Document:-
A/CN.4/3086

Summary record of the 3086th meeting

Topic:
Immunity of State officials from foreign criminal jurisdiction

Extract from the Yearbook of the International Law Commission:-
2011, vol. I

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46. The CHAIRPERSON said he took it that the members of the Commission wished to refer draft articles 19 to 66 to the Drafting Committee.

It was so decided.

The meeting rose at 11.05 a.m.

3086th MEETING

Tuesday, 10 May 2011, at 10 a.m.

Chairperson: Mr. Maurice KAMTO

Present: Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escobar Hernández, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Ms. Jacobsson, Mr. Kolodkin, Mr. McRae, Mr. Melescanu, Mr. Niehaus, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

Immunity of State officials from foreign criminal jurisdiction[42] (A/CN.4/638, sect. F, A/CN.4/646[43])

[Agenda item 8]

Second report of the Special Rapporteur[44]

1. The CHAIRPERSON invited Mr. Kolodkin (Special Rapporteur) to present his second report.

2. Mr. KOLODKIN (Special Rapporteur), presenting his second report on the immunity of State officials from foreign criminal jurisdiction, said that the report, which should have been considered at the previous session, but which had not been examined because its presentation had been delayed, concerned a fundamental aspect of the topic, that of the scope of that immunity. Three reports, the preliminary report,[45] the second report and a third report (A/CN.4/646) dealing with the procedural aspects of immunity, which would be presented during the second part of the current session, covered almost all the issues that needed to be studied at the preliminary stage of work on the topic.

3. As almost three years had elapsed since the preliminary report had been examined in 2008, the second report outlined the history of the consideration of the topic and summarized the contents of the first and second parts of the preliminary report. A summary of the second report was to be found in its last paragraph. In order to put Commission members completely in the picture, he had taken the liberty of having a summary of the third report distributed informally to them exclusively for their information. Members would thus have a comprehensive view of the key issues and of the Special Rapporteur's approach to them.

4. The second report drew extensively on the Secretariat memorandum.[46] In most cases, the citations of legal writings and court decisions contained in the memorandum were mentioned, but not reproduced *in extenso*. Since the second report had been drafted, some additional court decisions had been delivered and new strands of legal opinion of relevance to the topic had appeared. For example, the Supreme Court of the United States had delivered a decision in the *Samantar v. Yousuf* et al. case which was of interest not only in itself but also, and to a greater extent, on account of the position adopted by the Government of the United States on the case. A British court had recently issued a decision in the *Gorbachev* case. Unfortunately, the *Yearbook* of the Institute of International Law containing the preparatory work leading up to the resolution on the immunity from jurisdiction of the State and of persons who act on behalf of the State in case of international crimes, adopted by the Institute at its session in Naples in 2009,[47] had not been published before the second report had been written. Those documents and the resolution itself were of interest in the context of the questions examined in that report.

5. He would pick out only the most important points of his report. It analysed the scope of immunity *de lege lata*. His starting point had been the notion of immunity in positive international law, as reflected in the decisions delivered by the ICJ in the *Arrest Warrant* and *Certain Questions of Mutual Assistance in Criminal Matters* cases.

6. The report was premised on the idea that the personal or functional immunity of State officials from foreign criminal jurisdiction was a rule of general international law requiring no proof, whereas it was necessary to prove that there were exceptions to that immunity.

7. The report also proceeded on the assumption that functional immunity was in essence State immunity. It covered all the official's acts performed in an official capacity. Those acts encompassed all illegal acts, however serious they might be, *ultra vires* acts and non-public acts. The category of acts performed by officials in their official capacity was broader than that of acts falling within official functions. As all those acts were official, they were attributed to both the official and the State. In his view, the attribution of conduct for the purposes of immunity was no different from the attribution of conduct

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[42] At its fifty-ninth session (2007), the Commission decided to include the topic in its programme of work and named Mr. Roman Kolodkin Special Rapporteur (*Yearbook ... 2007*, vol. II (Part Two), p. 98, para. 376). At its sixtieth session (2008), it discussed the preliminary report of the Special Rapporteur (*Yearbook ... 2008*, vol. II (Part One), document A/CN.4/601) and also examined a memorandum by the Secretariat (A/CN.4/596 and Corr.1 (mimeographed; available from the Commission's website, documents of the sixtieth session)). The Commission could not discuss the topic at it sixty-first or sixty-second sessions, in 2009 and 2010, respectively (*Yearbook ... 2010*, vol. II (Part Two), chap. IX).

[43] Reproduced in *Yearbook ... 2011*, vol. II (Part One).

[44] Reproduced in *Yearbook ... 2010*, vol. II (Part One), document A/CN.4/631.

[45] *Yearbook ... 2008*, vol. II (Part One), document A/CN.4/601.

[46] A/CN.4/596 and Corr.1 (mimeographed; available from the Commission's website, documents of the sixtieth session).

[47] Institute of International Law, *Yearbook*, vol. 73 (2010), Session of Naples (2009), Parts I and II, Third Commission, "The fundamental rights of the person and the immunity from jurisdiction in international law", pp. 3 *et seq.*, and resolution on "The immunity from jurisdiction of the State and of persons who act on behalf of the State in case of international crimes", p. 226 (available from www.idi-iil.org, resolutions).

for the purposes of State responsibility. The functional immunity of a serving or former official protected that person only in respect of acts performed in an official capacity and therefore solely while he or she was in office. Hence, functional immunity was limited.

8. The personal immunity enjoyed by the "threesome", and probably some other senior State officials, covered acts performed in both an official and a private capacity. It protected those persons solely while they were in office for acts carried out during and before that period. Immunity linked to a post ceased as soon as its holder left it and once that person became a former official, he or she enjoyed only functional immunity in respect of acts performed in his or her official capacity while still in office; thus personal immunity was absolute.

9. The report examined the question of which acts of a State exercising jurisdiction were precluded by immunity, in other words, which acts would constitute a violation of immunity. It was suggested that the criteria for defining all acts of that kind should be those identified in the judgments rendered in the *Arrest Warrant* and *Certain Questions of Mutual Assistance in Criminal Matters* cases. In the latter judgment, the Court had found that "the determining factor in assessing whether or not there has been an attack on the immunity of the Head of State lies in the subjection to the latter to a constraining act of authority" (para. 170).

