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Summary record of the 3145th meeting

Topic:
Immunity of State officials from foreign criminal jurisdiction

Extract from the Yearbook of the International Law Commission:-
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78. Jurists who preferred to see absolute immunity granted on the basis of *ratione materiae* in cases of serious international crimes argued that such acts were as much acts of State as acts of the officials who committed them. They would deny the existence of responsibility even if the State attributed an act to itself to shield its official from responsibility and even if the other requirements for responsibility were met. Ignoring the fact that, in adopting the articles on responsibility of States for internationally wrongful acts,[267] the Commission had rejected the notion that a State might commit an international crime, they falsely asserted that if one prosecuted the official concerned in a foreign court one would be prosecuting the State. They also ignored the fact that such logic had been rejected when the Nuremberg Tribunal and the International Military Tribunal for the Far East (the Tokyo Tribunal) had been established and when the Rome Statute of the International Criminal Court had been adopted.

79. In short, it was very doubtful that customary international law accorded immunity *ratione materiae* with regard to the most serious crimes. In fact, the joint separate opinion issued in the *Arrest Warrant of 11 April 2000* case by judges Higgins, Kooijmans and Buergenthal seemed to indicate that no rule regarding immunity *ratione materiae* existed, though certain emerging trends could perhaps be discerned.

80. Nevertheless, the Commission should study the scope of crimes, other than the most serious international crimes, that might also preclude immunity *ratione materiae*, which in turn might entail determining what constituted an "official act". There was no agreement in jurisprudence on what constituted an official act for the purposes of determining which crimes lay within or outside the scope of immunity. The Commission could make a contribution in that regard, keeping in mind the fact that the default position was that there were no rules governing immunity as long as the crimes for which immunity operated had not been defined.

81. Regarding the Special Rapporteur's question about whether the list of officials for the purposes of immunity *ratione personae* should be closed or open and which officials should be on the list, he said that the answer depended on whether the functions of a particular official were essential for the proper functioning of the State and its sovereignty.

The meeting rose at 1 p.m.

3145th MEETING

Friday, 13 July 2012, at 10.05 a.m.

Chairperson: Mr. Lucius CAFLISCH

Present: Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. 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.

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

[Agenda item 5]

PRELIMINARY REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRPERSON invited the Commission to pursue its consideration of the preliminary report of the new Special Rapporteur on immunity of State officials from foreign criminal jurisdiction (A/CN.4/654).

2. Mr. ŠTURMA said that he approved of the Special Rapporteur's approach. She had rightly chosen first to examine the basic and often conflicting values underpinning the legal rules on immunity. Immunities, both of States and of State officials, reflected the fundamental principle of State sovereignty in inter-State relations. However, immunity no longer had an absolute, but a functional character. That was why it had to be justified by States' fundamental values and functions. The concern to preserve peaceful, friendly relations traditionally formed part of those values, but they had been supplemented by others, such as the determination to prevent impunity for the most serious crimes. From that perspective, reference to *jus cogens*, or to other principles and rules of international law, did not necessarily imply the replacement of *lex lata* by *lex ferenda*. Of course, it was necessary to maintain a distinction between them, but the Commission could not confine itself to the former and ignore the development of international law. Hence, there was a need to reconcile the principle of immunity with other existing principles and values.

3. The Commission must base its work on case law and, possibly, on national legislation on immunities, since it also reflected State practice. But it had to be remembered that the Commission's role was to set forth general rules, whereas judicial bodies, such as the International Court of Justice, had to apply the rules to a specific case. In the absence of treaties, the Commission's chief task would be that of codifying the rules of customary international law. It must also take account of its earlier work, especially the draft Code of Crimes against the Peace and Security of Mankind adopted by the Commission at its forty-eighth session[268] and the Rome Statute of the International Criminal Court.

4. The distinction between immunity *ratione personae* and immunity *ratione materiae* was crucial to the topic under consideration. Although both might be regarded as functional rather than absolute, they had different purposes. The former protected the most high-ranking

[267] See footnote 262 above.

[268] *Yearbook ... 1996*, vol. II (Part Two), para. 50.

State officials, while the latter protected other persons when they performed official acts. The number of persons enjoying immunity *ratione personae* must therefore be kept to a minimum. The prevailing trend was to reserve that form of immunity for the members of the troika, but not to rule out the possibility of restricting the personal immunity of ministers for foreign affairs.

5. On several occasions, the International Court of Justice had affirmed the idea that immunity did not mean impunity and that, as a procedural rule, it did not shield its beneficiaries against possible prosecution. Even a procedural rule could, however, hinder the administration of justice if a State were unwilling to try its national and no foreign court were competent to do so. The Rome Statute of the International Criminal Court itself rested on the principle of complementarity. It was worth thinking about possible exceptions to the immunity *ratione personae* of the highest State representatives, but without compromising other underlying values, in particular the stability of State relations. The risk of retaliatory measures was sufficient to warrant not giving States a carte blanche unilaterally to decide that a given crime justified the waiving of immunity *ratione personae*.

6. Immunity *ratione materiae* was the most important area requiring the codification and progressive development of rules on immunity from foreign criminal jurisdiction. Three main issues arose in that context. Who were the persons entitled to such immunity? What constituted an "official act"? Were there any possible exceptions? As far as the first question was concerned, it was already possible to posit that immunity should be granted to only a limited number of State officials or agents whose official acts were performed in that capacity. In that respect, the analogy with the articles on responsibility of States for internationally wrongful acts[269] was of only limited value, because attribution based on the criterion of function applied only to State responsibility, but was of no avail when it came to the immunity of persons who, although they were not State officials, exercised some public authority, or acted under the effective control of the State. In addition, civil and public service rules and regulations varied widely, with some people (such as teachers in the national education system) being regarded as officials in some countries, but not in others. Clearly, those persons did not have immunity, although they were public servants. How should State representatives therefore be defined for the purpose of determining whether they enjoyed immunity from foreign criminal jurisdiction? Perhaps the solution lay in distinguishing between acts *jure imperii* and acts *jure gestionis*, a distinction that was already well established in the law on State immunities. That test would also serve to define official acts. In other words, the only persons who would enjoy functional immunity were those who performed official acts of State (*jure imperii*) that could not be accomplished by private persons or entities.

7. However, not all acts of State were automatically covered by immunity. The most difficult task was that of determining the scope of exclusions. It would be going too far to exclude all unlawful or *ultra vires* acts. Immunity, like responsibility, presupposed that the person in question could commit unlawful acts for which they were liable to prosecution, otherwise the notion would be meaningless. Only the most serious crimes under international law, such as torture, genocide and crimes against humanity, must therefore be excluded from the scope of official acts covered by immunity *ratione materiae*. It seemed impossible to argue under contemporary international law that those acts belonged to State functions that were protected by immunity. A list of those acts could be drawn up on the basis of *jus cogens*, customary international law and even some treaties, but to prevent it from becoming too long, reference should be made essentially to the draft Code of Crimes against the Peace and Security of Mankind and the Rome Statute of the International Criminal Court.

8. The Commission should focus on the substantive aspects of immunity, which were the most problematical and controversial, before tackling the related procedural aspects.

