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Summary record of the 2987th meeting

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2987th MEETING

Wednesday, 30 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 (*concluded*) (A/CN.4/596 and Corr.1, A/CN.4/601)

[Agenda item 9]

PRELIMINARY REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

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. Mr. WAKO said that, as noted by the Special Rapporteur, the question of immunity from foreign criminal jurisdiction had been considered by the Commission on a number of occasions under different agenda items. It was an issue which, if not properly handled, as noted by Mr. Brownlie and Mr. Vasciannie, might give the impression that the principles of equality and the rule of law were under attack from the application of double standards and the attachment of weight to political considerations in what was essentially a matter of criminal justice. Hence it was necessary not only to take account of the current status of international law in that area, but also to encourage progressive development so that the applicable rules of international law were clear. He therefore agreed entirely with the Special Rapporteur's view expressed in the first sentence of paragraph 63 of his preliminary report, although he would omit the word "perhaps" and state that the Commission should certainly formulate draft articles or guiding principles on the issue.

3. The Special Rapporteur had limited the scope of his preliminary report on immunity of State officials from foreign criminal jurisdiction. Every State had the right to exercise jurisdiction over its territory and over all persons and things therein, but that right was subject to the immunities recognized by international law. As indicated in the Secretariat's memorandum, while international law considered criminal jurisdiction to be ordinarily territorial, almost all domestic legal systems had extended its application to extraterritorial offences through, *inter alia*, the nationality principle, the protective principle and the principle of universal jurisdiction. It was the latter principle that had a bearing on the topic before the Commission, since it determined jurisdiction by reference to the nature of the offence, which was deemed to be of concern to the international community as a whole, regardless of the *locus delicti* and the nationality of the offender and the victim. According to *Oppenheim's Intenational Law*, "[w]hile no general rule of positive international law [could] as yet be asserted which [gave] States the right to punish foreign nationals for crimes against humanity … , there [were] clear indications pointing to the gradual evolution of a significant principle of international law to that effect".[274] States might therefore have jurisdiction under international law to try foreign nationals. However, such jurisdiction was "subject to immunities recognized by international law".

4. He agreed with the Special Rapporteur's conclusion in paragraph 102 (*g*) of his report that immunity of State officials from foreign criminal jurisdiction was procedural and not substantive in nature. That was an important point to grasp because there was a tendency to argue that if State officials were to enjoy complete immunity and could not be tried abroad for international crimes, the result would be impunity. He took issue with that line of reasoning. The immunity from the jurisdiction of foreign courts enjoyed by the State officials concerned did not mean that they enjoyed impunity for any crimes that they might have committed. As the ICJ had stated in the *Arrest Warrant* case, "[w]hile jurisdictional immunity is procedural in nature, criminal jurisdiction is a question of substantive law" [para. 60]. As there had been very few juridical actors in the world previously and the concept of the nation State had been surrounded by insurmountable barriers, it had been necessary to grant universal jurisdiction to national courts in certain types of cases to supplement the structures put in place by international mechanisms. As recognized in the Secretariat's memorandum, the international system actually relied on domestic law for enforcement and the tendency at the time was to attribute competence over international crimes to national jurisdictions or to assume that they enjoyed such competence.

5. The situation was now different. First, as stated by the three judges who had issued a joint separate opinion in the *Arrest Warrant* case, the increasing recognition of the importance of ensuring that the perpetrators of serious international crimes did not go unpunished had had an impact on the immunities enjoyed by high State dignitaries under traditional customary law.[275] The Rome Statute of the International Criminal Court did not in fact provide for immunity. Secondly, as stated by Mr. Nolte, if any conclusions were to be drawn, they should tend to confirm the immunity of State officials from another State's criminal jurisdiction, the reason being that the greater the extent to which international criminal jurisdiction was established, the less necessary it would be to combat immunity by allowing third States to assume jurisdiction over State officials. Hence, the fact that State officials were not to be subjected to the jurisdiction did not mean that impunity was being tolerated. It simply meant that such State officials would be answerable to an international court

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[274] *Oppenheim's International Law*, 9th ed., vol. I, *Peace*, R. Y. Jennings and A. D. Watts (eds.), Harlow, Longman, 1992, p. 998.