10. If the criterion formulated by the Court were to be adopted, immunity would obviously not preclude all criminal procedure measures against a foreign official—far from it—but only those that imposed a legal obligation on the person, in other words those that might be accompanied by penalties or measures of constraint in the event of non-fulfilment. For example, the commencement of a preliminary investigation or the institution of criminal proceedings not only in respect of the alleged fact of a crime, but also against a specific person, could not be regarded as a violation of immunity if they did not impose any obligation on that person under the applicable national law.

11. For that reason, a State which had grounds to believe that a foreign official had committed an act that was punishable under its criminal law could begin to gather evidence for the case (in other words, to collect witnesses' testimony, documents and exhibits) by measures which were not binding or constraining on the foreign official. After that stage, it would be possible to judge with greater or lesser certainty whether (and to what extent) the person concerned had participated in the commission of the alleged crime and whether his or her acts should be deemed official, *inter alia*. If there was sufficient evidence to infer that the foreign official had participated in the crime, depending on the circumstances, it was up to the State exercising jurisdiction to choose other measures that did not violate that person's immunity. For example, the State concerned could be notified of the circumstances of the case with the suggestion that it should waive the official's immunity, a request for mutual judicial assistance with the case could be submitted or the evidence gathered during the preliminary investigation or initial criminal proceedings could be forwarded to that State with the proposal that it should bring an action against the person in question. If the alleged crime fell within the jurisdiction of an international criminal tribunal, or the International Criminal Court, that approach would make it possible to hand over the body of evidence to the appropriate international criminal judicial body. Finally, after the evidence had been gathered, while refraining from any measures precluded by immunity, criminal action could be initiated against the State official once he or she left office (if persons enjoying personal immunity had committed the acts prior to their taking office, or in a private capacity while in office).

12. With regard to the territorial scope of immunity, the opinion expressed in the report was that immunity did not apply solely during an official's stay abroad. In his opinion, criminal procedure measures imposing an obligation on a foreign official violated his or her immunity irrespective of whether he or she was in the territory of a particular State. The obligation not to take such a measure against a foreign official was breached as soon as the measure was adopted and not only when the person in question was abroad.

13. As for possible exceptions to immunity, the prevailing view was that the personal immunity of the "threesome" was absolute and was subject to no exceptions.

14. Any discussion of exceptions generally revolved around exceptions to immunity *ratione materiae*, but the more radically minded held that functional immunity was arguably non-existent if an official had committed crimes under international law, or international crimes.

15. The report examined a number of rationales for exceptions to immunity that had been put forward in legal writings or national courts' decisions. They constituted attempts to base the waiving of immunity on references to *jus cogens* norms, universal criminal jurisdiction or the emergence of a rule of customary international law establishing an exception to immunity, for example.

16. Since he had completed the second report, it had unfortunately become clear that it did not cover all the rationales for exceptions. For example, the report did not examine the contention that the State exercising jurisdiction was entitled to refuse to recognize immunity as a countermeasure to a breach of international law committed by the official's State of nationality. That rationale was discussed in an article by Andrea Gattini, which had been published in 2011 in the *Leiden Journal of International Law*.[48]

17. In his opinion, none of the rationales for an exception to immunity, or for the absence of immunity, that had been discussed in the report was sufficiently convincing and none could be regarded as an established rule of international law.

18. In that connection, it should be noted that arguments in favour of an absence of immunity were frequently buttressed by references to a wide range of national court

[48] A. Gattini, "The dispute on jurisdictional immunities of the State before the ICJ: is the time ripe for a change of the law?", *Leiden Journal of International Law*, vol. 24, No. 1 (March 2011), pp. 173–200.

judgments. A submission along those lines addressed to the European Court of Human Rights by a group of non-governmental organizations (NGOs)[49] in the cases *Jones v. the United Kingdom* and *Mitchell and Others v. the United Kingdom* was briefly mentioned in the report. On closer inspection, it was plain that not everything in those cases militated against immunity. Other examples could be quoted. The *Guatemalan Genocide* case heard by the Supreme Court of Spain in 2003, or the *Xuncax v. Gramajo* case heard by a district court in the United States in 1995, were sometimes cited in support of the principle that exceptions could be made to immunity. Ms. Escobar Hernández would correct him if he was wrong, but it seemed that, in the decision rendered by the Supreme Court of Spain, the question of jurisdiction had been studied in depth, whereas the subject of immunity had not been broached (perhaps one of the reasons was that the Government of Guatemala had not raised it). The decision in the *Gramajo* case bluntly stated that neither the past nor the current Governments of Guatemala had characterized the actions of their former official as officially authorized. Moreover, it had been found that the former Guatemalan official had no immunity, since the acts of which he was accused could not be regarded as having been committed within the scope of his official capacity.

19. Generally speaking, not all judicial decisions of that nature directly granted former officials immunity in respect of international crimes of which they were charged on the grounds that the acts in question had been performed by them in an official capacity. Yet there were some well-known examples of such decisions, such as the decisions taken by the German and French authorities in 2005 and 2008 (in Germany by the Federal Prosecutor's Office and in France by the Public Prosecutor's Office and the Ministry of Justice) when a request had been made to open criminal proceedings against American former officials, in particular the former Defense Secretary Donald Rumsfeld, and the decision of American district and appeal courts in the *Belhas* et al. *v. Ya'alon* case in 2008. One commentator, Jason Morgan Foster,[50] had stated that this decision was significant for several reasons. First, by granting immunity to a former head of military intelligence, *Belhas* et al. *v. Ya'alon* had provided further support for the increasingly accepted proposition that under customary international law, immunities *ratione materiae* covered activities performed by every State official in the exercise of his functions. Secondly, that decision had concluded (albeit on the basis of the text of a law entitled the Foreign Sovereign Immunities Act and not on the customary law of immunity of State officials) that a violation of a *jus cogens* norm did not necessarily remove immunity.[51] Those well-known decisions supporting the argument that no exceptions could be made to immunity had inadvertently not been mentioned in the second report, which was why he was drawing attention to them at that point.

[49] "*Jones v. United Kingdom* (application number 34356/06), *Mitchell and Others v. United Kingdom* (application number 40528/06): Written comments by Redress, Amnesty International, Interights and Justice", letters of 14 and 25 January 2010 (available from www.redress.org).