9. Mr. HUANG said that he wished to address three substantive aspects of immunity, namely scope, exceptions and procedure. In the view of Mr. Kolodkin, the previous Special Rapporteur, immunity *ratione personae* was absolute, but it applied only to persons while they were still in office. It was not, however, necessarily limited to the traditional troika. Immunity *ratione materiae* applied to all State representatives when they performed official acts. That was the commonly accepted rule under customary international law, which had been upheld by the International Court of Justice in the case concerning the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*. The immunity of State officials from foreign criminal jurisdiction was an established principle, even if a variety of sometimes unpersuasive arguments were advanced in favour of waivers. Some exceptions that were not laid down under international law nevertheless reflected a growing trend.

10. A court must heed a person's immunity right from the beginning of proceedings and must notify the State concerned because, save in the case of the troika, it was that State alone that could decide whether to waive immunity. Once immunity had been lifted, it could not be restored. But lifting immunity did not prevent the person concerned from evading his or her responsibility and, conversely, while immunity barred judicial measures, it did not exonerate that person from all criminal responsibility.

11. During the debate many members had contended that the commission of international crimes or breaches of *jus cogens* rules entailed the loss of immunity. He disagreed. As the International Court of Justice had stated in the case concerning *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, immunity was a procedural rule that did not have the status of *jus cogens* rules relating to genocide and other international crimes. A State and its representatives did not therefore automatically lose their immunity, for it might be held that the latter flowed from State immunity. The Commission should rely on that case law.

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

12. Similarly, as a procedural rule, immunity had a validity of its own that was not comparable with values such as international justice or the fight against impunity. The international community considered that international crimes were subject to universal jurisdiction, but that rule was not yet accompanied by a procedure that could take precedence over the rule on immunity under international law. In other words, justice on the merits could be done only at the expense of procedural justice.

13. Immunity was granted on the basis of criteria inherent in immunity itself and not in the light of the seriousness of the act. Some people were of the view that an international crime should not be regarded as an official act performed in the context of State representation, but the distinguishing feature of an official act was precisely the fact that it was performed in an official capacity, irrespective of its seriousness. In reality, atrocities could be perpetrated only by the State apparatus and with its resources as part of State policy; they therefore necessarily constituted an official act.

14. The rule of immunity was neutral and was not conducive to impunity. There were several reasons for that; usually they were a matter of policy. Policy measures were therefore required. Exceptions to immunity would not prevent crimes; they merely undermined the stability of inter-State relations. Given the current state of international relations, there was no saying what consequences inappropriate exceptions might have.

15. In short, the commission of international crimes did not entail the loss of immunity for State officials no matter how serious the act was. That had been the position of the previous Special Rapporteur who had strongly emphasized that the troika immunity *ratione personae* was absolute by its very nature and that other State representatives' immunity *ratione materiae* should also be maintained. That had also been the position of the Institute of International Law in its resolution on the immunity from jurisdiction of the State and of persons who act on behalf of the State in case of international crimes[270] and of the International Court of Justice in the case concerning the *Arrest Warrant of 11 April 2000*, where the Court had stated, in paragraph 59, that

> although various international conventions on the prevention and punishment of certain serious crimes impose on States obligations of prosecution or extradition, thereby requiring them to extend their criminal jurisdiction, such extension of jurisdiction in no way affects immunities under customary international law … These remain opposable before the courts of a foreign State, even where those courts exercise such a jurisdiction under these conventions.

16. Mr. McRAE said that, since the purpose of the report under consideration was to secure a transition between the earlier work done under the guidance of the previous Special Rapporteur and the work that would be undertaken during the quinquennium that was beginning, it was premature to make detailed comments on substantive aspects of the topic. He approved of the workplan proposed by the Special Rapporteur, who had rightly decided to build on her predecessor's comprehensive reports.[271] His answer to those members who thought that the Commission should first focus on the procedural—and less contentious—aspects of the subject was that it would be inadvisable to postpone the consideration of substantive issues until the following session, especially as several members had already alluded to them in their statements. However, the decision on the order to follow lay with the Special Rapporteur.

17. He wished to make two comments. First, with regard to methodology, the Special Rapporteur's reference to the "values and principles of international law" had given rise to some concern, since it was unclear who would have the competence to define those values. But in fact the Commission constantly referred to them, because legal discourse was implicitly or explicitly all about values. The question at the heart of the topic under consideration, namely whether the value of relations between States took precedence over the value of combating impunity, was fundamentally a debate about the international community's values and principles. Legal language and methodology masked, but did not obliterate, the essential policy choices that were made individually and collectively in the course of a debate. The only current difference was that the Special Rapporteur admitted that state of affairs quite openly. It could be said that that shift in discourse, far from being subjective and dangerous as some people feared, was, as those familiar with feminist scholarship would understand, a natural consequence of women being involved more broadly in the discussion of international legal issues. Instead of pretending to hold a debate free of any such concerns, the Commission must consciously endeavour to reconcile the values and principles at stake while at the same time proceeding in a cautious and practice-oriented manner, as Mr. Nolte had recommended.

18. His second comment was related to the question raised in the last paragraph of the Special Rapporteur's report, namely that of the balance between codification and progressive development. He agreed with, among others, Mr. Murase and Mr. Petrič that care had to be taken not to equate progressive development with *lex ferenda*. When the members of the Commission engaged in progressive development they did not simply identify what they would like the law to be, or what they thought it should be. Nor was there a clear divide between codification and progressive development; equating the latter with *lex ferenda* tended to diminish the worth of a central element of the Commission's mandate.

19. For that reason, he did not share the opinion that seemed to be implicit in the Special Rapporteur's suggestion that the Commission should first focus on *lex lata* before concerning itself with *lex ferenda*, in other words that it should decide first what could be codified before determining what must be progressively developed. As Mr. Tladi had pointed out, progressive development was a much subtler process, which could not be clearly distinguished from codification. Of course,

[270] Institute of International Law, *Yearbook*, vol. 73, Session of Naples (2009), p. 226. Available from the Institute's website (http://justitiaetpace.org).

[271] *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).

from time to time, the commentary to a particular article indicated that the provision in question was more in the nature of progressive development than codification—that was true, for example, of the general commentary to the draft articles on the responsibility of international organizations[272]—but that was an exception and not the rule. As Mr. Hmoud had said, the Commission was not in the habit of indicating what part of its work came under the heading of the codification of *lex lata* and what part amounted to progressive development. Mr. Tladi had rightly held that its work consisted in analysing practice, case law, Governments' statements in the Sixth Committee and elsewhere, and the views of scholars in order to ascertain how to achieve consensus on what would be an appropriate form for the codification of the topic before it.

20. It was not the Commission's task first to identify the law and then to apply it, as if it were a court. Hence, as Mr. Tladi had said, separate and dissenting opinions to the decisions of international judicial bodies might well be as important for the Commission as majority opinions. Even if a well-reasoned separate or dissenting opinion did not have the same legal status, it might have more significance for the Commission's work than a poorly reasoned majority opinion that was not supported by practice.

21. He therefore encouraged the Special Rapporteur to continue her work without any preconceived ideas about whether she should take stock of *lex lata* and, having undertaken an objective analysis of what had been said and done in that area by States, international and national courts and scholars, including what had been widely accepted and what seemed to be emerging trends and in the light of all that and of what she perceived to be the relevant values and principles of contemporary international law, to propose what she regarded as the appropriate draft articles. Some members would see her conclusions as *lex lata*, while others would regard them as progressive development, but ultimately it would be up to the Commission to decide, which it usually did by consensus, whether by adopting what had been proposed, it would be properly fulfilling its mandate progressively to develop and to codify international law.

