Document:-
A/CN.4/3143

Summary record of the 3143rd meeting

Topic:
Immunity of State officials from foreign criminal jurisdiction

Extract from the Yearbook of the International Law Commission:-
2012, **vol. I**

drafting proposals submitted by members, including the alternative wording suggested for draft article 13.

8. It had been suggested that the Commission should annex to the draft articles a model agreement based on the model status-of-forces agreements between the United Nations and countries hosting peacekeeping operations.[226] It had also been suggested that a similar model agreement could be elaborated to cover non-military actors providing assistance. While such highly detailed models were of practical interest, in his view their drafting fell outside the Commission's purview, and at any rate outside the Special Rapporteur's mandate.

9. He intended to devote most of his next report to the topics of prevention, preparedness and disaster mitigation. In preparing draft articles, he would bear in mind some of the comments made during the consideration of the fifth report—for example, those regarding measures that should be included in national legislation and measures to protect relief workers, especially United Nations personnel. In a future report, he would also propose draft articles on use of terms and miscellaneous provisions preserving the position of the United Nations, IFRC and ICRC.

10. If, once the Drafting Committee had adopted revised versions of draft articles A, 13 and 14, the Commission found them inadequate, he would be happy to submit more detailed suggestions. In conclusion, he thanked those members who had participated in the discussion of the fifth report for their contributions.

11. The CHAIRPERSON said that, if he heard no objection, he would take it that the Commission wished to refer draft articles A, 13 and 14 to the Drafting Committee.

It was so decided.

The meeting rose at 10.30 a.m.

3143rd MEETING

Tuesday, 10 July 2012, at 10.05 a.m.

Chairperson: Mr. Lucius CAFLISCH

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

---

[226] Model status-of-forces agreement for peace-keeping operations: Report of the Secretary-General (A/45/594).

Immunity of State officials from foreign criminal jurisdiction[227] (A/CN.4/650 and Add.1, sect. A, A/CN.4/654)

[Agenda item 5]

PRELIMINARY REPORT OF THE SPECIAL RAPPORTEUR

1. The CHAIRPERSON invited the Special Rapporteur to introduce her preliminary report on the immunity of State officials from foreign criminal jurisdiction (A/CN.4/654).

2. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that since she was addressing the Commission in plenary meeting for the first time in her capacity as Special Rapporteur for the topic of immunity of State officials from foreign criminal jurisdiction, she wished to make two brief statements before introducing her preliminary report. First of all, she was grateful to the members of the Commission for having appointed her Special Rapporteur, which was an honour and a genuine privilege. She would do everything within her power to carry out her task and dared to hope that by the end of the current quinquennium her work would have been up to the Commission's expectations. Second, she wished to express her acknowledgement and gratitude to Mr. Kolodkin, the previous Special Rapporteur for the topic, both for the work that he had done over five years and for his valuable contributions—the three reports[228] that, together with the memorandum[229] by the Secretariat, formed the historic basis of the Commission's work—which must be taken duly into account as the Commission considered the topic.

3. The preliminary report had been issued in all the official languages of the United Nations. However, a number of editorial corrections should be made to the Spanish text: in paragraphs 66 and 73, the French word "*fonctionnaire*" should be replaced with "*représentant de l'État*", while in paragraph 70 the term "*ratione personae*" should be replaced with "*ratione materiae*"; similarly, in the English version, the word "immunity" in the third sentence of paragraph 49 should be changed to "impunity", the word "contention" in paragraph 54 should be changed to "consensus", and in paragraphs 66 and 73, the French word "*fonctionnaire*" should again be replaced with "*représentant de l'État*". As the improperly used terms could mislead the reader, she urged members to kindly take note of the corrections she had indicated.

4. The preliminary report had three chapters. In the introduction, she briefly outlined the work done by the Commission on the topic thus far. Afterwards, she described the progress made with regard to the substance of the topic, and she set out the main elements of the reports submitted by Mr. Kolodkin and the main thrust of the debates that had

---

[227] At its 3132nd meeting on 22 May 2012, the Commission appointed Ms. Escobar Hernández, Special Rapporteur, to replace Mr. Kolodkin, who was no longer a member of the Commission.

[228] *Yearbook ... 2008*, vol. II (Part One), document A/CN.4/601 (preliminary report), *Yearbook … 2010*, vol. II (Part One), document A/CN.4/631 (second report) and *Yearbook … 2011*, vol. II (Part One), document A/CN.4/646 (third report).

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

taken place in the Commission and in the Sixth Committee of the General Assembly. In the following chapter, she had endeavoured to list the issues on which consensus had not been reached and which should therefore be considered as requiring further consideration by the Commission. Lastly, she proposed a systematic workplan that reflected her view of how she ought to deal with the topic in her future reports, with regard to both substance and method of work. She also recalled that on 30 May 2012 she had held open informal consultations with the members of the Commission, which could be considered to constitute an initial informal debate on the topic. She had included the opinions expressed on those occasions in her report to the extent possible, given the advanced state of her text, which she had already drafted, and the preliminary nature of the report. As the members of the Commission all had copies of the report, there was no need for her to summarize it, and she therefore proposed to focus her presentation on certain methodological or substantive points she thought should be emphasized in order to help the Commission engage in a more structured discussion, although in doing so she obviously had no intention of limiting or directing the debate. Out of a desire for clarity and simplicity, she had structured her statement into two groups of observations, one dealing with methodology and one with substantive issues.

5. First of all, with regard to the current state of the topic, an essential consideration, since it determined the form that future work would take, she said it was impossible, notwithstanding the significant preparatory work already accomplished, to say that the issues under consideration had been settled and that a final solution could be seen, or that the debates held so far had been conclusive. On the contrary, the reports of the preceding Special Rapporteur and the debates in the Commission and the Sixth Committee had shown that the topic under consideration was very complex, and that its principal points were far from eliciting even the beginnings of a consensus. Consequently, while future work should necessarily take account of Mr. Kolodkin's three reports, consideration should also be given to the views expressed by Commission members and by States on the subject of those reports. In particular, the points of view and perspectives expressed thus far, which were many and varied, should be taken into account, or else the Commission's work might be impeded. It was thus imperative to begin by identifying the very few points on which there was consensus and the numerous points on which views diverged; that was what she had tried to do in her preliminary report, which offered a new point of departure for the Commission.

