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Summary record of the 2983rd meeting

Topic:
Immunity of State officials from foreign criminal jurisdiction

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126. As to the Court's pending cases, it had concluded hearings on preliminary objections in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*. During the oral proceedings, the parties had made extensive references to the Commission's articles on responsibility of States.²³³ The judgment, which was rather complex, was under preparation. At the beginning of September, the Court would also be hearing arguments on the merits in a case concerning *Maritime Delimitation in the Black Sea*.

127. Three new contentious cases having been filed with the Court in the past year, including the *Maritime Dispute (Peru v. Chile)* and *Aerial Herbicide Spraying (Ecuador v. Colombia)* cases that she had already mentioned in passing. The Court's current docket therefore stood at 12 cases.

128. In closing, speaking on behalf of the entire Court, she wished the Commission every success in its work in the coming weeks.

129. The CHAIRPERSON thanked Judge Higgins, on behalf of the Commission, for her very interesting statement and for the invaluable information she had supplied on cases currently before the Court.

The meeting rose at 1.05 p.m.

2983rd MEETING

Wednesday, 23 July 2008, at 10.15 a.m.

Chairperson: Mr. Edmundo VARGAS CARREÑO

Present: Mr. Brownlie, Mr. Caffisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kolodkin, Mr. McRae, Mr. Melescanu, Mr. Niehaus, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Ms. Xue, Mr. Yamada.

Immunity of State officials from foreign criminal jurisdiction (*continued*) (A/CN.4/596 and Corr.1, A/CN.4/601)

[Agenda item 9]

PRELIMINARY REPORT OF THE SPECIAL
RAPPORTEUR (*continued*)

1. The CHAIRPERSON invited the Commission to continue its consideration of the preliminary report of the Special Rapporteur on immunity of State officials from foreign criminal jurisdiction.

2. Mr. PELLET said that he had learned of the existence of a memorandum by the Secretariat on immunity of State officials from criminal jurisdiction. Mr. Kolodkin's report was, in his view, both questionable and well drafted. It was of excellent quality, but he also found it to be extremely questionable, both in terms of points that were addressed and in terms of one very important point that was omitted. The general tone of the report was also problematic. Without wishing to judge the Special Rapporteur on his alleged motives, he had the impression throughout that the author of the report was favourably predisposed to the idea of immunity of State officials from jurisdiction, a feeling that he did not share, although he admitted that such immunity was a necessary evil and he had no intention of mounting a crusade against the principle.

3. With regard to methodology, the Special Rapporteur had rightly restricted his presentation of the issues to an overview of existing practice. By adopting a deductive approach, he had avoided engaging in empty speculation and had instead provided a rigorous outline of the issues to be addressed, although one—in his view, essential—issue had been forgotten. Moreover, he was not convinced that there was a fundamental difference between the “preliminary issues” addressed in paragraphs 27 to 102 and the “issues to be considered when defining the scope of the topic” laid out in paragraphs 103 to 130. It was to be hoped that, contrary to the reservation expressed by the Special Rapporteur in presenting his preliminary report, his future reports would be equally learned and well documented.

4. The Special Rapporteur had drawn a number of conclusions from the impressive body of clearly and rigorously presented information, some of which must be deemed irrefutable. First, while courtesy certainly played a role, particularly where immunities were accorded to the entourage of a Head of State, recognition of such immunities fell primarily within the domain of legal obligations—two concepts that were not necessarily irreconcilable. Next, leaving aside existing treaties that had some degree of relevance, the area was largely governed by customary international law, which offered scope for codification and progressive development, since the Commission could draw support from a reasonably solid legal base, which was not the case with regard to, for example, the protection of persons in the event of disasters. He also agreed without hesitation that jurisdiction preceded immunity, that the question of immunity arose only where a court had jurisdiction, that immunity could prevent such a court from exercising its jurisdiction and that the foregoing constituted a preliminary issue, probably of admissibility, although he personally found the distinction between admissibility and jurisdiction to be of little consequence. In that connection, he noted on a point of translation that the concept of “*jurisdiction*” in French did not mean exactly the same thing as “*jurisdiction*” in English, and that the terms “*jurisdiction législative*” and “*jurisdiction exécutive*” in paragraph 45 of the French version were virtually meaningless and should in fact read: “*compétence législative*” and “*compétence exécutive*”. Similarly, the French translation of the term “*act of State*” in the passage beginning with paragraph 71 by “*acte de gouvernement*” was unsatisfactory because that concept, which existed in French administrative law, should not be confused with the “*act of State*” doctrine as applied in the

²³³ See *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 26 *et seq.*, para. 76.

United States; moreover, the idea of an “*acte de gouvernement*” in French law was more likely to be associated with non-justiciability.

5. On the substance, he agreed with the Special Rapporteur that the concept of immunity from jurisdiction constituted a procedural rule, also in the case of personal immunity, rather than a substantive rule. While immunity could prevent a particular court from ruling on a leader’s responsibility, it in no way exonerated the leader under international law—a further reason why the Special Rapporteur was well advised to confine himself to what he termed judicial jurisdiction since, as he stated in paragraph 47, “for the purpose of the articles, the concept of jurisdiction covers the entire spectrum of procedural actions”. That being the case, the Special Rapporteur’s decision to include what he termed “executive jurisdiction” in the topic was difficult to understand. Perhaps he was referring to enforcement measures, which should certainly be included, but if his impression was correct and the scope of the reference was broader, he failed to see why the topic could not be restricted to judicial jurisdiction. In particular, he was unable to understand why the Special Rapporteur proposed to exclude interim measures from the study or why he seemed, in paragraph 55, to contemplate including practice in relation to foreign civil jurisdiction. While a study of such practice might be useful for comparative purposes, it had no bearing on the topic of immunity of State officials from foreign criminal jurisdiction. Lastly, he agreed with the Special Rapporteur that a distinction should be made between the personal immunity (immunity *ratione personae*) of the State official in question and functional immunity (immunity *ratione materiae*), which related only to certain acts. He preferred to refer to it as functional immunity, since the granting or denial of immunity depended on the nature of the acts performed in discharging an office or function.