[275] See the joint separate opinion of Judges Higgins, Kooijmans and Buergenthal.

or tribunal. In a closely knit international community, it was preferable for such State officials, especially—to use a term employed by Ms. Jacobsson—the "big fish", to be tried by an international court or tribunal if they were beyond the reach of their own country's justice system. He agreed with Mr. Vasciannie that one way forward was to stipulate that State officials who had perpetrated international crimes should be tried in their own countries or by an international court or tribunal set up for the purpose.

6. The goal was to ensure that there was no immunity. In some circumstances, however, there could be other compelling interests such as peace and security or national reconciliation that had to be addressed. At the international level, especially under the Rome Statute, the Security Council might in some cases adopt a resolution under Chapter VII of the Charter of the United Nations requesting the Court, pursuant to article 16 of the Statute, not to commence or proceed with an investigation or prosecution. The Court could then decide whether or not to comply. Such requests were not possible where a national jurisdiction was trying the case, and it was no wonder that, as a result, misunderstandings of the type alluded to by Mr. Brownlie and Mr. Vasciannie arose. A decision adopted recently by the Assembly of the African Union held in Egypt provided a good example of the kinds of fears that universal criminal jurisdiction could arouse.[276]

7. The Assembly, while recognizing that universal jurisdiction was a principle of international law whose purpose was to ensure that individuals who committed grave offences such as war crimes and crimes against humanity did not do so with impunity and were brought to justice, in line with article 4 (*h*) of the Constitutive Act of the African Union, resolved that the abuse of the principle of universal jurisdiction was a development that could endanger international law, order and security; that the political nature and abuse of the principle of universal jurisdiction by judges from some non-African States against African leaders was a clear violation of the sovereignty and territorial integrity of those States; and that the abuse and misuse of indictments against African leaders had a destabilizing effect that would have a negative impact on the political, social and economic development of States and their ability to conduct international relations. The Assembly therefore requested all United Nations Member States, in particular the States members of the European Union, to impose a moratorium on the execution of such warrants until all the legal and political issues had been exhaustively discussed by the African Union, the European Union and the United Nations.

8. It was therefore necessary both to clarify international law in that area and to contribute to its progressive development. He agreed with the Special Rapporteur's comments in that regard in paragraph 41 of the preliminary report and considered that the codification of international law would not only be "most useful", but that it was imperative.

9. The next question was which State officials should benefit from such immunity. The Special Rapporteur indicated that all State officials enjoyed immunity from foreign criminal jurisdiction *ratione materiae* but that only some of them enjoyed immunity *ratione personae*. There seemed to be a well-established principle of customary international law that the high-ranking officials who enjoyed personal immunity included Heads of State, Heads of Government and Ministers for Foreign Affairs, sometimes referred to as the "troika". The ICJ had confirmed the principle in the *Arrest Warrant* case, but had used the words "such as" the Head of State, Head of Government and Minister for Foreign Affairs, thus indicating, by virtue of the *ejusdem generis* rule, that other State officials of the same rank were not excluded. The British courts had accorded such immunity to the Minister of Defence of Israel (see the *General Shaul Mofaz* case) and the Minister of Commerce of the People's Republic of China (see the *Bo Xilai* case). When required to rule on the issue, the ICJ and national courts had rigorously examined the functions of the post held by State officials before concluding that they enjoyed immunity *ratione personae*. To state that persons "such as" the Minister for Foreign Affairs enjoyed immunity meant that other ministers might be in the same category.

10. Gone were the days when, apart from the Head of State, the Minister for Foreign Affairs had sole responsibility for the conduct of foreign policy and was the sole representative of the State in international negotiations and at intergovernmental meetings. In the global village, every activity involved international relations, and it could be argued that diplomacy was no longer about politics but about trade. Ministers of trade, finance and even in some countries, tourism, had taken over some of the functions that had previously been the preserve of the Minister for Foreign Affairs. At the regional level, where there was a trend towards political, economic and social integration, ministers of regional or community affairs were performing the functions that the Minister for Foreign Affairs had performed in the past. On issues such as organized crime or transnational crime or corruption, one often found ministers of justice representing the State at the international level.

11. He agreed with the Special Rapporteur and with other Commission members such as Mr. Pereira that it was necessary to develop criteria that took into account numerous factors, including: the rank of State officials; their functions; the circumstances in which they performed those functions; whether what they were representing in international relations was indispensable and a core component of the State's functions; how the performance of their functions related to that of the Minister for Foreign Affairs; and other factors that had been taken into account by the ICJ in the *Arrest Warrant* case and by national courts in the various cases that had come before them.

