerning *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, but others felt that that decision did not relate to the immunity of State officials.

11. Much importance was assigned to the procedural aspects of immunity, and there was general agreement that they merited consideration. Opinions were nonetheless divided as to when might be the best time to do so. Although most members endorsed the Special Rapporteur's proposal to address substantive issues first, others would prefer to consider procedural issues earlier without necessarily distinguishing them from substantive issues of immunity.

12. Lastly, it should be noted that two members had mentioned the need to address the issue of universal jurisdiction in the context of the Commission's work on the immunity of State officials from foreign criminal jurisdiction. They had referred to a report on the subject prepared by the technical expert group set up jointly by the African Union and the European Union.

13. In conclusion, the Special Rapporteur noted that the Commission had by no means reached a consensus on the substantive issues addressed in her preliminary report, as was evidenced by the debates. However, those issues were the subject of a structured inquiry that should be continued during forthcoming sessions on the basis of an in-depth study.

14. Turning to the exchange of views on methodology and the workplan, the Special Rapporteur recalled the transitional nature of her preliminary report, the purpose of which was to present the methodological foundations of the work she proposed to carry out during the present quinquennium. A number of members had highlighted the importance of methodological considerations at the present stage of the Commission's work and had made useful comments in that regard. Nevertheless, the debate had, for the most part, remained focused on the approach proposed in the report and its immediate outcome, the workplan. One member had questioned the neutrality of that approach, emphasizing that the latter should not in any way influence the substantive debate. It might be argued, however, that no approach could be neutral given that, by definition, the concept of an approach implied choosing to take a particular course of action in pursuit of a particular goal. It was therefore illusory to consider that the object and ultimate goal of the Commission's work or the angle from which a topic was addressed could be neutral, especially in the context of drafting texts—an exercise that to a large extent involved the Commission's mandate of the codification and progressive development of international law.

15. As often happened during the Commission's debates, the first methodological question that had been raised by members was what share of the work on the topic should be devoted to the codification and the progressive development of international law, and whether precedence should be given to analysing *lex lata* or *lex ferenda*. On the whole, members had agreed that it was not possible to address the topic exclusively from one of those two angles. They were of the view that, owing to the very nature of the issues under consideration, the Commission could not limit itself to what was set out in *lex lata* and should proceed to developing the law. They endorsed the cautious approach recommended by the Special Rapporteur, which consisted of beginning with *lex lata* considerations and later including an analysis *de lege ferenda*, while at the same time taking into account the evolution of international law. Without calling that approach into question, some members felt that it was necessary to refrain from making a clear distinction between *lex lata* and *lex ferenda*, or between the codification and progressive development of the law. They stressed that the Commission was not required to specify which part of its work pertained to the codification and which pertained to the progressive development of the law, inasmuch as its mandate encompassed both aspects. Its task was merely to produce a coherent set of draft articles that had been agreed by consensus. One member felt that it was necessary, on the contrary, to make an adequate distinction between *lex lata* and *lex ferenda*; others argued that the concepts of "analysis *de lege ferenda*" and "progressive development of international law" were not used with the necessary degree of accuracy in the Commission's work.

16. Second, members had endorsed the approach of drawing on the work of the previous Special Rapporteur in order to identify the remaining key issues of contention that called for new responses. They had generally supported the proposal that the various groups of issues should be addressed separately and sequentially. However, it was emphasized that an excessive compartmentalization of the issues to be examined risked obscuring certain problems. Third, a majority of the members had approved the workplan—and the four main groups of issues to be considered to which it referred—as contained in the last chapter of the report. Some members, without calling the workplan into question, had recommended the specific approach of dealing with general issues in a cross-cutting fashion concurrently with the other issues that were specific to the topic. As previously stated, some were of the view that the procedural aspects of the topic should be addressed at the outset, at the same time as the substance. Finally, clarification was sought on the strategy envisaged by the Special Rapporteur and on the schedule for the development of the topic.

17. Lastly, with regard to the Commission's future work, the first point to note was that the workplan and the four groups of issues to which it referred, which were set out in paragraph 72 of the preliminary report, appeared to remain valid. One member had questioned the strategy envisaged by the Special Rapporteur, even though it was clearly explained in that paragraph. Second, for the purposes of studying the issues put forward, the Special Rapporteur would draw on State practice, international and national case law, the rules and principles of the relevant international law and relevant doctrine. Taking as her basis the work of the previous Special Rapporteur[290] and the study by the Secretariat,[291] as well as any area of the Commission's work that pertained to the topic, the Special Rapporteur would endeavour to gain a "fresh perspective" as a way of resolving the remaining controversial issues.

18. Third, practical solutions would be offered to States, in particular to authorities concerned with issues relating to the immunity of State officials from foreign criminal jurisdiction, namely judges and prosecutors. The Special Rapporteur therefore proposed that future reports should include draft articles based on a coordinated and exhaustive approach to the immunity of State officials from foreign criminal jurisdiction. Along those lines, the proposal to elaborate a guide for prosecutors seemed somewhat premature—draft articles that gave the relevant authorities the necessary practical guidelines would no doubt suffice. Fourth, equal importance should be given to the codification and the progressive development of international law since the topic was to be studied from the perspective of both *lex lata* and *lex ferenda*. Fifth, with regard to the schedule for the development of the topic, when the Special Rapporteur had raised the possibility of completing the work during the present quinquennium, she had had in mind the adoption of a set of draft articles on first reading. Given that the issues to be addressed were complex and difficult, the Commission should take the comments of States into account before considering the draft on second reading, which could be completed in a short amount of time. The Special Rapporteur recognized the need to allow, where appropriate, for the possibility of changing the workplan in the light of future debates in the Commission and in the Sixth Committee. In any

[290] *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).

