Document:-
A/CN.4/3087

Summary record of the 3087th meeting

Topic:
Immunity of State officials from foreign criminal jurisdiction

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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

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[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.

consequences, as it would be not only naive but also irresponsible for it to hide behind a mere clinical reference to the procedural nature of immunity.

7. As to the Special Rapporteur's claim that there was necessarily a link between immunity as derived from the principle of State sovereignty on the one hand and State responsibility on the other, she was not entirely convinced that such was always the case. That issue had also been raised by Mr. Melescanu at the previous meeting. She wished to cite two examples of how the Special Rapporteur's argument was problematic and could be challenged.

8. The first example was derived from the judgment of the ICJ of 26 February 2007 in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, in which the Court had clearly found that a State could be in breach of an international obligation despite the fact that individual responsibility had not been established prior to the establishment of State responsibility (para. 180 of the judgment). The Court had rejected the respondent's argument that it was a *sine qua non* condition that State responsibility should be predicated on individual responsibility, concluding that "State responsibility can arise under the Convention for genocide and complicity, without an individual being convicted of the crime or an associated one" (para. 182).

9. The Court's formulation in that judgment had relevance for the Commission's work in two ways. First, it showed that the institution of criminal proceedings against State officials and the establishment of State responsibility were not necessarily procedurally linked. In fact, the Court had concluded that the reverse also applied. For example, war criminals who had acted as representatives of a State were increasingly being brought to justice without there being a parallel process by which State responsibility was established. The second aspect of relevance to the Commission's work was the categorical nature of the language used by the Court in its decision, when it stated that "[a]ny other interpretation could entail that there would be no legal recourse available under the [Convention on the Prevention and Punishment of the Crime of Genocide] in some readily conceivable circumstances" (*ibid.*).

10. If it could be shown that there was no procedural link between State responsibility and individual responsibility, then the question arose as to whether the link between the immunity of State officials from foreign criminal jurisdiction and State responsibility was as strong as the Special Rapporteur claimed it was. She did not believe so.

11. The second example of the problematic nature of the Special Rapporteur's argument came from the latter's statement that the State in which the official served could waive immunity, thereby allowing the court of another State to exercise criminal jurisdiction over the official in relation to an act of *jure imperii*, or sovereign authority. If immunity was necessarily linked to State responsibility, then there was the risk that a waiver of immunity by the State in which the official served could be used as a tool by that State to exonerate itself from its responsibility at the expense of the official.

12. The question was whether to approach the problem of the relationship between immunity and State responsibility as one involving a hierarchy of norms or as an exception to a rule or principle, or both. The Special Rapporteur had answered that question by focusing the discussion on exceptions to immunity and, in so doing, setting aside the issue of the hierarchy of norms and its relevance to the topic. It had been claimed by some, albeit not by the Special Rapporteur, that a hierarchy of norms could not be applied to the problem because State responsibility was governed by substantive rules, whereas immunity was governed by procedural rules. Whether or not one shared that view—and she did not—the issue of the hierarchy of norms was one that had to be addressed and analysed, and not simply dismissed.

13. It was unclear why the Special Rapporteur had indicated in his oral presentation that immunity for war crimes, or breaches of international humanitarian law, lay outside the scope of his report. To exclude that aspect from the Commission's work on the topic would be most unfortunate, since it was precisely in the field of international humanitarian law where the most substantive obligation to prosecute or extradite existed, and where the issue of exemption on grounds of immunity from the obligation to prosecute or extradite had been extensively analysed. The obligation to prosecute or extradite in cases of alleged war crimes could have a direct bearing on the immunity of State officials from foreign criminal prosecution. A military officer who was a suspected war criminal and who was present in the territory of a foreign country was not necessarily immune from prosecution in that country, particularly if his own country had not brought proceedings against him. The Commission should therefore not exclude such cases from its consideration.

14. Although the Commission had agreed that it would not address diplomatic or consular immunity because those forms of immunity were governed by existing international conventions, there might be some areas of overlap with jurisdictional immunity that made it necessary to consider them. For example, according to news reports, the United Kingdom had waived the "diplomatic immunity" of the Libyan leader Muamar Al-Qadhafi and members of his family. That raised the question of whether, given a hypothetical situation in which Mr. Al-Qadhafi was arrested in the United Kingdom for war crimes and crimes against humanity, he would be entitled to jurisdictional immunity on the ground that he was an acting Head of State and that the United Kingdom had waived only his diplomatic immunity.

15. One of the problems with the topic of immunity, if the Commission accepted the view of the Special Rapporteur, was that it was applicable to a wide range of acts. During the consideration of the topic at the Commission's sixtieth session, Ms. Jacobsson had stated that the Commission should address issues relating to acts carried out in the territory of a foreign State such as kidnapping, murder committed by a foreign secret service agent and illegal intelligence-gathering or espionage, since such acts could be performed by State officials who were not accredited diplomatic agents in the foreign State, thereby precluding the use of the *persona non grata* option.

That issue was addressed briefly in paragraphs 155 to 165 of the memorandum by the Secretariat[67] and merited further discussion by the Commission.

16. The way that sources were referenced in the second report of the Special Rapporteur was occasionally confusing. For example, the last footnote to paragraph 70 (*a*), which was intended to support the assertion that the case in France against Rose Kabuye, the Chief of Protocol of the President of Rwanda, had been stopped, redirected the reader to the footnote to paragraph 12, yet when the reader arrived there, the Special Rapporteur merely indicated that "[a]ccording to press reports, the case has been abandoned". The Internet link provided in substantiation of that fact led not to a specific article but rather to the home page of the Rwandan newspaper *The New Times*.[68] Such referencing of sources undermined the credibility of the report, as it made it difficult for the reader to check sources.

17. She also had a problem with the first footnote to paragraph 10, which referred to a report by the African Union–European Union Technical Ad hoc Expert Group on the Principle of Universal Jurisdiction. The footnote gave the impression that the report reflected the official view of both the African Union and the European Union, which was certainly not the case, as the terms of reference of the Expert Group had made it clear that the outcome of its work was not binding on either of those organizations. Given that that report had been highly contentious, it was misleading to refer, as the Special Rapporteur had done in the conclusions set out in paragraph 91 of his second report, to the "recommendations" of the experts, since that gave the impression that the European Union and the African Union endorsed the report.

18. The most important step for the Commission at present was to decide how it intended to continue its work on the topic. It had before it a comprehensive memorandum by the Secretariat, two extensive reports by the Special Rapporteur[69] and an instruction from the General Assembly, in its resolution 65/26 of 6 December 2010, to give priority to its consideration of the topic. The Special Rapporteur had refrained from recommending how the Commission might proceed, except to suggest in paragraph 93 that the Commission could consider the question of drawing up an optional protocol or model clauses on restricting or precluding the immunity of State officials from foreign criminal jurisdiction. In her view, the Commission should decide more specifically how it planned to develop the topic, and to that end it might be useful to establish a working group. While she agreed with the Special Rapporteur that the Commission should consider the topic from the perspective of *de lege lata*, its consideration must not stop short of another part of its mandate, namely the progressive development of international law.

19. Mr. KOLODKIN (Special Rapporteur) said that he wished to confirm that he had correctly understood Ms. Jacobsson's characterization of what he had said in his second report and in his introductory presentation regarding the necessary link between State responsibility and immunity. Had she understood him to say that the link between State responsibility and immunity was such that when a State granted immunity to protect its representatives from criminal responsibility the question of its own responsibility for an internationally wrongful act committed by one of its representatives was no longer at issue?