[50] J. Morgan Foster, "United States Court of Appeals for the District of Columbia: *Belhas v. Ya'Alon*: Introductory note", ILM, vol. 47 (2008), pp. 141–143.

[51] *Ibid*., p. 142.

20. A separate examination was made in the report of a situation where criminal jurisdiction was exercised by the State in whose territory the alleged crime had been committed, when that State had not consented to the conduct in its territory of the activity which had led to the crime and had not agreed to the presence in its territory of the foreign official who had committed the alleged crime. In those circumstances there seemed to be sufficient grounds for postulating an absence of immunity.

21. On the other hand, in his opinion, criminal proceedings against members of the armed forces and their immunity in respect of crimes committed during an armed conflict in the territory of the State exercising jurisdiction was a special case that should not be examined within the framework of the topic.

22. Generally speaking, the question of exceptions to the rule of functional immunity after international crimes had been committed was certainly a crucial and highly controversial issue when considering the scope of immunity. In that connection, it was necessary to point out that the 2009 resolution of the Institute of International Law, which he had already mentioned, to whose drafting some of the members present in the room had contributed, contained a provision which read: "No immunity from jurisdiction other than personal immunity in accordance with international law applies with regard to international crimes"[52] (Art. III, para. 1). If he was not mistaken, that provision had been proposed by Mr. Gaja.

23. On the other hand, the preparatory work contained in the Institute's *Yearbook* did not fully explain the bases on which that provision rested. In addition, the preamble to the resolution referred to *de lege lata* and *de lege ferenda* provisions of international law. That being so, the provisions forming the foundation of the provision which he had just mentioned were to be found in the sections of draft resolutions that concerned positive international law.

24. It was fairly widely held that while exceptions to immunity in the case of international crimes did not form part of positive international law, they had to be accepted in consequence of its progressive development. The report examined the question of the extent to which such development of international law was desirable. He was not entirely convinced that such development might be a sign of progress; one case in point being the status of relations between certain developed and developing countries, which had resulted from attempts to introduce universal jurisdiction and to restrict the immunity of foreign officials.

25. As a general rule, without the consent of their State of nationality, attempts to prosecute foreign officials for crimes committed in their country and not in the State exercising jurisdiction would lead nowhere, or would end in decisions delivered *in absentia*. Without the cooperation of the official's State of nationality, it was difficult to gain access to evidence of the alleged crime. That fact, together with the likelihood of a sentence passed *in absentia*, hardly made the spread of that kind of justice desirable. The possibility of initiating the criminal

[52] Institute of International Law, *Yearbook*, vol. 73 (see footnote 47 above), p. 227.

prosecution of State officials in another State for acts performed in their official capacity could potentially lead to the spread of selective, politically motivated justice.

26. The Commission's primary task was to codify international law on the topic. The immunity of State officials from foreign criminal jurisdiction was a matter of international law. The Commission could contribute to the uniform application by various national courts of international legal standards relating to the officials' immunity. That would enable it to abandon attempts to devise what were sometimes rather dubious foundations for the immunity of State officials, or the absence thereof.

27. He hoped to present a third report (A/CN.4/646) on the subject for the Commission's consideration during the second part of the session and thus to complete the preliminary stage of work on the topic. That report would deal, broadly speaking, with procedural aspects such as the validity of immunity and the refusal of immunity. It would also examine the link between the validity or the refusal of immunity and the potential responsibility of the official's State of nationality. In that connection, he wished to provide the Commission with a summary of the third report, which might, of course, be subject to some small amendments.

28. The contents of the third report could be summarized in the following manner:

(*a*) The question of the immunity of a State official from foreign criminal jurisdiction should in principle be considered at the beginning of judicial proceedings, or even prior to that, at the pretrial phase, when the State exercising jurisdiction was contemplating criminal proceedings which were precluded by the immunity of the person concerned.

(*b*) Failure to examine the question of immunity *in limine litis* might be regarded as a violation by the State of its obligations under rules on immunity. That also applied to the pretrial phase, when criminal proceedings precluded by immunity were being envisaged.

(*c*) Reliance on immunity was permissible, in other words it was capable of producing legal effects, only if such immunity was claimed by the foreign State concerned and not by the official.

(*d*) In order for a foreign State to claim immunity on behalf of its official, it had to be aware that criminal proceedings had commenced, or could commence. Consequently, a State that was planning to initiate such measures against a foreign State official must inform the State concerned.

(*e*) When the foreign State official was a Head of State, a Head of Government or a Minister for Foreign Affairs, the State exercising criminal jurisdiction must raise the question of that person's immunity *proprio motu* and then determine the course of action to be taken. In that case, the only appropriate course of action would be to ask the foreign State to waive immunity, with the result that the foreign State would not bear the burden of invoking the immunity of its official before the authorities of the State exercising jurisdiction.

(*f*) When the official of a foreign State enjoyed functional immunity, it was incumbent upon the State concerned to invoke immunity. If that State was willing to protect its official from foreign criminal prosecution by invoking immunity, it must inform the State exercising jurisdiction first, that the person concerned was its official and, secondly, that he or she enjoyed immunity because the acts ascribed to him or her had been performed in an official capacity. In the absence of such notification, the State exercising jurisdiction was not bound to raise or examine the question of immunity *proprio motu* and could therefore initiate criminal proceedings.

(*g*) When the official of the foreign State enjoyed personal immunity but was not one of the above-mentioned "threesome", it was incumbent upon the State of which he or she was an official to invoke immunity. If that State was willing to protect its official from foreign criminal prosecution by invoking immunity, it must inform the State exercising jurisdiction that the person was its official and that he or she enjoyed personal immunity, because he or she held a high-level position encompassing foreign relations and other functions essential to ensuring the sovereignty of that State.

(*h*) The foreign State, irrespective of the position held by its official, was not bound to notify the foreign court of immunity directly in order that it might examine that issue. That State could notify the State exercising jurisdiction by invoking the immunity of its official through diplomatic channels and that would be a sufficient basis for the court to examine the issue of immunity. The lack of any obligation on the part of the State directly to inform the foreign court flowed from the principle of sovereignty and the sovereign equality of States.

