Document:-
A/CN.4/3165

Summary record of the 3165th meeting

Topic:
Immunity of State officials from foreign criminal jurisdiction

Extract from the Yearbook of the International Law Commission:-
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personae should be extended only to Heads of State and possibly Heads of Government. He was troubled by the absence of State practice to support the conclusion in paragraph 58 of the report that the granting of immunity *ratione personae* to Heads of State, Heads of Government and Ministers for Foreign Affairs was established practice. Although the Special Rapporteur conceded that such immunity had originally been limited to Heads of State and had subsequently been extended to Heads of Government, she also suggested that its extension to Ministers for Foreign Affairs was not in doubt in the light of the judgment of the International Court of Justice in the case concerning the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*.

24. He questioned the assertion (para. 59) that granting immunity *ratione personae* to Heads of State, Heads of Government and Ministers for Foreign Affairs was necessary because their functions included representing the State in international relations. First, that was a policy consideration and not a legal argument. Second, there was no *a priori* reason why representational status should imply only immunity *ratione personae* and not immunity *ratione materiae*. Third, if immunity *ratione personae* had to be accorded to the troika because of its representative function, he wondered why the Special Rapporteur was reluctant to see it extended to other officials who might play a similar role (para. 60).

25. It was an area that had not been sufficiently developed in the practice of States and was thus fit for progressive development. That process should take into account not only the fight against impunity, but also the general trend of the Commission's work. In both its draft articles on jurisdictional immunities of States and their property[32] and the draft Code of Crimes against the Peace and Security of Mankind,[33] the Commission had been reluctant to place the immunities of Ministers for Foreign Affairs on the same footing as those of Heads of State.

26. However, to help the Commission move forward, he was prepared to accept, as a matter of developing the law, the extension of immunity *ratione personae* to Ministers for Foreign Affairs on the basis that the reasoning in the *Arrest Warrant* judgment had not been rejected by States and provided that the extension was subject to some exceptions. It was difficult to accept the principle contained in draft article 4 before seeing the possible exceptions, however. He therefore could not endorse the Special Rapporteur's suggestion that the issue might be considered separately from the other draft articles and could not support the referral of draft article 4 to the Drafting Committee, although he would not stand in the way of consensus.

27. He supported the principles set forth in draft articles 5 and 6 and their referral to the Drafting Committee. However, draft article 6, paragraph 1, did not clearly reflect what he believed the Special Rapporteur wished to convey, namely that immunity *ratione personae* could not be invoked after the expiration of the term of office, even for acts committed while in office; the paragraph might need some redrafting. Moreover, in view of the Commission's debate during the previous session on the implications of the *Arrest Warrant* case judgment, he considered that further analysis of the judgment and the joint separate opinion of Judges Higgins, Kooijmans and Buergenthal would be useful.

28. Mr. PETER said that the topic was followed closely in Africa, where some State officials had been arrested under the Rome Statute of the International Criminal Court and the principle of universal jurisdiction.

29. Concerning the draft articles, he suggested that the "without prejudice" clause should not be used at the beginning of draft article 1, in order not to set a negative tone. Regarding draft article 4, more research was needed to justify the inclusion of Ministers for Foreign Affairs, to the exclusion of other government officials. Regarding draft article 5, paragraph 1, he questioned the appropriateness of the words "prior to or", implying that State officials would enjoy immunity for past offences.

The meeting rose at 11.45 a.m.

3165th MEETING

Thursday, 16 May 2013, at 10.05 a.m.

Chairperson: Mr. Bernd H. NIEHAUS

Present: Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Gevorgian, Mr. Gómez Robledo, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Ms. Jacobsson, Mr. Kamto, Mr. Laraba, Mr. Murphy, Mr. Nolte, 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 (*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 members of the Commission to resume their consideration of the second report of the Special Rapporteur on immunity of State officials from foreign criminal jurisdiction (A/CN.4/661).