6. He would be unhappy if the Special Rapporteur were to act on his apparent intention to omit from the study questions of immunity for the family and entourage of State officials, since the issue, though subsidiary, was related to the topic. He would be even unhappier if the Special Rapporteur failed to consider the impact of recognition or non-recognition of the State that persons invoking immunity represented. The question of recognition was perhaps one of the core issues to be addressed, and the Commission would have to determine whether non-recognition of a State had an impact on the immunity of its officials. For his part, as a staunch supporter of the declarative theory of recognition, he considered that non-recognition should have little or no bearing on the question of immunity.

7. The Special Rapporteur was endeavouring unduly, in his view, to broaden the scope of personal immunity as opposed to functional immunity. It was normal for the threesome or “troika” composed of the incumbent Head of State, Head of Government and Minister for Foreign Affairs to enjoy “absolute” immunity. However, aside from the fact that personal immunity ceased when an official left office, subject to diplomatic and consular immunities that should, incidentally, be excluded from the scope of the topic, such immunity could not be extended beyond the threesome in question. In its disastrous judgment in the

Arrest Warrant case, the ICJ had stated that the issue of the Belgian arrest warrant was in itself liable to affect the conduct by the Democratic Republic of the Congo of its international relations. He was firmly convinced that therein lay the reason for granting personal immunities: it was because a State’s international relations might be affected by the judgement of a foreign criminal court that such personal immunities were granted. Notwithstanding the Special Rapporteur’s hesitations, it was quite clearly because the Minister for Foreign Affairs in the case in point, Mr. Yerodia, was primarily responsible for conducting the State’s international relations that he enjoyed personal immunity, in other words general immunity from criminal jurisdiction in respect of all his acts. And it was because the same applied to Prime Ministers, Heads of Government and Heads of State that they were the only senior officials, as noted in paragraph 111 of the report, authorized to represent the State in general, and *ipso facto* in international relations, for instance by signing international treaties without the need to produce full powers. It was for that reason alone, whatever the Special Rapporteur might be inclined to suggest, that such broad immunity was accorded to them. The same was true, subject to certain conditions, of heads of diplomatic missions and consular officials. He submitted, however, that the threesome and the category of ambassadors and consuls were the only officials referred to in paragraph 51 of the *Arrest Warrant* judgment in the somewhat awkwardly worded phrase “certain holders of high-ranking office in a State”. Apart from the threesome, no general immunity from criminal jurisdiction and no personal immunity existed, which did not mean that other government or State officials could not be covered in some cases by very broad immunities. In such cases, however, it was not their office or function in general that was covered, but specific acts that they performed in discharging their official functions. It followed that all State officials other than the Head of State, the Head of Government and the Minister for Foreign Affairs enjoyed functional and not personal immunities.

8. There were a number of reasons why such a solution seemed appropriate—reasons of a practical nature to begin with. If one moved beyond the threesome, whose representative functions at the international level constituted a well-defined criterion for separating them from other categories of State officials, where should the line be drawn? Should one include the minister of defence, who performed certain duties of international representation, albeit in a less prominent capacity than the Minister for Foreign Affairs since they were not his or her core duties nor were they generally recognized under international law? Or should one include the national security chief, who seemed to have been denied any personal immunity by the ICJ in the recent case concerning *Certain Questions of Mutual Assistance in Criminal Matters*, although the reasons for that position were unclear? There was nothing improper about granting immunity if one held that the law should be grounded on a certain moral decency. When such persons—a minister of defence, a national security chief or a State’s attorney general—were performing official duties at the international level, they unquestionably enjoyed functional immunities, which constituted the necessary and sufficient condition for the effective discharge of their functions, while the impunity that might result from an unduly broad interpretation of their immunities was restricted.

9. As noted by the ICJ in paragraph 194 of its judgment in *Certain Questions of Mutual Assistance in Criminal Matters* regarding the Head of National Security and *Procureur général* of Djibouti, “there are no grounds in international law upon which it could be said that the officials concerned were entitled to personal immunities”. He fully agreed with the argument put forward by a counsel for Djibouti in the case and which the Court endorsed in paragraph 190 of its judgment:

As for officials, either they act in their official capacity, in which case their personal criminal liability cannot be invoked, or they act in a private capacity, in which case no functional immunity can operate to their benefit. In this instance too there is really no place for the least presumption which might *a priori* and in the abstract tilt the scales one way or another. The issue is not to presume anything whatsoever, but to verify concretely the acts in question, when of course the issue of immunity has been raised.

In that context, “verify concretely” meant that such persons did not enjoy personal immunity but functional immunity. He was therefore unable to agree with the Special Rapporteur when he sought to extend the circle of authorities enjoying personal immunity beyond the members of the threesome or diplomats and members of special missions. As the law of diplomatic and consular immunity, including with respect to special missions, was well established, that aspect of the topic must be formally excluded from the scope of the Special Rapporteur’s study. On reading paragraphs 98 to 101, however, he was unsure of the Special Rapporteur’s intentions in that regard.

10. At the same time, he was by no means suggesting that the Commission should limit its study to the criminal immunity enjoyed by an incumbent Head of State, Head of Government or Minister for Foreign Affairs. His point was that, on the one hand, diplomatic and consular immunity, including for special missions, should be excluded without hesitation from the study and, on the other, that the three authorities mentioned, and they alone, enjoyed personal immunity—which, in his view, ceased when they left office since the source of their immunity disappeared when they no longer represented the State. The foregoing in no way implied that the study should not deal with the functional immunity enjoyed, subject to certain conditions, by all State officials.