(*i*) The State which invoked the immunity of its officials was not bound to substantiate its claim, apart from conveying the information referred to in subparagraphs (*f*) and (*g*) above. While the State exercising jurisdiction (or the court in question) was not obliged blindly to accept any statement by the foreign State regarding the immunity of its official, it could not ignore such a statement, unless the circumstances of the case clearly disproved it. The qualification of the acts performed by the person concerned as official, or the assessment of the importance of the duties of a high-level official for ensuring the sovereignty of the State was the prerogative of the foreign State and not of the State exercising jurisdiction.

(*j*) The right to waive the immunity of the official lay with the foreign State of which he or she was the representative and not with the official.

(*k*) When the Head of State, Head of Government or Minister for Foreign Affairs waived the immunity of one of the other two high-level representatives of the State, the State exercising jurisdiction might consider that he or she was expressing the will of the foreign State concerned, unless it had received notification from the latter to the contrary.

(*l*) A waiver of the immunity of a Head of State, Head of Government or Minister for Foreign Affairs had to be express. The only possible exception that could be made

was when the State concerned asked a foreign State to initiate criminal proceedings against that official. Any request of that kind was fully equivalent to and implied a waiver of immunity, which had the same implications as the measures requested.

(*m*) The waiver of the immunity of a State official who was not one of the "threesome", but who enjoyed personal immunity, or of a State official who enjoyed functional immunity, or of former State officials who enjoyed functional immunity, could be express or implied. When it was implied, it could take the form of the non-invocation of immunity by the State of which the person concerned was an official.

(*n*) When immunity had been expressly waived, it could no longer be invoked legitimately. In some cases, the express waiving of immunity could apply only to certain specific measures.

(*o*) When the implicit waiving of immunity took the form of the non-invocation of the functional immunity of a State official, or of the personal immunity of a State official who was not one of the "threesome", it seemed that immunity could still be invoked at a later stage of criminal proceedings (especially when the case was referred to a court). It was, however, doubtful that a State that had not invoked immunity before a court of first instance could do so at the appeal stage. In any event, procedural measures taken against the official by the State exercising jurisdiction before that person's immunity had been invoked should not be deemed unlawful.

(*p*) A State's waiver of its official's immunity cleared the way for foreign criminal jurisdiction to be exercised against that person. That was also true of acts performed by that person in an official capacity.

(*q*) Even if a foreign State had waived its official's immunity, it was not relieved of its international responsibility for acts performed by that person in an official capacity.

(*r*) The State which invoked the immunity of its official on the grounds that the acts ascribed to him or her were official thereby recognized that the acts in question were its own acts. It thus established the basis for any actor who was entitled to do so to invoke its international responsibility.

29. Mr. DUGARD said that, although the Special Rapporteur had presented a wealth of evidence of State practice in his second report, he had omitted any reference to the decision delivered in 2009 by the United States Court of Appeals for the Second Circuit in the case concerning *Matar and Others v. Dichter*. He personally would have done the same if he had held the same brief. Mr. Dichter, a former head of the Israeli Security Agency, had been responsible for bombing a residential district in Gaza. The target had been hit, but 14 innocent people had been killed and more than 50 had been injured. The court of appeal had held that the bombing had been committed "in the course of [Mr. Dichter's] official duties", which were not covered by the American Foreign Sovereign Immunities Act, but which were covered by the common law of the United States. Thus a former foreign official, who had not even been a minister, had been granted immunity.

30. He was mentioning that case at the outset because he wanted to inject some facts into the Commission's debate. The Special Rapporteur had examined the law, but he had failed to examine the facts of the cases involved, which had not been concerned with traffic accidents or petty theft, but mostly with crimes of the utmost gravity, such as torture, genocide, war crimes, crimes against humanity and other crimes committed by the worthy successors of Hitler, Eichmann, Idi Amin Dada or Pol Pot. That was therefore the first criticism which he wished to level at the Special Rapporteur. First, it was clear that the serious, gruesome crimes in question had been mainly directed at innocent civilians and had been committed by State officials in violation of *jus cogens* norms. Secondly, when faced with those situations, the territorial State had refused to prosecute the officials involved, because it had supported their acts. In paragraph 76 of his second report, the Special Rapporteur wrote that attempts to exercise universal criminal jurisdiction were, in the absolute majority of cases, undertaken in developed countries with respect to serving or former officials of developing States. That was nonsense, because it was well known that most of the current cases of that kind were being brought against Israeli officials who had committed crimes in Gaza in 2008 and 2009 which Israel, backed by the United States, refused to prosecute. There was no reason why torturers from the developing world, the likes of Al-Qadhafi and Mugabe, should be given immunity simply because they came from a developing country. He resented such a very patronizing attitude. Thirdly, the International Criminal Court was not an option in those circumstances, because the rogue States were not parties to the Rome Statute of the International Criminal Court. Nor was it possible to count on a referral of those situations to the Court by the United Nations Security Council because, in the case of the crimes committed in Gaza, for example, Israeli officials were protected by the veto of the United States.

31. The crucial question was therefore whether accountability or impunity should prevail and what role the Commission should play. As the American judge Felix Frankfurter had written, law-making was "not an exercise in logic or dialectic",[53] but an exercise in choice.[54] The Commission therefore had to choose between accountability and impunity. In either case, it would be engaging in progressive development, for it could not hide behind the fig leaf of codification as an excuse for retaining the old law which had existed before the International Criminal Court, before the human rights movement and before current demands for accountability.

32. The Commission was not examining that difficult subject for the first time. In 1950, it had rejected immunity when it had formulated the Principles of International Law Recognized in the Charter of the Nürnberg Tribunal

[53] F. Frankfurter, "Some reflections on the reading of statutes", *Columbia Law Review*, vol. 47, No. 4 (May 1947), pp. 527–546, at p. 529.

[54] *Ibid.*, p. 532.

and in the Judgment of the Tribunal[55] (Nuremberg Principles). It had done so again in 1954 in its draft code of offences against the peace and security of mankind[56] and in article 7 of the 1996 draft code of crimes against the peace and security of mankind.[57] Lastly, in 1999, its Working Group on jurisdictional immunities of States and their property had emphasized that developments relating to immunity as a result of the *Pinochet* case should not be ignored.[58] He was therefore somewhat dismayed that the Special Rapporteur was proposing to wipe out history and to depart from the position consistently adopted by the Commission.