22. Mr. FORTEAU said that he intended first to examine questions of methodology. Then he would comment on the substantive aspects that appeared to be of greatest importance for the structure of the topic, but he would not deal in detail with all the substantive issues raised by it. At the outset, he wished, however, to comment on the position that the Commission should adopt on possible exceptions to immunity in the event of an international crime. That was a very complex matter that warranted thorough consideration. As the real problem was that of knowing whether an exception could be made to immunity not when an international crime had been committed but when it was alleged that such a crime had been committed, it was essential to reflect on the procedural guarantees that should surround such exceptions, in order to avoid any abuses. It was very difficult to differentiate between the substantive aspects and the procedural aspects of that question.

23. Turning to methodology and the approach to be adopted, he fully subscribed to the Special Rapporteur's preliminary comments in paragraphs 5, 51 and 75 of her report, where she said that it was essential to clarify the terms of the debate, to continue work in a structured manner and, above all, in the coming years to address each of the various groups of questions one by one. In such a sensitive area, it seemed crucial not to jumble everything together, for deliberations would then become bogged down in theorizing instead of being focused on the actual consideration of draft articles. The discussion had to centre on drafting proposals and not expressing positions of principle.

24. As for the approach to be adopted, he agreed that it was necessary to draw on recent case law, especially on the judgment rendered on 3 February 2012 by the International Court of Justice in the case concerning *Jurisdictional Immunities of the State* between Germany and Italy, a judgment that should be used not only for the purpose of drawing analogies or borrowing methodology but also for learning some basic lessons about the intrinsic effects of *jus cogens* on the rules regarding immunity. All the same, it was necessary constantly to bear in mind the fact that that judgment concerned State immunity from civil jurisdiction and not the immunity of State officials from criminal jurisdiction.

25. Moreover, the Commission's work should not be confined to recording the findings of certain international judicial bodies. As the Special Rapporteur rightly said in paragraph 77 of her preliminary report, the Commission should simultaneously pursue the codification and the progressive development of the law in that sphere. What he had just said did not mean that he was taking sides as to the final solutions that would be adopted. Care would have to be taken not to turn the distinction between codification and progressive development into two opposing notions of the law on immunity, one of which would be conservative and the other progressive. As everyone realized that there was some uncertainty as to the law in that area, some progressive development would be unavoidable. In that context, the Commission would have to ensure that an appropriate equilibrium was maintained between the various interests at stake and, in the words of paragraph 48 of the report under consideration, it would have "to strike a balance between the need to preserve stability in international relations and the need to avoid impunity for serious crimes of international law".

26. In that connection, the Commission would certainly have to ask itself if it intended to codify the law on immunity as it stood, or if it should extend its analysis to the relationship between that law, on the one hand, and other legal rules that might interact with it, on the other. The Special Rapporteur mentioned that aspect from the perspective of the relationship with other values in paragraph 58. The other, perhaps main, issue was that of the interconnection between different kinds of legal rules, i.e. those relating to immunity, other rules that might restrict their application, especially the right to obtain a judicial determination and treaty-based rules that might have an impact on the customary rule of immunity such as, for example, article 98 of the Rome Statute of the International Criminal Court and the possible interpretation thereof. It

[272] *Yearbook … 2011*, vol. II (Part Two), para. 88, see in particular paragraph (5) of the general commentary.

must be remembered that the codification of custom in that case was taking place within a specific treaty-based context that had to be borne in mind.

27. As far as the substantive aspects of the topic were concerned, he agreed with the Special Rapporteur that, at least initially, it would be wise to maintain the distinction between immunity *ratione personae* and immunity *ratione materiae*, since it introduced some clarity into the debate, and to establish two separate legal regimes. It was, however, doubtful whether those two kinds of immunity shared the same basis or had the same purpose, as paragraph 57 of the report postulated. While immunity *ratione personae* ensured that the beneficiary could exercise his or her functions unhindered, the purpose of immunity *ratione materiae* was more to prevent one State sitting in judgment over the sovereign activities of another. That was not the same thing and probably explained why the two immunities were not identical and why immunity *ratione personae* covered private acts.

28. With regard to immunity *ratione personae*, on the whole he approved of the approach adopted by the Special Rapporteur in paragraphs 63 and 64 of her report with one substantial qualification: he had two reasons for thinking that it would be wrong to attempt to draw up a list of persons enjoying immunity. First, such a list would not necessarily be of any use, because the duties of the highest State officials differed from one country to another, as Mr. Murphy had pointed out. The second reason why it seemed inadvisable to draw up a list was that the International Court of Justice had not proceeded in that manner in the case concerning the *Arrest Warrant of 11 April 2000*. It had based its findings on a general test from which it had drawn the legal consequences in the particular case of the minister for foreign affairs in question. Paragraph 53 of that judgment made it clear that the extent of immunity depended on the nature of that person's functions. It would be worth reflecting on that criterion.

29. Three comments had to be made about immunity *ratione materiae*. First, in respect of the distinction drawn in paragraph 18 of the report under consideration between the official and personal nature of conduct, he, like Mr. Šturma, wondered if there were not a third category lying somewhere between the other two. What happened when an act performed in the context of official functions constituted a private or commercial act? It was necessary to ponder the extent to which the distinction between *jure gestionis* acts and *jure imperii* acts came into play in the sphere of State officials' immunity in criminal law.

30. Second, with reference to paragraph 66 of the report, the definition of the persons who enjoyed immunity *ratione materiae* seemed to be a non-issue, or at any rate a secondary issue. The problem was not so much one of knowing if a given category of person was entitled to immunity *ratione materiae*, but if a given kind of act conferred immunity *ratione materiae* under criminal law on the perpetrator, irrespective of who that person was. In his opinion, that element was likely to produce an effect, in particular at the procedural level. If most weight was given to the nature of the act rather than to the status of the person who had performed it, it was incumbent upon the State and not the individual to claim immunity during proceedings. At all events, that seemed to be the opinion of the International Court of Justice in the judgment that it had rendered on 4 June 2008 in the case concerning *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, in which it stated, in paragraph 188, that a claim of immunity *ratione materiae* was "in essence" a claim of immunity for the State. Moreover, in paragraph 196 the Court made it clear that it was up to the State that intended to claim immunity on behalf of one of its organs to inform the authorities of the other State concerned of that fact. However, it did not necessarily follow that the regime of immunity of State officials exactly matched the regime of State immunity, if only because it was the criminal law aspect of the former that was of interest to the Commission, whereas the latter, State immunity, was of concern to civil courts.

31. Third, the issue of the relationship with State responsibility was raised in paragraphs 59 and 60 of the Special Rapporteur's preliminary report. Those were two self-contained areas, even if they were linked in some respects. They were self-contained insofar as there were no exact parallels between the law of responsibility and the regime of immunity, since recent developments in international criminal law meant that an individual State agent and a State could both be prosecuted for the same act, at least as far as the most serious crimes were concerned. Of course, if an act were not official, there would be neither immunity nor State responsibility, but the opposite would not necessarily be true. Even if an act were official and entailed State responsibility, there would be nothing to prevent the formulation of a provision stipulating that immunity under criminal law would not apply. In that connection, it might be recalled that in its work on the jurisdictional immunities of States and their property at the end of the 1990s, the Commission had decided not necessarily to align the law on immunities on the arbitration regime under the law on State responsibility. That decision, which had been wise at the time, would be equally wise in the context of the current topic.

