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Summary record of the 3114th meeting

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enlarge the troika involved difficult decisions about which officials should be added, and, as a matter of policy, that was probably undesirable. Perhaps the responsibility for asserting immunity should in all cases be borne by the State claiming it, irrespective of whether or not the individual was a member of the troika. It seemed highly unlikely that a State would fail to notice that a Head of State was being prosecuted in a foreign court, unless it deliberately ignored the fact. In practical terms, requiring an official's State to assert immunity to the prosecuting State hardly seemed to be a great burden. Accordingly, the Special Rapporteur's conclusions in paragraph 61 (e), (f) and (g) of his report might merit reconsideration.

82. In addition, the assertion in paragraph 61 (i) that it was the prerogative of the official's State to characterize the conduct of an official as being the official conduct of the State went much too far. Surely the prosecuting State was also entitled to look into whether an act could be characterized as official: that was not solely the "prerogative" of the official's State. In paragraph 30, the Special Rapporteur recognized that the prosecuting State could inquire into the reasonableness of such a claim. Basing his argument on the advisory opinion of the ICJ in the case concerning the *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, he suggested that the appointment of an individual as an official created the presumption that he or she was acting in an official capacity. There, the Special Rapporteur went further than the Court, which had been referring to a presumption created by a claim of the Secretary-General of the United Nations that the individual concerned was acting as an official, not to a presumption based on the mere fact of appointment. It was really a question of how far the prosecuting State should go in looking into claims that an official was acting in an official capacity. Obviously each case would have to be assessed on its facts, but to suggest that there was a "presumption" arising out of the mere appointment of an official was to go too far and could not be substantiated.

83. The comprehensive series of reports³⁹⁹ produced on the topic by the Special Rapporteur had provided an excellent basis for the Commission to move forward. However, there was one important issue on which the Special Rapporteur and many members of the Commission remained divided—the extent of possible exceptions to the immunity of State officials, particularly in respect of serious international crimes. It should be the first item to be considered at the sixty-fourth session and should be dealt with initially by a working group. Until the issue was resolved satisfactorily, the Commission would not be able to make real progress.

84. In conclusion, he thanked the Special Rapporteur for his most valuable contribution to the Commission's work.

The meeting rose at 12.50 p.m.

3114th MEETING

Thursday, 28 July 2011, at 10 a.m.

Chairperson: Mr. Maurice KAMTO

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

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

[Agenda item 8]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRPERSON invited the members of the Commission to continue their consideration of the third report on immunity of State officials from foreign criminal jurisdiction (A/CN.4/646).

2. Mr. PETRIČ noted with satisfaction that, in his third report, the Special Rapporteur had identified all the relevant rules *de lege lata*, which on the whole derived from customary law, and had set out the procedural aspects of the immunity of State officials. The Special Rapporteur's viewpoint was carefully based on relevant State practice and national and international judicial practice, as well as the doctrine, and his approach was characterized by sharp legal logic. As he had already indicated during the consideration of the Special Rapporteur's second report,⁴⁰⁰ he personally continued to believe that the Commission should adopt a balanced approach to the topic. Immunity had been well established in past centuries as a reflection of State sovereignty and thus of the principle *par in parem non habet imperium*, from which immunity *ratione personae* was derived, and as a consequence of the greater need for safe international communications, which was a source of immunity *ratione materiae*. Today, and probably even more so in the future, the principle of non-impunity for crimes under international law, the concept of universal jurisdiction and efforts to establish the rule of law as a common value accessible to all peoples should have an impact on the concept of immunity and its applicability. Thus, when the Commission elaborated the draft articles on the immunity of State officials in the next quinquennium, it should codify existing customary rules, but it should also not hesitate to promote progressive development. Serious consideration should be given to the point made at the previous meeting by Mr. Dugard on the importance of distinguishing between ordinary crimes and core crimes.

³⁹⁹ The preliminary report is reproduced in *Yearbook ... 2008*, vol. II (Part One), document A/CN.4/601.

⁴⁰⁰ *Yearbook ... 2010*, vol. II (Part One), document A/CN.4/631. For the consideration of the second report at the present session, see the 3086th, 3087th and 3088th meetings above.

3. In several paragraphs, essentially paragraphs 23 to 31 of his third report, the Special Rapporteur touched upon the problem of substantiating the invocation of immunity by the official's State. The Special Rapporteur took the categorical view that substantiation was not needed and could not be requested by the State exercising the jurisdiction or by its court, and he did not see any significant difference between personal and functional immunity. In paragraph 26, he explained that his position was based primarily on the fact that, if acceptance of the invocation of immunity must be substantiated, "an official's State may be requested to provide information that is of an extremely sensitive nature for it and to disclose data related to its internal sovereign affairs". Even if it was generally accepted that in case of invocation of immunity *ratione materiae*, substantiation was necessary, nothing would prevent the official's State from substantiating the invocation of immunity only as much as it would consider necessary for the invocation to be persuasive and effective. In any event, as the Special Rapporteur himself argued, the official's State must at least invoke the fact that the person concerned was its official and had been acting in an official capacity. Thus, in many cases substantiation might not be much more than a sufficiently elaborated invocation of immunity, which would neither force the jurisdictional State to "blindly accept" (para. 30) the invocation nor put it in a position to ignore it.

4. It could be claimed that in the case of functional immunity, since it was not obvious that the person who had committed the illicit act was a State official acting in an official capacity, there might be a need or even a duty to substantiate the invocation of immunity. That issue had been raised in the case concerning *Certain Questions of Mutual Assistance in Criminal Matters* by France, which had contended that the absence of substantiation "would signify that all an official, regardless of his rank or functions, needs to do is assert that he was acting in the context of his functions to escape any criminal prosecution in a foreign State" (para. 189 of the judgment). That warning, which should be taken into consideration, was particularly relevant in the context of progressive development. Clearly, if a State was not required to substantiate the invocation of the immunity of its officials, then immunity *ratione materiae* could be granted in an arbitrary manner, in disregard of the rationale of such immunity, and could create legal uncertainty. Moreover, if a State could invoke the immunity of all its officials without substantiating that the illicit act was of an official nature, that would amount to granting *de facto* immunity *ratione personae* to all its officials, and immunity for acts actually performed in a private capacity might also be granted. Thus, immunity *ratione materiae* would lose its functional character and would also become the privilege of persons who were not part of the troika. If a State was not under an obligation to substantiate the invocation of immunity *ratione materiae*, that might favour unjustified impunity. He hoped that the Special Rapporteur could provide some clarification on that matter.

5. In paragraph 31, and implicitly in other paragraphs, the Special Rapporteur asserted that "the State must set out the grounds for a claim that, although its official is not a Head of State or Government or a minister for foreign affairs, his or her status and functions nevertheless meet the criteria

for asserting personal immunity". At issue was personal immunity, and not functional immunity. Concerning the latter, there was no question that the official's State was sovereign to decide, *inter alia*, who its officials were and what acts they were authorized to perform on its behalf. Personal immunity for acts performed by members of the troika in their official capacity overlapped with functional immunity. However, the immunity *ratione personae* of those officials, which covered not only acts performed in an official capacity while in office, but also acts performed in a private capacity, including when they were no longer in office, was in his understanding a privilege based on international law, and not on domestic law. That huge privilege, which was limited to the three highest State officials, was a direct reflection of State sovereignty, which the Head of State and the Head of Government symbolized, and of the special position of the Minister for Foreign Affairs in inter-State relations. The three members of the troika enjoyed *jus representationis omnimodae* in international law, and thus (contrary to what the Special Rapporteur seemed to imply in paragraph 31) the State should not be authorized to enlarge the troika of officials enjoying immunity *ratione personae*. That narrow circle of three persons could be enlarged—which would have an impact on international law and in the area of immunity—by a new convention or by general converging practice of States creating a new *opinio juris*—a new customary rule of international law—and not just by the official's State.