6. Second, she wished to make an observation of a methodological nature that also recalled in a general way the Commission's mandate. In Mr. Kolodkin's reports and in the debates in the Commission, including the informal consultations held in May, and in the Sixth Committee, the question had arisen as to whether the topic ought to be dealt with solely from the standpoint of *lex lata* or whether it should be looked at from the standpoint *de lege ferenda* as well—in other words, whether the Commission ought to limit itself to a simple exercise in codification or also undertake to engage in the progressive development of international law. As on many other questions, there was a divergence of views, even if it seemed to her that the majority wished to follow both approaches simultaneously. Without wishing to enter into an ongoing debate in the Commission and focusing her comments only on the topic under consideration, she did not believe that the topic could be dealt with solely from the perspective of *lex lata* or of codification. Rather, as had been stated countless times during the past quinquennium, while the topic was indeed a classic subject of international law, it must be dealt with in the light of new developments and the changes that had taken place in international law during the last third of the twentieth century. It could not have escaped the notice of any educated observer that the current legal situation was not the same as the one that had prevailed during the first half of the twentieth century or even during the two decades that had followed the Second World War. Indeed, the changes that had taken place in the past three decades alone and the new practices that had developed during the same period clearly showed that the international community was once again interested in a topic that until recently had been considered to be incidental, not to say irrelevant and negligible. To overlook those changes in the international community and contemporary international law would have the effect of diluting the Commission's work, rendering it pointless and unproductive, since it would fail to take into account new legal principles, values and realities in which the notion of immunity in general and immunity from criminal prosecution in particular were evolving and must continue to evolve. In the light of those considerations, she believed that the Commission must approach the topic under consideration from the dual standpoint of codification and progressive development—even if, for practical reasons, it would seem logical to consider first, but not exclusively, the elements that were related to codification, that is, the elements of *lex lata*.

7. Third, she believed that the topic must be dealt with in such a way that the draft articles that the Commission adopted formed a coherent part of the international legal system as a whole. Such a systematic approach to the topic within the framework of the international legal order implied that the Commission was looking at the relationship between the immunity of State officials from foreign criminal jurisdiction and the structural principles and legal values that protected and served international law. In his three reports, Mr. Kolodkin had made a detailed analysis of the problem of the legal basis for such immunity and the principles and values that underlay it. Yet the debates in both the Commission and the Sixth Committee had shown a need to take account also of other values and principles of the international community that were recognized and protected by international law, such as the protection of human rights and the combating of impunity. That was why, without seeking to modify the scope of the topic under consideration, she felt that it could not be addressed without taking into account the balance between the various international values and legal principles involved and, more particularly, without taking into account (as a matter of principle, if that was possible) the new developments that had occurred in international criminal law in recent decades. That dynamic new branch of international law was not limited, after all, to the establishment of a genuine system of international criminal jurisdiction but also encompassed the establishment or reinforcement of national techniques

for combating impunity in general and the most serious international crimes in particular, particularly the rules for attributing competence to national courts and techniques for international legal cooperation and assistance, which were equally important. Even if that did not necessarily result in an automatic transposition into the topic at hand of all the principles and norms that could be invoked in an international criminal court with regard to immunity, it was equally clear that they could not be simply ignored whenever immunity was invoked in national courts. The same held true, albeit at a somewhat different level, for the unequal relationship that existed between State responsibility and individual responsibility and between State immunity and individual criminal immunity. That relationship must be given special treatment when considering the topic, once again in the light of the essential principles and values of the international legal system, if the Commission did not wish to elaborate a set of draft articles on immunity from foreign criminal jurisdiction that, rather than address problems that arose in practice, introduced incoherent and controversial new elements into the system. She was truly convinced that the mandate and the very nature of the Commission required its members to help to bring about, through their work, a strengthening of the systemic nature and coherence of the international legal system, and that that objective must be reflected in her future reports.

8. Lastly, it was necessary to structure the debate on the topic in the Commission and in the Sixth Committee. As she had noted at the beginning of her statement, that debate had in her view taken on an overly general form, which had not facilitated a harmonization of the divergent points of view on various aspects of the topic. She herself believed that the topic was an extremely complex and sensitive one, and that it was difficult, if not impossible, to approach it from a methodological standpoint as a whole. The Commission would do well to tackle the various aspects of the topic on a step-by-step basis—in other words, by taking up groups of clearly defined issues in succession, a method that would allow her to submit annual reports on different substantive issues. Those reports ought to cover the draft articles that dealt with each issue analysed, with a view to eliciting a concrete debate within the Commission and, in due course, the Sixth Committee. She was fully aware that many of the substantive issues to be considered in the future were cross-cutting in nature and were thus recurrent in the work of the Commission; however, she was convinced that a new effort to take up those issues systematically would make it possible to progress rapidly, surely and in a predictable and efficient manner. It was to that end that she had circulated an informal document during her informal consultations. That was also why she had grouped those issues into four major categories in the last chapter of her report; those groups would be dealt with in the reports she planned to submit to the Commission at forthcoming sessions.

9. She had wanted first of all to draw members' attention to those methodological considerations in order to stress both the importance she attached to them and the fact that whatever position the Commission took on the matter would have an impact on the way the various substantive aspects of the topic were dealt with. While her report was of a preliminary nature, she had nevertheless included in it substantive issues that lay at the heart of the topic. She had tried to list those issues and, more precisely, the specific issues on which no consensus could be seen to exist, either in Mr. Kolodkin's reports or in the debates to which those reports had given rise. She had also, in the penultimate chapter, identified elements that might indicate the direction in which the future work of the Commission ought to go. Without entering into the details of that chapter, she thought it was essential to mention the fundamental issues she would discuss in future reports, spelling out the main problems that each one posed, which were discussed more fully in the preliminary report. First, the Commission should consider the distinction drawn between immunity *ratione personae* and immunity *ratione materiae* and the consequences that that distinction might have for the possible establishment of two distinct legal regimes, each applicable to one type of immunity. Second, the debate should focus on the eminently functional nature of those two types of immunity and the scope and meaning that that functional dimension had or should have for each of those categories and for the corresponding legal regime to be established. Third, the Commission would have to determine which persons enjoyed immunity *ratione personae* and whether or not it was useful to draw up a list of such persons, specifying, where necessary, whether the list was open or restrictive. Fourth, the notion of "official act" would have to be defined for the purposes of immunity from foreign criminal jurisdiction, bearing in mind issues relating to the possible coexistence of double responsibility of the State and the individual and double immunity of the State and the individual, both of which flowed from such "official acts". Consideration would also have to be given to the implications that that would have for determining which category of State officials could enjoy immunity. Fifth, the place of exceptions to immunity *ratione personae* and immunity *ratione materiae* would have to be studied, and the Commission would have to determine whether it could enumerate the various norms and principles that might apply to each of the two categories of immunity. Sixth, it would be necessary to determine how much weight to give to the protection of the international community's legal principles and values and, in particular, to efforts to address the most serious international crimes, in terms of limits or exceptions to each of those types of immunity. Lastly, the Commission would have to study the rules of procedure that would have to be put in place for such immunity to be duly enjoyed in a specific case. Such rules should also cover jurisdictional and procedural norms in the strict sense as well as, quite probably, the rules governing forms of international legal cooperation and assistance between States.