32. Mr. WAKO said that, although in general he approved of the working method advocated by the Special Rapporteur in paragraph 75 of her report, which consisted in addressing each of the various groups of questions in turn, he agreed with Mr. Nolte on the need to recognize that those issues were interrelated and, in particular, to take account of the distinction between immunity *ratione personae* and immunity *ratione materiae*.

33. With regard to immunity *ratione personae*, which protected high-level State officials from virtually any suits in foreign courts while they were still in office, it had been said that the members of the troika, in other words the Head of State, the Head of Government and the minister for foreign affairs, enjoyed that immunity, but he agreed with Mr. Tladi that the office of a minister for foreign affairs was not coextensive with that of a Head of State. It was even doubtful, when the Head of Government and Head of State were not the same person, whether the Head of Government automatically enjoyed that immunity. The only person who could enjoy it was the Head of State who personified the State. The Special Rapporteur should not therefore proceed on the assumption that all members of the troika possessed immunity *ratione personae*, but should study the matter in closer detail.

34. In principle, both the Head of Government (if he or she were not the Head of State) and the minister for foreign affairs should enjoy immunity *ratione materiae*. The list of beneficiaries of that immunity should not, however, be closed because the structure of Governments in the contemporary world was more complex than it had been in the nineteenth or twentieth centuries. Economic relations and foreign trade had become central to relations among States and when peace and security were at stake, it was often the ministers of defence and security that played the leading role in external relations. Rather than compiling a list of State representatives who enjoyed immunity *ratione materiae*, the Special Rapporteur might wish to establish a criterion for identifying the beneficiaries of that immunity.

35. According to paragraph 12 of the report under consideration, the scope of the topic was only the immunity of the officials of one State from the criminal jurisdiction of another and did not encompass international criminal jurisdiction. He was therefore pleased that, in paragraph 60 of her report, the Special Rapporteur stated that the question of individuals' international criminal responsibility and the potential implications thereof for the immunity of State officials from foreign criminal jurisdiction was "essential" and that the Commission might wish to address that issue at the beginning of the quinquennium. In that connection, he recalled Mr. Peter's statement that the concept of universal jurisdiction, in other words the competence of a national court to try a person suspected of committing a serious international crime, even if neither the suspect nor the victim was a national of the forum State, should figure prominently in the workplan. It was not enough simply to investigate the legal and sociological bases for the immunity of State officials from foreign criminal jurisdiction, as the Special Rapporteur suggested should be done in paragraph 73 of the report under consideration. Universal jurisdiction was a sensitive area and the concerns that had been expressed about its politicization had led to the setting up in 2009 by the African Union and the European Union of an advisory Technical Ad Hoc Expert Group on the Principle of Universal Jurisdiction. The indictment of African leaders by low-level judges, sitting alone in some rural area of a developed country and without any particular competence in international law, had greatly tarnished the image of universal jurisdiction in the developing countries. It was therefore not surprising that the above-mentioned group of experts, which had included Mr. Peter, had recommended that the member States of the African Union and the European Union should consider the adoption of legislation to specify an appropriate level of court at which proceedings in respect of such crimes could be instituted.[273] The group had also recommended the provision of specialist training in the investigation, prosecution and judging of such crimes. The Commission, with the Special Rapporteur's assistance, could contribute by formulating international standards to guide investigators, prosecutors and judges who exercised universal jurisdiction. That was the only way to put an end to the improper exercise of that jurisdiction that Judge *ad hoc* Bula-Bula had described as "'variable geometry' jurisdiction, selectively exercised against some States to the exclusion of others" (para. 104) in his separate opinion on the judgment of the International Court of Justice in the case concerning the *Arrest Warrant of 11 April 2000*.

36. It would be essential to conduct extensive research in order to ascertain whether the concept of universal jurisdiction existed in customary international law. Unfortunately, the International Court of Justice had not expressed an opinion on the subject in the case concerning the *Arrest Warrant of 11 April 2000*, since the parties had decided that that issue was not a point of contention. Some judges had, however, stated their viewpoint. For example, the President of the Court, Judge Guillaume, had emphasized in his separate opinion that international law knew only one true case of universal jurisdiction, that of piracy, and that international conventions provided for the establishment of subsidiary universal jurisdiction for purposes of the trial of certain offenders arrested on national territory and not extradited to a foreign country (para. 12). In his view, apart from those two instances, international law did not accept universal jurisdiction, let alone universal jurisdiction *in absentia*. In his dissenting opinion, Judge Oda had considered that the law on universal jurisdiction was not sufficiently developed (para. 12). Judges Higgins, Kooijmans and Buergenthal in their joint separate opinion had contended that there was no established practice in which States exercised universal jurisdiction, but that that did not necessarily indicate that such an exercise would be unlawful (para. 45). The category of international crimes in respect of which universal jurisdiction could be exercised was not clearly established. For some people it encompassed only piracy, crimes covered by some international treaties, such as the war crimes forming the subject of the 1949 Geneva Conventions and, possibly, genocide. Those treaties did not, however, establish universal jurisdiction *per se*, but obligatory territorial jurisdiction over persons, albeit in relation to acts committed elsewhere.

37. Generally speaking, the immunity of State officials gave rise to the same kind of difficulty. In the article entitled "Pinochet's legacy reassessed", to which Mr. Nolte had referred, Ingrid Wuerth concluded that some seminal decisions of national and international courts had definitely ruled in favour of State immunity and the immunity of the serving Head of State before foreign courts, even in cases concerning human rights violations.[274] That undermined the main arguments against immunity and ran counter to some decisions rendered after the *Pinochet* case that had denied immunity. Wuerth had argued that customary international law, as it stood, did not allow any exception to functional immunity on the basis of human rights law or international criminal law. In addition, it would be advisable to be cautious when analysing national courts' case law on the matter because, in most cases, the State that could have relied on immunity failed to do so, either because it was in favour of prosecution for policy reasons, or because it could put forward other pleas regarding jurisdiction.

[273] Report of the Technical Ad Hoc Expert Group, Council of the European Union, document 8672/1/09 Rev.1, annex, 16 April 2009.

[274] I. Wuerth, "Pinochet's legacy reassessed", *American Journal of International Law*, vol. 106, No. 4 (October 2012), pp. 731–768, in particular p. 739.

38. Prosecutions by the International Criminal Court, special tribunals or regional courts certainly did not fall within the scope of the topic. It would, however, be useful to study them as well as prosecutions based on certain treaties, with a view to progressively developing the law in an area that was of vital importance to the struggle against impunity. As the world was becoming a global village, it was essential to gain a better understanding of those issues and to regulate them. The question was not that of codification versus progressive development. As Mr. McRae had rightly pointed out, there was no clear divide between those two notions in the context of the topic under consideration, and progressive development would in fact be central to the Commission's work. The Commission should therefore agree to develop the law in such a way as to promote good relations among States and to strengthen measures against impunity. In that connection, he hoped that the Special Rapporteur would heed the call of the Assembly of the African Union to the Commission to take up the concept of universal jurisdiction so as to assist its development, as the Commission had done in other areas of international law, including State responsibility.