33. As Judges Higgins, Kooijmans and Buergenthal had written in paragraph 75 of their joint separate opinion in the *Arrest Warrant* case,

> On the one scale, we find the interest of the community of mankind to prevent and stop impunity for perpetrators of grave crimes against its members; on the other, there is the interest of the community of States to allow them to act freely on the inter-State level without unwarranted interference. A balance therefore must be struck between two sets of functions which are both valued by the international community. Reflecting these concerns, what is regarded as a permissible jurisdiction and what is regarded as the law on immunity are in constant evolution. The weights on the two scales are not set for all perpetuity. Moreover, a trend is discernible that in a world which increasingly rejects impunity for the most repugnant offences, the attribution of responsibility and accountability is becoming firmer, the possibility for the assertion of jurisdiction wider and the availability of immunity as a shield more limited.

34. He did not wish to become embroiled in a debate on whether the refusal to grant immunity for serious crimes was the rule or the exception. A clear distinction had to be drawn between two arguments; the first was that immunity extended to Ministers for Foreign Affairs and other State officials, the second was that there was no immunity for Heads of State or Heads of Government in cases of serious international crimes. In the former case, the crucial question was whether there was a new rule because, before the *Arrest Warrant* case, it had generally been accepted that Ministers for Foreign Affairs and other ministers were not entitled to immunity. He was not convinced that the decision of the ICJ in that case had been correct. The Court had provided absolutely no evidence of State practice in support of its view that Ministers for Foreign Affairs should be afforded immunity. Furthermore, at its session in Vancouver in 2001, the Institute of International Law had stated that no such immunity should be granted.[59] In 1991, the Commission had reached the same conclusion in its work on the jurisdictional immunities of States[60] and, as the Special Rapporteur acknowledged in his second report, many legal writers had been very critical of that particular judgment. Judge Van den Wyngaert had also expressed a strongly dissenting opinion on that case.[61] At that point, it was necessary to mention that the ICJ did not include many international criminal law specialists, which meant that there was all the more reason to listen to those who were.

35. The real question, however, was whether State officials were immune from foreign criminal jurisdiction in national courts or, in other words, whether there was an exception to the rule of immunity in cases involving grave crimes where *jus cogens* norms had been violated.

36. There were two possible narratives, each supported by sources. The first, in favour of immunity, was proposed by the Special Rapporteur. First, it postulated that immunity was absolute except where there was a clear exception, as in the case of *acta gestionis* (commercial acts); secondly, that immunity applied to Heads of State, Heads of Government, Ministers for Foreign Affairs and, possibly, other officials; thirdly, that immunity embraced immunity *ratione materiae*, or functional immunity and immunity *ratione personae*, or personal immunity; fourthly, as the Special Rapporteur had stressed, that immunity from jurisdiction did not mean impunity for crimes committed, since immunity from criminal jurisdiction and individual responsibility were two different concepts, the first being procedural in nature, whereas the second was a question of substantive law. Jurisdictional immunity might bar prosecution, but did not exonerate the person from criminal responsibility, at least in theory, for in practice everyone knew that this person would never be prosecuted, because he would never be tried before a national court and could not be tried before an international criminal court; and fifthly, that none of the exceptions to immunity was valid, in other words, immunity applied to acts that were so heinous that they could not be regarded as official acts, to acts which constituted violations of *jus cogens* norms and to acts which were subject to universal jurisdiction.

37. The other narrative against immunity postulated that, first, immunity was not absolute, as was shown by the development of international law in respect of commercial acts. Immunity was continually evolving in accordance with the values of the international community as a whole. Secondly, that while it did apply in the case of serious international crimes, it certainly did not apply to Ministers for Foreign Affairs. Thirdly, that advocates of accountability generally accepted that immunity *ratione personae* continued to apply to Heads of State and Heads of Government while they were in office, because State practice and judicial decisions were very clear on the subject. However, as the Special Rapporteur clearly pointed out in paragraphs 67 and 77 of his second report, where he rightly relied on the literature and certain judicial decisions, that position was illogical, because if *jus cogens* trumped immunity, it must trump both functional and personal immunity. He agreed with that view, even if the proponents of accountability were generally opposed to it. Fourthly, the narrative postulated that the argument that immunity was procedural and therefore did not remove criminal responsibility was without substance. The consequence of immunity, whether it was termed procedural or anything else, was that it removed criminal responsibility, because in practice there was no national or international forum to try such a person, who would go free. Of course, that theory, which was endorsed

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[55] *Yearbook ... 1950*, vol. II, p. 374.

[56] *Yearbook ... 1954*, vol. II, pp. 151–152.

[57] *Yearbook ... 1996*, vol. II (Part Two), pp. 26–27.

[58] *Yearbook ... 1999*, vol. II (Part Two), annex, p. 172 (paragraphs 11–13 of the appendix).

[59] Institute of International Law, *Yearbook*, vol. 69 (2000–2001), Session of Vancouver (2001), p. 743.

[60] *Yearbook ... 1991*, vol. II (Part Two), p. 22 (paragraph (7) of the commentary to draft article 3).

[61] *I.C.J. Reports 2002*, pp. 142–151.

by the Special Rapporteur, was supported by the ICJ, but there was very little reasoning behind that opinion which contradicted the 1996 draft code of crimes against the peace and security of mankind. In the commentary thereto, the Commission had stated that

> The absence of any procedural immunity with respect to prosecution or punishment in appropriate judicial proceedings is an essential corollary of the absence of any substantive immunity or defence. It would be paradoxical to prevent an individual from invoking his official position in order to avoid responsibility for a crime, only to permit him to invoke this same consideration to avoid the consequences of this responsibility.[62]

In that case, there was a very clear difference of opinion between the ICJ and the Commission. Fifthly, logic, practice, judicial decisions and literature supported the view that there was an exception to immunity in the case of serious international crimes. The Special Rapporteur was therefore wrong in suggesting in paragraph 80 of his second report that proponents of exceptions raised several arguments to support that view because each of them was so weak, for in reality those arguments were all closely related. Essentially, there were two arguments in favour of exceptions. The first was that serious crimes fell outside the functions of the State—it was not the function of the State or of its officials to commit torture or genocide. While that argument did have some support in judicial opinions, he did not find it very persuasive because, as Lord Steyn had observed in the *Pinochet* case, "when Hitler ordered the 'final solution' his act must be regarded as an official act deriving from the exercise of his functions as head of state".[63] The main argument in favour of exceptions to immunity rested on the principle that *jus cogens* norms were hierarchically superior to immunity and trumped it. The Special Rapporteur listed other arguments all of which were offshoots of the *jus cogens* argument. For example, he contended that crimes which were subject to universal jurisdiction were not subject to immunity, or that crimes which were subject to the principle of *aut dedere aut judicare* were not subject to immunity, or that grave crimes were not subject to immunity. But essentially all those arguments confirmed that there was tension between immunity and *jus cogens* norms and that the latter must prevail.