20. Ms. JACOBSSON said that she had understood the Special Rapporteur to claim in his report that there must always be a link between State responsibility and immunity. In her statement, she had provided two examples to show that there could be cases in which no such link existed, and that the Commission should therefore examine the issue further.

21. Mr. KOLODKIN (Special Rapporteur) said that what he had meant to convey was that the same criterion, namely, the attribution to the State of the conduct of the official, should apply when asserting immunity *ratione materiae* as was applied when invoking the responsibility of a State for an internationally wrongful act. That was the point that Mr. Melescanu had contested at the previous meeting.

22. As he had indicated in his second report, if the same criterion of attribution was used, neither the invocation nor the waiver of immunity by the State or the State official exonerated the State from responsibility for an internationally wrongful act. That was very different from the position presented by Ms. Jacobsson in her comments on his report. Essentially, if the same criterion was used for the purposes of both State responsibility and the immunity of a State official from foreign criminal jurisdiction, then the responsibility of the State and the criminal responsibility of the State official could be invoked simultaneously. Conversely, a situation could arise in which immunity from foreign criminal jurisdiction was both asserted and recognized, yet the victim of the offence or other actors entitled to do so could still invoke State responsibility in respect of the wrongful act simply—or precisely—because the same criterion of attribution was applicable. The last two paragraphs of the summary of his third report (A/CN.4/646), which he had circulated to Commission members, dealt specifically with that particular issue.

23. Ms. JACOBSSON said that the question of whether immunity and State responsibility should be linked in the manner suggested by the Special Rapporteur was a sensitive one. How it was resolved would have an impact on the Commission's work, especially if it decided to extend immunity from foreign criminal jurisdiction to all State officials. She was not entirely convinced that such a link always existed, and that view appeared to be shared by Mr. Melescanu. In citing the example of a State that used the waiver of immunity as a political tool to exonerate itself from responsibility, she had simply sought to stress that such a waiver might be used as a legal argument or for purposes of political manoeuvring. It was for that reason that the Special Rapporteur's argument should be examined carefully before the Commission formulated any draft articles on the basis thereof.

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

[68] The reference was made more specific when the report was edited in view of its inclusion in *Yearbook … 2010*, vol. II (Part One): Kennedy Ndahiro, "Judicial restrictions on Rose Kabuye lifted", *The New Times*, 26 September 2009.

[69] The preliminary report is reproduced in *Yearbook … 2008*, vol. II (Part One), document A/CN.4/601, and the second report in *Yearbook … 2010*, vol. II (Part One), document A/CN.4/631.

24. Mr. VARGAS CARREÑO said that the Special Rapporteur's second report was well researched and that his proposals were, for the most part, realistic and based on current international jurisprudence and practice. While certain members were unable to endorse some of the Special Rapporteur's proposals which, in their view, failed to take into account the most recent trends in international law, that did not mean that they discounted the Special Rapporteur's notable achievements in addressing what was a difficult, complex and important topic.

25. In order to advance its work on the topic, the Commission should decide what its next step should be in the light of three important considerations. The first was that because the current quinquennium was drawing to a close, the Commission had very little time to devote to the topic, as it would have to deal with other, more urgent matters in the second part of the session. The second consideration was the fact that, since the start of the Commission's consideration of the topic, several seemingly irreconcilable differences had arisen between some members on certain points. The third consideration was the concern expressed by many delegations in the Sixth Committee at the meagre progress made on the topic to date and their conclusion that the topic should be given priority consideration at the current session. Accordingly, he endorsed Ms. Jacobsson's proposal to establish a Working Group on immunity of State officials from foreign criminal jurisdiction.

26. The proposed Working Group could meet during the first part of the session with the single aim of identifying a range of issues that the Commission might consider and that would be included in its annual report to the General Assembly. During the second part of the session, the Working Group could formulate general principles relating to those issues and submit them to a plenary meeting of the Commission for adoption. The proposed principles should be brief, referring only to essential aspects of the topic, such as the grounds for foreign criminal jurisdiction of State officials, the scope and content of immunity *ratione materiae* and immunity *ratione personae* and, in particular, the effects that the commission of particular offences had on the immunity of State officials from foreign criminal jurisdiction. The Working Group could also identify those offences defined under international law in respect of which immunity from jurisdiction could not be invoked.

27. The Working Group should obviously base its discussions on the Special Rapporteur's second report, but it might also usefully refer to his preliminary report, the summary of his third report and the most significant decisions of the ICJ, such as the judgment in the *Arrest Warrant* case and the judgment in the case concerning *Certain Questions of Mutual Assistance in Criminal Matters*. The assenting and dissenting opinions of judges in those decisions should also be considered by the Working Group.

28. In addition, the Working Group might wish to consider the decisions of national courts, noteworthy among which were the judgment of March 1999 of the United Kingdom House of Lords on the appeal against the entitlement to immunity of the former dictator of Chile, Augusto Pinochet (*Pinochet No. 3*), including some of the opinions of the seven judges who had intervened in the case; and the November 2000 decision of the Court of Appeal of Amsterdam in the *Bouterse* case. Important contributions to the topic of immunity from foreign criminal jurisdiction were also to be found in the scholarly literature, one example of which was a study by the Institute of International Law entitled "Fundamental rights of the person and the immunity from jurisdiction in international law".[70] There was thus sufficient background material to enable the Commission to make progress on the topic and to comply with the General Assembly's instruction to give it high priority. The Commission could then expect to adopt a draft text at its sixty-fourth session and could aim to conclude its work on the topic during the next quinquennium.

29. Most of the main points that the Commission should take up at the current session were contained in the Special Rapporteur's second report. However, the first of those points, the rationale for immunity, was dealt with primarily in the preliminary report. With regard to the Special Rapporteur's conclusions, which were contained in paragraphs 102 and 103 of that report,[71] it should be pointed out that the immunity of State officials from foreign criminal jurisdiction had various complementary and interrelated grounds, such as the principles of international law relating to the sovereign equality of States, non-interference in the internal affairs of States and the need to ensure stability in international relations and the independence of States in the conduct of their activities. Although jurisdictional immunity often served as an obstacle to the attribution of criminal responsibility, that was not always the case. The Commission's conclusions should explicitly indicate that immunity from jurisdiction should never be aimed at facilitating the impunity of officials for the commission of grave violations of international law. The conclusions should deal primarily with the immunity *ratione materiae* and *ratione personae* of State officials. With the exception of some details that might be taken up in the proposed Working Group, the Special Rapporteur's proposals and conclusions appeared to provide a suitable basis for the Commission's future consideration of the topic.

30. Immunity *ratione materiae* should apply only to acts carried out by officials in the discharge of their duties and should not cover any acts they had committed prior to taking office. As for immunity *ratione personae*, it should be limited to high-ranking State officials and acts committed while the persons concerned were holding such office, irrespective of whether the acts had been committed in a personal or official capacity. Such personal immunity ceased when the officials in question no longer held office.