39. The Commission would also have to define the notion of an "official act". Not all official acts should be covered by immunity. The Commission would therefore have to determine the cases that were not covered, in other words the cases that constituted an exception to the rule of immunity. In that respect, international conventions adopted since the Second World War—such as the Convention on the Prevention and Punishment of the Crime of Genocide—or texts such as the statutes of the International Tribunal for the Former Yugoslavia[275] and of the International Tribunal for Rwanda,[276] and, of course, the Rome Statute of the International Criminal Court, appeared to show that no State officials, not even Heads of State and Heads of Government, could claim immunity when they were accused of the commission of the most serious international crimes. That position would seem to be established in practice and to form part of *jus cogens*, but it would be up to the Commission to make sure of that.

40. Mr. NIEHAUS commended the Special Rapporteur on her very clear, well-structured preliminary report, which facilitated consideration of the topic. The latter was of major importance, as had been evidenced by the General Assembly's request that it should be considered as a matter of priority. It was axiomatic that the Commission should base its work on the three reports drawn up by the previous Special Rapporteur,[277] which provided a useful insight into State practice, case law and legal writings and the ensuing issues. The stress placed by the Special Rapporteur on the need to take account of those reports and of the comments made on them in the Commission and in the Sixth Committee was therefore welcome. The transitional report submitted by the Special Rapporteur, which set out to clarify the terms of the debate hitherto and to identify the main points of controversy, would greatly enhance the quality of the forthcoming debate.

41. In her report, the Special Rapporteur had also laid out the main issues requiring examination and proposed a workplan. She recapitulated the main points developed by the previous Special Rapporteur, which, to judge by members' statements, did not raise any difficulties. First, it was plain that the right of a person possessing immunity not to be subjected to foreign jurisdiction formed the counterpart to a foreign State's obligation not to exercise its jurisdiction over that person. Hence immunity was a limit placed on sovereignty in the interests of good inter-State relations and the expression of a common will to develop and strengthen those relations.

42. In the light of the foregoing, the theoretical distinction between immunity *ratione personae* and immunity *ratione materiae* was crucial. In the opinion of some proponents of the general tendency to limit the scope of immunity in international relations, immunity *ratione personae* had to be reserved for the troika comprising the Head of State, the Head of Government and the minister for foreign affairs. Limiting the enjoyment of immunity *ratione personae* to those high-level officials seemed to contribute to security and be part of customary law. While that did not pose a problem as far as the Head of State and the Head of Government were concerned, the position was different with regard to the minister for foreign affairs. Several members had also drawn attention to the fact that other high-ranking State officials, for example ministers of defence, of labour or of health, were often prominent on the international stage, and since in their view it was illogical to treat them any differently to the minister for foreign affairs, they recommended extending immunity beyond the troika.

43. One proposal for dealing with the complex issue of determining who enjoyed immunity *ratione personae* had been that the conditions for granting it should be laid down in detail; that seemed problematical in view of the diversity of State systems. It would be better for the Commission to continue to base its work on the traditional notion of the troika. There was no doubt that a State official possessed immunity *ratione materiae* for acts performed in an official capacity, in other words when the State official acted as such.

44. The question of whether immunity was absolute or, on the contrary, whether exceptions to immunity existed when *jus cogens* rules had been breached or when international crimes had been committed was crucial. The idea that immunity could cover such acts was difficult to accept. It was therefore essential to reaffirm forcefully that immunity must not lead to impunity. That was the reason why the thesis of absolute immunity was indefensible. As for the most appropriate term to describe the beneficiary of immunity, rather than choosing from "official", "agent" or "representative", it would be better precisely to determine the criteria that that person must meet in order to enjoy immunity.

45. Another vital question was that of the procedural aspects of immunity. In that respect, the Special Rapporteur was right to ask in paragraphs 69 and 70 of her report whether it was necessary to establish a single procedural regime for both immunity *ratione personae* and immunity *ratione materiae* or whether,

[275] Security Council resolution 827 (1993) of 25 May 1993; the statute is reproduced in the annex to the Secretary-General's report (S/25704).

[276] Security Council resolution 955 (1994) of 8 November 1994.

[277] See footnote 271 above.

on the contrary, separate procedural rules should be formulated to take account of the specific characteristics of each of those immunities. The workplan proposed in paragraph 72 of the report was clear, simple and useful. It covered the main questions that had to be examined while at the same time recognizing that the Commission could not and should not ignore earlier work on the subject. The Special Rapporteur's proposal that draft articles should be submitted to the Commission as work progressed deserved support. Lastly, on the question of whether the approach should be that of *de lege lata* or *de lege ferenda*, the Special Rapporteur was quite right to say that the subject could not be addressed through only one of those approaches and that it would be advisable to begin with *lex lata* considerations and include an analysis *de lege ferenda*, as needed, at a later date.

46. Sir Michael WOOD commended the Special Rapporteur on her preliminary report and paid tribute to the outstanding contribution made by the previous Special Rapporteur, Mr. Kolodkin.

47. In paragraphs 37, 48 and 77 of her report, the Special Rapporteur had rightly highlighted the question of the *de lege lata* as opposed to the *de lege ferenda* approach, in other words the distinction between the codification and progressive development of the law—as Mr. Petrič had helpfully explained—which was crucial to the topic and which the Commission should try to maintain, because its work pertained to a set of rules of international law that were chiefly applied by domestic courts, usually in urgent and sensitive cases; it was not always easy to distinguish between restatements of existing international law and proposals for new rules. The Commission should at the very least reach a clear decision on whether it aimed to do more than simply restate the law.

48. If it decided to go beyond the existing law, it would have to endeavour to propose rules that were acceptable to States and therefore to formulate well-reasoned, cautious and well-balanced proposals. At the previous meeting, Mr. Park had quoted the example of the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property. The small number of ratifications of that instrument was due not to the fact that States did not approve of its substance, but to its complexity and the need to reconcile the views of many ministries and stakeholders. The Commission's proposals on the topic under consideration might well be incorporated into a convention in due course. The effectiveness of that convention would depend on its ability to attract wide participation. While a degree of progressive development might sometimes eventually be seen to ripen into customary international law, even in the absence of a convention that had entered into force, it was unlikely that that would be the case in the field under consideration if the Commission departed radically from positive law.

49. Before commenting in detail on the preliminary report, he wished to express his agreement with an important point made by Mr. Nolte. It had sometimes been said, especially in the writings, that a trend was emerging towards the restriction of the immunity of State officials from criminal jurisdiction. That tendency was mentioned by the Special Rapporteur in paragraph 29 of her report. Some people considered that that "trend" had begun with the attempt of English courts to execute an extradition warrant against the former President of Chile, Augusto Pinochet, which had culminated in a decision of the House of Lords of 24 March 1999. The notion of a "trend" was, however, something of a myth, or perhaps wishful thinking, because the *Pinochet* decision had not been widely followed, or even understood. A case could be made for saying that, in practice, the trend went in the opposite direction. The case concerning *Pinochet*, in which seven Law Lords had each given a different opinion, was hardly an authority for general propositions about international law in the field of immunities. In the end, the House of Lords had focused on the interpretation and application of a specific treaty, the United Nations Convention against torture and other cruel, inhuman or degrading treatment or punishment, to which Chile, the United Kingdom and Spain were parties. The House had considered that the member States concerned had implicitly waived immunity from criminal jurisdiction, since acts of torture within the meaning of the Convention could be committed only by persons acting in an official capacity. It was far from clear how far that exception would apply to other international crimes, such as war crimes. In the later cases concerning *Jones and Mitchell v. Saudi Arabia* and *Jurisdictional Immunities of the State*, which, admittedly, had been civil and not criminal cases, the House of Lords and the International Court of Justice had been careful not to draw conclusions from the *Pinochet* case.