6. Views had been expressed during the debate at the previous meeting on the immunity *ratione personae* of the Minister for Foreign Affairs and other possible beneficiaries of such immunity. The position of Ministers for Foreign Affairs in international relations, which traditionally was special and fairly well established in international law, should be respected. An enlargement of the troika to include new beneficiaries of immunity *ratione personae* should be considered in the contemporary context: today, expectations were that there should be less rather than more immunity, in particular for crimes of international law, and that such crimes would not go unpunished.

7. He hoped that his comments would help clarify a number of remaining questions. Apart from that, he endorsed the views and conclusions contained in the Special Rapporteur's excellent third report.

8. Mr. HMOUD said that, as with the conclusions of the preliminary report,⁴⁰¹ the second report had given rise to differences of opinion in the Commission which reflected the division in the international community and among legal scholars about the scope of immunity of State officials from foreign criminal jurisdiction. The Special Rapporteur advanced very solid arguments in support of his core conclusions, but the fact remained that the traditional concept of immunity was on the defensive. The current state of law was not the same as it had been in the 1800s. While few would contest the need to implement the principles of sovereign equality and non-interference in international relations, the content of the rights and obligations of such principles took into account the changes that occurred at the international level and the different perspective of the international community

⁴⁰¹ *Yearbook ... 2008*, vol. II (Part One), document A/CN.4/601.

in that regard. Those were core principles in international relations that existed in order to protect States, no matter what their status, size or weight on the international scene, but they were not a licence to abuse the underlying rights. On the contrary, sovereign equality and non-intervention could be used in certain circumstances as arguments against absolute immunity. When a State committed acts against the territory, population and national interests of another State in violation of international law and the national law of the latter State, it was violating the principles of sovereign equality and non-intervention. Thus, by invoking absolute immunity to shield its officials on the basis of the very principles that it was violating, a State significantly undermined its legal position. As such, the immunity of State officials from the criminal jurisdiction of another State was on a case-by-case basis and was not a blanket immunity. Despite certain assertions by the Special Rapporteur, his second report, even more than the preliminary report, had the consequence of granting blanket immunity, which would affect the conduct of international relations and would actually lead to more tensions than those caused by the blanket application of universal jurisdiction. When an aggrieved State, knowing that it had no recourse at the international level, was unable to assert its criminal jurisdiction in a case in which its sovereignty had been violated by the criminal action of an official of another State, there was a potential that it would retaliate unlawfully against the latter State, and that would have an adverse impact on international relations. The Commission should take that into account and reach conclusions on the topic that ensured sovereign equality and protected against abuse. As a result, he supported the proposal that the Commission establish a working group to consider the core principles associated with immunity of State officials, whether immunity was the norm or the exception, as Mr. Murase had said, the relationship with national jurisdiction, the scope of functional and absolute immunity, and the relationship between those types of immunity and various offences, including the most serious international crimes. In so doing, the working group would need to examine international jurisprudence and to note that the judgments of the ICJ in the *Arrest Warrant* and the *Certain Questions of Mutual Assistance in Criminal Matters* cases had not endorsed the principle of absolute immunity and had in fact introduced limitations on immunity. The *Arrest Warrant* case actually provided an opening for the exercise of jurisdiction in certain situations and had upheld immunity in that particular situation, because the Court had concluded that the exercise of universal jurisdiction by one State hindered the proper performance of the functions of a Minister for Foreign Affairs of another State. However, the Court had not ruled out the possibility of the exercise of foreign jurisdiction following the departure of a high-ranking official from office in cases of the most serious international crimes and had not conditioned such jurisdiction on a waiver of immunity by the official's State. That was confirmed by the joint separate opinion of Judges Higgins, Kooijmans and Buergenthal. Thus, the working group would have to look into the question of whether, in the case of the most serious international crimes, functional immunity continued to exist after the departure of the State official from office. In *Certain Questions of Mutual Assistance in Criminal Matters*, the Court had not ruled out the application of functional immunity, but it had also not

specified the elements of such immunity or indicated whether "acts carried out in [a]n official capacity" constituted a sufficient threshold for such immunity.

9. The working group should also examine the issue of attribution in the context of functional immunity. The Special Rapporteur contended that the act of a State official was an act of the official's State in order to counter any argument that such an act could be subject to the criminal jurisdiction of a foreign sovereign. He then stated that it was an act with "dual" attribution, which confirmed the proposition that the forum State could assert its criminal jurisdiction in certain circumstances over the foreign official without ruling on the attribution of the act to the official's State. Even if the act was attributed to the official's State, that State could not be considered under general international law to have committed an international crime, but the official could be, and a closer consideration was needed of the circumstances in which the official could not be shielded from foreign criminal jurisdiction when acting in an official capacity.

10. The Special Rapporteur advanced a proposition with a very limited exception—which he called absence of immunity—in the case of an act by a State official committed against the sovereignty of another State while his/her presence in the territory of that State was not consented to. Actually, if the logic used in the three reports on immunity was followed, even in that case the official's State could invoke immunity on the official's behalf; after all, it was an act of that State, which under international law should not be subject to foreign criminal jurisdiction.

11. A State whose sovereignty had been violated by the official of another State must be entitled to exercise its criminal jurisdiction and should not in all circumstances be prevented from doing so in the name of "procedural" immunity. A State had the right and duty to protect its nationals and its territory against violations of international law committed by another State, including through its officials. Assuming that customary international law provided for immunity for the State official, there was an equal if not superior principle stemming from sovereign equality, which gave the other State rights and obligations under international law in relation to its territory and citizens. If a State was the victim of an act of sabotage committed in its territory by foreign State officials who had not been present in that territory during the commission of the act, or if members of its population living abroad were victims of ethnic cleansing committed by officials of another State, did that "procedural immunity" prevent it from exercising its right and obligation under international law to protect its territory and its nationals? That was not a question of *lex lata* versus *lex ferenda*: only *lex lata* was involved. At a minimum, the injured State had the right, under the doctrine of countermeasures, to suspend the application of the obligation towards the injuring State of granting immunity to the latter's official who had committed the act. That was not *lex ferenda*. That was certainly better for the stability of international relations than for the injured State to resort to the use of force because the injuring State invoked "procedural immunity", and it advanced the principle of sovereign equality better in case the State could not resort to the use of force.

12. The Commission in its future composition, and possibly the working group that might be established, should examine the issue of the prosecution of grave international crimes that violated the principle of *ius cogens* and consider whether they prevailed over procedural immunity. In a conflict between two principles of international law, the one with the higher value was applicable, even if the two principles were of a different nature. The ruling of the ICJ in the *East Timor* case was not comparable, as the issue had involved the jurisdiction of the Court and the possibility that a ruling on the *erga omnes* character of certain obligations would have required the Court to rule on the conduct of a State that had not been a party to the case before it.

13. On the whole, he agreed with most of the propositions advanced by the Special Rapporteur on the procedural aspects of immunity, except when such propositions aimed to reinforce substantive conclusions in the second report. He concurred with the Special Rapporteur that the question of immunity must be considered at an early stage of a trial and must be decided expeditiously due to the potential harm that might arise from any delay. In general, if the official concerned was part of the troika, the State of jurisdiction must assume immunity—the official's State did not need to invoke it. However, further consideration should be given to the proposition that the two States—the State of jurisdiction and the State of the high-ranking official—needed to cooperate. When the State of jurisdiction learned that the official concerned might be part of the troika, it should seek confirmation from the official's State if there were doubts concerning the official's status, and the State of that official should then confirm or deny the existence of such status. The official's State should also inform the State of jurisdiction when the latter was not aware of such status.

14. As for functional immunity, apart from the troika, the conclusion that the official's State was the entity entitled to invoke immunity was plausible and was supported by international practice and jurisprudence.