2. Mr. CAFLISCH said that he would like to start with a few comments on terminology. It would be preferable to replace the term "acts" with "conduct", since the reference in some instances was not to acts but to failure to act. Similarly, a more neutral term than "official"—perhaps "agent"—would be preferable, since all persons who acted on behalf of a State and who performed State functions were

[32] *Yearbook … 1991*, vol. II (Part Two), para. 28.

[33] See footnote 31 above.

not necessarily officials. In addition, the use of the term "jurisdiction" to refer both to criminal jurisdiction and to criminal courts, in other words, tribunals, as was currently the case in draft article 3, should be avoided. Lastly, when referring to "officials", references to nationality should be avoided, since what mattered was the fact that a person acted for the State: there was nothing to prevent a foreign national from being charged with acting for a State, in which case his or her conduct could be covered by immunity *ratione materiae*.

3. As to the substantive aspects, the Commission had to determine who constituted the "holders of high-ranking office" who enjoyed immunity from both civil and criminal jurisdiction. Referring to the judgment of the International Court of Justice in the *Arrest Warrant* case, he said he could not understand what had led the Swiss Federal Criminal Court to extend immunity *ratione personae* to the Minister of Defence,[34] or what had prompted the representative of Switzerland to state before the Sixth Committee that foreign State officials other than the members of the troika enjoyed immunity.[35] The troika seemed to him to be the best solution, or the least wrong one, as it had the advantage of both reinforcing the status quo and resolving the question of who could enjoy immunity *ratione personae*. Lastly, since immunity in general was on the decline in the contemporary world, it would be sending the wrong signal to try to extend it in the specific area of immunity *ratione personae*. In conclusion, he said that subject to the remarks on terminology he had just made, he was in favour of referring the draft articles to the Drafting Committee.

4. Mr. HMOUD, noting that the topic was one of the most contentious ones ever discussed by the Commission, said that the outcome of its work would have a significant impact on international and legal relations in terms of immunity from criminal jurisdiction. The step-by-step approach adopted by the Special Rapporteur seemed to him to be prudent and practical. The conceptual divergences were not easy to reconcile, and moving forward required first tackling the issues on which consensus was most likely or that caused the least disagreement. The Commission could then delve into the issues that raised the greatest controversy, such as the scope of immunity and its limitations.

5. As some members had pointed out, the treatment in international law of the most serious crimes had shifted dramatically over the past 60 years. While some members favoured not moving with the times, the fact remained that sovereignty and immunity should no longer be mutually exclusive. As to the distinction between *lex lata* and *lex ferenda*, certain legal aspects associated with immunity could be described as settled in international law, yet on other aspects, either the law was silent or there were differences in the practice or practices of States that made it hard to deduce specific rules. The Commission must make a distinction between *lex lata* and *lex ferenda* only when the applicable law was clearly delineated and when the distinction served a useful purpose for its work. Its conclusions must have a strong legal underpinning and be grounded in the current system of values in international law, all the while taking into account the need to strike a balance between one State's right to exercise criminal jurisdiction and another State's right not to be subject to the exercise of such jurisdiction or to ensure that such jurisdiction was limited when it interfered with its sovereignty. The legitimate interests of the two States must be weighed up, and some might prevail over others in certain situations. Immunity was not absolute, and its implementation, in the case both of individuals and of States, was limited. A procedural rule could only prevail and bar a substantive rule from being applied if it protected legitimate interests in the exercise of sovereignty and the performance of functions that were an integral part of such sovereignty.

6. Turning to specific comments, he agreed with the Special Rapporteur that the scope of the draft articles should be limited to immunity from the jurisdiction of foreign criminal courts and not encompass international criminal jurisdiction or special immunity regimes such as diplomatic and consular immunities. However, the legal and conceptual basis for such regimes should be studied in deducing relevant rules for the topic: why a diplomatic agent enjoyed immunity, how that immunity was exercised and what was the logic that justified the lack of immunity before international courts of officials performing "State acts" were matters that had to be analysed and taken into account. He thought that an article containing definitions should be included, although he did not see the need for a definition of "criminal jurisdiction", since international legal instruments generally did not include definitions of national forms of jurisdiction. In addition, definitions of jurisdiction that might be more suitable in certain legal systems than in others should be avoided.