50. Turning to the preliminary report, he said that he was grateful to the Special Rapporteur for summarizing the previous Special Rapporteur's three reports and the debates held in the Commission and in the Sixth Committee in 2008 and 2011. Those debates had revealed broad agreement on a number of points. The Special Rapporteur had, perhaps, overstated the differences when she referred to "rare points of consensus" in paragraph 54 of her report. On the contrary, he would like to think that there was rather more common ground within the Commission. For example, the members of the Commission seemed to agree that immunity was an institution resting on customary international law and that the question of immunities flowing from *ad hoc* treaty rules—and, it might be added, from the corresponding rules of customary international law—did not fall within the scope of the topic. The Commission was not concerned at all with the immunities that might be enjoyed by members of diplomatic missions, consular posts or special missions, or by official visitors, representatives of international organizations or military personnel. It seemed equally clear that the Commission was not addressing the question of immunity before courts other than national courts. Immunity before international criminal courts and tribunals was governed by the statutes of the judicial bodies concerned. Appearing before an international criminal court or tribunal and appearing before a national court were two very different matters. As a result, the special rules applying to international criminal courts and tribunals, for example article 27 of the Rome Statute of the International Criminal Court, were of little relevance to the Commission's work. Lastly, there also appeared to be consensus on the importance of the distinction between immunity *ratione personae* and immunity *ratione materiae*.

51. While on the scope of the topic, he wished to point out that the question of universal jurisdiction had not been studied as such, although it undoubtedly formed a significant part of the background to the topic and highlighted its importance. Some people had asked whether the Commission should also deal with the inviolability of the person. He believed that the Commission should do so. Inviolability was very closely related to immunity and the former often proved to be of more practical importance, since lack of respect for it might cause more immediate, severe damage to international relations than the opening of criminal proceedings.

52. In the penultimate chapter of her preliminary report on issues to be considered, the Special Rapporteur mentioned studies by private bodies and noted some developments in international law such as the establishment of international criminal courts and tribunals. That background information was interesting, but possibly of limited significance. On the other hand, the Special Rapporteur rightly emphasized the importance of the judgment rendered by the International Court of Justice in the case concerning *Jurisdictional Immunities of the State*. In that connection, the Commission should also look at the separate and dissenting opinions to that judgment—Judge Yusuf's opinion was particularly enlightening—even if they did not have the same weight as the judgment itself.

53. In paragraphs 54 to 58 of her report, the Special Rapporteur correctly noted the general agreement on the conceptual distinction between immunity *ratione personae* and immunity *ratione materiae*. She therefore considered it necessary to treat separately the two legal regimes applicable to those two forms of immunity. He agreed with that approach. She then went on to suggest that there was a degree of unity between the two regimes. That might well exist. On the other hand, he failed to see how the Special Rapporteur's theoretical considerations in paragraphs 57 and 58, in particular the statement that the purpose of the two types of immunity was to preserve principles, values and interests of the international community as a whole, were of any practical significance for the Commission's work. The usefulness of a debate on those issues was indeed doubtful. The emphasis placed on the functional basis of all forms of immunity, to the exclusion of any other bases, such as representation, sovereign equality and non-interference, which still played a major role, was problematic. He was not convinced that a value-oriented debate would be fruitful. If the Commission decided to embark upon such a debate, it must not forget the values protected by immunity that were likewise central to the topic. When prosecuting authorities were independent of the executive, or when private persons might obtain arrest warrants, there was a great risk that international relations might be seriously disrupted. In that context, immunity continued to play a substantial role in preserving friendly relations among States.

54. With regard to immunity *ratione personae*, which the Special Rapporteur considered in paragraphs 61 to 64 of her report, it would first be necessary to determine the class of persons who were entitled to such immunity. While he understood the arguments of the members who took a different view, he considered that there was no doubt that, under contemporary customary international law, serving Heads of State, serving Heads of Government and serving ministers for foreign affairs enjoyed personal immunity while they held office. He therefore disagreed with Mr. Wako that only Heads of State, but not Heads of Government, should enjoy immunity *ratione personae*, for that would constitute serious discrimination against States where the Head of State did not exercise executive functions. Some members had questioned the soundness of the finding of the International Court of Justice that, in its judgment in the case concerning the *Arrest Warrant of 11 April 2000*, had said that the personal immunity of ministers for foreign affairs was "firmly established" (para. 51). In practice, what the Court had said in 2002 had been widely accepted by States because it reflected the current state of international law. Far from questioning the Court's decision, States had supported it. That was unsurprising, for the decision had been adopted by a large majority and the underlying reasoning was persuasive—even though the Court had reasoned largely by analogy. The fact that some authors criticized the outcome was also unsurprising, for it was much more interesting to criticize a decision of the Court than to agree with it. In that connection, there had been many references to the joint separate opinion of Judges Higgins, Kooijmans and Buergenthal in the case concerning the *Arrest Warrant of 11 April 2000*. It was vital to note precisely what they said in paragraphs 83 and 84 of their opinion; they did not say that ministers for foreign affairs were entitled only to functional immunity. They said that there was broad agreement in the literature that a minister for foreign affairs was "entitled to full immunity during official visits in the exercise of his function" and that during private travels,

> he or she may not be subjected to measures which would prevent effective performance of the functions of a Foreign Minister. Detention or arrest would constitute such a measure and must therefore be considered an infringement of the inviolability and immunity from criminal process to which a Foreign Minister is entitled.

However, in the same case, the Court had also clearly indicated that the class of officials entitled to immunity *ratione personae* went beyond the three high office holders in question. With regard to that form of immunity it was essential to clarify the scope of what the previous Special Rapporteur had aptly termed a "narrow circle of high-ranking officials".[278] Mr. Murphy had helpfully set out the legal policy reasons for and against going beyond the troika. He agreed, however, with Mr. Gómez Robledo that it was necessary to widen the circle beyond the troika and to identify criteria to that end. Mr. Niehaus was perhaps right that that would be difficult, but the Commission must undertake that task and, in order to do so, it could base itself on the judgment rendered in the case concerning the *Arrest Warrant of 11 April 2000*, which contained some helpful guidance. Several decisions delivered by national courts had borne out the fact that immunity *ratione personae* had to be extended to members of the Government for whom foreign travel was essential. It was important that a State could be represented *vis-à-vis* other States at the political level by persons of its choice. In the contemporary world, where international cooperation was intensifying in so many fields and where government structures were rapidly changing, a State

[278] *Yearbook … 2010*, vol. II (Part One), document A/CN.4/631, para. 94 (*i*).

could not be represented internationally by persons of its choice unless a group wider than the troika was free to travel. Those persons might be the ministers of foreign trade and of defence who did indeed have immunity *ratione personae*, as a number of English courts had decided. If the Commission thought that that was going too far, it could possibly base its work, for example, on the reasoning of the joint separate opinion in the case concerning the *Arrest Warrant of 11 April 2000* and apply a regime of qualified personal immunity to persons other than the troika. Some people sometimes suggested that, under existing law, there might be exceptions to the immunity from foreign criminal jurisdiction of persons enjoying immunity *ratione personae*, but he could see no basis for such exceptions. Unlike some other members, he did not believe that the Commission should propose *de lege ferenda* exceptions to immunity *ratione personae*.