15. Ms. JACOBSSON said that the third report on immunity of State officials was vital for the further consideration of the topic, because it provided a good picture of the Special Rapporteur's approach. Coming from a country which made a clear distinction between the right to establish jurisdiction over crimes by legislative means and the right to apply legislative measures by procedural means, she particularly appreciated the Special Rapporteur's focus on procedure, which, although it could not be separated from material law, was a distinct feature. The Special Rapporteur had suggested a well-structured line of reasoning that should be built upon.

16. Confining herself to the propositions contained in paragraph 61 of the third report, she said that her comments on the procedural aspects of immunity did not mean that she shared the Special Rapporteur's generous view on which persons enjoyed, or should enjoy, such immunity. She agreed with the proposition in paragraph 61 (a) that the question of immunity must in principle be considered as early as possible. In practice, that might be difficult to do, since a pretrial procedure might be initiated by the police authorities long before it became known that

the person subject to the procedure might be entitled to immunity. The Special Rapporteur's approach might require the adoption of legislation. Even if national legislation provided that the question must be raised at an early stage, the national authorities might have difficulty assessing the specific situation.

17. With regard to paragraph 61 (b), she said that, unlike the Special Rapporteur, she did not believe that “[f]ailure to consider the issue of immunity *in limine litis* may be viewed as a violation of the obligations of the forum State under the norms governing immunity”, at least not in all cases, because that would take the obligation too far. The forum State, and in particular its officials, must have a certain latitude to examine whether considerations of immunity were relevant to the case. Moreover, it would be very difficult to define clearly a fixed point at which the responsibility of the forum State should be established. The problem of responsibility for failure to examine the question of immunity must be posed at a later stage.

18. She understood the rationale behind paragraph 61 (c), but thought that the wording of that general rule should be expressed more cautiously. The time element had a role to play in that context. If the State was not in a position to invoke immunity (it might not even know about the case), then the official must be entitled, if not to invoke, at least to inform the forum State that he/she enjoyed immunity. The forum State and its officials would have to take that information into account. That was not the same as saying that such information constituted a legally binding invocation of immunity, but it would certainly be “relevant”.

19. On paragraph 61 (d), she agreed with the Special Rapporteur that the right to be informed was a prerequisite for invocation of immunity. The question was at what stage information should be transmitted, and by whom. First of all, she did not think that it was feasible to establish an obligation that required the forum State to inform the official's State as soon as it considered taking measures. In most democratic societies built on the balance of power, the Government would not even know what the police or a prosecutor was planning. In fact, the preliminary police inquiry into a case would most likely be secret. If there was an international legal obligation to inform at too early a stage, it would probably be necessary to amend national legislation, since representatives of the judiciary would have to consult with the Government. It would not be easy to have such a law passed in parliament, because such provisions would be perceived as a threat to the independence of the police and the prosecution.

20. She did not agree entirely with the proposition contained in paragraph 61 (e). Not all Heads of State or Government and Ministers for Foreign Affairs were as well known as the representatives of the major political powers. Clearly, the State exercising criminal jurisdiction had a special responsibility to inform the official's State when one of the members of the troika was involved. Once it had done so, it had fulfilled its obligation. The duty to cooperate would also have a role to play in that regard and should be granted greater importance in the topic as a whole.

21. Whereas she agreed with the conclusions in paragraph 61 (f), she did not share the assumption on which paragraph 61 (g) was based, namely that such a category of persons actually existed, and that the official's State could simply declare that a person enjoyed immunity and that such immunity must be respected. She would therefore refrain from commenting on paragraph 61 (g). As had been pointed out, paragraph 61 (g), like paragraph 61 (f), concerned the scope *ratione materiae* of immunity. With regard to paragraph 61 (h), she agreed that it was sufficient for the immunity to be invoked through diplomatic channels, but she was far from convinced that such invocation would imply that the court of the State exercising jurisdiction would be barred from continuing its procedure. However, she noted that the Special Rapporteur used the formulation "in order for that court to consider the question of immunity", which seemed somewhat more cautious than simply saying that the court would be barred from continuing its procedure. Regarding paragraph 61 (i), she agreed in part and disagreed in part. She agreed that the State invoking immunity was not "obliged" to provide grounds, apart from those referred to in paragraph 61 (f) and (g), but then it could not assume that such invocation would be accepted in all cases. The State invoking immunity should at least be encouraged to provide grounds for its invocation, which could be done in simple terms and without infringing the principle of the equality of States and other important principles.

22. The proposition set out in paragraph 61 (j) seemed to be the general rule, but the conclusion needed to be qualified. The conclusion in paragraph 61 (k) likewise needed to be further elaborated. On the other hand, the reasoning in paragraph 61 (l) was not entirely clear, first, because it was the first time that the Special Rapporteur had referred to a "serving" Head of State, and, secondly, because the situation described in the second sentence was not necessarily connected to the requirement that the waiver of immunity be express. However, she agreed with the example given. She also endorsed paragraph 61 (m), but with the understanding that she did not share the Special Rapporteur's view on which State officials enjoyed immunity, and she concurred with the proposition in paragraph 61 (n). In paragraph 61 (o), she agreed that immunity must have been invoked before criminal proceedings commenced, except in situations in which the State was not aware that proceedings had been instituted.

23. She endorsed paragraph 61 (p), but emphasized that when a State waived the immunity of its official, it was not necessarily relieved of its responsibility under international law. If an official of a State that had a *de facto* policy of ethnic cleansing had committed illegal acts in accordance with that policy, and that State (which denied that it had such a policy) admitted that the official had committed illegal acts but was prepared to waive his immunity, the State could not then claim that it had no responsibility for the illegal policy and for the acts committed under that policy. She was therefore pleased that the Special Rapporteur had raised the point in paragraph 61 (q), whose conclusion was very important. She fully agreed with paragraph 61 (q) and (r). She thanked the Special Rapporteur for his well-structured and well-researched report and hoped that the Commission in its new composition would address the topic as a matter

of priority in order to decide on the most important issue, namely the extent of immunity, so that it could then move on to the elaboration of draft articles.

24. Mr. NOLTE said that the Special Rapporteur had once again provided the Commission with a well-researched and thoughtful report that carefully digested the pertinent sources and balanced the relevant arguments. The Special Rapporteur had not relied too much on extrapolations from logic; rather, he had drawn on enough practice to enable the report to serve as an excellent basis for future work. As he was in general agreement with the Special Rapporteur's approach and conclusions, he would limit himself to a few points. However, since some members of the Commission had reopened the debate on issues raised by the second report, which had been discussed in the first part of the current session, he would also add a few remarks in that regard.

25. Mr. Dugard had ended his impassioned intervention with a warning that the Commission might damage its reputation if it did not meet the expectation that it recognize an exception to immunity in cases of core crimes or human rights violations. Mr. Dugard's concern was unjustified for two reasons. First, the Commission always sought to strike a balance between different legitimate considerations and did not let itself be guided disproportionately by one of them. Secondly, neither the ICJ nor the European Court of Human Rights had compromised their reputation with their rulings in the *Arrest Warrant* case or the case concerning *Al-Adsani v. the United Kingdom*. In any event, although there was a trend to restrict immunity in the context of the creation of international jurisdictions, a countervailing trend to recognize immunity before national jurisdictions could also be observed, as shown by the *Arrest Warrant* and *Al-Adsani v. the United Kingdom* cases. The two trends were not contradictory, but complementary from the more general viewpoint of the fight against impunity, which required restricting immunity, although primarily before international jurisdictions, and not in a way that would threaten peaceful international relations; hence the legitimacy, in principle, of immunity before national jurisdictions. Ultimately, such a balance was the way to combat impunity effectively without running the risk of being discredited or of paying too high a price.

26. For lack of time, Mr. Pellet had confined himself to forcefully asserting that there was no immunity for core crimes. Both Mr. Pellet and Mr. Murase had argued on a very general and abstract level. The Commission should address the matter in greater detail during the next quinquennium and should examine the possible implications and consequences of such an assertion. He therefore supported Mr. McRae's proposal on how to proceed.