38. The question that had to be addressed was whether the sources supported the existence of those exceptions. No one could say that those sources were absolutely clear on the subject. Some treaties rejected immunity. That was true of the treaties setting up the *ad hoc* tribunals and the International Criminal Court, the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, the 1968 Convention on the non-applicability of statutory limitations to war crimes and crimes against humanity and the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid. There was no logical reason why the principle asserted in those international treaties—some of which applied to international tribunals and others to all tribunals—should not extend to national jurisdictions. As far as he knew, no treaty provided for immunity in respect of international crimes. None of the anti-terrorism or anti-corruption conventions referred to immunity and it could certainly not be inferred from their silence that there should be immunity. The picture was not clear with regard to legislation. Some States, including Burkina Faso, Congo, Niger, Panama, the Philippines, South Africa, Uruguay and, probably, New Zealand, expressly excluded immunity before national courts, whereas others, such as the Netherlands, not surprisingly, were in favour of immunity. In paragraph 74 of his second report, the Special Rapporteur had referred to the case of Belgium, which had amended its universal jurisdiction statute in 2003, and he suggested that it had taken that decision in the wake of the judgment in the *Arrest Warrant* case, but everyone knew that Belgium had not deferred to principle and that it had changed its legislation because the United States had resorted to blackmail by threatening to move NATO headquarters from Belgium if it did not do so. As for case law, in paragraphs 69 and 70 of his second report, the Special Rapporteur listed many cases in which immunity was neither pleaded nor considered. While it was unclear exactly what inference could be drawn from the decisions in those cases, it was certainly not that immunity had to be recognized. There were also cases where the judges had been divided: in *Pinochet No. 3*, the majority of judges had been opposed to immunity, whereas in the *Arrest Warrant* case the majority had been in favour of immunity and a strong minority had been against it. That had been one of the bad decisions of the ICJ, which was to human rights and accountability what the 1966 advisory opinion on the *South West Africa* case had been to non-discrimination. In *Al-Adsani v. the United Kingdom*, which had been heard by the European Court of Human Rights, of the 17 judges, 8, 1 of whom had been Mr. Caflisch, had held in dissenting opinions that *jus cogens* trumped immunity. The decision delivered in the *Ferrini v. the Federal Republic of Germany* case by the Supreme Court of Italy was currently being contested by Germany at the ICJ and, in the United Kingdom, in the case *Jones v. Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya*, the Court of Appeal had issued a different ruling from that of the House of Lords.

39. There had been a tendency to dismiss civil society, although it had substantially influenced developments by promoting the adoption of the Rome Statute of the International Criminal Court and the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction. For that reason, NGOs and their positions with regard to the development of the law could not be ignored. Very cautious NGOs, such as the International Law Association or the Institute of International Law which had debated the subject at its session in Naples for more than a week, and more radical NGOs, such as Amnesty International or Human Rights Watch, were all opposed to the principle of immunity. The Special Rapporteur had been very dismissive of universal jurisdiction, but it had to be appreciated that, although universal jurisdiction, or the threat thereof, which was called "lawfare" in the United States, did not necessarily bring persons before a court, it was a very effective means of publicizing

[62] *Yearbook ... 1996*, vol. II (Part Two), p. 27 (paragraph (6) of the commentary to article 7).

[63] *Regina v. Bow Street Metropolitan Stipendiary Magistrate*, ex parte *Pinochet Ugarte* (*Nos. 1, 2 and 3*), England, House of Lords, 25 November 1998, and 15 January and 24 March 1999, ILR, vol. 119 (2002), p. 104.

atrocities and preventing criminals from travelling. That was what had led to restraints being placed on the travel plans of Tzipi Livni.[64]

40. The authorities themselves were divided. The Special Rapporteur was wrong to conclude in paragraph 78 of his second report that there were no satisfactory arguments in favour of exceptions to immunity, that they were insufficiently convincing and that they were undesirable. The truth was that, as the Special Rapporteur admitted in paragraph 90 of his second report, "[t]he practice of States is also far from being uniform in this respect". The Commission therefore had a choice. It could endorse immunity and therefore impunity in accordance with the expectations of rogue States, dictators and torturers, or it could choose accountability in accordance with the values of the international community and its own history. At the risk of being unpopular, he wished to point out that two opposing cultures met head on in the approach to immunity: the culture of State officials, in other words the culture of seeing legal issues through the spectacles of State interest, and the culture of practising and academic lawyers and of NGOs, who were not blinded by the interests of States. In what was perhaps a Freudian slip, the Special Rapporteur complained in paragraph 80 of his report that "[t]he question of exceptions to immunity *ratione materiae* in cases of grave crimes under international law continues to be raised by lawyers and non-governmental organizations". He hoped that he was wrong, but it did seem that the Special Rapporteur was placing himself in the camp of State officials rather than in that of lawyers, whereas the members of the Commission were first and foremost lawyers and not State officials. The American school of legal realism had argued that, when exercising their choice in law-making, judges should be aware of their inarticulate premises. That was a very important point. He personally was openly in favour of accountability and against immunity. In other words, since the law was uncertain, the Commission could be faithful to its history and incline towards accountability, or it could favour State interests.