10. Even if the issues that she had just enumerated had been discussed to some extent in the three reports prepared by Mr. Kolodkin, she believed that the answers to those questions had not been sufficiently discussed or justified. Moreover, the debates in the Commission and the Sixth Committee had shown that a single, consensual answer to those questions did not exist, and that they should therefore be treated in greater depth in her future reports. That was why her preliminary report contained a workplan in which the issues she had mentioned were divided into four main groups that allowed them to be addressed systematically. The four groups also corresponded to the amount of time available for work

during the current quinquennium, which should allow the Commission to complete its consideration of the topic within that time. In order to make optimum use of the time available, then, members should plan to deal with certain issues in a cross-cutting manner and should not expect that the order given would always be followed.

11. In conclusion, she recalled that her preliminary report was a "transitional" report, which was intended to ensure that all the work done on the topic in the past would be duly taken into account while also ensuring that all future work would take effectively into account all the views expressed thus far by Commission members and by States. She had no intention of doing away entirely with the excellent work that had been done in the past but wished to propose a new road that would make it possible to address the many questions that had been raised during the preceding quinquennium, the goal being to provide an effective legal response to what was felt as a need by States and the international community, who had demonstrated in many different ways the high degree of importance they attached to the topic of immunity of State officials from foreign criminal jurisdiction—in particular, by expressly asking the Commission, through the General Assembly, to give priority to the topic in its programme of work. Furthermore, the topic's importance was closely linked to the defence of the principles and values that underlay it. For that reason, the Commission ought to deal with it in a balanced and cautious manner, without overlooking the new realities and trends in international law that had emerged in recent years at both the national and international levels, particularly in the area of criminal responsibility for the most serious international crimes. In any event, that work could only be accomplished through the collective effort of a collegial body such as the Commission. She therefore looked forward with great interest to the comments and observations members would make following her introduction.

12. Mr. NOLTE said that the Special Rapporteur's report was truly a "transitional" report, as she herself had called it. The Commission must be grateful that she had found the time and the energy to prepare the report in the short time between her appointment as Special Rapporteur and the beginning of the second part of the session. Although the report was not very long, it contained a great many important elements. The report sought, to use the Special Rapporteur's words, to prepare the ground for a "structured debate" and had "methodological and conceptual clarification" as its goal. Thus it did not contain any clear proposals regarding substantive questions, except where the Special Rapporteur identified an existing consensus. It was apparently limited to setting out methodological, conceptual and structural questions with a view to outlining a plan for the future work of the Commission. It was indeed necessary to pursue that goal, and the Special Rapporteur deserved praise for her efforts and for the valuable basis that her report offered for the Commission's debate. However, as the topic under consideration was a difficult one in many ways, and because the Commission was at the stage of discussing general orientation, he wished to express a number of caveats. Methodology and conceptual clarifications must remain neutral and should not prejudice substantive issues. He was not saying that the Special Rapporteur had chosen clarifications that were not neutral: he simply wished to ensure from the outset that the choice of methodological approach or conceptual distinctions did not tilt in favour of certain substantive conclusions, for such conclusions would have to be justified independently on the basis of additional sources.

13. His first caveat concerned the fact that the Special Rapporteur appeared to be suggesting that the Commission should pursue an abstract and systematic method that entailed deducing conclusions from certain conceptual distinctions; that approach reminded him of the traditional civil law approach. The report did not contain many references to specific judgments or legislative acts that might constitute the basis for an analysis of practice, and he was aware that that was not its purpose. However, a practice-oriented and inductive style of reasoning was necessary to arrive at a solid determination of international law, whether the Commission sought to identify *lex lata* or propose *lex ferenda*. While he valued abstract and systematic reasoning, coming as he did, like the Special Rapporteur, from the civil law tradition, he wished to emphasize that abstract categories had their foundations in empirical developments and must therefore be justified accordingly. He did not doubt that the Special Rapporteur was conscious of that methodological question, but he thought that it would be worthwhile to raise the issue at an early point in the discussion. That question could become relevant in practical terms in dealing with the relationship between the international responsibility of the State and the international responsibility of individuals, which the Special Rapporteur addressed in paragraph 59 of her report, and possibly the distinction between "official acts" and "unlawful acts", made in paragraph 67.

14. His second caveat concerned the fact that in paragraph 29 of her report the Special Rapporteur spoke of "a tendency to limit immunities and their scope". That reference, and others in the report, could be understood to constitute a new version of the "trend argument" that had often been used in the past to limit the immunity of States and their officials. That argument should be used with caution. For example, the International Court of Justice had recently rejected, in the case concerning *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, the contention of the Italian courts that a trend existed in international law towards a restriction of the immunity of the State in the particular area under consideration, and had shown that, on the contrary, the immunity of the State had been reaffirmed in recent years. There were in fact indications that a similar development may have taken place with regard to the immunity of State officials from foreign criminal jurisdiction. That argument had been developed in an article that was about to be published in the *American Journal of International Law*, which had been based on an extensive analysis of jurisprudence of many countries from the past 15 years.[230] Such a trend towards reaffirmation of immunity before national criminal jurisdictions, if it actually existed, would be compatible with the trend towards the restriction of immunity before international jurisdictions. In that connection, it would be important to take account of the decisions of the International Criminal Court of 12 and

[230] I. Wuerth, "Pinochet's legacy reassessed", *American Journal of International Law*, vol. 106, No. 4 (October 2012), pp. 731–768.

13 December 2011 on the non-existence of immunity for State officials before international jurisdictions under customary international law (*The Prosecutor v. Omar Hassan Ahmad Al Bashir*), which had given rise to sharp protests from the African Union Commission. More generally, he suggested that the International Law Commission should pay close attention to what it meant when it spoke of a trend.

15. That brought him to his third caveat: The Special Rapporteur, in her report, often spoke of the "values" of the international community that should be given effect, particularly the value of endeavouring to prevent impunity. The question at hand was not whether to give effect to the values of the international community—that was undeniable—but deciding how to give them effect. The issue of "responsibility to protect" offered an appropriate analogy. That responsibility certainly represented a value of the international community, but for the purposes of international law the decisive question was this: Who had the competence to give effect to that value? Certainly, the State on whose territory international crimes were being committed did—that State even had an obligation to protect—as did the United Nations, but third States did not. That had been the conclusion reached in the 2005 World Summit Outcome.[231] Perhaps the situation with regard to the immunity of State officials from foreign criminal jurisdiction was structurally similar. However, the "value" argument could not be so easily transposed to the rules and principles of international law. Rules of international law, such as the rules on immunity, also represented values. It was not sufficient simply to balance values against each other; such a balancing process must take place within the framework of general rules relating to the formation and evidence of customary international law. Needless to say, the Commission would also have to discuss in greater depth the more or less legal nature of the values to which the Special Rapporteur was referring.