12. Mr. NIEHAUS said that the topic of immunity of State officials from foreign criminal jurisdiction was particularly interesting in view of the topicality of the issue and the fact that international law in the area was underdeveloped. The codification of such an important subject was clearly in the interest of international

[276] Assembly of the African Union, eleventh ordinary session, 30 June–1 July 2008, Sharm el-Sheikh (Egypt), Decisions, declarations, tribute and resolution [Assembly/AU/Dec.193-207 (XI)], Decision Assembly/AU/Dec.199 (XI) on the Report of the Commission on the Abuse of the Principle of Universal Jurisdiction [Doc.Assembly/AU/14 (XI)], available at www.au.int/en/decisions/assembly (accessed 8 January 2013).

relations in the early twenty-first century. While the final speakers in the debate on a topic on the Commission's agenda had the advantage of being able to draw on the informed opinions already expressed by other members of the Commission, they also risked repeating what had already been said, and said very eloquently. In order to avoid that pitfall, he would seek to confine his comments to the summaries of the first and second parts of the Special Rapporteur's preliminary report, which by no means implied that the actual content of those two parts was insignificant.

13. With regard to the summary of the first part in paragraph 102 of the report, he agreed with Ms. Xue that it was important to take account of the case law of domestic courts, but he endorsed the comment in subparagraph (*a*) of the summary to the effect that the basic source was international law, particularly customary international law. He approved of the Special Rapporteur's decision to confine his study to immunity and to avoid considering jurisdiction as such. Moreover, like several other members of the Commission, he thought that diplomatic and consular immunities should be omitted from the study because they were already covered by a special regime. With regard to jurisdiction *ratione personae*, it was logical to restrict immunity to the highest-ranking officials, but he wondered whether it should be enjoyed only by Ministers for Foreign Affairs. In the modern world, other ministers, such as those for foreign trade, the environment or defence, performed functions that were equivalent in terms of representation to those performed by the Minister for Foreign Affairs. A more thorough study of the question was therefore necessary, although the concept of immunity *ratione personae* should be narrowly construed. Immunity should be granted only to the highest-ranking State officials, and if it was extended to other officials, the immunity in question was functional and not personal. At the same time, the immunity of high State dignitaries who played an indispensable role in international relations should be preserved.

14. Furthermore, the Commission should constantly bear in mind the need to fight against impunity. However, Mr. Nolte's comment in that regard was pertinent: the more the scope of international criminal jurisdiction expanded, the less necessary it would be to fight against impunity by allowing States to try foreign State officials. He noted that the Special Rapporteur intended to deal with the question of exceptions to immunity in his next report. Another question that several Commission members had mentioned but, in his view, had failed to emphasize sufficiently was that of the immunity of former Heads of State or Heads of Government, which he thought should be studied. The immunity of members of the families of State officials also formed part of the topic.

15. In conclusion, he thanked the Chairperson, Mr. Vargas Carreño, for his excellent summary at the previous meeting of the proceedings in the *Pinochet* case, a case of key importance for the questions of immunity and jurisdiction.

16. The CHAIRPERSON, speaking as a member of the Commission, said that he wished to make some very general comments. First, the Commission's work on the topic had, in his view, got off to a good start, thanks to the high quality of the Secretariat's memorandum, the excellence of the Special Rapporteur's preliminary report and the wide-ranging debate in which a very large number of members had participated. He would not review the first part of the report but merely enumerate some of the problems that remained to be solved. First, the Commission would have to decide whether the scope of immunity *ratione personae* should be limited to the "troika" (Head of State, Head of Government and Minister for Foreign Affairs) or whether it should be extended to other officials. As noted by Mr. Niehaus and Mr. Wako in particular, there was a trend in the era of globalization to grant immunity to other State officials involved in international relations, such as the minister of defence or the minister of the interior in the case of issues such as the fight against terrorism. The question was a very sensitive one and due caution should be exercised. As he saw it, the Commission should, in principle, adopt a restrictive approach in order to address the need to reconcile State sovereignty with action against impunity for the perpetrators of serious crimes, two principles that were well established in international law.

17. Secondly, with regard to exceptions to immunity, a number of members had stressed the importance of ensuring that Heads of State who had committed crimes against humanity did not enjoy impunity. Recent events had shown, however, that things were not quite so simple in practice. If, for example, the prime minister of a European State or the President of the United States was alleged to have committed a crime against humanity, would other States be prepared to arrest him or her? The Commission would have to be realistic. One option would be to make exceptions to immunity applicable only to former Heads of State, Heads of Government or Ministers for Foreign Affairs.