11. The second point on which he took issue with the Special Rapporteur concerned what he held to be a serious omission from the report, apart from the question of the impact of immunity which the Special Rapporteur intended to address in a subsequent report. He was unable to share the Special Rapporteur’s reverential respect for the stance of the ICJ in the *Arrest Warrant* case. While the Court generally applied existing law, it was quite prepared, when it felt that the circumstances so required, to interfere in the process of elaboration of the law, by supplementing it, shifting its direction or, less felicitously, seeking to prevent or curb current trends. In the *Arrest Warrant* case in particular, its eminently overcautious response to a clearly discernible trend towards withholding criminal immunity from political leaders in the case of particularly heinous crimes had needlessly (since the Congolese application could have been taken up elsewhere) curbed a promising trend.

12. While it was appropriate for the Commission to pay close attention to the positions adopted by the ICJ, it was

not necessarily bound by them, and the Court’s far too conservative position in its 2002 judgment in the *Arrest Warrant* case, which ran counter to the general trend at the time towards the communal development of international law, should not unduly intimidate the Commission. He willingly conceded that the immunity of Heads of State or Government or of Ministers for Foreign Affairs should be linked to their persons and not just to the acts they performed. He was also willing to concede, albeit with deep regret, that such immunity was extremely extensive and that it could be argued, *de lege lata*, that it was absolute. Thus, however open to criticism it might be, the Court’s position was not necessarily untenable *de lege lata*. But *de lege ferenda*, from the standpoint of the progressive development of international law, it was certainly open to severe criticism: the large-scale and systematic perpetration of genocide, crimes against humanity, aggression and war crimes should entail total transparency on the part of the State and should bar it from invoking immunity from jurisdiction. The trend had been clearly discernible until the Court’s attempt to apply the brakes to it in 2002, and it would redound to the Commission’s credit if it were to reinforce the trend towards restricting, or even barring, procedural immunity for all State officials in the case of the most heinous international crimes. The joint separate opinion appended by three judges of the Court (Judges Higgins, Kooijmans and Buergenthal) to the 2002 judgment constituted an interesting first step in that direction, especially paragraphs 74 and 75, but the Commission could go a great deal further.

13. In conclusion, he found it regrettable that the Special Rapporteur had not encouraged reflection in the Commission along those lines and had not even included among the issues to be considered the question of whether the immunity of State officials constituted an undifferentiated whole or whether it could be adjusted or modified in terms of the nature of the crimes with which they were charged. If immunity were to thwart the exercise of criminal jurisdiction, crimes of an international character should in turn thwart the enjoyment of immunity, and it was to be hoped that the Special Rapporteur would include that vital aspect of the topic in his future studies.

14. Mr. KOLODKIN (Special Rapporteur) said that he had unfortunately omitted to state in his preliminary report that the points raised by Mr. Pellet in the latter part of his statement would be considered in his next report, when he would address the question of the extent of the immunity enjoyed by State officials from foreign criminal jurisdiction.

15. Mr. DUGARD congratulated the Special Rapporteur on his excellent report and complimented the Secretariat on its memorandum. While the Special Rapporteur’s report was thorough, it avoided some of the issues and he would focus his statement on those omissions. For instance, it was essential to address the question of derogations from the principle of absolute immunity of incumbent or former State officials from foreign criminal jurisdiction in subsequent reports. He trusted that the Special Rapporteur would do so, but he still had serious doubts inasmuch as the Special Rapporteur had not raised the question when presenting his preliminary report and had also overlooked the matter when dealing with the immunity of incumbent or former

State officials. He was inclined to agree with Mr. Pellet that the Special Rapporteur strongly favoured the idea that due account should be taken of the important role played by immunity in ensuring stable relations among States. As a result, he apparently wished to remain content with the current state of immunity law and to accept that State officials enjoyed absolute immunity. He set out the two basic theories underlying that approach in paragraph 87 of his report and noted that that such immunity was further warranted by the principles of the sovereign equality of States and non-intervention. It was, to say the least, surprising that it was only in response to Mr. Pellet's remarks that the Special Rapporteur had stated his intention to address the question of derogations from the principle of absolute immunity for incumbent or former State officials in the case of international crimes. When touching on the question of international crimes, the Special Rapporteur had failed to mention the issue of derogations.

16. It was important to consider whether there was an exception to the principle of immunity for State officials in the case of international crimes in order to determine whether the law was evolving in the direction of restricting that principle. The President of the International Court of Justice had raised that key question at the previous meeting when she had drawn attention to the tension arising from inconsistency between traditional rules on immunity and respect for human rights. The existence of such tensions had been noted by the Commission, which had stated on several occasions that immunity should not be granted to State officials alleged to have been involved in international crimes. For instance, in paragraph 6 of its commentary to article 7 of the 1996 draft code of crimes against the peace and security of mankind, the Commission stated: "It would be paradoxical to prevent an individual from invoking his official position to avoid responsibility for a crime only to permit him to invoke this same consideration to avoid the consequences of this responsibility."²³⁴ The Special Rapporteur could therefore invoke a precedent in support of the existence of a derogation from immunity for current or former State officials. In 1999, the Working Group on jurisdictional immunities of States and their property had also discussed the question of whether there should be a derogation from the principle of immunity in the case of international crimes.²³⁵ Furthermore, the Institute of International Law was currently undertaking a study on the fundamental rights of the person and immunity from jurisdiction in international law and would submit its final report on the subject in 2009. It followed that the Special Rapporteur had every reason to address the issue of derogations from the principle of immunity for State officials; he should also discuss the extent of the immunity enjoyed by former Heads of State, which was referred to in paragraph 4 of the report but not thoroughly examined.