31. The list of officials enjoying such personal immunity should be as short as possible. Under international customary law it should include only the "threesome" of Heads of State, Heads of Government and Ministers for Foreign Affairs; however, it could also include persons temporarily performing those functions, such as a crown prince or deputy foreign minister. Also covered by personal immunity were officials such as diplomats, consuls and members of special missions under the 1961 Vienna Convention on

[70] Institute of International Law, *Yearbook*, vol. 73 (2010), Session of Naples (2009), pp. 3 *et seq.* (available from www.idi-iil.org, resolutions).

[71] *Yearbook ... 2008*, vol. II (Part One), document A/CN.4/601, pp. 184–185.

Diplomatic Relations, the 1963 Vienna Convention on Consular Relations and the 1969 Convention on special missions. Nevertheless, immunity *ratione personae* should be applied restrictively, in view of the important role played by officials in international relations.

32. The main problem currently posed by the topic was the possibility that the various forms of immunity from jurisdiction might protect the perpetrators of grave crimes, especially those punishable under international law, as Mr. Dugard had pointed out. Immunity *ratione materiae* seemed to be less problematic. With the development of international law in recent years, no one could claim that one of the duties of high-ranking officials was to commit crimes. In that connection, the Special Rapporteur referred in his report to the views of various members of the House of Lords Appeal Committee in the *Pinochet No. 3* case. He himself wished to cite the view of the President of the Appeal Committee, Lord Browne-Wilkinson, who had concluded:

> If, as alleged, Senator Pinochet organised and authorised torture after 8 December 1988, he was not acting in any capacity which gives rise to immunity *ratione materiae* because such actions were contrary to international law, Chile had agreed to outlaw such conduct and Chile had agreed with the other parties to the Torture Convention that all signatory states should have jurisdiction to try official torture (as defined in the Convention) even if such torture were committed in Chile.[72]

The Home Secretary had subsequently given the authority to proceed to the extradition of General Pinochet for crimes of torture and conspiracy committed after 8 December 1988.

33. The Special Rapporteur also referred to other court decisions providing for an exception to immunity *ratione materiae*, such as the judgment of the Court of Appeal of Amsterdam in November 2000 in the *Bouterse* case concerning the dictator Desiré Delano Bouterse, the perpetrator of various assassinations, in which the Court noted that "the commission of very grave criminal offences of this kind cannot be regarded as part of the official duties of a Head of State".[73]

34. The Working Group might in fact wish to consider which offences could under no circumstances be considered as official acts, including acts defined as crimes under international law. Perhaps the best solution would be to use the definitions contained in the Rome Statute of the International Criminal Court of crimes falling within the Court's jurisdiction, such as genocide, crimes against humanity and war crimes. Admittedly, the types of situation the Commission had to consider under the topic were different, but the definitions contained in the Rome Statute had the advantage of having already met with consensus. There was a practical reason, too: in order to ratify the Rome Statute, several States had been obliged to amend their own criminal legislation.

35. It was more difficult to find a solution to the problem of officials who committed offences while enjoying immunity *ratione personae*, and he had several comments to make regarding the position of the Special Rapporteur in that connection. He did not share the Special Rapporteur's view that high-ranking officials enjoyed such immunity before assuming their functions. It was not advisable to state in such categorical terms that such immunity should always be regarded as absolute; the Statute did not consider it to be so for Heads of State or Government.

36. It was true that it was hard to find examples in practice where immunity *ratione personae* had not been granted in respect of the commission of international crimes. The only example cited by the Special Rapporteur came from an article by Professor Brigitte Stern, who had noted that in 2000 a court in Belgrade had sentenced 14 Western leaders, including Bill Clinton, Tony Blair and Jacques Chirac, to 20 years' imprisonment for acts carried out in Yugoslavia by NATO; the author had gone on to state that that example demonstrated the possible counterproductive consequences of lifting the impunity of former officials.[74]

37. Although there was consensus that immunity *ratione materiae* could not be granted for grave international crimes, there was no consensus regarding the possibility of immunity *ratione personae* being granted for all types of offences. That question could be taken up by the Commission with a view to finding a solution that reconciled the established rules of international law with the need to discourage impunity. Perhaps a useful working basis might be article III, paragraph 1, of 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 International Law Institute at its session in Naples in 2009, which stated: "No immunity from jurisdiction other than personal immunity in accordance with international law applies with regard to international crimes."[75] That position was not so categorical as the Special Rapporteur's statement that immunity *ratione personae* was always absolute, and it might be more acceptable, since it had been adopted at the Naples session by a clear majority of participants.

38. In conclusion, he commended the Special Rapporteur for his efforts, since, despite the diverging views among members, his report would serve as a useful basis for the Commission's future work on the topic. Mr. Vargas Carreño strongly endorsed the proposal to establish a Working Group, with the active participation of the Special Rapporteur, to draft a brief report dealing with the grounds for immunity of State officials from foreign criminal jurisdiction as well as the characteristics of immunity *ratione materiae* and immunity *ratione personae*, and which would explain whether such forms of immunity were affected by the commission of certain crimes. The report should be included in the Commission's annual report to the General Assembly and serve as the point of departure for consideration of the topic at the Commission's sixty-fourth session.

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[72] ILR, vol. 119 (2002), p. 157.

[73] *Netherlands Yearbook of International Law*, vol. 32 (2001), p. 277, para. 4.2.

[74] B. Stern, "Vers une limitation de l''irresponsabilité souveraine' des États et des chefs d'État en cas de crime de droit international?", *in* M. G. Cohen (ed.), *Promoting Justice, Human Righs and Conflict Resolution through International Law*, Liber Amicorum *Lucius Caflisch*, Leiden, Martinus Nijhoff, 2007, pp. 513–549, at p. 526.

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

39. Mr. PELLET said that it was difficult to be brief on an important topic that had given rise to a debate of such a high standard. The questions of principle raised had considerable implications that should not be overlooked. It would be hard to make progress with the topic until agreement was reached on those questions of principle as well as on the procedural approach outlined by the Special Rapporteur in the summary of his third report.

40. The Special Rapporteur's second report was a good report on account of its impressive scientific documentation, although he shared Ms. Jacobsson's reservations regarding the footnotes, a further example being the footnote to paragraph 79 which referred to the topical summary, prepared by the Secretariat, of the discussion held in the Sixth Committee of the General Assembly during its sixty-second session,[76] which reflected the view not of the Sixth Committee of the General Assembly but only of some of its delegations. While the analysis of the materials discussed in the second report seemed rigorous, it was in fact quite biased. His only criticism concerning the form of the report was the plethora of footnotes containing important information that could have been incorporated in the body of the report.

41. It was truly unfortunate, then, that the report was such a good one, since it was based on erroneous premises. The Special Rapporteur drew highly questionable conclusions, making the report seem like a kind of special pleading rather than an impartial exposé of the facts, which a preliminary report ought to be. Indeed, the so-called second report was in fact a follow-up to the preliminary report that had been considered at the sixtieth session in 2008. At that time, he and several other members had expressed surprise that the preliminary report did not draw a distinction between problems relating to immunity associated with "ordinary" offences and those relating to "grave" crimes. The Special Rapporteur had replied that such matters would be taken up in the second report, which they had—albeit far from convincingly.

42. While he was not in total agreement with Mr. Dugard, the latter had pinpointed the problem with the topic clearly and convincingly at the previous meeting. He would not go quite so far as Victor Hugo to say that it was "a battle between night and day"; nevertheless, he saw two conflicting concepts regarding the role of the Commission and even of international law itself coexisting. The Special Rapporteur's approach—the special pleading—was based on an absolute concept of sovereignty, which precluded the possibility of any exception to the absolute immunity of State leaders when they enjoyed immunity *ratione personae*.