16. A fourth caveat concerned the interrelationship of different aspects of the law of immunity and different aspects of international law in general. In her workplan, the Special Rapporteur proposed to break the topic down into several different issues to be taken up in sequence. That, of course, was a useful method that had been successfully employed in other contexts, but the Commission must remember that those issues were interrelated and continue to take that interrelatedness into account. Thus, for example, the distinction between immunity *ratione personae* and immunity *ratione materiae* derived from a common legal source, which was the immunity of the State. Likewise, while the topic under consideration concerned only immunity in criminal matters, that did not mean that developments in the area of immunity in civil matters were irrelevant for the Commission's purposes. Immunity in both criminal and civil matters derived from the same legal basis, and it was sometimes difficult to determine whether a case related to criminal or civil jurisdiction. By looking at the interrelationship of different aspects of the law of immunity, it was possible to identify "grey areas", as the Special Rapporteur called them in her report, that must be acknowledged and addressed.

17. A fifth caveat had to do with terminology. In paragraphs 34 and 62 of her report, the Special Rapporteur drew a distinction between those who held that immunity was "absolute" and those who maintained that it was "restricted". He did not believe that such a distinction was helpful in the current context, and it could even be misleading. In fact, the question was not at issue, since it was now largely agreed that absolute immunity no longer existed. After all, the previous Special Rapporteur had reminded the Commission of the widely recognized "forum State exception", according to which a State could not claim immunity for acts that one of its officials had committed on the territory of the forum State. The question, then, was not one of an "absolute" versus a "restricted" conception of immunity, but rather what had to be determined was the extent to which immunity should be restricted.

18. His sixth caveat concerned an interesting remark that the Special Rapporteur made in paragraph 27 of her report, namely that "the statements made by some members of the Commission who spoke on the topic [of the justification for immunity] did not make a sufficient distinction between the application of the two bases—functional and representative—for immunity *ratione personae* and immunity *ratione materiae*". That remark suggested that the Special Rapporteur believed that a functional justification was in some way inherently more limited than a representative justification of immunity. Yet what was meant by "functional" was very much a matter of definition and did not necessarily imply a restrictive interpretation. It was certainly true, as the Special Rapporteur noted in paragraph 57 of her report, that the functional immunity of State officials was "linked to preservation of the principles and values of the international community", but that was a rather general point that did not address a difficult aspect of the question, which was whether the primary function of immunity changed depending on developments in efforts to combat impunity.

19. A seventh caveat related to the question of possible exceptions to immunity *ratione materiae*. In paragraph 68 of her report, the Special Rapporteur focused on cases "involving the violation of *jus cogens* norms or the commission of international crimes" and stated that "there appears to have been greater support for a potential exception in the case of immunity *ratione materiae* than in that of immunity *ratione personae*". But perhaps *jus cogens* norms should be dealt with differently from international crimes and a distinction should be made between different types of international crimes where immunity was concerned. Lastly, he wished to recall that the suggestion made at the sixty-third session by Mr. Gaja to the effect that exceptions to immunity might be derived from different kinds of treaties had enjoyed some support among Commission members.

20. His eighth caveat concerned the procedural aspects of immunity. Unlike the Special Rapporteur, who remarked in her report that the Commission had so far discussed the procedural aspects less than the substantive aspects, he recalled that the Commission had discussed them quite extensively at the previous session. He also believed that substance and procedure were closely related in that area. If, for example, it should be possible to identify procedural rules that would have the effect of pressuring States not

[231] General Assembly resolution 60/1 of 16 September 2005, "2005 World Summit Outcome", paras. 138–139.

to invoke their immunity in certain cases, then the need to recognize certain exceptions might not arise in the same way. He wondered whether it might not in fact be wiser to begin by dealing with the procedural aspects of the topic, thereby enhancing the chances of reaching a consensus on certain substantive issues.

21. Lastly, in paragraph 48 of her report, the Special Rapporteur maintained that the debate in the Sixth Committee had produced "a wide range of views concerning the role to be played by a study *de lege lata* or *de lege ferenda*". It had been his impression, however, that almost all States in the Sixth Committee had expressed the wish to see the Commission produce an analysis of the *lex lata*, which did not preclude the fact that some States might also have thought it advisable for the Commission to formulate considerations *de lege ferenda*. His sense, however, was that States wished to have a clear picture of what distinguished considerations of *lex lata* and *lex ferenda*. That was also his personal preference, as he tended to disagree with the Special Rapporteur when she stated in paragraph 77 of her report that "the topic of the immunity of State officials from foreign criminal jurisdiction cannot be addressed through only one of these approaches". He did agree that the topic could and should be addressed through both approaches, but he thought that the two approaches should, in the interest of transparency, be used for analytical purposes as separately as possible. That did not preclude the Commission from taking into account "new approaches" and "evolving" aspects of international law, which the Special Rapporteur mentioned in paragraph 48 of her report, but the Commission should have the courage to decide whether those new trends had the character of *lex lata* or *lex ferenda*. Otherwise it would be doing what the Italian courts had done in the cases that had given rise to the decision of the International Court of Justice in the *Jurisdictional Immunities of the State* case, in which the Court had corrected the absence of a distinction between *lex ferenda* and *lex lata*.

22. Mr. HUANG commended the Special Rapporteur for having managed in such a short time to submit a preliminary report that was extremely rich, concise, logical and well structured, and which contained a workplan for the quinquennium that had clear objectives. The new approach that she was proposing would no doubt give greater vigour to the Commission's debate on the immunity of State officials and would foster progress on the topic.

23. The Commission had prepared several draft articles on the topic, which had become an integral part of the Vienna Convention on Diplomatic Relations[232] and the Vienna Convention on Consular Relations,[233] and some of which had been used in the United Nations Convention on Jurisdictional Immunities of States and Their Property.[234] However, no harmonized norms existed yet on the very important question of the immunity of State officials from foreign criminal jurisdiction. The first task was to gather and compile information on State practice, and the Commission had a positive role to play in that undertaking. It should therefore give priority to the topic under consideration, in accordance with General Assembly resolution 66/98 of 9 December 2011 (para. 8).

24. The question inevitably arose as to the link between the work done by the previous Special Rapporteur, Mr. Kolodkin, to whom the Commission owed a great deal, and that done by Ms. Escobar Hernández. Mr. Kolodkin's three reports contained a study of State practice, case law and various theories, as well as detailed analyses.[235] The new Special Rapporteur should base her work on that done by Mr. Kolodkin and not start from scratch, as that would amount to a waste of resources and undermine the Commission's effectiveness.