17. He agreed wholeheartedly with Mr. Pellet's comments on the *Arrest Warrant* case. The Special Rapporteur had studied the judgment in detail but had simply dismissed the dissenting opinions of Judge Al-Khasawneh and Judge *ad hoc* Van den Wyngaert on the grounds that the overwhelming majority of judges had supported the contrary

position. According to Judge *ad hoc* Van den Wyngaert, "[t]here is no evidence for the proposition that a State is under an obligation to grant immunity from criminal process to an incumbent Foreign Minister under customary international law. By issuing and circulating the warrant, Belgium may have acted contrary to international comity. It has not, however, acted in violation of an international obligation" [see paragraph 1 of the dissenting opinion of Judge *ad hoc* Van den Wyngaert]. He shared Mr. Pellet's view that the judgment in the *Arrest Warrant* case was "disastrous". The Commission was under no obligation to follow the Court's decisions blindly, especially since the judgment had been handed down before the Court's acceptance of the notion of *jus cogens*. Were the same case before it today, the Court might well adopt a different position. It should also be stressed that the Court had not had any basis at the time for finding in its judgment that there was a customary rule establishing immunity for Ministers for Foreign Affairs. The Court had simply found that, given his status as Minister for Foreign Affairs, the issue against Mr. Yerodia of the arrest warrant of 11 April 2000, and its international circulation, constituted violations of a legal obligation of Belgium towards the Democratic Republic of the Congo, in that they failed to respect the immunity from criminal jurisdiction and the inviolability which the incumbent Minister for Foreign Affairs enjoyed under international law. The Court had thus simply stated that the function of a Minister for Foreign Affairs was to do business abroad, so that Mr. Yerodia should enjoy absolute immunity even if he was guilty, as alleged, of incitement to genocide. As the judgment was thus not based on any rule, the Special Rapporteur should examine the question of its legal basis more thoroughly in due course. He should also consider whether the situation had evolved since 2002, when the judgment had been handed down.

18. Many States had had the opportunity to pronounce on the correctness of the judgment in the *Arrest Warrant* case when incorporating the Rome Statute of the International Criminal Court in their domestic law. While some States, such as the Netherlands, had indicated their approval of the judgment and that they would grant immunity to foreign Heads of State and Government, even where they had allegedly committed an international crime, others had adopted a radically different position. For instance, South Africa had enacted legislation that would authorize the courts to try foreign Heads of State for international crimes without their being able to raise the plea of immunity. Other countries such as Croatia, Germany and New Zealand had enacted statutes contemplating the possibility of allowing national courts to exercise jurisdiction over senior State officials. It was therefore important for the Special Rapporteur to examine States' national legislation to determine their position on the matter. He should also study the Rome Statute of the International Criminal Court, the Statute of the International Tribunal for the Former Yugoslavia and the Statute of the International Tribunal for Rwanda, which expressly excluded immunity for Heads of State or Government. The Special Rapporteur considered that those instruments had no bearing on the topic under consideration because they dealt with international rather than national jurisdiction. He submitted, however, that the Commission could not draw such a sharp distinction. It had not done so, moreover, when elaborating the draft code of crimes against the peace and security of mankind.

²³⁴ *Yearbook ... 1996*, vol. II (Part Two), p. 27.

²³⁵ *Yearbook ... 1999*, vol. II (Part Two), annex, p. 149.

19. With regard to the immunity of former Heads of State, it was unclear whether the Special Rapporteur intended to deal with the matter in his subsequent reports and it was regrettable that his preliminary report had contained no real discussion of the *Pinochet* case. In that connection, he referred to paragraph 61 of the judgment of the ICJ in the *Arrest Warrant* case, in which it stated that the immunities enjoyed under international law by an incumbent or former Minister for Foreign Affairs did not represent a bar to criminal prosecution in certain circumstances. It further stated that, “[p]rovided that it has jurisdiction under international law, a court of one State may try a former Minister for Foreign Affairs of another State in respect of acts committed prior or subsequent to his or her period of office, as well as in respect of acts committed during that period of office in a private capacity”. He suggested that the Special Rapporteur should consider in detail in his subsequent reports what was meant by acts committed “in a private capacity”, particularly whether genocide, war crimes or crimes against humanity committed by a senior State official in pursuance of government policy should be treated as official acts or acts committed in a private capacity. For example, in the *Pinochet* case a judge of the House of Lords had noted that the reasoning of the divisional court led to the conclusion that Hitler’s order regarding the “final solution” had constituted an official act.²³⁶ Did that mean that the perpetrator would have been entitled to immunity pursuant to the decision taken by the ICJ in the *Arrest Warrant* case? As the Special Rapporteur recognized that the question of which acts should be considered as having been performed “in an official capacity” was of paramount importance for determining the extent and limits of immunity, he trusted that it would be discussed in great detail in his subsequent reports.

20. The Special Rapporteur considered that the distinction between immunity *ratione personae* and immunity *ratione materiae* was of only minor importance in the case of senior State officials. His own view was that the distinction was of crucial importance when it came to deciding on the immunity of former Heads of State, as illustrated by the *Pinochet* case, which made it clear that former State officials enjoyed immunity only *ratione materiae*. The majority of judges in the *Pinochet* case had held that the acts of torture attributed to the accused could not be deemed to have official status because, on the one hand, they could not be considered as an official act of State and, on the other, because they violated peremptory norms of international law.