7. Regarding the definition of immunity from foreign criminal jurisdiction, which was not absolutely necessary but might shed light on the content and nature of immunity, he said that any such definition should clearly indicate that immunity was a procedural bar to the exercise of foreign jurisdiction that came into play in certain conditions and according to the rules of international law and the provisions of the draft articles. As to the types of immunity, it seemed appropriate to distinguish between immunity *ratione personae* and immunity *ratione materiae* for the purpose of identifying, insofar as possible, the rules associated with personal immunity and those relating to immunity for acts performed in an official capacity. As the Special Rapporteur had mentioned in her report, there were elements common to the two forms of immunity. Even when a State official was acting in the performance of his or her duty when committing a crime, that did not mean that the responsibility of both the individual and the State were to be treated the same way. To maintain that the act of an individual was solely the act of a State for the purposes of immunity *ratione materiae* was to say that the person concerned could not be responsible for the act under any circumstances—in other words, that he or she was absolved of responsibility. That ran counter to the consensus in the international community and the views of the International Court of Justice, particularly in the *Arrest Warrant* case. In the

[34] See *A. v. Ministère public de la Confédération* [BB.2011.140], decision of 25 July 2012, cited several times in the Special Rapporteur's report.

[35] See *Official Records of the General Assembly, Sixty-seventh Session, Sixth Committee*, 21st meeting (A/C.6/67/SR.21), para. 36.

same vein, it might be prudent to postpone the inclusion of a definition of immunity *ratione materiae* until the Commission had agreed on the scope and content of that form of immunity, rather than to include a "without prejudice" clause at the current stage.

8. Lastly, he agreed with the restrictive approach advocated by the Special Rapporteur with regard to immunity *ratione personae*. He was in favour of having foreign ministers covered by that form of immunity, both because such immunity had been confirmed by the International Court of Justice and because of the presumption that Ministers for Foreign Affairs represented the State in international relations. In conclusion, he recommended that the draft articles should be referred to the Drafting Committee.

9. Mr. HUANG said that given the difficult nature of the topic, the Commission should focus on the codification of *lex lata*, while giving consideration to progressive development on some specific issues, in a cautious manner and on the basis of consensus. He fully endorsed the Special Rapporteur's approach and the distinction she had drawn between immunity *ratione personae* and immunity *ratione materiae*. However, he would like the meaning of "Immunities established under other *ad hoc* international treaties", in draft article 2 (*c*), to be clarified, preferably by providing examples. It would also be useful to clarify whether the immunity of military officials was within the scope of the topic.

10. He did not agree with what the Special Rapporteur said in paragraph 29 of her report about methodological inconsistency: the fact was that draft article 1 excluded immunity before all international criminal courts from the scope of the draft articles. As to the case law of individual States, the only example so far was the decision of the Swiss Federal Criminal Court, and that could not be regarded as a trend. He was likewise not in agreement with the views set out in paragraph 30: he did not think that the jurisprudence of international criminal courts was particularly relevant to the topic. As to the definition of "official" mentioned in paragraph 32, he thought that the term could refer to a specific senior public office holder representing a State, within the framework of immunity *ratione personae*, while in the context of immunity *ratione materiae*, more emphasis would be given to function rather than to representation.

11. As to the relationship between jurisdiction and immunity, the "eminently procedural" legal nature of immunity should entail two elements: first, immunity was simply a procedural impediment to the exercise of jurisdiction and did not absolve the persons concerned from material responsibility; and second, immunity fell within the domain of procedural rules, and irrespective of the basis on which a court decided that it had jurisdiction, it did not imply the absolute exclusion of immunity. Caution was called for as to the definition of "criminal jurisdiction" mentioned in paragraph 38. The judicial systems of States differed: while some made a clear distinction between criminal proceedings and administrative and civil proceedings, that was not the case in all States. Moreover, the criteria whereby "executive acts" made it possible to "establish that … there is specific individual criminal responsibility for acts that constitute crimes" were too broad. There was accordingly a need to take into account the differences in the judicial systems of States and to exercise caution to prevent arbitrary expansion of the scope of criminal jurisdiction.