43. He was well aware that the Special Rapporteur recognized the need to distinguish immunity *ratione materiae* from immunity *ratione personae*; moreover, on the whole, he had no problem with the Special Rapporteur's analysis of immunity *ratione materiae* or with the bulk of the conclusions drawn in paragraph 94 (*a*) to (*m*) of the second report. However, the crux of the current debate was the hyper-Westphalian concept which the report conveyed. As Ms. Jacobsson had noted, it took the Commission back to the times when the State alone was the subject of international law and nothing it did could incur its responsibility. For, unlike some other members of the Commission, he shared the Special Rapporteur's view that the immunity of State leaders was the consequence of State immunity. Yet just as State sovereignty was not an absolute principle according to which States could do whatever they liked, so State leaders could not escape the consequences of their acts, whatever they might be, on the pretext that they were representing the State. Such representation did not confer all rights on them, just as sovereignty did not give the State the right to do whatever it liked. As one member of the Commission had so aptly put it, such a position was untenable in 2011.

44. At the previous meeting, Mr. Dugard had said that he did not want to enter into a debate on what constituted the rule and the exception for the granting of immunity, but he agreed with Mr. Melescanu that this issue was central to the debate. He firmly believed that the issue should not be treated as the Special Rapporteur had done. The Special Rapporteur posited that the basic principle was the absolute immunity of State leaders, or at least of Heads of State, Heads of Government and Ministers for Foreign Affairs, but he himself, like Mr. Vargas Carreño, wondered who else might enjoy such absolute immunity, as the Special Rapporteur had left the question open.

45. The absence of immunity from criminal jurisdiction was merely an exception, of which the Special Rapporteur found no trace in positive law. However, that simple assumption was unacceptable, because it was tantamount to denying all the progress that had been made in international law since the end of the First World War and, in particular, since the Second World War with the advent of the idea of the international community and the awareness, albeit limited, that there were higher interests that prevailed over the interests of the individual members of that community. Those higher interests were reflected in the notion of *jus cogens* in general international law.

46. Those interests of the international community were still limited and rudimentary, yet they did exist and were of fundamental importance to the Commission's approach to the topic: from that international public order it had emerged that the important principle was not immunity but responsibility of both the State and of its representatives for a few very grave crimes, and that the perpetrators of such crimes, be they the State, international organizations or individuals, could be tried without the benefit of immunity.

47. Referring to the earlier exchange between Ms. Jacobsson and the Special Rapporteur on the link between the responsibility of the individual and that of the State, he said that he did not share the view of Ms. Jacobsson and Mr. Melescanu, but rather that of the Special Rapporteur. While it was true that in some exceptional situations there could be a disjunct between the responsibility of the State and that of its leaders, in virtually all cases the leaders were responsible on account of their functions, even if they had acted *ultra vires*. It could also be held that the responsibility of the State was incurred on account of the actions of its representatives.

[76] A/CN.4/588, para. 161.

48. However, the Commission was considering only grave crimes that constituted serious breaches of obligations under peremptory norms of general international law. As he had often said when discussing the draft articles on State responsibility for internationally wrongful acts,[77] in particular articles 40 and 41, one of the main consequences arising from that particular category of internationally wrongful acts was that in such situations the State became transparent. Moreover, it was precisely in such cases that one could investigate the individual responsibility of leaders, including Heads of State, who could not hide behind the veil of the State and be exonerated from such responsibility.

49. In such cases, and as the Nuremberg Tribunal had observed in its judgment, "[c]rimes against international law are committed by men, not by abstract entities";[78] thus the State, which was also responsible, became transparent and its personality could not hold the criminal responsibility of the individual in check. That had been proclaimed in many international treaties, including some that were the outcome of the Commission's *travaux*, such as the Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal[79] and others mentioned by Mr. Dugard at the previous meeting.

50. It was likewise important not to confuse a rule of substance with a rule of competence, as the dissenting judges seem to have done in the *Al-Adsani v. the United Kingdom* case, also referred to by Mr. Dugard. In other words, unlike the dissenting judges in that case, he would not assert that the *jus cogens* norms that the applicants had been accused of violating, which included the prohibition against torture, took precedence over the rules governing competence any more than the ICJ could have exercised jurisdiction that it did not have in the *Armed Activities on the Territory of the Congo* case on the pretext that the applicant had claimed that the defendant was responsible for a breach of a *jus cogens* norm. To reason in that way was to confuse the rules of substance with the rules of competence, and thus he could not endorse the views expressed by Ms. Jacobsson in that regard.

51. That being said, he would have drawn the same conclusion as the dissenting judges by observing that, in such a case, there was quite simply no immunity; the outcome was the same, but the reasoning was very different and, with all due respect, it was more accurate. In broader terms, it went without saying that it was not because an individual was accused of the crimes of genocide or aggression that the ICJ would be competent to try that individual, since the Court was not competent to rule on individual responsibility. That situation—the fact that the Court was not competent—was not a consequence of the immunity of the individual in question but a consequence of the rules of the competence of the Court. On the other hand, if a national or international criminal court was competent to try the perpetrator of certain international crimes whose punishment was sought by the international community, the individual had no grounds for pleading immunity, simply because such immunity did not exist. There again, a different reasoning was used, based on the competence of the court concerned, yet the outcome was the same.

52. Once the basic principle of responsibility—and thus absence of immunity—had been established, two questions arose. First, when did such responsibility towards the international community prevail? Secondly, were there exceptions to such responsibility in the form of immunity from criminal jurisdiction and, if so, before which courts?

53. Concerning the first question, in a society such as the international community in which there was so little unity and solidarity there would be very few cases of absolute responsibility, and they would likely involve genocide, crimes against humanity, aggression, torture and war crimes, although only if committed on a systematic and large scale. Some prudence was called for with regard to *jus cogens* norms lest they be trivialized.

54. His answer to the second question was a categorical no: there could be no exceptions in those rare cases of absolute responsibility where the State became transparent and the individuals acting on its behalf had no possibility of immunity, unless the court's lack of competence was considered to constitute an exception. That, however, was another issue altogether.

55. The second report of the Special Rapporteur was thus a good example of a *pro domo* appeal, but since its underlying premise was wrong or incomplete, it could not possibly arrive at the right conclusions. To echo Blaise Pascal, who had once spoken of "a strange justice that is bounded by a river",[80] it was a strange science that was blind to a century of developments in that area of the law while focusing solely on authorities all of whom looked resolutely towards the past.

56. He did not intend to examine the Special Rapporteur's arguments one by one, since Mr. Dugard had already demonstrated that they could be countered. Admittedly, if one looked at the situation strictly from the standpoint of positive law, all arguments did not necessarily point in that direction. The unfortunate judgment of the ICJ in the *Arrest Warrant* case had undoubtedly strengthened the argument in favour of absolute immunity. He had often taken issue with what he regarded as one of the most regrettable decisions of the Court since 1923, not so much because of the untenable reasoning, but because the Court could have quite well reached the same findings, of which he approved, by basing itself on completely different grounds, namely those relating to the Belgian courts' jurisdiction. The Court had thus chosen to deal a blow to the felicitous developments that had resulted from the *Pinochet* cases before the House of Lords and the *Gaddafi* [Qadhafi] case before the French Court of Cassation.