21. On the question of which officials should be covered, he agreed with Mr. Pellet that immunity should not extend beyond the triumvirate of the incumbent Head of State, Head of Government and Minister for Foreign Affairs for the reasons advanced by Mr. Pellet. Moreover, there was little State practice to support such an extension. The Special Rapporteur cited an English district court ruling in support of extending immunity to other State officials, but the citation represented only the opinion of a minor court. There were also strong policy reasons against such an extension, inasmuch as ministers of defence or ministers of the interior were actually the persons most likely to be

involved in international crimes. Lastly, he did not think it was appropriate to extend immunity to the members of the family of a State official, and he considered that the Commission should undertake a direct study of the question of recognition.

22. In conclusion, he said that the question of immunity of State officials from foreign criminal jurisdiction was one of the most important and exciting topics facing contemporary international law. The key question was whether Heads of State, Heads of Government, Ministers for Foreign Affairs and senior State officials should be granted immunity in respect of international crimes. That was really the only issue that the Commission needed to discuss for the time being. The other issues were peripheral and covered by traditional rules of international law.

23. The CHAIRPERSON, speaking as a member of the Commission, said that he fully agreed with Mr. Dugard, especially his statement regarding the crucial importance of the *Pinochet* case for the topic under consideration. However, he drew the attention of Commission members to the need to be more precise when referring to the case, which had been considered by a number of different English judicial bodies. The most important decision was, in his view, the judgement handed down by the second panel of the House of Lords.

24. Mr. PELLET said that he was unfortunately unable to agree with Mr. Dugard on the points he had raised with regard to the question of *jus cogens*. If one accepted that immunity issues arose only at the jurisdiction stage, the *jus cogens* status of a rule had no bearing on a court’s jurisdiction, as stated on several occasions by the ICJ, particularly in the *Armed Activities on the Territory of the Congo (New Application: Democratic Republic of the Congo v. Rwanda)* case. It was unwise to confuse issues of jurisdiction with issues of *jus cogens*. A link could indeed be forged between immunity or lack of immunity and *jus cogens*, but it was inappropriate to link *jus cogens* and jurisdiction because of the danger of undermining the principle that rules of jurisdiction were not altered by the nature of the rule breached. Otherwise, the ICJ would have jurisdiction over everything that could be characterized as *jus cogens*.

25. Mr. HMOUD said that he had two comments on Mr. Dugard’s statement. First, with regard to the distinction between functional immunity and personal immunity in respect of certain crimes, which was a highly contentious issue, the same question arose in the context of diplomatic and consular immunities. It was difficult to draw the line between acts performed in an official capacity and those performed in a personal capacity. Secondly, while he agreed that one could not say that international crimes were committed by the State, he submitted that there was one exception, namely acts of aggression, which could be characterized as State acts. He hoped that the Special Rapporteur would consider whether that question merited special attention in the context of the topic under consideration.

26. Mr. BROWNLIE, referring to the Chairperson’s comment on the *Pinochet* case, said that the decision by the first panel of the House of Lords, which was of great

²³⁶ *Pinochet (No. 1)*, 25 November 1998, ILR, vol. 119 (2002), p. 104.

interest and contained a remarkable statement by Lord Steyn that had been mentioned by Mr. Dugard, had not been annulled on the basis of its substance but on the basis of the apparent bias of one judge. When the new panel was constituted, the first panel's decision had been cited during the arguments both by counsel and by the judges on account of its quality. It was therefore unrealistic to argue that the first decision did not count. The real problem was that other municipal courts had failed to act on the case law it established.

27. Mr. GAJA said that the Special Rapporteur had produced a well-researched and clearly argued preliminary report. It not only reviewed practice and doctrine, but also indicated the general approach to the topic that the Special Rapporteur intended to adopt. The Commission had also been provided with an outstanding memorandum by the Secretariat, which even covered the recent judgment of the ICJ in the *Certain Questions of Mutual Assistance in Criminal Matters* case. In this context, he wondered whether it might not be preferable for the Commission to have before it a single report by the Special Rapporteur instead of two overlapping studies, leaving it to the Special Rapporteur to acknowledge, where appropriate, the Secretariat's contribution. Should the need arise for an analysis of specific aspects of the subject, the Secretariat could undertake one or more additional studies in its own name.

28. The preliminary report already covered a substantial portion of the topic, but it would be premature to comment on the various questions raised and their possible solutions or indeed on questions that had not been raised. He would nonetheless offer a few comments that the Special Rapporteur might find helpful in the further pursuit of his study.

29. His first comment concerned a point already raised by two previous speakers. The Special Rapporteur, citing the judgment of the ICJ in the *Arrest Warrant* case, held that certain holders of high-ranking office such as the Head of State, the Head of Government or the Minister for Foreign Affairs enjoyed personal immunity. The Court seemed to have adopted a more restrictive approach in its judgment in the *Certain Questions of Mutual Assistance in Criminal Matters* case already cited by Mr. Pellet. A thorough analysis of State practice and a discussion of relevant policy considerations should be undertaken. In terms of both practice and policy, the criterion proposed by the Special Rapporteur in paragraph 121 of his report for determining which State officials enjoyed personal immunity, namely "the importance of the functions", seemed far too broad. When ministers travelled on official business, they might fall into the category of members of a special mission and enjoy personal immunity in that capacity alone.

30. His second comment concerned terminology. Functional immunity, or immunity *ratione materiae*, was sometimes referred to, for instance by the ICJ, as State immunity. The report contained similar wording, for instance in paragraph 88. In his view, it would be preferable to avoid such terminology because a State official's functional immunity did not necessarily coincide with State immunity. There might be limits to functional immunity from the criminal jurisdiction of a foreign State, but a

State itself could never be subject to criminal jurisdiction. In the case of civil jurisdiction, on the other hand, a State official might enjoy immunity while the State itself might not: for instance, when an official purchased property abroad for the State, the official would enjoy functional immunity, while the State would be subject to civil jurisdiction if a dispute arose regarding the sale.