25. There was also the question of methodology: in the context of the topic under consideration, the Commission should gear its work towards codification rather than the progressive development of international law. The question of immunity, which touched on basic principles of international relations and international law, was a highly complex and sensitive one. By emphasizing the development of rules on immunity, the Commission would generate undue controversy; it would find it difficult to reach a consensus quickly, and even if it did obtain some result, it would be difficult to guarantee universal recognition. Under those conditions, the Commission should instead orient its work towards the compilation of existing practice and rules at the international level, and the preparation of clear guidelines. It should not be overly ambitious.

26. Lastly, international treaties should not serve as a pretext for not applying the rules of immunity. In addition, the Commission should bear in mind that the topic was limited to the immunity of State officials from foreign criminal jurisdiction and did not cover the immunity of diplomatic or consular personnel. Emphasis should therefore be placed on the rules of customary international law. Similarly, exemptions or exceptions that States could claim under treaties were not part of the topic.

27. Mr. MURASE said he understood that two major issues had been raised at the sixty-third session (2011): one was determining which State officials enjoyed immunity from foreign criminal jurisdiction and the other was determining which crimes should be excluded from immunity. Those two questions had been put to the Member States in chapter III of the Commission's report to the General Assembly[236] in order to elicit their views. He was somewhat puzzled that the Special Rapporteur had made no reference in her preliminary report to the crimes to be excluded from the draft articles on the topic (a question that was different from the question of *jus cogens*, which was touched on briefly in the report). Unless the Commission had a clear idea of the types of crimes that were covered by the topic, no useful discussion could take place. He assumed that the crimes in question were only the most serious crimes under international law, but he would be grateful for any clarification from the Special Rapporteur on that point.

[232] *Yearbook ... 1958*, vol. II, document A/3859, chap. III, para. 53, draft articles on diplomatic intercourse and immunities and commentaries thereto.

[233] *Yearbook ... 1961*, vol. II, document A/4843, chap. II, para. 37, draft articles on consular relations and commentaries thereto.

[234] *Yearbook ... 1991*, vol. II (Part Two), para. 28, draft articles on jurisdictional immunities of States and their property and commentaries thereto.

[235] See footnote 228 above.

[236] *Yearbook … 2011*, vol. II (Part Two), paras. 37–38.

28. With regard to the question of which State officials should enjoy immunity, he agreed with the idea of limiting it to the troika (Head of State, Head of Government and minister for foreign affairs), but also felt that a limited number of members of Government or possibly parliament could perhaps be included, in keeping with article 27, paragraph 1, of the Rome Statute of the International Criminal Court, which stipulated that "official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility". He disagreed with the idea that the troika should enjoy comprehensive immunity. The Commission should remain consistent with its past work on that question and the rather "restrictive" approach it had taken, at least for crimes under international law. The draft Code of Crimes against the Peace and Security of Mankind, which the Commission had adopted in 1996, provide in its article 7 (Official position and responsibility) as follows:

> The official position of an individual who commits a crime against the peace and security of mankind, even if he acted as Head of State or Government, does not relieve him of criminal responsibility or mitigate punishment.[237]

The same position was taken in the Rome Statute of the International Criminal Court, article 27, paragraph 2, which provided as follows:

> Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

He believed that a person charged with serious crimes should be treated on the same footing whether he or she was convicted by an international tribunal or by a national court, and from that perspective he thought that the Commission should align itself with the Rome Statute.

29. A hidden but important question was that of control over prosecutorial discretion. To prevent any abuse, adequate safeguards must be provided. Prosecutors in both international and national criminal justice systems were required to exercise their discretionary powers transparently. Recalling the Guidelines on the Role of Prosecutors,[238] he said that at the national level the establishment of guidelines for prosecutors in the form of laws or regulations might be the most effective way of preventing arbitrary or aggressive exercise of prosecution against foreign Heads of State. Other guidelines could be prepared to prevent the abuse of prosecutorial discretion by international prosecutors. He hoped that the Special Rapporteur and the Commission would consider including that question in the Commission's programme of work on the topic.

30. Like Mr. Nolte, he was a bit concerned with the expression "system of values" in paragraph 72 of the Special Rapporteur's preliminary report (subpara. 1.2), and he hoped and trusted that that did not imply the imposition of Western values on the rest of the world.

31. Lastly, he expressed concern regarding the argument in paragraph 77 of the report concerning *lex lata* and *lex ferenda*. As an organ for codification and progressive development, the Commission did not have a mandate for the exercise of *lex ferenda*. The Special Rapporteur seemed to equate "progressive development" with "*lex ferenda*", which was not correct. While the Commission's codification work was based on customary international law, progressive development was carried out on the basis of emerging rules of international law; that was different from the making of new laws, which was what *lex ferenda* usually implied. The Commission itself had not always used the term *lex ferenda* correctly, and it had to a certain extent led the Sixth Committee astray in that regard. Particular caution should therefore be taken when using the expression "progressive development" as it related to the Commission's mandate.

32. Mr. KITTICHAISAREE agreed with the Special Rapporteur that the topic must be approached from the perspective of *lex lata* at the outset and from that of *lex ferenda* at a later date, as needed. Many States had advocated such a two-step approach. The question then arose as to what *lex lata* was, and when and how a rule incorporated in an international instrument became a rule of customary international law of general application.

33. With regard to general issues of a methodological and conceptual nature, which formed the first group of issues to be considered under the Special Rapporteur's proposed workplan, he believed that the distinction between immunity *ratione materiae* and immunity *ratione personae* should be retained in order to narrow the material scope of the former and the temporal scope of the latter. Personal immunity and functional immunity could coexist, for example, in the case of a person entitled to personal immunity who discharged his or her official functions and thus enjoyed functional immunity. Moreover, as Mr. Nolte and Mr. Murase had pointed out, the Commission should be careful in balancing immunity with the system of values and principles of contemporary international law. One could ask, for example, whether the principle that there could be no immunity for serious crimes of concern to the international community as a whole could override the principle of democracy, whereby a democratically elected Government decided, for the sake of national reconciliation, to grant amnesty to perpetrators of such crimes and asserted the immunity of its officials in foreign courts.

34. Another issue to be considered was the relationship between immunity on the one hand and the responsibility of States and the criminal responsibility of individuals on the other. Functional immunity derived from the need to allow State agents to perform their official duties. It had been argued by Mr. Kolodkin that a State official discharging official duties on behalf of his or her State could not be called to account for any violation of international law he or she might have committed while performing those duties, for such acts were attributable to the State, which alone could be held responsible at the international level. However, some States, such as France, had suggested that

---

[237] *Yearbook ... 1996*, vol. II (Part Two), p. 26.