41. The Special Rapporteur had suggested that the Commission might consider drafting an optional protocol precluding immunity. But everyone knew what would happen to that protocol. It would not be signed by any State and, like the Rome Statute of the International Criminal Court, it would certainly not be signed by any of the rogue States. That was not therefore a serious option. The Commission had to make a choice. It was to be hoped that the Commission would decide substantially to limit immunity when State officials had committed international crimes against *jus cogens*. Obviously, that decision would not be taken at the current session and neither he nor Mr. Kolodkin would be present at the following session. The Commission would therefore have to show wisdom in appointing a new Special Rapporteur. It would be wrong to appoint an activist—which was unlikely, since Ms. Paula Escarameia had been the only activist on the Commission—but it would be equally wrong to give the topic to a State official.

42. The Special Rapporteur had referred to the presentation of his next report, but the presentation of the next report presupposed the Commission's acceptance of the report currently under examination. The Special Rapporteur had not submitted any draft articles. He therefore wished to know if the members were required to express a preference for or against the principles expounded by the Special Rapporteur. Of course, it was for the Chairperson to decide, but he personally failed to see how the Commission could move on to the following report without having accepted the current report. Speaking for himself and, he hoped, some of his colleagues, he could not accept the current report.

43. Sir Michael WOOD said that members of the Commission obviously did not sit on the latter as serving or former State officials, or as representatives of NGOs. It would be unwise to adopt an emotive approach to the topic and it would not be helpful to focus on the example of Gaza. In addition, the Commission was not a lawmaker; its role was to propose texts. Others would take them up and decide whether to turn them into law. As for its past practice, apart from the fact that its choices in the past did not necessarily bind it, on most if not all of the occasions when it had dealt with international crimes it was looking at the international jurisdiction of courts, with the result that those examples were irrelevant.

44. Mr. DUGARD accepted that his approach had been "emotive" and said that he had intended it to be emotive, because it was an emotional topic. Everyone was the captive of his own history and his was unfortunate, since he had grown up in South Africa at the time of apartheid. If a lawyer criticized the regime, his fellow lawyers called him emotive and urged him to get down to the law. That was where the problem lay in the topic under examination. It was an emotive issue, because the key question with regard to the very serious crimes in question, which had been committed by very nasty people, was whether the latter should be allowed to escape prosecution simply because they were State officials. As far as the Commission's history was concerned, in 1950 and 1954, in the days of hope, there had been an expectation that an international criminal court would be established. But in 1996, when the Commission had adopted its draft code of crimes against the peace and security of mankind, there had been no such expectation and, at that stage, the Commission had quite clearly been talking about national and international jurisdictions.

45. Mr. MELESCANU congratulated the Special Rapporteur on his second report. It was well drafted and clear and it offered a detailed analysis of legal theory, State practice and the decisions of national and international judicial bodies on the subject. The topic was far from easy or purely technical, for it plainly had a political and emotional impact, as well as implications for current international relations, as was evidenced by the large number of cases which had been referred to national courts and international judicial bodies.

[64] In December 2009, the magistrates court of Westminster (United Kingdom) issued an arrest warrant against Tzipi Livni, head of the Israeli opposition, accused of war crimes in Gaza. At the time of the alleged war crimes, Tzipi Livni was the Minister for Foreign Affairs of Israel. The warrant was quickly withdrawn, according to the media, after it was established that she was not in the territory of the United Kingdom (Ian Black, "Tzipi Livni arrest warrant prompts Israeli government travel 'ban' ", *The Guardian*, 15 December 2009).

46. Against that background, the Commission first had to determine what approach to adopt and, above all, to commence work as soon as possible on drawing up draft articles. In that respect, the second report was extremely useful, especially paragraph 94, which summarized some arguments which, if they were accepted by the majority of the Commission's members, would form the cornerstone of the drafting process.

47. The first argument was that, "[o]n the whole, the immunity of a State official, like that of the State itself, from foreign jurisdiction is the general rule, and its absence in a particular case is the exception to this rule" (para. 94 (*a*)). Furthermore, the Special Rapporteur emphasized that the "immunity of officials from foreign criminal jurisdiction is a rule of international law … [which] is an obstacle to criminal liability but does not in principle preclude it" (para. 17). He then added that "[d]espite the existence in the doctrine of a different point of view, it is fairly widely recognized that immunity from foreign jurisdiction is the norm, i.e. the general rule, the normal state of affairs, and its absence in particular cases is the exception to this rule" (para. 18). The Special Rapporteur also explained that the rationale for the immunity comprised "some … principles of international law concerning sovereign equality of States and non-interference in internal affairs [as well as the] need to ensure the stability of international relations and the independent performance of States' activities" (para. 17).

48. Immunity plainly played an important role when it came to stabilizing international relations and exercising State prerogatives. It was a recognized principle that had been clearly codified in diplomatic law. The fact that the principle of the immunity of diplomatic and consular officials and special missions had been accepted in the 1961 Vienna Convention on Diplomatic Relations, the 1963 Vienna Convention on Consular Relations and the 1969 Convention on special missions proved that that was a customary rule of public international law that had been very clearly codified in diplomatic law. That rule of diplomatic law should not, however, be turned into a general rule applying to all State officials. That was the first fallacy in the report. The Special Rapporteur used specific rules on the immunity of diplomatic and consular officials, specifically belonging to diplomatic law, to lay down a general rule of public international law on the responsibility of State officials.

49. The contents of the principle of non-intervention in the internal affairs of other States had undergone some very interesting developments in recent years, to the extent that the point had been reached of there being talk of a right, or even a duty, to intervene. In addition, after the establishment of the Nuremberg Tribunal, the International Military Tribunal for the Far East and the International Criminal Court, a theory had grown up that there were international crimes, such as genocide, crimes against humanity, war crimes and aggression, which were matters for international justice.

50. With reference to the argument set out in paragraph 94 (*a*) of the report, it would be clearer to speak not of a customary rule on the immunity of State officials, but of a principle whose contents the Commission would endeavour to define. That approach would also have the advantage of allowing the Commission to examine the "exceptions to immunity" mentioned by the Special Rapporteur in subparagraphs (*n*) and (*o*) of the same paragraph, with which Mr. Melescanu did not agree. The idea that there was a customary rule on immunity and that exceptions to that rule did not exist, or had to be proved before a court, seemed to be going too far and was highly debatable. It was impossible to accept that the principle of immunity *ratione materiae* and *ratione temporis* could not be limited in certain cases involving the most serious international crimes, crimes against the *jus cogens* norms of public international law, acts performed in a private capacity or certain other acts. The idea that Heads of State, Prime Ministers or Ministers for Foreign Affairs enjoyed absolute immunity for acts committed before, during and after their term of office seemed to be taking matters too far and could not be justified by the need to preserve harmonious inter-State relations.