31. Furthermore, it might have been justifiable, in view of the preliminary nature of the report, to refrain from considering certain exceptions to the functional immunity of State officials. However, a reference to the possible existence of certain exceptions would have been useful, if only to indicate that, in the Special Rapporteur's view, their existence was indeed arguable.

32. The first exception—which was discussed in paragraphs 180 to 207 of the Secretariat's memorandum—concerned the commission by a State official of an international crime, or at least of specific international crimes. As a great number of such crimes could hardly be committed by someone who was not a State official, they would only be prosecuted, in the absence of an exception to immunity, in the unlikely event of such action being taken by the State of which the official was a national.

33. The second exception—briefly covered in paragraphs 162 to 165 of the Secretariat's memorandum—concerned conduct by a State official abroad that was not authorized by the territorial State. Typically, spies did not enjoy functional immunity, and the same applied to certain acts by consular officials, for instance the act of killing a local police officer on instructions from the sending State. In such cases, there should be no immunity. He noted that the ICJ, in a passage in its judgment in the case concerning *Certain Questions of Mutual Assistance in Criminal Matters*, did not seem to reject the idea that State authorization was a precondition for immunity. However, in paragraph 191 of the judgment, the Court based its conclusion that immunity should be denied on a different argument, namely that it had not been "concretely verified" that "the acts which were the subject of the summonses as *témoins assistés* issued by France were indeed acts within the scope of their duties as organs of State". The Court's finding that the acts in question were not official rendered it unnecessary to establish whether the lack of authorization by the territorial State affected the officials' immunity.

34. Although he was impressed by the scale of the research conducted both by the Special Rapporteur in his preliminary report and by the Secretariat in its memorandum, he was surprised that issues relating to military forces stationed abroad in peacetime had not been addressed. The immunity of troops was often regulated by multilateral or bilateral agreements, but issues of immunity sometimes arose under general international law. Moreover, in most cases the agreements in question only covered relations between the sending and receiving States, whereas the question of immunity might arise with respect to a third State. For instance, the Italian Court of Cassation had found that a soldier from the United States of America who had shot dead an Italian agent at a checkpoint near Baghdad in Iraq enjoyed immunity from jurisdiction [*Lozano v. Italy*].

35. The question of immunity with respect to third States arose not only in the case of members of foreign military forces and should be duly analysed. Immunity might stem from the functions that an official exercised in a particular State. For instance, a diplomatic agent enjoyed personal immunity because of the functions he or she exercised in the receiving State, but one might ask what kind of immunity—personal or functional—the agent enjoyed in a State other than the receiving or transit State. This type of question had not been addressed either in the preliminary report or in the Secretariat's memorandum, and he hoped that the Special Rapporteur would take up the issue of the situation in third States in a subsequent report.

36. Mr. CAFLISCH said that the topic under consideration was, in principle, well grounded in *lex lata*, as had been shown in the thorough, clear and analytical report before the Commission, for which he thanked the author. The report would greatly facilitate the Commission's work, especially the conclusions set out in paragraphs 102 and 130, particularly regarding the following points.

37. First, the question of immunity must be distinguished from that of jurisdiction. Secondly, criminal immunity must be distinguished from civil immunity and, as shown by the *Timoschenko* case²³⁷ mentioned in paragraph 113 of the report, it must begin to operate in the pre-trial phase. Thirdly, immunity was granted, at least in criminal matters, in respect of procedural measures. It was subdivided into immunity *ratione materiae*, which covered acts of State, both current and future acts, and immunity *ratione personae*, which protected limited categories of persons who, by virtue of their functions, personified the State in its relations with other States, and which ceased when the individuals in question no longer formed part of the group of exempted persons. Fourthly, immunity from criminal jurisdiction should be considered solely in terms of foreign criminal jurisdiction and not in terms of an official's immunity from domestic jurisdiction or *vis-à-vis* international courts and tribunals. Fifthly, immunity *ratione personae* was enjoyed basically by Heads of State, Heads of Government and Ministers for Foreign Affairs, referred to as the "threesome", but criteria could and should be established if immunity *ratione personae* were to be extended, where appropriate, to other high-ranking officials. And sixthly, it was unnecessary to consider the question of the recognition of States and governments or that of the immunity of family members of officials enjoying immunity *ratione personae*.

²³⁷ In 2005, in connection with a planned visit to the Russian Federation by Prime Minister Yulia Timoshenko of Ukraine, against whom criminal proceedings had been instituted in the Russian Federation long before her appointment to the post, the official position on the question of her immunity from criminal jurisdiction in the Russian Federation was publicly formulated by the Prosecutor-General of the Russian Federation. In particular, he pointed out that Prime Minister Yulia Timoshenko of Ukraine would have no problem if she wished to visit the Russian Federation, since senior State leaders—including Heads of Government—enjoy immunity. At the same time, he added that the criminal proceedings against Ms. Timoshenko would be extended (www.newsru.com/russia/15feb2005, accessed 2 January 2012). It was only on 26 December 2006 that the Main Military Prosecution of the Russian Federation announced the closing of the criminal case against the former Prime Minister of Ukraine because of the expiration of the statute of limitations.