55. As far as immunity *ratione materiae* was concerned, as many members had already said, the Commission would have to address the question of what was meant by the term "official". That should not cause any serious problems. In that respect, he agreed with the analysis made by Mr. Forteau. It would be more difficult to define "an official act", but the link with the articles on responsibility of States for internationally wrongful acts[279] might be of assistance. Acts that were attributable to States for the purposes of responsibility were official acts for the purposes of immunity. They included illegal or even criminal acts. In the *Pinochet* case, for example, members of the House of Lords had not apparently had any difficulty in holding that there was immunity in respect of the charge of conspiracy to murder.

56. The Commission must also examine the question of what other exceptions might be made in the context of immunity *ratione materiae*. Mr. Kolodkin had proposed one, which the Commission should consider, namely the case in which the act had been committed in the territory of the forum State. Should other exceptions be allowed? Mention had been made of international crimes, whatever that meant, grave international crimes, the "core crimes" covered by the Rome Statute or serious breaches of obligations arising under *jus cogens*—an expression used in a completely different context in the draft articles on State responsibility. As the terms "international crimes", "crimes under international law", "grave crimes under international law" or "breaches of *jus cogens*" were imprecise, the Commission would have to define the acts in question carefully if it intended to make exceptions when they had been committed.

57. As far as the workplan was concerned, like other previous speakers, he welcomed the Special Rapporteur's emphasis on the need for a systematic, structured debate on the topic. The earlier debates in 2008 and 2011 had of necessity been of a general nature, and members had commented on a wide range of issues. Mr. Kolodkin had not proposed draft articles, although he had helpfully provided a summary at the end of each of his reports. The time had arrived to move beyond the stage of general comment. As he had already said, he was not convinced that an abstract discussion of conceptual issues would serve any real purpose, and he doubted that the Commission would be able to agree on general and abstract propositions. Attempting to do so would only complicate its task. For that reason, the Commission must concentrate on the specific rules that applied, or should apply, and, as the Special Rapporteur had said in paragraph 52 of her report, it should identify the principal remaining points of controversy, which he understood to mean specific points, not vague conceptual ones.

58. The preliminary report contained three lists of issues: in paragraph 73, a list of questions that had been submitted to members during informal consultations on 30 May 2012; five sets of issues set out in the five parts of the penultimate chapter of the report; and a workplan suggested in paragraph 72. It seemed that the questions listed in paragraph 73 had been superseded by the more refined questions in the penultimate chapter on issues to be considered, which would provide a good agenda for the Commission's future work. The third list constituted the workplan proposed in paragraph 72. For the reasons he had already given, he invited the Special Rapporteur to consider whether it would be useful to address separately the questions listed in section 1, with the possible exception of question 1.1, for the others would naturally arise in the course of the Commission's consideration of later questions. On the other hand, he agreed with the rest of the workplan, and he concurred with what Ms. Jacobsson had said at the previous session about the importance of procedure. But, like Mr. McRae, he was not sure that the Commission should take up procedural aspects first in isolation. On the contrary, it should perhaps deal with the procedural aspects of immunity as it considered points 2 and 3 on the workplan proposed in paragraph 72 and, if necessary, while it was examining substantive issues. Lastly, in paragraph 5 of her report, the Special Rapporteur suggested a programme of work that she considered "necessary to pursue in the future in order to complete work on the topic during the current quinquennium". That would be a laudable objective, but to complete a second reading by 2016 would be a big challenge. It would therefore be helpful if the Special Rapporteur could indicate more precisely the time plan that she had in mind for the remaining sessions of the quinquennium, especially the points that she expected the Commission to cover in the two sessions in 2013 and 2014.

59. Mr. MURASE, referring to his citation of article 27 of the Rome Statute of the International Criminal Court, said that he realized that it pertained to a special regime and that the question of immunity before national tribunals had to be seen in a different light. Nevertheless, he believed that a strong argument in favour of merging both regimes was that a person who had been charged with certain international crimes had to receive similar treatment irrespective of whether he or she was being tried by a national or international court.

60. Sir Michael WOOD said that that issue could be discussed when the Commission considered the substance of the topic. He believed that there were different considerations behind prosecution depending on whether the case was being heard before a national or an international court.

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

61. Mr. CANDIOTI congratulated the Special Rapporteur for producing an excellent report in such a short time. The report, while concise, duly addressed all the aspects of interest to the Commission as it continued its consideration of the question at hand; additionally, as it was clear, structured and well founded, it would provide a solid basis for continuing the Commission's work. He also paid tribute to the valuable contribution made on the one hand by Mr. Kolodkin, who had submitted three high-quality legal reports[280] during the past quinquennium, and on the other hand by the Secretariat, which in 2008 had drawn up an excellent memorandum[281] that, as Sir Michael had suggested, would perhaps be usefully updated through the addition of an annex. The deliberations at the Commission and the opinions expressed by the States in the Sixth Committee highlighted the highly complex nature of the subject and the major divergences that resulted from some of its fundamental and very sensitive aspects. As the Special Rapporteur had said, the preliminary report provided a fresh starting point. The approach put forward to progress towards the drafting of proposed articles to overcome those difficulties was the right one. In accordance with its statute, the Commission was responsible for promoting the progressive development and codification of that important part of general international law that was still pending. Of course, account must be taken of its previous work in the field in question, which had included various instruments ranging from the conventions on diplomatic relations, on consular relations and on special missions of the 1960s to the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property. It would perhaps eventually be necessary to review those instruments, in particular to maintain the coherence and harmony of the principles and rules of general international law on immunities, while taking into account recent developments. Obviously, as the Special Rapporteur had noted, in recent decades the criminal immunity of high State officials in particular had attracted renewed interest, while at the same time new values, principles and institutions had emerged that the Commission could not ignore if it wished to make a useful contribution. The Special Rapporteur had rightly stated that, as in other cases, the Commission must first analyse the treaties, legislation and practice of States to find areas of agreement in national and international case law and doctrine, later specifying and supplementing such elements with the progressive development that it would deem appropriate. He agreed that it was necessary to structure the consideration of pending questions, dealing with them as successive groups and moving ahead step by step, and he thus thanked the Special Rapporteur for proposing in paragraph 72 of her preliminary report a workplan that provided an orderly and systematic treatment of the draft articles.