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[77] General Assembly resolution 56/83 of 12 December 2001, annex. The draft articles adopted by the Commission and the commentary thereto are reproduced in *Yearbook … 2001*, vol. II (Part Two) and corrigendum, pp. 26 *et seq*., paras. 76–77.

[78] *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945–1 October 1946*, Nuremberg, 1948, vol. XXII, p. 466.

[79] *Yearbook … 1950*, vol. II, p. 374.

[80] B. Pascal, *Pensées, lettres et opuscules divers*, Paris, Napoléon Chaix et Cie, 1864, chap. III, p. 83 (available from http://gallica.bnf.fr).

57. Although the Commission had to pay careful attention to the case law of the ICJ, it was not obliged to endorse all its tortuous reasoning, including its mistakes; first, because there was no hierarchical relationship between the two institutions and, secondly, because they did not perform the same functions. The Court had to base its decisions on positive law, *lex lata* (although it was unclear whether in the case to which he had referred the law had already existed), whereas the Commission's first duty was the progressive development of international law. The Commission had more than enough material at its disposal to strike out in the right direction—in other words, to consolidate the trend which the ICJ had so clumsily interrupted in its judgment in 2002 in the *Arrest Warrant* case.

58. It was chiefly for those reasons that, notwithstanding his esteem for the Special Rapporteur, his conscience led him to endorse the comments of Mr. Dugard, Ms. Jacobsson, Mr. Melescanu and Mr. Vargas Carreño and to urge the Commission not to consider the topic any further until it had considered the general direction in which the Special Rapporteur wished to steer it. He agreed with Ms. Jacobsson and Mr. Vargas Carreño that this question should be taken up in a Working Group which, he hoped, would be chaired by the Special Rapporteur or by a member whom he trusted. He also hoped that the Working Group would point the Commission's work in a direction that was more likely to fulfil the hopes that many members, as well as human rights organizations and activists, placed in the judicious refocusing of international law on the interests of the international community as a whole.

59. Mr. PETRIČ said that the Special Rapporteur's second report on immunity of State officials from criminal jurisdiction would form a good basis for discussion, since it was the product of substantial research into the practice of States, the case law of international and national courts and the relevant doctrine.

60. Some of the views and conclusions reached by the Special Rapporteur as a result of his research, especially those concerning exceptions to immunity, were bound to provoke a reaction and prompt an exchange of views, thereby furthering the Commission's discussion of that sensitive but important topic. In paragraphs 90 to 93 and paragraph 94 (*n*) and (*o*) of the second report, the Special Rapporteur was probably expressing his own views rather than proposing a position for adoption by the Commission. In fact, several previous speakers had used largely the same material—State practice, jurisprudence and doctrine—to reach conclusions quite different from those of the Special Rapporteur.

61. The Commission was authorized by the Charter of the United Nations to progressively develop and codify international law—in other words, to draft multilateral legal instruments for submission to States. That was the Commission's goal in considering the current topic. The essence of codification was to turn existing customary law into a draft treaty. The existence of customary rules, which were to be found in State practice and *opinio juris*, was a *sine qua non* for any codification exercise. Progressive development should go hand in hand with codification and should transcend existing customary law. That did not, however, mean that such an exercise should be wilful or have no limits. It must be relevant and take account of trends in international law, developing human values and the realities of the international community. Progressive development could be one step ahead of existing international customary law, but it had to be a cautious step that accommodated the need to regulate some new aspect of relevance to the international community and to individual States, while at the same time furthering cooperation between them, their coexistence and their common interests.

62. In most cases, the Commission's work combined codification and progressive development, and the same should hold true of the topic under consideration. Accordingly, the Commission should look not only at existing rules of customary law on the immunity of State officials but also at the needs and expectations of the international community, at values and trends in legal science and at the needs of human society. While codification of the topic was tied to existing State practice, progressive development should be forward-looking and anticipate problems that might arise in the future. All in all, the Special Rapporteur's second report seemed to be too closely tied to *lex lata* which was ripe for codification, without giving adequate consideration to possibilities for progressive development.

63. The extent to which it should engage in progressive development was the main dilemma facing the Commission in its work on the topic. On the one hand, the principle of immunity *ratione personae* and *ratione materiae* of State officials from foreign criminal jurisdiction was well established in customary international law. That principle had been discussed in the Special Rapporteur's preliminary report[81] and in the first part of his second report. On the other hand, recent trends in State practice, case law, the dissenting views of judges at international courts and legal writings centred on the vital principle of non-impunity for crimes under international law. That notion was rooted in the decisions of the Nuremberg Tribunal, the International Military Tribunal for the Far East, the International Criminal Court and a number of *ad hoc* international courts. Its corollary was the idea of universal jurisdiction for the most serious crimes.

64. There was no denying that the immunity of State officials was recognized in international law. That well-established principle stemmed from the need for cooperation among States and, like diplomatic immunity, it was of great value. However, there was also no denying that in the contemporary world there was an expectation and indeed a need to ensure that the perpetrators of crimes under international law did not go unpunished. It might be possible to bridge both sets of demands by permitting exceptions to immunity for crimes against *jus cogens*. The Commission would have to consider how far it could go in building that bridge. That would be the main responsibility of any working group that might be established on the topic. Since half of the Special Rapporteur's second report was devoted to exceptions to immunity, it was clear that he regarded the question of how to deal with the immunity of State officials from foreign jurisdiction in the event of

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

crimes against international law as the crucial issue in the Commission's deliberations. He himself disagreed with the Special Rapporteur's opinion that only one exception could be allowed.

65. He had reservations about the Special Rapporteur's views regarding *ultra vires* conduct of State officials. State officials who engaged in *ultra vires* conduct were no longer acting under the instructions of the State or within their official functions. An official's immunity *ratione materiae* was a continuation of State immunity. Since *ultra vires* conduct did not constitute an act performed in the context of official functions and was not authorized by the State, immunity *ratione materiae* should not therefore extend to *ultra vires* acts.

66. He also had some reservations concerning paragraphs 35 to 37 of the second report. His own research had led him to the conclusion that immunity *ratione personae* was a reflection of State sovereignty and ought therefore to be restricted to State officials who represented the sovereign State. No high-ranking officials other than a Head of State, a Head of Government or a Minister for Foreign Affairs were entitled to immunity *ratione personae*. The "high-ranking State officials" and "other possible holders" referred to in paragraphs 35 and 36 of the report, respectively, enjoyed immunity *ratione materiae* which enabled them to perform their functions unhindered.

67. Furthermore, immunity was a logical necessity only in respect of official acts; it should not apply to acts performed in a private capacity. In short, immunity *ratione personae*, whose historical origins lay in the nineteenth century or even earlier, should not be extended to other State officials who already enjoyed immunity *ratione materiae*.

68. Turning to the crucial part of the second report, which dealt with exceptions to the rules of immunity, he noted that the Special Rapporteur stated in paragraph 54 that "we are dealing here with such exceptions to immunity as are founded in customary international law". That limitation was significant. The Special Rapporteur further stated that "[t]here can be no doubt that it is possible to establish exemptions from or exceptions to immunity through the conclusion of an international treaty". That finding was even more significant. While in customary law there were indeed some clearly established exceptions to immunity, they could equally well be established in bilateral or multilateral treaties. It was precisely the task of the Commission to produce a draft multilateral treaty on the immunity of State officials that would establish exceptions to immunity and constitute progressive development of international law. It must reflect the contemporary international community's values and needs by incorporating the principle of non-impunity for crimes covered by rules of *jus cogens*.