27. He agreed that the Commission should not reopen the debate on the personal immunity of the Minister for Foreign Affairs and that it should not extend such immunity to other official functions. Today, in the age of globalization, international relations were not necessarily limited to the troika, and the Commission should not rule out the possibility that other State officials, depending on the circumstances, were in a situation sufficiently comparable to that of the members of the troika to benefit from personal immunity.

28. Turning to the questions addressed by the Special Rapporteur in his third report, including whether a State which exercised jurisdiction was required to consider the issue of immunity *proprio motu*, he said that the Special Rapporteur's careful analysis, in paragraphs 16 to 18, of the case concerning *Certain Questions of Mutual Assistance in Criminal Matters* should be pursued a bit further. He agreed with the Special Rapporteur's point of departure, which was the statement by the Court according to which "[t]he State which seeks to claim immunity for one of its State organs is expected to notify the authorities of the other State concerned". Given the context in which it had been formulated, it was clear that that statement had not been intended to mean that a State could exercise criminal jurisdiction against one of the three highest officials until their State invoked their personal immunity. The Special Rapporteur rightly noted that the identity of those officials was usually well known or could be immediately verified. As pointed out in paragraph 19, in such a case "the State exercising criminal jurisdiction should itself raise the question of that person's immunity", should "make a determination" and should "ask the official's State merely to waive immunity".

29. The argument concerning the duty of the forum State to raise the question *proprio motu* could not be limited to cases in which the three highest State officials were implicated. It was equally applicable when it was manifest, in the circumstances, that jurisdiction would be exercised with respect to an official who had acted in his official capacity. In such a case, the State of the official should have the opportunity to invoke immunity—if the preconditions were established—before relevant measures were taken that would violate immunity. He agreed with the Special Rapporteur, however, that if the State concerned, after having been made or having become aware of the situation, did not express its position within a reasonable time, the forum State could assume that the other State did not claim immunity for its official. That was another aspect of the proceduralization of immunity, which the ICJ had recognized in the *Certain Questions of Mutual Assistance in Criminal Matters* case, and it reflected the principle of *bona fides* which must govern international relations.

30. He acknowledged that the use of the word "manifest" as a criterion in cases of immunity *ratione materiae* might sometimes not prevent a disagreement over whether it was manifest that an official act by a public official was concerned. However, it was not uncommon for procedural preconditions to be determined by the standard of "manifest", which preserved smooth international intercourse and prevented mutual recriminations about whether an initial exercise of jurisdiction had actually been motivated by the wish to make a political point. Therefore, in cases which manifestly involved acts performed by officials in their official capacity, the State which exercised jurisdiction must indicate *proprio motu* to the State of the official concerned that jurisdictional measures were being contemplated and thereby give that State an opportunity to claim immunity for that official before such measures were taken. That condition did not contradict the requirement of the ICJ that the State concerned must invoke immunity. On the contrary, it was part of the logic of the procedural approach and was in keeping

with the rule of mutual consideration and cooperation in international relations. He also agreed with the Special Rapporteur's general line of reasoning in paragraphs 25 and following, according to which the burden on the State of the official to substantiate its invocation of immunity *ratione materiae* did not go very far, in particular where the official capacity of the person concerned and the official nature of the act were manifest. However, he personally would not speak of a presumption that the acts of an official were being performed in an official capacity, as the Special Rapporteur suggested in paragraphs 29 and 30 of his report. The advisory opinion of the ICJ concerning the *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* did not support such a broad interpretation. On the contrary, it confirmed the general proposition that if the official capacity of the person and the official nature of the person's acts were manifest in a specific situation, the burden of proof was significantly alleviated. Indeed, as the Special Rapporteur noted in paragraph 31, "as in the case where the actions of an official are characterized as official acts, the State exercising jurisdiction is not obliged to 'blindly accept any' such claim by the State" which the official represented. That meant, to take the hypothetical example given by Mr. Dugard at the previous meeting, that a State which prosecuted Mr. Mladić must not accept a simple letter from Serbia that he was its official and that the acts in question had been official acts. Rather, Serbia would have to refute what appeared to be public knowledge about Mr. Mladić. On the other hand, if a person clearly was a commander in the armed forces of a country, and the accusation concerned the activities of the armed forces of that country, it should be sufficient for the State of the official to say so. It must be borne in mind that the purpose of any duty to substantiate was merely to determine whether an official had acted in an official capacity, and not to indirectly force a State to defend itself for its actions in a foreign jurisdiction. That also meant that the question of whether the forum State or the State invoking immunity had the prerogative to decide the question of immunity was not very helpful. The forum State must ultimately decide whether it recognized the immunity, but it must do so within narrow and clear limits.

31. Concerning the question of waiver of immunity, two situations should be more clearly distinguished: waiver of immunity in individual cases and waiver of immunity for certain categories of cases that might be contained in a general treaty rule. He agreed that the standard for identifying such exceptions to immunity was that the waiver must be certain, as stated by the Institute of International Law in its resolution on immunities from jurisdiction and execution of Heads of State and Government in international law,⁴⁰² and not any particular formal criterion, such as a presumption in one direction or the other. The commonality between the two forms of waiver should not obscure the fact that the determination of when immunity had been excluded was not the same in both cases. When a general waiver of immunity was provided for by a treaty rule, the required certainty related mainly to the interpretation of substantive law, whereas for individual waiver, the question was one of an assessment of a specific procedural act. Basically, his

⁴⁰² Institute of International Law, *Yearbook*, vol. 69 (2000–2001), Session of Vancouver (2001), pp. 743 *et seq.*

sense was that, to determine whether waiver applied in a particular case, the standard of certainty implied a *bone fides* duty to inquire with the State of the official if there was any doubt. States and their organs might not readily accept that the conduct of another State constituted a waiver of immunity. On the other hand, it followed from the rule of mutual consideration and cooperation in international relations that States also had a duty to express themselves clearly within a reasonable time if they wished to invoke immunity and were confronted with a situation which required their response.

32. As to the question of “whether a State’s non-invocation of the immunity of an official can be considered an implied waiver of immunity”, he agreed with the Special Rapporteur that the ICJ had not held, in the case concerning *Certain Questions of Mutual Assistance in Criminal Matters*, “that in not invoking immunity, Djibouti had waived it”. He also agreed that it depended on the circumstances of the specific case whether the non-invocation of immunity constituted a waiver. Therefore, the most important problem was the point in time at which the question of implicit waiver arose. As long as a State did not have certain knowledge of the exercise of jurisdiction against one of its officials or had not yet had sufficient time to respond, the non-invocation of immunity could not be regarded as a waiver. However, once the State concerned had been fully informed and given sufficient time for reflection (which must not be too long), non-invocation of immunity was usually considered as constituting an implied waiver or a valid acquiescence in the lapse of the claim in the sense of article 45 of the draft articles on responsibility of States for internationally wrongful acts, on loss of the right to invoke responsibility.⁴⁰³ The Commission might draw inspiration from paragraph (11) of the commentary to article 45, subparagraph (b), according to which

[i]nternational courts generally engage in a flexible weighing of relevant circumstances in the given case, taking into account such matters as the conduct of the respondent State and the importance of the rights involved. The decisive factor is whether the respondent State has suffered any prejudice as a result of the delay in the sense that the respondent could have reasonably expected that the claim would no longer be pursued. Even if there has been some prejudice, it may be able to be taken into account in determining the form or extent of reparation.⁴⁰⁴

33. For reasons of legal and procedural security, a waiver could not be revoked, and therefore he did not share the Special Rapporteur’s view that certain implied waivers did not exclude that a State could invoke immunity at a later stage. That was an unnecessary and misleading proposition which the Special Rapporteur only seemed to need for those cases with respect to which he had accepted that the State which exercised jurisdiction could go forward until the other State invoked immunity. However, such a situation was not one of implied waiver. Rather, it concerned the period during which the question of immunity was still open and during which it must be decided as soon as possible, in a process of mutual cooperation between the two States concerned, whether

the preconditions for immunity were present and whether immunity was invoked. If there were serious indications that immunity might be invoked, the State that exercised jurisdiction must act with restraint and give the other State an opportunity to do so. Jurisdictional measures that were taken during that period and that were proportionate would not become invalid if immunity was ultimately and rightfully invoked; however, their validity was not based on an implied waiver, but rather on a limited power to initiate proceedings even in the face of the possibility that immunity might be invoked. The character of a waiver as a unilateral act that determined *in fine* the position of a State with respect to one of its rights should not be called into question.