38. In addition, there seemed to be four core issues to be studied. First, the distinction between civil and criminal immunity, an issue which could cause problems, as shown by practice relating to article 6 of the European Convention on Human Rights, and which could also entail different consequences, especially during the pretrial phase. Second, the distinction between immunity *ratione materiae*, in respect of the act, which was continuous and which existed for all persons who had performed an act on behalf of the State, and immunity *ratione personae*, which was enjoyed by certain high-ranking officials who personified the State's activity in the area of foreign relations. Third, a problem arose when it came to identifying the beneficiaries of immunity *ratione personae*, not in the case of the "threesome"—the Head of State, the Head of Government and the Minister for Foreign Affairs—but in the case of other high-ranking officials. The practice cited in paragraphs 117 to 123 of the report was somewhat porous and inconclusive. It seemed clear that immunity *ratione personae* should be enjoyed only by persons of high rank and not, for example, by a head of a department or division of the ministry of defence. A second criterion was doubtless the degree of involvement of the persons concerned in running the country's foreign affairs; a high degree of involvement would certainly be required. The Commission would have to consider whether such immunity really existed in the case of other high-ranking officials and, if so, on what other criteria it was based. In his view, that issue, as well as the question of international crimes, constituted the most difficult aspects of the topic under consideration. He now wished to comment briefly on a number of points in the Special Rapporteur's preliminary report.

39. The existence of a problem of terminology had not escaped the Special Rapporteur's attention: when referring to the person who had performed the act of State, should one use the term "State representative", "State agent" or "State organ" (para. 108 of the preliminary report) or should one use the term "official" or "high-ranking official", as the Special Rapporteur occasionally did himself (paras. 111, 120 and 121)? He proposed, by a process of elimination, the use of the terms State "agent" or "representative": the person performing the act did not always belong to a permanent State "organ", and the "threesome", as well as other ministers, were not "officials" or "high-ranking officials".

40. Under the heading "Immunity and jurisdiction", the Special Rapporteur rightly drew a distinction between the two concepts, a distinction that was also reflected in the relevant jurisprudence. The Swiss Federal Court, for instance, sought to establish, when considering the question of jurisdiction, whether there was a sufficiently close link between the legal relationship in question and the national territory; then it considered whether immunity was invoked advisedly. Although the courts did not always adopt a clear-cut approach to the matter, it seemed clear that the question of immunity arose only where jurisdiction had been established.

41. In paragraph 54 of his report, the Special Rapporteur noted that criminal and civil jurisdiction were not so easily distinguished, but in paragraph 55 he stated that the two types of jurisdiction had "enough features in common

for consideration of the topic to take into account existing practice in relation to immunity". Personally, he was unsure whether that was the case, given the uncertainty surrounding the question of civil immunity in general.

42. Immunity from criminal jurisdiction was procedural rather than substantive, as noted by the Special Rapporteur in paragraphs 64 to 66 of his report, which meant that while criminal prosecution might be suspended, the possibility of criminal responsibility did not disappear. That was not necessarily the case for civil matters. In some cases involving immunity or an act of State, a breach of the substance of the law in question had been found (for instance in the judgements handed down by the European Court of Human Rights in *Z. and Others v. the United Kingdom* on 10 May 2001 and in *Marković and Others v. Italy* on 14 December 2006).

43. Framing his final comment in terms of a question, he asked why was it advisable, as suggested by the Special Rapporteur in paragraph 70 of his report, to leave aside the question of immunity from interim measures of protection or measures of execution.

44. Lastly, he emphasized that his comments and questions were attributable to the stimulating content of the preliminary report and he commended the Special Rapporteur on his fine work.

45. Mr. PETRIČ thanked the Special Rapporteur for his preliminary report and the Secretariat for its memorandum, which would certainly stimulate an interesting and productive debate in the Commission. There was no doubt in his mind that the Special Rapporteur would address the question of international crimes in due course, since the fact that immunity should not be enjoyed by the perpetrators of certain categories of crimes, known as "crimes under international law", was a core issue. He took it that there had been some form of misunderstanding between the Special Rapporteur and the members who had commented on the subject.

46. A number of trends were discernible in the area covered by the topic. One was a clear tendency to restrict immunity in the case of international crimes. It was illustrated, *inter alia*, by the activities of the International Criminal Court. There was also a tendency to broaden the categories of persons entitled to enjoy immunity *ratione personae*, which reflected a more functional approach to the question. A third trend consisted in placing emphasis on the functional aspects of immunity.

47. In view of the preliminary nature of the Special Rapporteur's report, he would comment on the ideas it contained without dwelling on the wording used. In paragraphs 6 to 26, the Special Rapporteur presented an accurate and precise review of the consideration by the Commission and the Institute of International Law of the question of immunity of State officials from foreign jurisdiction, to which he had nothing to add. In paragraphs 27 to 42, the Special Rapporteur analysed the sources and rightly concluded that "[i]nternational custom is the basic source of international law in this sphere", citing national and international doctrine and jurisprudence in support of that conclusion. The Special

Rapporteur rejected the view that immunity from jurisdiction was granted not as a matter of right, but as a matter of international comity. While he agreed with the Special Rapporteur, he noted that circumstances might differ in the case of former Heads of State or ministers. A State could, of course, grant immunity to officials of another State as a matter of goodwill, exercising its sovereign authority, but the Commission's work should focus on immunity as a right.

48. Mr. Petrič fully supported the Special Rapporteur's reasoning, based on meticulous research, regarding the distinction between civil jurisdiction, administrative jurisdiction and criminal jurisdiction, and his conclusion that only the latter fell within the scope of the topic under consideration. It was also correct that immunity from criminal jurisdiction could already be asserted in the pre-trial phase.