69. In paragraph 56 of his second report, the Special Rapporteur set forth several possible rationales for exceptions to immunity, which were drawn from the case law of international and national courts, the legal writings of the Institute of International Law and the positions of NGOs. In the paragraphs that followed, he elaborated on those rationales and concluded that "the various rationales for exceptions to the immunity of State officials from foreign criminal jurisdiction are not sufficiently convincing" (para. 94 (*n*)). The Commission should, however, look for more exceptions than the sole example accepted by the Special Rapporteur, and it should endeavour to find convincing arguments in support of them. The Special Rapporteur's choice of wording in his conclusions was rightly cautious, given his analysis in paragraphs 57 to 59 of the report. He did not entirely rule out the possibility that other exceptions to the immunity of State officials might exist. In several places in the report he presented differing, contradictory views, including the opinions of the dissenting judges in the *Arrest Warrant* case. He spoke of "widespread" views in support of exceptions to immunity but noted that it was "not fully clear why the gravity of a criminal act" might be grounds for such an exception (para. 61). His conclusion, however, was clear: that no rule on exceptions to immunity could be found in customary international law. He made no mention of progressive development.

70. The Commission did not have enough time to examine in detail all the well-documented arguments presented by the Special Rapporteur. The Special Rapporteur contended in paragraph 61 of his second report that it was not clear why the gravest crimes might cease to be attributed to the State and lose their official character, thereby constituting a rationale for exemption from immunity. The answer was simply that it was because of the particular gravity of the crimes: such criminal acts would not lose their official character and would remain an act of the State, but because of their gravity as violations of peremptory norms of international law, their perpetrators should not benefit from immunity. In any conflict between the rules of immunity and the rules of *jus cogens*, it was reasonable that the latter should prevail. There was significant support in the literature for that position.

71. In paragraph 64, the Special Rapporteur argued that the norm concerning immunity was procedural and did not affect the criminalization of acts against *jus cogens*. While that was true, there was nothing to prevent the introduction of exceptions to immunity in order to safeguard the principle of non-impunity. It was also difficult to accept the conclusions set forth in paragraphs 68 and 69 of the report. The norms of international law concerning the punishment of war criminals that had been established in the Nuremberg Charter and the Charter of the International Military Tribunal for the Far East, the Rome Statute of the International Criminal Court and the Statute of the International Tribunal for the Former Yugoslavia had had a significant impact on *opinio juris*. The fact that the Axis Powers had not asserted immunity was irrelevant, since they had not been in a position to do so.

72. In paragraph 72 of his second report, the Special Rapporteur took issue with the view that the immunity *ratione materiae* of an official did not operate in cases where the crime concerned was one in respect of which universal criminal jurisdiction was exercised by a foreign State. On the other hand, he held that "at first sight" the possibility of exercising universal jurisdiction in respect of grave international crimes was enshrined in the legislation of many States. In cases of grave crimes

over which international jurisdiction existed, there were obviously grounds for arguing that exemptions to immunity from foreign criminal jurisdiction also existed. The fact that a State had not acceded to the Rome Statute of the International Criminal Court should not make it possible for the officials of that State to claim immunity from foreign jurisdiction in respect of grave crimes for which they would have been held answerable by the International Criminal Court if their State had been a party to the Rome Statute.

73. Immunity, whether diplomatic immunity or the immunity of State officials, was a great asset in international relations. On the other hand, there was a need in the contemporary international community to ensure that the gravest crimes under international law did not go unpunished. The Commission would have to strike a proper balance in its endeavours to codify and progressively develop the topic under consideration. While customary law contained no rules establishing exceptions to immunity, he believed that the Commission should bear progressive development in mind when it drafted a future instrument on the immunity of State officials from foreign criminal jurisdiction. The extent of that progressive development would depend on further discussions within the Commission and on States' reactions to its reports in the Sixth Committee.

74. While the Commission should not undermine the valuable concept of immunity, it should ensure that perpetrators of crimes against *jus cogens* did not go unpunished, because such crimes harmed thousands of people and destroyed entire communities and countries. The punishment of those individuals was in the common interest of all humanity.

75. No draft articles should be formulated at the present juncture, for the Commission must first hold a substantive debate to see how far it could go in the progressive development of the topic. The establishment of a special Working Group was therefore a good idea.

76. Mr. GAJA said that although the Special Rapporteur's second report on immunity of State officials from foreign criminal jurisdiction was underpinned by a wealth of references to cases and legal writings, its arguments were frustratingly one-sided. That was particularly true of the assertion that there was a general principle providing for the immunity of foreign officials *ratione materiae* and that there could be no exceptions to that principle because practice was either divided or insufficient.

77. The Special Rapporteur's views on the question of the relationship between functional immunity and the exercise of jurisdiction over international crimes had to be considered against the background of the outline of his third report, which he had presented at the previous meeting. In his third report, the Special Rapporteur intended to demonstrate that functional immunity would operate only when the official's State invoked it. Thus if the official's State did not raise the question of immunity, judicial decisions concerning offences could not be regarded as a significant element of practice restricting immunity. That approach tended to limit the relevance of some decisions concerning international crimes committed by foreign officials. While it was probably premature to discuss the Special Rapporteur's assumption, one would have to take it into account.

78. The evidence provided by treaties on the suppression of international crimes showed that the Special Rapporteur's description of the position with regard to *lex lata* was not entirely correct. While treaties could derogate from a rule of general international law concerning functional immunity, immunity *ratione materiae*, they also presented elements that demonstrated that such a rule did not apply when the State official's alleged offence constituted an international crime.

79. Most treaties relating to the suppression of international crimes contained no provisions on immunity. That silence could not be regarded as an implicit recognition that immunity applied. As suggested in the *Arrest Warrant* judgment, there was one implicit exception that made it possible to exempt from criminal jurisdiction the few persons who enjoyed personal immunity while they held office. If a similar exception was made with regard to functional immunity, thousands of people would be exempt from prosecution for an indefinite period, and many treaties concerning the suppression of international crimes would become meaningless.

80. For example, States parties to the 1971 Convention for the suppression of unlawful acts against the safety of civil aviation were under an obligation to suppress the crimes defined in article 1, make those offences punishable by severe penalties and exercise their jurisdiction under certain conditions. He wondered whether the Convention could be interpreted to mean that a State party's obligation to exercise jurisdiction over a crime such as placing a bomb on an aircraft could be restricted by the functional immunity of the alleged offender. Would the Convention thus exempt foreign officials from prosecution? If it turned out that the alleged offender was someone working for the secret service of a State, should another State refrain from prosecution because of that person's immunity? Would it not be more reasonable to understand this Convention, like other similar treaties, as requiring prosecution, irrespective of whether the alleged offender was a State official? The silence of treaties concerning the suppression of international crimes on the matter of immunity should generally be interpreted to mean that there were no exceptions.

81. No distinction appeared to be made in the Convention for the suppression of unlawful acts against the safety of civil aviation according to whether or not the State in question was a party to the Convention. The Convention and similar treaties suggested that States parties were entitled to punish the conduct of offenders whether or not they were State officials. In other words, when an international crime was committed, functional immunity could not be invoked. Given the number of treaties on the suppression of international crimes, that was a significant body of opinion.