34. It was true that the scope of a waiver could be broad or narrow. Thus, what initially might have been a limited waiver that authorized the forum State to take certain preliminary measures did not prevent the State of the official from invoking the remaining immunity later with respect to a regular criminal procedure. He also concurred with the Special Rapporteur’s view on the issue of State responsibility, in particular where he observed in paragraph 60 that “the State which invokes its official’s immunity on the grounds that the act with which that person is charged was of an official nature is acknowledging that this act is an act of the State itself”. He also agreed that, in so doing, that State was not necessarily acknowledging its responsibility for that act as an internationally wrongful act. In closing, he thanked the Special Rapporteur for his excellent report, which had laid the groundwork for the Commission’s consideration of the topic during the next quinquennium.

35. Mr. DUGARD, referring to Mr. Nolte’s assertion that the refusal of immunity should apply only in the case of international tribunals and that immunity should prevail in the case of national courts, stressed that that was the situation in an ideal world. Today, *ad hoc* tribunals were on the way out, and only 116 States had ratified the Rome Statute of the International Criminal Court. That meant that most prosecutions of State officials for serious international crimes were before national courts, which must be the centre of the Commission’s focus.

36. Mr. NOLTE said that he had merely wanted to underline the legitimacy, in principle, of immunity; he had not taken a specific position on how far it went. He had simply sought to underscore the interrelationship between the two trends, which the Commission would need to work out in greater detail.

37. Mr. WISNUMURTI thanked the Special Rapporteur for his third report and for his lucid introduction. The report reflected an in-depth analysis and extensive research on judicial decisions, State practice and legal opinion. It dealt with procedural aspects of the immunity of State officials from foreign criminal jurisdiction as well as the important question of the immunity *ratione personae* of an official and the responsibility of the official’s State. The third report logically followed the second report, which had examined substantive issues, including the scope of immunity *ratione personae*, and on which he had commented earlier. In his view, personal immunity should be limited to the members of the troika,

⁴⁰³ General Assembly resolution 56/83 of 12 December 2001, annex. The draft articles adopted by the Commission and the commentary thereto are reproduced in *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 26 *et seq.*, paras. 76–77.

⁴⁰⁴ *Ibid.*, p. 123.

namely the Head of State, the Head of Government and the Minister for Foreign Affairs. It should not be extended to include other senior officials, and there should not be any exception to the rule on personal immunity when a Minister for Foreign Affairs had committed core crimes, even when acting in an official capacity.

38. On the whole, he concurred with the views expressed by the Special Rapporteur on the various aspects of the issues discussed in the third report and would like to make a few comments. With regard to the timing of consideration of immunity, he agreed that the issue of the immunity of a State official from foreign criminal jurisdiction should, in principle, be considered at an early stage of the judicial proceedings, or earlier still, at the pretrial stage. As pointed out in paragraph 11 of the report, early consideration of immunity was necessary in order to achieve its fundamental objectives: ensuring normal relations among States and the maintenance of their sovereignty. In more concrete terms, early consideration of immunity would ensure legal certainty and would protect in particular the State official acting in an official capacity, although the right to invoke immunity belonged to the State which the official served, and not to the official concerned. That should not prevent the official from declaring to the authorities of the State exercising criminal jurisdiction, before legal proceedings were initiated, that he or she had immunity. It was certainly true that the official's State must convey to the State exercising jurisdiction a reaffirmation of the immunity of that official. Recognition of the right of the official to declare, even before legal proceedings were initiated, that he or she enjoyed immunity was essential for preventing the official's mistreatment.

39. He endorsed the point made in paragraph 32 that only the State could legally invoke the immunity of its officials, whether these officials were members of the troika, who had personal immunity, or other officials who had functional immunity. Thus, it was only when immunity was invoked or declared by the official's State that the invocation of immunity had legal consequences. He agreed with the analysis of the judgment rendered by the ICJ in *Certain Questions of Mutual Assistance in Criminal Matters*: the burden of invoking immunity fell to the State which wanted to shield its official from foreign criminal jurisdiction, whereas in the case of personal immunity applicable to the Head of State, the Head of Government and the Minister for Foreign Affairs, it was the State exercising jurisdiction that had to determine its position regarding the action it might take on the immunity of the official in accordance with international law. The Special Rapporteur had concluded that in that case the official's State did not bear the burden of raising the issue of personal immunity with the authority of the State exercising criminal jurisdiction; however, this should not be construed to mean that the official's State was deprived of its inherent right to raise the issue of immunity with the authorities of the State exercising criminal jurisdiction and to invoke the personal immunity of its official, as and when necessary. As noted in paragraph 61 (i), the State invoking the immunity of its official was not obliged to provide grounds for immunity, but it must inform the State exercising jurisdiction that the person in question was its official and enjoyed personal or functional immunity, since he had acted in an official capacity.

40. It was important to stress that the State, and not the official, had the authority to waive the immunity of a State's official, whether it be immunity *ratione personae* or immunity *ratione materiae*. The Special Rapporteur discussed the question of whether waiver must be express or whether it was sufficient for it to be implied. On the whole, he agreed with the Special Rapporteur that, when applied to a serving Head of State, Head of Government or Minister for Foreign Affairs, a waiver of immunity should be explicitly stated, whereas in the case of other serving or former officials who enjoyed functional immunity, a waiver of immunity could be either express or implied. However, he had difficulty understanding what the Special Rapporteur meant by the phrase "serving officials who are not included in the 'threesome' but who enjoy personal immunity".

41. In the last part of the report, the Special Rapporteur addressed the issue of the link between an official's immunity and the responsibility of the official's State and had referred to the dual attribution of responsibility. A waiver of the immunity of an official acting in an official capacity that resulted in legal proceedings being instituted by the State exercising jurisdiction could lead to the invocation of the responsibility of the official's State in the event that the act performed by the official constituted a violation of the State's obligation under international law. The act of the official, having been performed in an official capacity, was an act of the State concerned. However, that principle could only be applied case by case, taking into account the facts surrounding the act and the specific circumstances. The reports on the topic of immunity of State officials from foreign criminal jurisdiction contained a number of contentious issues that had to be resolved before the Commission could commence with the elaboration of draft articles. He therefore agreed with Mr. McRae's proposal that a working group be set up in 2012 to address those questions.

42. Sir Michael WOOD said that the Special Rapporteur's three reports, together with the Secretariat's 2008 memorandum,⁴⁰⁵ would remain essential reading for anyone who had to deal with the issue of immunity of State officials from foreign criminal jurisdiction. The third report was an important part of the overall picture drawn by the Special Rapporteur, and, in that connection, he did not share the concerns expressed by Mr. Pellet at the previous meeting: it was true that, for lack of time, the Commission had not been able to reach conclusions on the second report, but that did not matter, because the third report could just as well have been part of the second report. Equally, it could have constituted an addendum to the second report, addenda being common practice in the consideration of other topics.

43. Like other speakers, he was on the whole in agreement with the third report. The Special Rapporteur had explained during his introduction that a different methodology underlay the report, which to a large extent was based on deduction and logic rather than practice, which was scarce. However, it was also apparent that the report reflected the Special Rapporteur's wide experience.

⁴⁰⁵ Document A/CN.4/596 and Corr.1; mimeographed, available from the Commission's website (documents of the sixtieth session).