12. He felt that draft article 4 did not reflect the new trends in international practice; its wording essentially ruled out the possibility of including any State representatives other than the members of the troika among those who enjoyed immunity *ratione personae*. While it was true that Heads of State, Heads of Government and Ministers for Foreign Affairs traditionally enjoyed such immunity, it must not be forgotten that in the *Arrest Warrant* case and *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, the International Court of Justice had not excluded the possibility that other senior State officials should also be granted such immunity. More and more cases in national courts demonstrated that immunity *ratione personae* was not limited to the troika. The judges in such cases stated that with the development of international relations, senior State officials such as ministers of defence and ministers of international trade increasingly took part in international exchanges and were better able to perform their functions as international representatives of the State if they were granted immunity *ratione personae*. Only a minority of countries in the Sixth Committee were in favour of limiting immunity *ratione personae* to members of the troika. A majority of States were ready to explore the possibility of extending that form of immunity to other senior officials. The absence of consensus on the subjective scope of immunity *ratione personae* must not lead the Commission to limit that scope to the members of the troika. The wording of draft article 4 should therefore be amended to allow other individuals, such as senior State officials, to be included. In conclusion, he was in favour of referring draft articles 1 to 6 to the Drafting Committee.

13. Mr. KAMTO commended the Special Rapporteur on her clear and well-structured second report. Although he found nothing of a methodological nature to criticize, he would have liked to have seen more examples of State practice and major trends in international law. He saluted the Special Rapporteur's achievement in presenting six draft articles at such an early stage of the work, but he would have preferred for her to concentrate on the first three, providing the necessary clarification on the analysis that went into their formulation. When the Commission was drafting new rules of international law, it could not create them *ex nihilo*; rather, it must base them on established practice or, where necessary, on strong trends in international law deduced from analysis of international legal instruments.

14. He agreed that it was necessary to harmonize the wording of draft article 1, which spoke of the immunity of "certain" State officials, with the title of the topic, namely the immunity from foreign criminal jurisdiction of "State officials". He proposed that the words "*renvoie à*" should be replaced by "*traite de*" in the French version of draft article 1. Also to be deleted were the words "*ou le contexte*", in draft article 2 (*a*), which were superfluous, and "*ad hoc*", in draft article 2 (*c*), which added nothing except ambiguity. He welcomed the

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

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

16. Although it was too early to draw final conclusions from that rapid overview, one could justifiably assert that there was currently a trend in international law towards recognizing individual responsibility for international crimes, independently of whether their perpetrators had the status of State official. Such immunity, which lasted as long as the person held office, did not cover acts performed prior to taking office, in contrast to what the Special Rapporteur suggested in draft article 5, paragraph 1. Immunity protected the State official in that capacity, but did not exonerate him or her of responsibility; instead of erasing the offence by ruling out any possibility of prosecution, it merely deferred prosecution. In short, he felt that further consideration was required for draft article 4. While the Head of State, Head of Government and Minister for Foreign Affairs certainly enjoyed immunity from foreign criminal jurisdiction, it was an open question whether other State officials should be entitled to immunity. As to whether immunity from foreign criminal jurisdiction should be valid with respect to international crimes, the question must be dealt with now, probably in draft article 5. Lastly, the temporal factor must be clarified by clearly indicating that the expiration of immunity *ratione materiae* opened the door to foreign criminal jurisdiction for the most serious crimes committed before, during and, *a fortiori*, after an official's term of office.

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

The meeting rose at 11.30 a.m.

3166th MEETING

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

Chairperson: Mr. Bernd H. NIEHAUS

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

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

[Agenda item 1]

1. The CHAIRPERSON drew attention to the programme of work for the next two weeks of the session.

2. Ms. ESCOBAR HERNÁNDEZ, Mr. NOLTE, Mr. CANDIOTI and Sir Michael WOOD proposed amendments to enable the Drafting Committee to complete its work on time.

3. The CHAIRPERSON said he took it that the Commission wished to adopt the proposed programme of work, as amended.

It was so decided.

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

* Resumed from the 3163rd meeting.