[238] *Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August–7 September 1990, Report prepared by the Secretariat* (A/CONF.144/28/Rev.1, United Nations publication, Sales No. E.91.IV.2), Guidelines on the Role of Prosecutors, p. 189.

it was necessary to determine whether a State official had acted in an official capacity and to consider the extent to which an "act of an official as such" differed from an "act falling within official functions";[239] others, such as Spain, preferred a restrictive interpretation of the term "official acts". He himself thought that it all depended on whether such an act could be attributed under international law to the State that the author of the act was representing. He disagreed with Mr. Kolodkin, who had contended that State officials had immunity *ratione materiae* for unlawful acts and acts *ultra vires* performed in an official capacity; he believed that State officials were not entitled to immunity *ratione materiae* if the act was unlawful or *ultra vires* under the law of that State.

35. However, States could only incur responsibility if the acts in question were attributable to them. The International Court of Justice had clearly established that principle in the *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* case and the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, in which it had had to settle the crucial question of whether the Bosnian Serbs who had committed acts of genocide had been *de facto* agents or organs of the Government of the Federal Republic of Yugoslavia for the purpose of determining whether or not those acts incurred State responsibility. The Court had held that there was no proof of any genocidal intent on the part of that State, either on the basis of a concerted plan or on the grounds that the events revealed a consistent pattern of conduct that could only have pointed to the existence of such intent. As a corollary, unlawful acts committed by State officials could be directly attributed to the State only if they had been ordered, connived at or condoned by the State, or if they could be attributed through a joint criminal enterprise or the notion of command responsibility. Thus, as many members had maintained at the previous session, State responsibility and individual criminal responsibility might overlap, but each had a separate existence.

36. It had been argued that attribution of State responsibility might be relevant in determining whether a State official was entitled to immunity *ratione personae*. However, that argument was not well founded, as immunity *ratione personae* derived from the position of the person in question and not from the official nature of the act that incurred that person's individual criminal responsibility. As the International Court of Justice had recalled in the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* case, the rationale for personal immunity was the need to ensure the effective performance by State officials of their representation functions throughout the world. The Court had reaffirmed in that case that the troika (i.e. Head of State, Head of Government and minister for foreign affairs) as well as diplomatic and consular agents enjoyed *de lege lata* immunity *ratione personae* for any official act they had performed while in office, and even after they left office. Some States favoured limiting immunity *ratione personae* to the troika so as not to disrupt the balance between immunity and the growing desire to prevent impunity for international crimes; others, however, felt that it should be extended to other State officials, such as ministers for whom international travel was intrinsic to their functions. In the light of those conflicting positions, any extension of immunity *ratione personae* must clearly be justified. A compromise might be obtained by allowing every State the freedom to grant such immunity to any foreign State official on an official visit for the duration of that visit.

37. Accordingly, he viewed immunity *ratione personae* from foreign criminal jurisdiction in the following manner: it was accorded to Heads of State, Heads of Government and ministers for foreign affairs; it was granted to diplomatic and consular agents in accordance with the applicable rules of customary international law or treaties; and it could be granted by a State to representatives of another State on an official visit, subject to certain conditions, as necessary. Any person entitled to immunity from foreign criminal jurisdiction enjoyed such immunity while in office, even when on a private visit or acting in a private capacity. Provided that it had jurisdiction under international law, a court of one State could try a former official of another State in respect of acts committed prior or subsequent to his or her term of office as well as in respect of acts committed in a private capacity during the term of office.

38. As to the absolute or restricted nature of immunity *ratione personae* and, in particular, the role that international crimes should or should not play, he recalled that there had been a consensus in both the Commission and the Sixth Committee that international law needed to balance stability in international relations with the need to hold the perpetrators of crimes proscribed by peremptory norms accountable for their acts. However, as Germany had contended, the violation of a *jus cogens* norm, which was part of substantive law, did not necessarily remove immunity, which fell in the realm of procedural law. For several States, the current state of customary international law was to deny immunity to the perpetrators of international crimes (genocide, war crimes and crimes against humanity), including to the troika. Conversely, other States considered that while the denial of immunity could be found in treaties, such as the Rome Statute of the International Criminal Court and the Convention against torture and other cruel, inhuman or degrading treatment or punishment, it was not part of general customary international law. That had also been the view taken by Mr. Kolodkin.

39. The recent judgment in the *Jurisdictional Immunities of the State* case could open up possibilities for denying State officials immunity from foreign criminal jurisdiction. Certain judges had in fact expressed dissenting opinions, contending that in those exceptional circumstances where immunity might prevent the victims of international crimes from obtaining an effective remedy, or where no other means of redress was available, domestic courts should set aside immunity, irrespective of whether or not the acts in question were acts of State. While the Court's judgment concerned jurisdictional immunities of the State and not of its officials, it could be argued that the principle of the immunity of State officials derived from the principle of the sovereign equality of States, and thus if a State was denied immunity, then its officials could not enjoy it either.

[239] *Official Records of the General Assembly, Sixty-sixth Session, Sixth Committee*, 20th meeting (A/C.6/66/SR.20), para. 44.

40. He submitted, as a matter of general principle, that immunity should not impede the criminal prosecution of State officials, provided that such prosecution did not pose a threat to the stability of international relations and that it did not worsen or prolong the suffering endured by the population in the State of the official concerned. In order to strike a balance between immunity and the need to combat impunity for international crimes, the Commission might wish to contemplate a provision on the relationship between immunity and impunity that was based on the jurisprudence of the International Court of Justice and would set out the following principles: immunity granted under customary international law or applicable treaty obligations remained opposable before the courts of a foreign State even where those courts had jurisdiction *ratione personae* or *ratione materiae* over the case in question; immunity served as a procedural barrier to criminal prosecution, whereas impunity absolved a person of individual criminal responsibility under substantive criminal law; as a general principle, no person was above the law, and an individual's official position did not relieve the individual of criminal responsibility or mitigate the applicable punishment; and immunity did not preclude prosecution of the individual who enjoyed it in a State having criminal jurisdiction, provided that such prosecution was not inconsistent with the obligation of that State under international law.

41. With regard to immunity *ratione materiae*, he believed, in the light of what he had said thus far, that functional immunity had the following components: it was accorded to all State officials discharging their official duties or acting in an official capacity; "official acts" in the current context meant any act that was attributable to the State represented by the person performing the act; and State officials did not enjoy functional immunity when they committed an act attributable to the State that was unlawful or *ultra vires* under the law of that State.