He agreed with what the Special Rapporteur said on the timing of consideration of immunity and with almost everything he said on the invocation of immunity, and he endorsed the two sections on waiver. However, Ms. Jacobsson's comments on the conclusions and the Special Rapporteur's response clearly showed that many details still needed to be explored. In that regard, it would be interesting to have more information about the procedural position under the various national legal systems.

44. He had four comments on the report. First, the report did not appear to deal expressly with inviolability of the person as opposed to immunity in the narrow sense. Inviolability could be very important in practice, and it might be particularly relevant to questions concerning the timing of the invocation of immunity.

45. Secondly, on the question of the invocation of immunity, he was not as convinced as the Special Rapporteur that a clear distinction could be made between the troika and other high-ranking office holders who might enjoy immunity *ratione personae*. As other members had said, it might well be that a State's authorities, such as its police or its courts, did not know all the Heads of State, Heads of Government and Ministers for Foreign Affairs of the world's 193 States, and it might equally be that they were aware of the status of certain other high-ranking officials outside the troika. He therefore doubted that hard and fast rules could be laid down; much depended on the particular circumstances of the individual case. In any event, if a State wished to see the immunity of its official upheld, it would be well advised to be clear on that point, and if the legal or factual issues surrounding immunity were complex, then although there should probably be no obligation to do so, it might well be in that State's interest, where it could, to participate directly in the proceedings to explain its case, rather than relying on the authorities of the forum State or the court itself to evoke those questions.

46. With regard to the troika, he stressed once again that, in his opinion, there was no doubt that under present-day customary international law, Heads of State, Heads of Government and Ministers for Foreign Affairs enjoyed immunity *ratione personae* while they remained in office. Attempts, whether by authors or even by members of the Commission, to cast doubt on the judgment of the ICJ on that point were little more than wishful thinking. The majority in the *Arrest Warrant* case was a strong one, and careful explanations for that position appeared in the judgment. The real issue was how to determine which other office holders also enjoyed immunity *ratione personae*. He did not agree that the immunity of serving members of the troika was not absolute, at least if it was put forward as a proposition *lex lata*, and he endorsed the view expressed in that regard by the counsel for France in *Certain Questions of Mutual Assistance in Criminal Matters*.

47. Thirdly, concerning the invocation of immunity, he agreed with the Special Rapporteur that the State of the official would normally have to claim immunity *ratione materiae*. Some of the criticisms of the Special Rapporteur's formulations on the respective roles of the State of the official and the forum State seemed misplaced. He personally did not see the use of the technical term "prerogative" as being sinister, although it could have

been avoided. The Special Rapporteur's language was carefully chosen and appropriate. He was not sure, however, that the same deference as had been shown by the ICJ to the statement by the United Nations Secretary-General⁴⁰⁶ in the *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* would necessarily be appropriate in the case of assertions by a State, because sometimes it would be necessary to look behind what a State said.

48. Fourthly, with regard to the section of the third report on waiver, he noted that in paragraphs 44 to 46, the Special Rapporteur dealt with the possibility that States might be deemed to have given an implied waiver of immunity by becoming party to certain treaties. He agreed with the Special Rapporteur's overall conclusions on that point, the opposing view being based on what he would term the "wishful thinking" approach to treaty interpretation. At the same time, he endorsed Mr. Pellet's comment that the reference at the end of paragraph 44 to the intention of the individual State was out of place. Either a treaty necessarily implied a waiver, and for all parties, or it did not. In the *Pinochet* case, the British House of Lords had reached such a conclusion in respect of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, but only after a detailed analysis of the terms of that instrument. Its reasoning could not be blithely carried over to other treaties.

49. The topic under consideration was of great interest to States and others. Foreign ministries and their legal advisers constantly faced serious legal questions in that area that required an immediate response. The Special Rapporteur's work could be of great practical assistance, since it was based on experience and sought to find practical solutions to practical problems. It had been asserted at the previous meeting that the Commission's reputation could be at stake if it failed to adopt a certain approach to the topic. On the contrary, the Commission was more likely to damage its reputation by adopting unrealistic positions, pandering to the more extreme views of certain campaigning bodies. Members of the Commission were present in their individual capacity as lawyers, and their task was to contribute to the codification and progressive development of international law; they were not spokespersons for particular groups or interests.

50. In 2012, the Commission would have to decide how to proceed with the topic. Essentially, it had two choices. Either it could seek to codify existing law, or it could take a conscious decision to propose new rules for consideration by States. It was to be hoped that a carefully reasoned and balanced statement of new rules would be acceptable to States and indeed welcomed by them. Presumably such rules would need to be incorporated into a convention in due course. Each choice had its advantages and disadvantages. A codification exercise might be helpful, as it would clarify and fill in gaps, such as those which had come to light in the procedural matters dealt with in the third report. Elaborating new rules would be more challenging and would only be useful if they were widely accepted by States. It would

⁴⁰⁶ ICJ, "Written statement submitted on behalf of the Secretary-General of the United Nations", 2 October 1998 (available from www.icj-cij.org).

be interesting to hear from States, before the next session, what they expected of the Commission.

51. Mr. PELLET said that he had criticized the Commission's consideration of the third report on the topic for reasons of method. Normally, a Special Rapporteur elaborated a preliminary report which served as a basis for future examination. In the current case, some aspects of the preliminary report had proved controversial, yet the Commission had continued without agreeing on what its basis was.

52. With regard to the choices put forward by Sir Michael, he stressed that, in the Commission's mandate, progressive development preceded codification.

Reservations to treaties (*concluded*)* (A/CN.4/638, sect. A, A/CN.4/639 and Add.1, A/CN.4/647 and Add.1, A/CN.4/L.779, A/CN.4/L.793, A/CN.4/L.795)

[Agenda item 2]

REPORT OF THE WORKING GROUP ON
RESERVATIONS TO TREATIES (*concluded*)**

53. The CHAIRPERSON invited the Chairperson of the Working Group on reservations to treaties to introduce his second report on the work of the Working Group.

54. Mr. VÁZQUEZ-BERMÚDEZ (Chairperson of the Working Group on reservations to treaties) recalled that, at its 3099th meeting on 6 July 2011, the Commission had referred to the Working Group on reservations to treaties for consideration the text of the draft recommendation or conclusions of the International Law Commission on the reservations dialogue, which had appeared in paragraph 68 of the Special Rapporteur's seventeenth report on reservations to treaties (A/CN.4/647 and Add.1). After careful consideration, and in the light of past Commission practice, the Working Group had agreed that it was more appropriate for the Commission to elaborate a set of conclusions on the question of the reservations dialogue, to be followed by a recommendation to the General Assembly, rather than to address direct recommendations to States. The nine conclusions provisionally adopted by the Working Group, which were preceded by eight preambular paragraphs and followed by a recommendation to the General Assembly, were reproduced in document A/CN.4/L.793.

55. Several of the changes made by the Working Group to the text originally proposed by the Special Rapporteur were worth mentioning. With respect to the preamble, the Working Group had added a second preambular paragraph, including a reference to the Special Rapporteur's seventeenth report. The third preambular paragraph constituted a reformulation of the original second preambular paragraph; it now referred to "the need to achieve a satisfactory balance between the objectives of safeguarding the integrity of multilateral treaties and securing the widest possible participation therein". The

fourth and fifth preambular paragraphs resulted from the splitting and reformulation of the original third preambular paragraph. In the last preambular paragraph, the reference to regional organizations had been replaced by a general reference to international organizations.

56. With respect to the conclusions listed under section I, the first part of the text of the third conclusion was new. It referred to the importance of the statements of reasons by the author of a reservation for the assessment of the validity of the reservation. The Working Group had felt that the inclusion of that element was important in order to balance the statement contained in the fifth conclusion, which referred to the potential usefulness, for the assessment of the validity of reservations, of the concerns expressed about a reservation by States and international organizations. The content of the fourth conclusion was taken from the last sentence of paragraph 1 originally proposed by the Special Rapporteur, with the addition of a reference to the possible limitation of the scope of certain reservations as an alternative result of the periodic review of reservations. Finally, the recommendation contained in section II corresponded, with minor adjustments, to paragraph 9 of the text originally proposed by the Special Rapporteur. The Working Group recommended that the Commission include the text reproduced in document A/CN.4/L.793 in an annex to the Guide to Practice.