82. Paragraph 59 of the *Arrest Warrant* judgment quoted in paragraph 77 of the second report, which apparently conflicted with the above-mentioned view,

stated that jurisdiction under international conventions on the prevention and punishment of certain serious crimes did not affect immunities under customary international law, and that those immunities remained opposable before the courts of a foreign State even when those courts exercised such jurisdiction under those conventions. However, the Court had not said that, under customary international law, immunity *ratione materiae* also covered international crimes. In view of the attitude of most of the States that were parties to the numerous conventions on the suppression of international crimes, it seemed highly unlikely that customary international law established a general rule to the effect that immunity *ratione materiae* applied irrespective of the alleged offender's conduct.

83. Mr. VASCIANNIE congratulated the Special Rapporteur on his challenging and lucid report which, as a statement of *lex lata*, was generally convincing. In the main, he agreed with the legal propositions set out in paragraph 94—first, that immunity of State officials was the general rule and its absence in a particular case was an exception to the general rule (para. 94 (*a*)).

84. Secondly, it was also correct to suggest that State officials enjoyed immunity *ratione materiae* from foreign criminal jurisdiction: they were immune as long as they had performed an act "in an official capacity". It was sometimes difficult to distinguish acts performed in an official capacity from other acts, but such uncertainty did not invalidate the distinction. Whether or not an act was official could be determined not only by reference to the law of State responsibility, the Rome Statute of the International Criminal Court and other international instruments; guidance could also be obtained from those municipal systems in which the distinction was a familiar one. Indeed, at a later stage in the project, the Special Rapporteur might wish to consider giving clearer indications of what constituted an official act for the purposes of immunity.

85. Thirdly, the Special Rapporteur rightly regarded the distinction between immunity *ratione materiae* and immunity *ratione personae* as an important element of the law. Immunity *ratione personae* not only applied to illegal acts performed in an official capacity but also extended to illegal acts undertaken in a private capacity before or during the official's term of office. Such full or absolute immunity, however, was confined to a relatively small group of State officials, arguably only Heads of State, Heads of Government and Ministers for Foreign Affairs. What the Special Rapporteur called the "troika" or "threesome" for the purposes of immunity *ratione personae* seemed correct as part of the prevailing law, notwithstanding reservations expressed in the joint separate opinion of Judges Higgins, Kooijmans and Buergenthal in the *Arrest Warrant* decision. His own view on that point was that the majority view in the *Arrest Warrant* case should not be lightly dismissed.

86. Fourthly, and perhaps most controversially, the Special Rapporteur indicated in his second report that "the various rationales for exceptions to the immunity of State officials from foreign criminal jurisdiction are not sufficiently convincing" (para. 94 (*n*)). However, in paragraphs 54 to 93 the Special Rapporteur carefully reviewed various perspectives on exceptions to the general rule of immunity. Possible exceptions included the notion that illegal acts could not be official acts; the idea that the same act ought not to be attributed to the individual and to the State; *jus cogens*; the emergence of a new customary rule barring immunity; universal jurisdiction; and the notion of *aut dedere aut judicare*. The Special Rapporteur assessed each of those ideas in the context of immunity and dismissed them, but according to his own reading of the law, the *jus cogens* exception could benefit from more detailed treatment. Although the Special Rapporteur reviewed judicial approaches to that argument, he did not establish exactly why a *jus cogens* norm against torture, for example, could not trump procedural immunity for State officials. In paragraph 65, the Special Rapporteur referred to Lord Hoffman's remarks in the House of Lords judgment of 2006 in the *Jones v. Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya* case, but those remarks seemed to address the problem by assertion rather than by analysis of why the *jus cogens* norm should not prevail. If one started from the easy premise that the rules of *jus cogens* were peremptory, then it was a short step to the conclusion that the violation of a *jus cogens* rule should be recognized by a foreign court, even *vis-à-vis* an individual with procedural immunity. In that connection, the minority approach in the *Al-Adsani* case heard by the European Court of Human Rights had much to recommend it (mentioned in paragraph 63 of his second report).

87. The Special Rapporteur's approach required the Commission to go back to first principles insofar as the nature of the project was concerned. It could be perceived essentially as an exercise in codification, designed to formulate the law on State immunity as it currently existed. Judicial decisions and scholarly writings pointed in different directions, and States might appreciate guidance as to what international law allowed and what it required in respect of immunity for State officials. That was especially true in view of the inevitably high profile that would be acquired by cases in which foreign State officials were taken to court in another jurisdiction.

88. However, the project could also be viewed through the lens of progressive development. From that standpoint, he would support the Special Rapporteur if he reoriented the project to take more fully into account various policy considerations that were becoming increasingly pervasive in that area of the law. The law on State immunity had developed on the basis of sound policy presumptions. It had traditionally been assumed that immunity for State officials promoted positive relations between States *inter se* and thus encouraged order, security and stability in international relations. The law had also been built on the idea that comity and reciprocity were important considerations, so if the foreign minister of State X was subject to a criminal charge in State Y, would it be long before State X initiated "tit-for-tat" prosecutions? The idea that one man's freedom fighter was another man's terrorist should not encourage State inactivity in the face of evil but should highlight the risks inherent in having one State prosecute leaders of other States on matters of policy that might well have a subjective component.

89. There were two other policy arguments in favour of the current legal arrangements. One was based on the notion of territoriality. It had often been said that extraterritorial

legislation was problematic and arguably contrary to the rules of international law: from that perspective, one might say that a State should not overreach itself by trying to convict State officials for alleged crimes not committed on its territory. Prosecution with an extraterritorial component could be bad policy, not only because it represented an attempt by a State to stretch its sovereignty into other countries, but also because difficulties could be encountered in collecting and assessing evidence against the accused.

90. The other policy argument was more overtly political: there was reason to believe that in a world without immunity for State officials, politically motivated trials would occur far too often; trials might become a major way of seeking to resolve what were essentially political disputes. That would be a good thing if all those concerned accepted a system of extraterritorial courts, but given the political division that existed within the international community, it was doubtful that any such system of national court trials for alleged criminals from other countries would be accepted. Moreover, any system in which national courts could disregard the immunity of foreign officials would be open to the accusation that more powerful States had the right to try officials of less powerful States, but not vice versa—an accusation that ought not to be ignored when assessing the viability of the rules concerning immunity.

91. On the other hand, there were also strong policy reasons in favour of removing immunity for State officials in some instances. For example, with increasing emphasis placed on human rights promotion and protection, it seemed anomalous to maintain that State officials could escape prosecution for heinous crimes at the national level simply because they were State officials. That was particularly true with respect to the grave crimes that had come to be accepted as international crimes. Furthermore, it was becoming increasingly apparent that the International Criminal Court would not enjoy the full jurisdictional range that had originally been anticipated. Although optimists might still hope that the Court would be able to bring to trial persons from all jurisdictions, that prospect remained uncertain in the light of well-known political and diplomatic realities. Accordingly, the argument ran, there should be alternative means of bringing to justice State officials who committed certain grave crimes: the international system would then be able to promote justice and reduce the likelihood of impunity.