42. Finally, with regard to the procedural aspects of immunity, which had been presented in the third report[240] by Mr. Kolodkin, he noted that they had not been as contentious, nor had they elicited as many comments, as the substantive aspects. They were nevertheless interrelated with them, since some procedural aspects might have to do with the seriousness of the crime allegedly committed by the State official. It might therefore be appropriate for the Commission to focus on reaching a consensus on the substantive aspects of immunity before proceeding to consider its procedural aspects.

43. Mr. TLADI said he believed that the topic under consideration was one of the most important on the Commission's agenda and certainly the most sensitive. He was confident that the draft articles that the Commission would produce would have a significant impact on the development of international law. It was to be hoped that they would contribute positively to the fight against impunity and not erode the progress achieved in that area thus far.

44. In his second report,[241] in which he had set out his approach to the topic, Mr. Kolodkin had listed a number of questions that South Africa had drawn to the Commission's attention in 2009. Those questions were critical for the Commission's future work. The first—and the crucial—question was whether ministers for foreign affairs and other State officials enjoyed the same immunities as Heads of State under customary international law.[242] The previous Special Rapporteur had proceeded from the assumption that the troika—and even officials beyond the troika—enjoyed immunity *ratione personae* and that such immunity was subject to no exception. Yet the Commission's reports on the work of previous sessions indicated that there was no agreement on that question. It was thus premature to proceed to other aspects of the question, such as exceptions and waivers, in the absence of a common understanding of the categories of officials who benefited from immunity *ratione personae*. There was sufficient doubt on that point to warrant a thorough analysis of State practice in that regard. Members would recall that in 1991, in its draft articles on jurisdictional immunities of States and their property,[243] the Commission had been unwilling to treat the immunities of ministers for foreign affairs as being on a par with those of Heads of State. Similarly, in its resolution on immunities from jurisdiction and execution of Heads of State and Government in international law, the Institute of International Law was not willing to extend immunity *ratione personae* to ministers for foreign affairs.[244] He was not making the point that not all members of the troika were entitled to immunity *ratione personae*. A careful study was warranted nevertheless, bearing that premise in mind.

45. In paragraph 63 of her report, however, the new Special Rapporteur also seemed to be arguing that the troika enjoyed immunity *ratione personae*, the only question being whether other officials beyond the troika could do so as well. It was true that in the *Arrest Warrant of 11 April 2000* case, the International Court of Justice had declared that ministers for foreign affairs and possibly other officials enjoyed the same immunities as Heads of State and of Government. It should be recalled, however, that several judges had dissociated themselves from that view, noting that the issue was far from clear under customary international law, or that nothing in precedent, *opinio juris* or legal writing supported that proposition.[245]

46. Notwithstanding the real doubt suggested by those diverging views, the Court had concluded that the immunities of ministers for foreign affairs were the same as those of Heads of State. Consequently, any discussion of who enjoyed immunity must therefore begin at that point. However, the Court had produced no State practice or *opinio juris*—and the Commission would surely touch on that question when it considered the topic of the formation and evidence of customary international law—but had based itself entirely on the "nature of the functions exercised by a Minister for Foreign Affairs". That approach was problematic: Claiming that the immunity of

[240] *Yearbook … 2011*, vol. II (Part One), document A/CN.4/646.

[241] *Yearbook … 2010*, vol. II (Part One), document A/CN.4/631, para. 9.

[242] *Official Records of the General Assembly, Sixty-fourth Session, Sixth Committee*, 15th meeting (A/C.6/64/SR.15), para. 69.

[243] See footnote 234 above.

[244] Institute of International Law, *Yearbook*, vol. 69 (2000–2001), Session of Vancouver (2001), p. 743. Available from the Institute's website (http://justitiaetpace.org).

[245] Joint separate opinion of Judges Higgins, Kooijmans and Buergenthal, para. 80.

a Head of State could be extended to a minister for foreign affairs for policy reasons was not sufficient to establish the existence of such immunity in law. More importantly, by using functionality, the Court obfuscated the *raison d'être* of immunity *ratione personae*. Heads of State did not enjoy absolute immunity simply by virtue of their functions; traditionally, they did so because they were seen as the personification of the State. The sovereign immunities of States were thus vested also in the person of the Head of State. Ministers for foreign affairs, in contrast, did not personify the State in any way. It would thus be incorrect to extend, by analogy, the immunities attaching to Heads of State to ministers for foreign affairs. In other words, while ministers for foreign affairs might well enjoy similar immunities, those immunities could not be extended by virtue of analogy with Heads of State.

47. Any assertion of such immunities must be proven to exist in customary international law. In the absence of such proof, it was difficult to conclude that ministers for foreign affairs and Heads of State enjoyed the same immunities. State practice in that regard was insufficient, and in their joint separate opinion in the *Arrest Warrant of 11 April 2000* case, Judges Higgins, Kooijmans and Buergenthal concluded that the immunities of ministers for foreign affairs and other high-ranking officials had generally been considered in the literature to be merely functional, a view that had been taken up by the Commission in its draft articles on jurisdictional immunities of States and their property and by the Institute of International Law in its resolution on immunities from jurisdiction and execution of Heads of State and of Government in international law.

48. Even if there was no customary rule in the law as it existed that extended the immunities enjoyed by Heads of State to ministers for foreign affairs, the question might well be asked whether the Commission should propose that question as an area of development, given the nature of the functions of ministers for foreign affairs as described by the Court in the aforementioned judgment. It was true that a minister for foreign affairs served as the head of his or her Government's diplomatic activities, represented the Government in international forums, had full powers *ex officio* and had to travel frequently to perform those functions. Nevertheless, such policy considerations would have to be replaced in the context of the emergence of a new value-laden international law, which, while acknowledging the principle of sovereignty and concepts associated with it, such as immunity, sought to move beyond them in the direction of legal humanism and recognition of an international society. In that new value-laden international law, concepts such as *jus cogens* and *erga omnes* obligations served to temper some of the harsh consequences of sovereignty, including the impunity that could arise from an undue emphasis on immunities—what Mr. Nolte had referred to as the "trend argument". An important implication of the emergence of that new approach was the aggressive fight against impunity and the promotion of justice and accountability, particularly in connection with the most serious crimes of concern to the international community.

49. In truth, the *jus cogens* argument could be said to cut both ways: the question could be asked whether, given their centrality to traditional international law based on inter-State/bilateral relations, immunities were not part of *jus cogens*. He doubted that that was the case, and that would certainly go against the very idea of "forbidden treaties" advanced by Alfred von Verdross in the 1930s.[246] As an aside, he would add that if one held that immunities were part of *jus cogens*, then one should discount the idea that immunity was itself a limitation of sovereignty, as the Permanent Court of International Justice had recalled in the famous judgment in the *"Lotus"* case.