62. As for the substantive questions addressed in the report, he wished to make only a few general observations. The distinction traditionally drawn between immunity *ratione personae* and immunity *ratione materiae* apparently provided an acceptable starting point for organizing the work. As indicated in paragraph 58 of the report, the two types of immunity had a functional nature, which corresponded with the contemporary approach to the law of immunity. In principle, only Heads of State and of Government, and possibly ministers for foreign affairs or external relations, should benefit from immunity *ratione personae*, by virtue of the important functions they performed as representatives of the State. That was one of the controversial points now rightly raised by Mr. Tladi and other members of the Commission. The possibility of extending such immunity to other representatives must be the subject of an in-depth study. It must be borne in mind that immunity was in itself an exception to the territorial criminal jurisdiction of the State and was thus a limit on the sovereignty of that State. As such, it must be interpreted in narrow terms. He agreed with other members of the Commission that it would be very complicated to draw up a list of other persons benefiting from immunity *ratione personae*. In any event, it would be preferable to list clear criteria to ascertain who such beneficiaries were, while maintaining a restrictive approach to the matter.

63. As indicated in paragraph 67 of the preliminary report, special attention should be paid to the definition of an "official act". The proposal made by Mr. Šturma to consider the distinction between acts *jure imperii* and acts *jure gestionis* was of interest. It would also be useful to bear in mind the comments made by Sir Michael concerning the analogy with the articles on responsibility of States for internationally wrongful acts. As for the need referred to in paragraph 66 of the report to employ more specific terminology, it would be more appropriate to use the term "representative", proposed along with other possibilities such as State "agent" or "body", as a replacement for "official".

64. Determining exceptions to immunity—in other words offences for which no kind of immunity could be claimed—was obviously one of the crucial elements of the subject under consideration. At the previous session of the Commission, Mr. Dugard, quoting Felix Frankfurter, had recalled that construction was not an exercise in logic or dialectic, but a choice.[282] The Commission, under the leadership of the Special Rapporteur, must decide between two positions that heretofore had been difficult to reconcile: either it would restrict itself to codifying immunity as much as possible in the conventional sense, or it would reconcile respect for the principle of sovereign equality and the maintenance of normal relations among States with the need to establish appropriate limits to immunity so that the most serious crimes that affected the whole of the international community did not go unpunished *de facto*, and so that justice and the rule of law would actually prevail. He endorsed the arguments other members of the Commission had put forward so eloquently. He too believed that the time had come for the Commission, in accordance with its mandate to codify and develop progressively international law, to choose the second option.

65. Mr. KAMTO, noting that Ms. Escobar Hernández was the first woman named as Special Rapporteur since the establishment of the Commission, congratulated her

[280] See footnote 271 above.

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

[282] F. Frankfurter, "Some reflections on the reading of statutes", *Columbia Law Review*, vol. 47, No. 4 (May 1947), pp. 527–546, at p. 529. For the intervention by Mr. Dugard, see *Yearbook … 2011*, vol. I, 3086th meeting, para. 31.

on her remarkable preliminary report. As for how to deal with the subject at hand, as he had already indicated in 2011, the Commission must strike a balance between two needs: on the one hand, the need to ensure stability in relations among States and, on the other hand, the need to fight impunity. The Special Rapporteur had captured that problem, as was evident in paragraphs 27 to 34 of her report. With regard to the methodology, he agreed with those members of the Commission who had pointed to the dovetailing between codification and progressive development, or *lex lata* and *lex ferenda*, although he sometimes had trouble grasping the very subtle distinction drawn by Mr. Petrič between progressive development and *lex ferenda*.

66. He wished to make three main points. First, the distinction between immunity *ratione personae* and immunity *ratione materiae* was no doubt useful from the methodological point of view, at least as a basic conceptual approach to the subject, but it would very quickly become clear that the problem was more complex than that and that such a distinction would not always hold. In many situations, the two kinds of immunity overlapped. Second, immunity apparently belonged to the State. But what might seem obvious in the case of *ratione materiae*, where it was firmly established that the State could lift immunity, was not so clear when it came to *ratione personae*: Could the State lift the immunity of a member of the troika? Third, procedural aspects were an important part of the subject. The Special Rapporteur had understood that and had referred to it very briefly in paragraphs 69 and 70 of her report. On that score, the analysis presented by Mr. Kolodkin in his third report[283] warranted the Commission's full attention. The question could be raised whether immunity was mandatory, a means imposed on the judge even when the person benefiting from the immunity did not invoke it. The International Court of Justice apparently would have it so but the national case law of certain States went against that rule. He pointed to the decisions rendered under Swiss and French case law, in particular those handed down a few years earlier in the case concerning the recovery of Mobutu's assets[284] and much more recently in the so-called "ill-gotten gains" affairs involving three African Heads of State. In the case in question, the Paris public prosecutor's office had received a complaint from Transparency International and Sherpa against the three Heads of State for misappropriation and embezzlement of public funds, with the money hidden in banks in France, which allowed the persons in question to acquire an enormous amount of property. The investigating judge at the Paris Tribunal had rejected the complaint for lack of *jus standi*, and the decision had been upheld by a 2009 decision of the Paris Court of Appeal. However, in a decision handed down on 9 November 2010, the Court of Cassation had overturned the decision of the Court of Appeal, ordering that the case should be investigated.[285] The counsel of the persons in question had not directly or principally invoked the immunity of the Heads of State in question. In any event, it could be deduced from the decision of the French Court of Cassation, the highest court in France, that invoking immunity was not mandatory. Should immunity then be invoked *in limine litis* at the risk of losing its benefits if it were reserved for use later in the proceedings? That was one of the questions that the Special Rapporteur could address. While her efforts to produce the workplan proposed in paragraph 72 were to be praised, it should be borne in mind that the complexity of the subjects and the way deliberations developed within the Commission always led to adjustments to initially established plans.

67. Lastly, the discussion on principles and values suggested by the preliminary report and so well described by Mr. McRae in his statement could not be avoided. However, as Sir Michael had suggested, such a discussion should not be held in abstract terms. There was no interest in pursuing the subject unless the discussion was founded specifically on possible treaty provisions, on case law and to a certain extent on doctrine, as demonstrated by Mr. Nolte and Mr. McRae. On the other hand, he did not go so far as to endorse the position put forward by Mr. McRae when he said that it was sometimes necessary to place the individual or dissenting opinions of some judges of the International Court of Justice at the same level as the decisions of the Court, as he considered that to be going too far.

The meeting rose at 1 p.m.

3146th MEETING

Tuesday, 17 July 2012, at 10.05 a.m.

Chairperson: Mr. Bernd NIEHAUS (Vice-Chairperson)

Present: Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gevorgian, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Murphy, 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.

Cooperation with other bodies (*continued*)*

[Agenda item 12]

STATEMENTS BY REPRESENTATIVES OF THE AFRICAN UNION COMMISSION ON INTERNATIONAL LAW

1. The CHAIRPERSON welcomed the representatives of the African Union Commission on International Law (AUCIL), Mr. Tchikaya and Mr. Getahun, and invited them to address the Commission.

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

[284] See "Chronologie du blocage des avoirs Mobutu en Suisse (1997–2009)", annex 2 to the draft federal law on the restitution of assets of politically exposed persons obtained by unlawful means (www.admin.ch/opc/fr/federal-gazette/2010/2995.pdf) of 28 April 2010.

[285] For information concerning the progress made in this case, see www.transparency-france.org/ewb_pages/div/Chronologie_Biens_mal_acquis.php (in French only).

* Resumed from the 3140th meeting.