92. His final thought was that the policy arguments were finely balanced, and the Special Rapporteur should be encouraged to develop them more fully with a view to making recommendations on whether the project should seek to codify the law gradually or whether it should try to describe in greater detail how the law might look if it was open to a significant degree of progressive development. The latter approach might meet with resistance from States, but that was no reason to discount it. The Special Rapporteur might also wish to take into account certain trends in the Commission, particularly in relation to human rights, in preparing his next report.

93. In conclusion, he observed that the Special Rapporteur's outstanding second report had given the Commission much to think about.

94. Mr. McRAE thanked the Special Rapporteur for a second report that continued the high standard of scholarship and analysis demonstrated in his preliminary report and said that he had also appreciated Mr. Dugard's spirited rebuttal of the report. Mr. Dugard had put forward views that were the polar opposite of the Special Rapporteur's positions; between the two, they had framed the debate very well.

95. While he himself agreed with much of the content of the second report, there were certain key questions over which controversy continued to reign, the central question being whether there ought to be exceptions to immunity in cases of serious international crimes. The Special Rapporteur argued that there should be no exceptions to immunity, or least that the case had not been made for them. He did that, however, by setting a very high standard for determining whether such exceptions ought to exist: they must be "founded in customary international law" (paragraph 54 of the report). He then looked at practice and *opinio juris* and found it lacking. Cases had been brought before domestic and international courts, by and large unsuccessfully; the views of writers were seen by the Special Rapporteur as *lex ferenda*, and he was not convinced on policy grounds that exceptions to immunity were a good idea.

96. Mr. Dugard's approach was quite the opposite—rather than base itself on a customary rule of international law, traditionally viewed as the *sine qua non* for any action by the Commission, he believed that the Commission should take a stand on a matter of fundamental principle: was it for impunity or for accountability? In Mr. Dugard's view, the Commission should not look at that matter in a static way; it should follow the trend in that area, given that the international community had moved beyond the *status quo* and sought to focus on accountability and reject impunity.

97. The debate, then, was about policy, but he was not sure that the essential policy question could be answered by saying that one approach was right as a matter of law and one was wrong. Neither could the problem be solved by trying to achieve consensus on what the law was, although Mr. Gaja had just said some very interesting things about customary international law in that connection.

98. If one reasoned, as the Special Rapporteur did, that exceptions should be seen to exist only if a rule of customary international law could be found by applying traditional modes of analysis—such as State practice and decisions of international tribunals—then his position was more plausible. As the Special Rapporteur pointed out, there were very few decisions supporting the idea of an exception to immunity, and the *Arrest Warrant* case was a rejection of that idea. There was no conventional State practice supporting an exception to immunity or what traditionally might be regarded as necessary to establish *opinio juris*. In other words, if one accepted the Special Rapporteur's premise, then his conclusions followed more readily; his analysis of the evidence was certainly thorough, though he himself would not go so far as to say that the Special Rapporteur was correct as a matter of *lex lata*, as Mr. Vasciannie had just done.

99. However, there was another way of looking at the matter: Mr. Dugard's alternative narrative. There were many instances of individuals being prosecuted in domestic courts for serious international crimes even though they had immunity, and such prosecutions reflected the view that there must be exceptions. There were judges who dissented from the view that there were no exceptions, and there was academic literature that supported the idea of exceptions. In Canada, legislative bills had been introduced to enable domestic courts to entertain suits by victims against foreign State officials for serious international crimes, notwithstanding their immunity. In short, the issue was not clear-cut.

100. For that reason, he had difficulty with the implications of the Special Rapporteur's conclusions in paragraph 94 (*n*) and (*o*), which seemed to be that the Commission should not accept that there should be exceptions to immunity.

101. In his own view, whether or not there was a rule of international law recognizing exceptions was partly a matter of perspective. The premise from which the Special Rapporteur started seemed to make that the inevitable conclusion, but he privileged some of the evidence for the existence of customary international law while putting other evidence aside. It was a mistake to say that the issue was whether the Commission followed customary international law or engaged in progressive development. Mr. Gaja had just raised some questions about whether the analysis had been completed. As Mr. Pellet had just pointed out, the Commission was dealing with different conceptions of international law, and the whole issue could be viewed not as one of exceptions to immunity but of exceptions to a rule of absolute responsibility for serious international crimes.

102. Even if the Commission endorsed the position that there was no customary norm of international law, however, that should not preclude it from accepting the notion that there should be exceptions: it could engage in progressive development, as Mr. Petrič had strongly argued. He was not sure, however, that at the present stage the Commission could concede the point that there was no basis in customary international law for exceptions to immunity. More thorough consideration needed to be given to the matter.

103. But what about the policy arguments or the rationales for exceptions to immunity, which the Special Rapporteur said were "not sufficiently convincing"? There were two paradigms for considering the issue of foreign courts prosecuting individuals for serious international crimes. One, articulated by Mr. Dugard, was that bad people who had committed horrendous crimes were enjoying immunity and would not be brought before an international tribunal or a domestic tribunal within their own State. Thus, a foreign court, exercising all the procedural safeguards of a properly functioning judicial system, should be able to make them accountable and not be barred by a claim to immunity. That was a very appealing image.

104. There was an alternative paradigm, however: that politically motivated prosecutions might be brought against prominent individuals, notwithstanding their immunity, and without any guarantee of procedural or substantive safeguards. That, of course, was a serious concern, especially if it resulted in manifest injustice, hampered the conduct of foreign relations or undermined the very thing that the institution of immunity sought to protect.

105. What, then, was the Commission to do, faced with competing views of the consequences of establishing exceptions to immunity? The Special Rapporteur had indicated that he would submit a third report and would not propose draft articles on the topic. The Commission would have to decide at some point how it wished to move ahead—with the preparation of draft articles or the submission of additional reports. It had been suggested that a Working Group should be established to deal with the matter, but he was not convinced that decisions on the future direction of work could be taken at the current session; that was essentially a matter for the next quinquennium. Nevertheless, he wished to set out some views on the general direction of future work.

106. First, work on the topic should not be abandoned. If the fundamental issues could be resolved, it was an ideal topic for the production by the Commission of draft articles.

107. Secondly, he did not think that the Commission should let the Special Rapporteur's position that there should be no exceptions to immunity stand. More analysis of the question was required. The Special Rapporteur tended to contrast what he saw as "legal" arguments with those he described as based on logic or expediency, but his legal arguments were often just a different policy perspective. Why, he asked, should attribution of the acts of an individual to a State be different for acts constituting serious international crimes than it was for other acts? Why should the gravity of an act suspend the principle of equality of States on which immunity was based? He treated the argument that acts constituting serious international crimes were not acts of the State as "an artificial and not entirely legal attempt" to support exceptions to immunity. In essence, that argument was just a policy argument that invoked legal concepts. How did the equality of States justify protecting State officials who had committed serious international crimes? Why was it that the policy rationale for immunity required that individuals who had committed serious international crimes should be shielded from prosecution? The basic problem, as Mr. Vasciannie had pointed out, was the lack of an effective international jurisdiction for punishing serious international crimes, and that was why prosecution by foreign States was being contemplated.

108. In any event, the Commission would be expected to do more than simply reach the conclusion that there could be no exceptions in respect of immunity. If the Commission adopted the view that there were no exceptions, that would be seen as contrary to its approach on other issues. Further analysis of the subject of exceptions to immunity was needed, perhaps through further reports by the Special Rapporteur's successor or through a Working Group to be set up in the next quinquennium.

The meeting rose at 1 p.m.