57. With regard to the recommendation on mechanisms of assistance in relation to reservations, he recalled that the Commission had referred to the Working Group on reservations to treaties the consideration of the draft recommendation on technical assistance and assistance in the settlement of disputes concerning reservations, which appeared in paragraph 101 of the Special Rapporteur's seventeenth report. The Special Rapporteur had also submitted to the Working Group a revised draft recommendation, which he had elaborated in the light of the comments made during the plenary debate. The Working Group had worked on the basis of that revised text, which it had examined paragraph by paragraph.

58. Taking into account the position expressed by some members during the plenary debate, the Working Group had considered that the text of the recommendation should be formulated in terms of a suggestion addressed to the General Assembly and that the Commission's proposals should remain general so as to leave largely open the modalities of any mechanism that might be established. The text of the recommendation as provisionally adopted by the Working Group was reproduced in document A/CN.4/L.795, and the Working Group proposed that this recommendation be included in chapter IV of the Commission's draft report on the work of the current session.

59. With regard to the modifications introduced to the text as initially proposed, the Working Group had deemed it preferable to limit the scope of the recommended mechanism to States. Thus, the references to international organizations had been deleted from the text of the recommendation and from the annex.

60. With respect to the preamble, a reference to the formulation of reservations had been included in the

* Resumed from the 3106th meeting.

** Resumed from the 3090th meeting.

second preambular paragraph, and the last preambular paragraph now referred to “flexible mechanisms”, so as to cover both the “observatory” referred to in paragraph 1 and the assistance mechanism envisaged in paragraph 2 and in the annex.

61. Paragraph 1 was new. Based on a proposal by the Special Rapporteur, it contained a suggestion that the General Assembly consider establishing within the Sixth Committee an “observatory” on reservations to treaties at the universal level and that it recommend that States consider establishing such mechanisms at the regional and subregional levels. As indicated in the footnote to paragraph 1, such observatories could draw their inspiration from the one established within CAHDI.

62. With regard to the annex, he said that, following a suggestion by the Special Rapporteur and in the light of comments made during the plenary debate, reference was now made to a mechanism consisting of “experts”, rather than “government experts”. The formulation of paragraph (ii) had been simplified; reference was now made to reservations, objections to and acceptances of reservations, without mentioning interpretation, permissibility or effects of reservations. In paragraph (iii), the term “disputes” had been replaced by the more general expression “differences of view”. An additional footnote had been included suggesting that the experts engaged in assisting States in settling differences of view should not be the same as those who would have provided assistance to one of the parties.

63. He hoped that the Commission would be in a position to take note of the report and of the recommendations of the Working Group regarding an annex to the Guide to Practice on the reservations dialogue and the inclusion in the draft report of a recommendation on mechanisms of assistance in relation to reservations.

64. Mr. VASCIANNIE, referring to the recommendation on the reservations assistance mechanism, said he was surprised that the observatory, the nature of which was not very clear, had been given pride of place before the assistance mechanism in the suggestions to the General Assembly. He sought clarification on that point.

65. Mr. VÁZQUEZ-BERMÚDEZ (Chairperson of the Working Group on reservations to treaties) said that the two suggestions were not mutually exclusive and that it was for reasons of drafting logic that the suggestion relating to the establishment of an assistance mechanism immediately preceded the annex in which the assistance mechanism was defined.

66. Mr. VASCIANNIE said that, if the order of the suggestions did not matter, he proposed reversing it.

67. Mr. PELLET (Special Rapporteur) said it followed from his report that he considered the mechanism envisaged in paragraph 2 to be more important than the observatory contemplated in paragraph 1, but he did not have any set opinion on the order of the paragraphs.

68. Mr. CANDIOTI suggested that, for the sake of convenience, the footnote to paragraph 1 provide the website address of CAHDI. In that connection, he asked

whether CAHDI itself constituted the observatory or whether it contained a body exercising that function. He also stressed that depositaries should be encouraged to continue to improve their means of communicating reservations, for example by creating databases or easily accessible Internet sites in order to help countries with limited resources in that area.

69. Ms. ESCOBAR HERNÁNDEZ, speaking as Vice-Chairperson of CAHDI, said that CAHDI itself exercised the function of observatory on a permanent basis, in collaboration with the secretariat of the Council of Europe.

70. Mr. NOLTE said he preferred that the order of the suggestions remain as given by the Working Group. It was easier to give effect to the first suggestion, namely establishing a reservations observatory, than to the second suggestion, and thus the current order was more realistic.

71. Mr. DUGARD supported Mr. Vasciannie’s proposal, especially since paragraph 1, with its reference to CAHDI, was “Eurocentric”, whereas paragraph 2 concerned a general mechanism.

72. Mr. PETRIČ agreed with Mr. Nolte that the current order of the paragraphs should be retained.

73. Mr. PELLET (Special Rapporteur) said that he was troubled by the reason given by Mr. Nolte and even more so by the one given by Mr. Dugard, but he reiterated that, as far as he was concerned, the order of the paragraphs was of little importance.

74. After a discussion in which Mr. NOLTE, Mr. PETRIČ, Mr. VÁZQUEZ-BERMÚDEZ (Chairperson of the Working Group) and Mr. PELLET (Special Rapporteur) took part, the CHAIRPERSON said that, if he heard no objection, he would take it that the Commission wished to take note of the oral report of the Chairperson of the Working Group on reservations to treaties, with the amendment proposed by Mr. Vasciannie on the order of the paragraphs in document A/CN.4/L.795, on the understanding that the annex on the reservations dialogue and the recommendation on the assistance mechanism would be considered by the Commission paragraph by paragraph when it adopted its annual report.

It was so decided.

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

[Agenda item 8]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

75. Ms. ESCOBAR HERNÁNDEZ said that the Special Rapporteur’s third report was closely in line with the two previous reports⁴⁰⁷ and reflected careful logic. The substantive aspects of the topic having been examined in

⁴⁰⁷ *Yearbook ... 2008*, vol. II (Part One), document A/CN.4/601 (preliminary report) and *Yearbook ... 2010*, vol. II (Part One), document A/CN.4/631 (second report).

the preliminary report and the second report, the third report, which focused on procedural questions, was much less controversial.

76. However, some of the propositions formulated in the third report and summarized in paragraph 61 of the document were debatable.

77. Particularly troubling was the lack of clarity with regard to State officials or agents who enjoyed immunity, notably where reference was made to a category already established in the previous reports, that of other officials who enjoyed personal immunity, and the Special Rapporteur's insistence on defining immunity in a manner that was sufficiently broad to include former State officials.

78. In the third report, the Special Rapporteur continued to attach absolute importance to the wish of the official's State, which resulted in that wish being given primacy when determining which persons enjoyed immunity and in its being taken solely into account when defining what could be deemed "official acts".

79. Although the Special Rapporteur introduced a number of elements aimed at establishing a balance between the State of the official and the forum State, that type of "safeguard clause" was inadequate for three reasons. First, the determination of the beneficiaries of immunity was a question of international law. It could not be exclusively subordinated to rules of domestic law, and even less to a decision by the authorities of another State. Secondly, the concept of "official acts" must be objective and must be subject to criteria defined under international law, and not unilaterally by the official's State. Such an exclusivity could not even be justified by the fact, noted by the Special Rapporteur, that the qualification of an act as "official" might entail the international responsibility of another State. Thirdly, the principle of sovereign equality and the principle *par in parem non habet imperium* required that the opinion of the forum State must be taken into account. While it was certain that a State could not be subject to the compulsory jurisdiction of another State without account being taken of its wish, it was equally certain that the absolute primacy of the wish of the official's State automatically resulted in a limitation of the sovereign rights of the forum State, whose courts would not be able to exercise their jurisdiction over a person because of another State's mere decision, the validity or legitimacy of which could not be contested.