49. As noted by the Special Rapporteur, there was no definition of immunity in general international law. Mr. Petrič fully agreed with the statement in paragraph 58 that "on the one hand there is a right for the State's jurisdiction not to be exercised over the person enjoying immunity, while on the other hand there is a duty of the State that has jurisdiction not to exercise it over the person enjoying immunity". He also agreed that an attempt should perhaps be made to develop a definition of "immunity" and "immunity from foreign criminal jurisdiction" in the context of drafting future draft articles or other normative provisions (para. 60 of the report). The lack of a clear definition of such a core concept would weaken the impact of the product of the Commission's work. In that connection, he fully supported the reasoning in paragraph 63 of the report as well as the reasoning and conclusions regarding the procedural character of immunity from criminal jurisdiction. Immunity protected persons only from criminal prosecution and from the enforcement of criminal law in the State from whose jurisdiction they were exempt, but they were not exempted from respecting the law of that State. He also agreed with the Special Rapporteur's conclusion that, "[a]t this stage at least, it seems advisable simply to address immunity of State officials from foreign criminal jurisdiction, without dealing with the question of immunity from interim measures of protection or measures of execution".

50. With regard to the reasoning and conclusions set out in paragraphs 78 to 82 of the report concerning the immunity of officials *ratione personae* and *ratione materiae*, it was clear that, in principle, immunity *ratione materiae* extended to all persons performing official functions on behalf of the State but only in respect of acts performed in an official capacity. It was equally clear that immunity *ratione personae* encompassed immunity *ratione materiae*. The distinction between the two established by the Special Rapporteur was of great methodological value. For the time being, it was for him to decide how far that distinction should be taken.

51. Mr. Petrič would refrain from commenting on paragraphs 84 to 97 of the report since he agreed with their content. He also shared the views set forth in paragraphs 98 and 99 concerning diplomatic and consular immunities, namely, as also noted by another member of

the Commission, that such immunities were so well established in international law that it was unnecessary to deal with them, save perhaps in the commentary. As indicated in the last footnote to paragraph 101, “the immunity of the State itself was behind all the immunities of all State officials from foreign jurisdiction”.

52. He agreed with the content of the summary contained in paragraph 102 of the report but pointed out, in connection with a question he had broached earlier in his statement, that the Special Rapporteur should carefully reconsider whether the question of the immunity of State officials from foreign jurisdiction in the pretrial phase should be addressed, given its particularly sensitive nature.

53. With regard to the second part of the preliminary report (paras. 103 to 130), he broadly agreed with the Special Rapporteur’s comments regarding the boundaries of the topic. With regard to the definition of the concept of a “State official”, he concurred with the views expressed in paragraph 107 but felt that the Special Rapporteur, when elaborating draft articles, should consider whether it was necessary to draw a distinction between incumbent and former State officials. In paragraph 108, the Special Rapporteur mentioned terms other than “State official” that were used in various instruments. In his view, the Commission should employ only the latter term, which was used in the title of the topic, although the question, which was not just one of terminology, merited further examination.

54. In paragraphs 109 to 121, the Special Rapporteur addressed one of the main issues, namely which State officials enjoyed immunity *ratione personae*. It seemed easy to conclude that they were the Head of State, the Head of Government and the Minister for Foreign Affairs—the so-called “classic threesome”. The Special Rapporteur was inclined to broaden the circle, and he agreed with him on that point. The Special Rapporteur mentioned the minister of defence and other ministers in that connection, but one might also add, for instance, the Vice-President or the President of a country’s Parliament, depending on the constitutional order of the State concerned. Account should also be taken, at least in the commentary, of the situation in federal States.

55. The question of recognition (paras. 122 to 124) and that of family members (paras. 125 to 129) were somewhat controversial. Where there was mutual recognition between two States, there was no major problem, even if one of them was recognized by only a limited number of other States. In other cases, it should be borne in mind that States must respect general international law in their relations. Heads of unrecognized States performed the same functions as those of recognized States, personifying the sovereignty of the State concerned, and simply denying them immunity could prove problematic. In any event, the question merited further consideration. Self-proclaimed States were, of course, another matter. He pointed out that if the Commission were to take up the matter of recognition, it would have to engage in discussions of the impact of recognition and its declaratory or constitutional character, subjects that were perhaps best avoided. He was unsure, however, whether the whole

question of recognition could be ignored. It was clear, on the other hand, that the question of immunity for the family members of a head of State fell outside the scope of the topic, as indicated by the Special Rapporteur in paragraph 129 of his report.

56. Lastly, he agreed with the conclusions set out in paragraph 130 of the Special Rapporteur’s preliminary report, subject to the minor reservations that he had mentioned.

The meeting rose at 1 p.m.

2984th MEETING

Thursday, 24 July 2008, at 10 a.m.

Chairperson: Mr. Edmundo VARGAS CARREÑO

Present: Mr. Brownlie, Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kolodkin, Mr. McRae, Mr. Melescanu, Mr. Niehaus, Mr. Nolte, Mr. Ojo, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Ms. Xue, Mr. Yamada.

Immunity of State officials from foreign criminal jurisdiction (*continued*) (A/CN.4/596 and Corr.1, A/CN.4/601)

[Agenda item 9]

PRELIMINARY REPORT OF THE SPECIAL
RAPporteur (*continued*)

1. The CHAIRPERSON invited the Commission to continue its consideration of the preliminary report of the Special Rapporteur on immunity of State officials from foreign criminal jurisdiction (A/CN.4/601).
2. Ms. ESCARAMEIA congratulated the Special Rapporteur on his report—the fruit of enormous research—and the Secretariat on its memorandum (A/CN.4/596)—a substantial work of reference of such substance as to merit publication. Although she felt somewhat overwhelmed by the enormous volume of material and by other members’ profound knowledge of the topic, she nonetheless hoped that her comments would provide useful guidance for the Special Rapporteur in his future work. She would divide her presentation into three parts, dealing respectively with areas of agreement, hypotheses she believed to have been made too readily in the report and which possibly required further consideration, and aspects that had been overlooked.
3. She agreed, first, on the importance of having a definition of “immunity from criminal jurisdiction”, in particular so as to establish to what acts in the criminal procedure immunity applied—an issue raised in the case