51. The argument set out in paragraph 94 (*j*) that "[i]mmunity *ratione personae* is affected neither by the fact that acts in connection with which jurisdiction is being exercised were performed outside the scope of the functions of an official, nor by the nature of his [or her] stay abroad, including in the territory of the State exercising jurisdiction", was also extremely debatable, because it did not rest on either codified or customary provisions. In such cases, it was possible to speak of rules of protocol or of international courtesy, but not of legal rules. In addition, when extremely serious criminal offences had been committed, such acts should not be regarded as falling within the functions of a Head of State, as had been made clear in the decision of the Court of Appeal of Amsterdam in the *Bouterse* case and as had been found by Lord Steyn and Lord Nicholls in the *Pinochet No. 1* case and by Lord Hutton and Lord Phillips in the *Pinochet No. 3* case.

52. The second main fallacy in the report, with which he absolutely disagreed, consisted in the recommendation which was to be found in paragraph 94 (*c*) and (*d*) of the second report that the rules on State responsibility for internationally wrongful acts should be applied to the immunity of State officials. The provisions concerning the attribution of conduct of State officials for the purposes of responsibility were necessarily very wide-ranging and encompassed *ultra vires* acts so that State responsibility might be invoked, since the responsibility in question was for wrongful acts and not responsibility arising out of personal fault. Without such provisions, the institution of State responsibility would be weakened or rendered inoperative, since the wrongful acts were not perpetrated by the State itself, which was an abstract entity, but by State officials. Adopting the same approach for the immunity of State officials was questionable because it would not be based on international practice and the responsibility of State officials might be greatly restricted. It was important not to conflate two separate questions: on the one hand, the attribution of officials' conduct for the purpose of invoking State responsibility for internationally wrongful acts and, on the other, the immunity of State officials. The arguments put forward in paragraphs 25, 26 and 27 of the report, which tended to attribute the acts of State officials to the State itself, rested on examples which could not be applied to immunity.

53. Paragraph 94 (*k*) and (*l*) were also problematical on account of their categorical wording. A statement such as "[a]ll serving officials enjoy immunity in respect of acts performed in an official capacity" (subpara. (*k*)), could be formulated only after debate within the Commission and could not serve as a premise for its debates. On the other hand, he endorsed the arguments set out in subparagraphs (*m*) and (*p*) which seemed to be sensible and based on practice in diplomatic and consular law. They might provide a basis for work in respect of codification and progressive development.

54. Lastly, he drew attention to the link between immunity and the *aut dedere aut judicare* clause. He shared the misgivings of the Special Rapporteur on the obligation to extradite or prosecute. In his preliminary report in 2006, Mr. Galicki had included immunities among the "numerous obstacles to the effectiveness of prosecution" for crimes under international law.[65] Although the Special Rapporteur on the immunity of State officials said that he did not have "at his disposal evidence of any widespread practice of States, including judicial practice, or their *opinio juris*, which would confirm the existence of exceptions to the immunity of foreign officials where the exercise of national criminal jurisdiction over them on the basis of the *aut dedere aut judicare* rule is concerned" (para. 79 of the second report), he personally considered that Mr. Galicki's concern was still valid. In its work on both subjects, the Commission might contemplate the introduction in draft articles on immunity of a "without prejudice" clause covering rules on the application of the *aut dedere aut judicare* rule.

55. In conclusion, he agreed with Mr. Dugard that it was unwise to think about the examination of a third report when the Commission had not yet reached any conclusions about the second report which was currently under consideration.

The meeting rose at 11.45 a.m.

3087th MEETING

Thursday, 12 May 2011, at 10 a.m.

Chairperson: Mr. Maurice KAMTO

Present: Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escobar Hernández, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Ms. Jacobsson, Mr. Kolodkin, Mr. McRae, Mr. Melescanu, Mr. Niehaus, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

Immunity of State officials from foreign criminal jurisdiction (*continued*) (A/CN.4/638, sect. F, A/CN.4/646)

[Agenda item 8]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (*continued*)[66]

1. The CHAIRPERSON invited the 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.4/631).

2. Ms. JACOBSSON said that before expressing her views on the Special Rapporteur's second report, she wished to welcome the new member of the Commission, Ms. Concepción Escobar Hernández, of Spain. The nomination by Spain of a woman as a candidate for membership of the International Law Commission set an example that other States ought to follow, as the composition of the Commission should reflect that of the legal community, where there was no lack of qualified women who were experienced international lawyers.

3. The immunity of State officials from foreign criminal jurisdiction was an important topic, as evidenced by the consensus in the Sixth Committee of the General Assembly that the Commission should give high priority to its consideration. The views expressed by the Special Rapporteur in his report were clear and consistent; in addition, the report was well researched and provided a valuable update on relevant case law.

4. The fact that the question of immunity was a sensitive one could be seen from the Special Rapporteur's passionate defence of the logic of his report and the Commission's animated debate on the topic. In fact, no lawyer could claim to apply the law free from any ideological or emotional predisposition, for neither the law nor its application was value-free. She therefore disagreed that greater justification could be claimed for a particular legal position if it was held to be devoid of emotion. While the Special Rapporteur's conclusions might be purely logical, as he maintained, they merely followed from his stated hypothesis. Consequently, an assessment of that hypothesis was more important than whether the conclusions derived from it were purely logical, and the Commission must decide whether or not to accept it.

5. The Special Rapporteur's starting point was the principle of State sovereignty and its effects, one of which was the immunity of State officials from foreign criminal jurisdiction. In essence, the Special Rapporteur took the view that immunity was absolute. While State sovereignty clearly lay at the heart of international law, the way in which that principle was viewed had evolved over the past several decades. The question, then, was whether its effects had also evolved and, if so, to what extent.

6. She concurred with the argument that immunity was procedural in nature; however, its consequences were not. Accordingly, the Commission had to address those

[65] *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/571, pp. 262–263, para. 14.

[66] Reproduced in *Yearbook ... 2010*, vol. II (Part One), document A/CN.4/631.