80. Consequently, she could not subscribe to all the propositions formulated in paragraph 61 (*d*), (*g*) and (*i*) of the Special Rapporteur's third report. On the other hand, she fully agreed with the assertion that the question of immunity must in principle be posed as soon as possible, including at the pretrial stage.

81. She also endorsed the idea that the right to waive the immunity of an official was vested in the State concerned. However, she had reservations about the possibility of invoking immunity at any time, including when the State had not made any prior declaration of waiver or when it had partially waived the immunity of its official. She had even stronger reservations about the conclusion that the official's State could invoke immunity at the stage of appeal proceedings if it had implicitly or explicitly

waived it in the court of first instance. Waiver of immunity had important consequences not only at the political, but also at the legal level. Thus, it must be subject to a strict interpretation of the principle of legal certainty. For that reason, she could not fully endorse the conclusion contained in paragraph 61 (*o*).

82. The Special Rapporteur's comments in the third report on the international responsibility of the forum State which followed from its not having raised the question of immunity were acceptable, although the assertion in the first sentence of paragraph 61 (*b*) went too far.

83. With regard to the relationship between the immunity of a State official from foreign criminal jurisdiction and the international responsibility of the State concerned, she agreed on the whole with the conclusions in paragraph 61 (*q*) and (*r*).

84. On the other hand, she found it more difficult to endorse the warning contained at the end of paragraph 60 that, if it did not invoke the official's immunity, the State opened the way for that person to be criminally prosecuted in a foreign State and thereby created the possibility of occasionally serious intrusion by a foreign State into its internal affairs. The reference to such an intrusion as a consequence of the exercise of foreign criminal jurisdiction went too far.

85. She deeply regretted that Mr. Kolodkin would not pursue his task as Special Rapporteur on the topic and hoped that the new Commission that emerged from the elections in November 2011 would continue to give priority to the topic in its work.

86. Mr. VASCIANNIE said that he supported most of the conclusions put forward by the Special Rapporteur in the third report. As noted by Mr. McRae, the Special Rapporteur had not been dogmatic when practice had been insufficient or did not suggest definitive answers.

87. Concerning the conclusions set out in paragraph 61 of the report, he fully agreed with other speakers that the question of immunity must be considered either at the pre-trial stage or early in the court proceedings and that failure to consider the issue of immunity *in limine litis* might give rise to responsibility on the part of the forum State.

88. The Special Rapporteur had done well to stress in paragraph 61 (*c*) that the invocation of immunity should be by the official's State, although personally he thought some degree of flexibility could be contemplated. In paragraph 15, the Special Rapporteur noted that "only when it is the State of the official which invokes or declares immunity is the invocation or declaration of immunity legally meaningful, i.e., only under those circumstances does it have legal consequences". He joined Mr. Dugard and others in asking whether there might be any exceptions to that. The Special Rapporteur might consider whether any legal effects attached to the invocation of immunity by the official himself, for example a stay in proceedings until the official's status was confirmed by his State. That approach might already be implicit in the Special Rapporteur's requirement that the forum State know that criminal measures were contemplated if the

rule on invocation was to apply, but it might be helpful for accused persons to be aware that they should bring their putative status to the attention of the court at an early stage in the proceedings.

89. On a related point, the Special Rapporteur noted, partly in reliance on *Certain Questions of Mutual Assistance in Criminal Matters*, that the court of the forum State was not obligated to consider the question of immunity *proprio motu*. He agreed with that conclusion and asked whether there were any guidelines which could be recommended concerning the circumstances in which the court in the forum State could exercise its *proprio motu* discretion. That would not necessarily undermine the main rule that the court could choose to rely only upon the invocation of immunity by the official's State.

90. On the whole, he was in agreement with the Special Rapporteur on the procedure to be adopted by the official's State in notifying the forum State of the invocation of immunity, and in particular the idea that it was not necessary for such notification to be given to the foreign court, but could go through diplomatic channels. However, it would be good not to have a hard and fast rule to the effect that, in the case of the troika, the forum State must consider the question of immunity on its own and without regard to the invocation of immunity by the official's State.

91. As to waiver, he agreed with the approach recommended by the Special Rapporteur. Waiver for members of the troika must be express, with due note taken of the case in which the official's State requested that another State take criminal procedure measures. For other officials, waiver could be express or implied. The technical issues raised by implied waiver could be addressed when the Commission considered the draft articles.

92. In paragraph 61 (*r*) and in the section of the report preceding the summary, the Special Rapporteur examined the relationship between the official's immunity and the responsibility of the official's State and asserted that a State which invoked the immunity of its official in relation to a charge recognized that the act constituted an act by that State itself and that this established the prerequisites for the international legal responsibility of the State. He disagreed with the Special Rapporteur on that point. As noted by Mr. Singh, there might be a variety of reasons that explained the invocation of immunity by the official's State, including the desire of the official's State to investigate the matter that formed the basis for the criminal charge. The official's State might also wish to invoke immunity quickly in order to avoid undue embarrassment for the official, and it might do so before forming a clear view as to its responsibility. In the circumstances, the invocation of immunity might be a factor to be considered in determining whether the prerequisite of attribution had been satisfied with respect to the invoking State, but he did not support the strict rule that appeared to be contemplated by the Special Rapporteur in paragraph 61 (*r*).

93. Finally, he noted that there were important matters outstanding from the second report, including the nature and extent of the immunity to be enjoyed by members of the troika. He agreed with Mr. McRae and others that the issue should be sent to a working group in 2012 for

further consideration in the light of the different opinions expressed in the Commission. The Commission might also consider appointing a new special rapporteur first, who would be given the opportunity to formulate a position on the question before its referral to a working group. Drawing attention to the chapter on jurisdictional immunities of States and their property in the *Yearbook of the International Law Commission, 1989* (vol. II, Part Two), he recalled that article 4, paragraph 2, of the draft articles provisionally adopted by the Commission stated the following: "The present articles are likewise without prejudice to the privileges and immunities accorded under international law to heads of State *ratione personae*."⁴⁰⁸ Why not also Heads of Government and Ministers for Foreign Affairs? The Special Rapporteur, Mr. Sucharitkul, responded by saying that "the privileges and immunities enjoyed by these persons as well as by members of the families of heads of State were granted on the basis of international comity rather than in accordance with established rules of international law".⁴⁰⁹ However, the Special Rapporteur had been pressed further, because he noted the following: "With regard to paragraph 2, several members suggested that the scope of the provision be extended to heads of State in their private capacity, as well as to heads of Government, Ministers for Foreign Affairs and other persons of high rank."⁴¹⁰ The Special Rapporteur said that he would not object to adding a reference to Heads of Government, Ministers for Foreign Affairs and other high-ranking officials, but he would not do so for families of the Head of State, as he still doubted that families had special status "on the basis of established rules of international law".⁴¹¹ That implied that the Special Rapporteur had changed his mind on whether the members of the troika had immunity *de lege lata*.

94. As the extract showed, the question was not new, and it was not the first time that the Commission had had to address it. Thus, it was difficult to imagine that the reputation of the Commission would turn on the way it sought to resolve the issue.

The meeting rose at 1 p.m.

3115th MEETING

Friday, 29 July 2011, at 10 a.m.

Chairperson: Mr. Maurice KAMTO

Present: Mr. Caffisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escobar Hernández, Mr. Fomba, Mr. Galicki, Mr. Hmoud, Ms. Jacobsson, Mr. Kolodkin, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

⁴⁰⁸ *Yearbook ... 1989*, vol. II (Part Two), p. 102, para. 443.

⁴⁰⁹ *Ibid.*, pp. 102–103, para. 446.

⁴¹⁰ *Ibid.*, p. 103, para. 448.

⁴¹¹ *Ibid.*, para. 450.