[291] A/CN.4/596 and Corr.1 (document available from the Commission's website).

case, the next report would be chiefly devoted to the issues enumerated in paragraph 72, subparagraphs 1 and 2, of the preliminary report. Lastly, in response to several members who had pointed out that it was the first time in the history of the Commission that a woman had been appointed Special Rapporteur, Ms. Escobar Hernández, while welcoming that development, expressed the hope that the composition of the Commission in future might more closely reflect the proportion of women in the community of lawyers of international law, which was significantly higher.

The meeting rose at 11.55 a.m.

3148th MEETING

Tuesday, 24 July 2012, at 10.05 a.m.

Chairperson: Mr. Lucius CAFLISCH

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

Formation and evidence of customary international law[292] (A/CN.4/650 and Add.1, sect. G, A/CN.4/653)

[Agenda item 7]

NOTE BY THE SPECIAL RAPPORTEUR

1. The CHAIRPERSON invited Sir Michael Wood (Special Rapporteur) to present his note on formation and evidence of customary international law (A/CN.4/653).

2. Sir Michael WOOD (Special Rapporteur) said that uncertainty about the process of formation of rules of customary international law was sometimes seen as a weakness in international law generally. It was an easy target for those who sought to play down the importance and effectiveness of international law, or even to deny its nature as law. Perhaps the Commission's study of the topic would contribute to the acceptance of the rule of law in international affairs.

3. A more prosaic reason for engaging in the topic was to offer guidance (not prescription) to those who, although they were not necessarily specialists in international law, were called upon to apply it, in other words judges in both the highest and the lower domestic courts. Some arbitrators in investment cases might likewise have little instinctive understanding of how to identify rules of customary international law. Explaining to a domestic judge why something was, or was not, a rule of customary international law could be quite challenging when there was no firm reference point, apart from some rather brief pronouncements by the International Court of Justice. Guidance might also be helpful for lawyers operating primarily within national systems, but who might occasionally encounter public international law in their day-to-day work. He therefore hoped that the Commission's work on the topic would assist judges and lawyers practising in a wide range of fields.

4. His preliminary note should be read together with annex I to the Commission's report on its work at its sixty-third session,[293] which contained the syllabus and an extensive, but by no means comprehensive, list of materials and writings.

5. As the proposal to include the topic in the Commission's programme of work had been discussed in 2010 and 2011 in the Working Group on the long-term programme of work for the quinquennium, current and former members of the Commission had already supplied some very useful input. He looked forward to receiving more input during the current debate, since work on the topic was a collective endeavour.

6. The aim of the note was to stimulate an initial debate. After the introduction, the Special Rapporteur listed seven preliminary points that might be covered by a report in 2013. Those points were of varying degrees of importance, but each should be covered. Section A referred to the Commission's ground-breaking work on the topic in 1949[294] and 1950.[295] It had been almost the Commission's first task and one prescribed by its statute. That very practical work was still relevant and formed the basis for many United Nations publications in the field of international law, including some of the admirable publications prepared by the Codification Division.

7. In addition, there might be much to learn from the Commission's work on other topics, especially when it was largely engaged in codification. Over the years, the Commission had presumably gained considerable experience in identifying rules of customary international law. As the Commission had a dual mandate, namely

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[292] At its sixty-third session, the Commission included the topic in its long-term programme of work and recommended the preparation of a draft on the topic (*Yearbook … 2011*, vol. II (Part Two), paras. 365–366, and annex I). At the current session, it decided to include the topic in its programme of work and appointed Sir Michael Wood, Special Rapporteur (see above, 3132nd meeting).

[293] *Yearbook … 2011*, vol. II (Part Two), p. 183.

[294] Memorandum submitted by the Secretary-General, "Ways and means of making the evidence of customary international law more readily available: preparatory work within the purview of article 24 of the statute of the International Law Commission" (A/CN.4/6 and Corr.1; available from the Commission's website). For the Commission's consideration of the subject at its first session, see *Yearbook ... 1949*, 31st meeting, paras. 89 *et seq*. (the working paper prepared by the Secretariat on the basis of the memorandum submitted by the Secretary-General (A/CN.4/W.9) is reproduced in footnote 10 to para. 89). See also the Commission's report to the General Assembly, *ibid*., paras. 35–36.

[295] *Yearbook ... 1950*, vol. II, document A/3116, Report of the International Law Commission covering its second session, Part II, "Ways and means for making the evidence of customary international law more readily available", paras. 24–94. See also document A/CN.4/16 and Add.1 (article 24 of the statute of the International Law Commission: working paper by Manley O. Hudson), *ibid*., pp. 24 *et seq*.