50. Leaving aside the notion that immunity could also be part of *jus cogens*, an idea that he did not support, it was difficult to refute the assertion that thus far not much practice or *opinio juris* had been advanced to the effect that officials other than Heads of State and of Government had absolute immunity. Consequently, as Mr. Dugard had observed, whatever policy direction the Commission chose to go in would in fact involve some progressive development. He disagreed with Mr. Nolte's desire to create a deep divide between *lex lata* and *lex ferenda*. While values did not necessarily translate into rules, they must nevertheless be taken into account in the formulation of rules.

51. The Special Rapporteur had recalled the recent judgment of the International Court of Justice in the *Jurisdictional Immunities of the State* case and had usefully referred in her report to the separate and dissenting opinions, which were important as a "subsidiary means for the determination of rules of law", in accordance with Article 38 of the Statute of the Court. The case in question was not directly relevant to the topic under consideration, since it concerned the immunities of the State rather than those of its officials. It was nevertheless worth considering, and he wished to draw attention to several points that he hoped the Special Rapporteur would highlight from that case.

52. First, the majority judgment and several individual opinions had accepted the distinction between *acta jure imperii* and *acta jure gestionis* as a matter of law. If State immunity, from which the immunity of State officials derived, should permit the restrictions implied by that distinction, it would be antithetical for the ancillary immunity of State officials not to be similarly restricted—in that connection, the dissenting opinion of Judge Yusuf, particularly paragraphs 21 to 23 thereof, was instructive. Second, it would be difficult to conceive of modern international law, which was concerned with humanity and eradicating the scourge of serious international crimes, permitting restrictions to immunity for commercial interests while seeking an absolute view of sovereignty when it came to responding to serious international crimes. Third, it should be noted that Judge Gaja, a former member of the Commission and an *ad hoc* judge in the case, had undertaken a survey of State practice in relation to the "tort exception" to State immunity. While that practice applied to State immunity, the Commission might draw inspiration from it in developing the law on the current topic, particularly in the absence of firmly established State practice. The Commission might also seek inspiration in the Court's treatment of the tension

[246] A. von Verdross, "Forbidden treaties in international law: comments on Professor Garner's report on 'the law of treaties'", *American Journal of International Law*, vol. 31, No. 4 (October 1937), pp. 571–577.

between *jus cogens* and immunities; however, it should not overlook the dissenting opinion of Judge Cançado Trindade in the *Jurisdictional Immunities of the State* case or the joint separate opinion of Judges Higgins, Kooijmans and Buergenthal and the dissenting opinion of Judges Oda, Al-Khasawneh and Van den Wyngaert in the *Arrest Warrant of 11 April 2000* case. Lastly, he wished to draw attention to the common misconception that the judgment in the last-mentioned case implied that anything done by a person enjoying immunity *ratione personae* was covered *ad infinitum*, whereas one could in fact infer from paragraph 61 of the judgment that officials, including Heads of State, could be prosecuted once they left office for non-official acts committed while in office. That important restriction would he hoped be reflected in future reports and draft articles.

53. Mr. EL-MURTADI SULEIMAN GOUIDER thanked the Special Rapporteur for her preliminary report on a particularly important and complex topic, which raised sensitive issues and practical difficulties. The four main substantive issues that the Special Rapporteur proposed to take up were all equally important and sensitive. The Commission must be given the time it needed to consider them as well as the observations made by members during the current meeting. It was important that in her work the Special Rapporteur should make a careful distinction between international responsibility of the State and individual international responsibility, which was essential in the context of the topic. Her approach whereby she would propose draft articles gradually as each of the issues was considered seemed to be the right one, and it was in fact too soon to formulate any proposals regarding the form the final outcome of the work on the topic should take.

54. Mr. PETER said that he wished first of all to welcome the participants in the International Law Seminar. With regard to the topic before the Commission, he commended Ms. Escobar Hernández for having risen to the challenge set by the Commission by preparing within a short period of time a transitional report in which the number of footnotes showed that she had already made a detailed analysis of the questions that the topic raised. Since the report was a preliminary one, he would not go into detail about the issues identified but would limit himself to a few observations regarding the last chapter, on the workplan, in which the Special Rapporteur recalled that the topic had been on the Commission's programme of work for six years and that three reports had been submitted by the previous Special Rapporteur, Mr. Kolodkin.[247] It appeared that the Special Rapporteur did not intend to ignore those reports, which was good news, but it would be interesting to learn more about the way in which she planned to move forward, given that questions already settled in international law had been discussed for a long time. Accordingly, the Special Rapporteur should not go back to square one but should focus on current issues in order to bring the work to completion in the time allotted and ensure that it met the international community's expectations.

55. It would also be interesting to know how the Special Rapporteur intended to approach the issue of the absolute or restricted nature of immunity *ratione materiae* (item 3.3 of the workplan announced in para. 72 of the report) and immunity *ratione personae* (item 2.3). It should be noted in that regard that exceptions to the general rule of immunity already existed and that the question of absolute immunity was no longer an issue, as Mr. Nolte had pointed out. The importance of the principles established in the Rome Statute of the International Criminal Court and of new principles, such as universal jurisdiction and even the responsibility to protect, that were gaining ground should not be underestimated. Those principles made it possible to find at least partial answers to the question of the immunity of State officials. While the Commission explored the question of who might enjoy immunity, presidents in office and the prime ministers of certain African countries were being stripped of theirs and were being hunted throughout the world like any other criminal under ordinary law. They were the subject of arrest warrants issued by national courts and not simply summonses to appear in court. He also wished to draw the Special Rapporteur's attention to the 2009 report of the African Union–European Union Technical Ad hoc Expert Group on the Principle of Universal Jurisdiction,[248] which she should take into account when she considered the question of how that principle should be applied in the fairest and least discriminatory manner throughout the world. More generally, it was important to know the extent to which the Special Rapporteur intended to take account of the aforementioned exceptions to the principle of immunity, for the relevance and usefulness of the Commission's work to the international community depended on it.

56. Ms. Escobar Hernández had made a smooth transition in taking over from the previous Special Rapporteur on the topic, but it would be interesting to know what rules governed, in a general way, the handing over of topics and the way in which they were assigned, as well as whether the Commission, once a topic had been officially included in its agenda, was required to complete its work on the topic or could decide of its own accord to abandon it.

The meeting rose at 12.55 p.m.

3144th MEETING

Thursday, 12 July 2012, at 10 a.m.

Chairperson: Mr. Lucius CAFLISCH

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

---

[247] See footnote 228 above.

[248] Council of the European Union, document 8672/1/09 Rev.1, annex, 16 April 2009 (http://register.consilium.europa.eu).