18. Thirdly, an important question raised during the debate concerned the concepts of complementarity and subsidiarity. In his view, foreign criminal jurisdiction should be exercised only where the national criminal jurisdiction was unable or unwilling to prosecute, an approach that was in line with the Rome Statute of the International Criminal Court. The principle of subsidiarity of the exercise of foreign jurisdiction should somehow be reflected in the draft articles.

19. The Special Rapporteur had included in the list of questions raised in chapter IV of his preliminary report the question of recognition of States and State officials. In his view, that was a highly political issue and, as it rarely arose, he thought that any attempt at codification would be premature. On the other hand, it was essential to deal with the question of the immunity of family members of a Head of State or Head of Government, an area in which both codification and progressive development were conceivable.

20. Mr. KOLODKIN (Special Rapporteur), summarizing the debate on the topic, said that he would bear in mind the many comments that had been made on his preliminary report and the diverse views expressed on the questions that he intended to take up in his next report.

21. First, the members of the Commission broadly agreed that the main source of the immunity of State officials from foreign criminal jurisdiction was international law and, in particular, customary international law. Some members had also emphasized the importance of national practice and the decisions of domestic courts.

22. Many members supported the idea that the immunity of State officials from foreign criminal jurisdiction constituted a legal relationship linked to existing rights and obligations. Many members also recognized that such immunity was basically procedural; however, others considered that in some circumstances immunity might also relate to substantive law. There had been broad support for the idea that immunity from criminal jurisdiction extended only to executive and judicial jurisdiction and that the question of such immunity was important because it could be raised in the pretrial phase of criminal proceedings.

23. Some members had expressed support for the postulate that immunity was based on a combination of functional and representative components. One member had argued that the basis of immunity could be different according to the rank of the State official concerned. For example, Heads of State derived their immunity from the fact that they personified the State, but that rationale was not applicable to other State officials.

24. Many members agreed that jurisdiction preceded immunity. The question of universal jurisdiction also arose. Some members considered that the concept of jurisdiction could not be ignored and should be addressed at least in the context of exceptions to immunity. In that regard, he said that while he certainly intended to examine the issue, he proposed to adopt an analytical approach since it was unnecessary for the Commission to adopt a substantive position regarding jurisdiction as such.

25. Many members had found his reflections on the immunity *ratione personae* and the immunity *ratione materiae* of State officials very helpful, at least in analytical terms, but at least one member had proposed, as an alternative to that distinction, referring to acts performed in an official capacity and acts performed in a private capacity. He drew attention in that connection to his statement in the report that the distinction between immunity *ratione personae* and immunity *ratione materiae* was useful for analytical purposes but that no such distinction was made in the normative instruments.

26. While the debate had shed light on the scope of the topic, many questions were still unresolved. In general, the members took the view—and he fully agreed with them—that the immunity of diplomatic agents, consular officials and members of special missions (with the possible addition of representatives of States in and to international organizations) fell outside the scope of the topic. One member had referred to the situation in which a diplomatic agent accredited to one State was sent by the accrediting State to attend an event in the territory of a third State. In that situation, which was considered in the report, the official would enjoy immunity as a State official but not as a diplomatic agent. Diplomatic and consular law were well-established branches of international law, and the outcome of the Commission's work on the topic should not undermine the immunity of persons in those categories.

27. Most members who had addressed the question considered that the topic should not cover issues of international criminal jurisdiction. Nevertheless, some felt that such issues could not be overlooked in the context of exceptions to immunity. The importance of taking into account the principle of complementarity, as set out in the Rome Statute of the International Criminal Court, had also been mentioned. While he intended to deal with those matters in due course, he would do so without prejudice to whatever conclusions he reached.

28. There seemed to be a majority of members against taking up the question of recognition. However, several members disagreed. Some suggested that the wisest option might be simply to examine the consequences of non-recognition of an entity as a State when matters pertaining to the immunity of its officials were addressed.

29. With regard to immunity *ratione personae*, some members took the view that only Heads of State, Heads of Government and Ministers for Foreign Affairs enjoyed such immunity. Others, while admitting that other officials might also enjoy immunity *ratione personae*, cautioned the Commission against venturing beyond the limits of the "troika". At least two members held that, even if officials other than the troika enjoyed such immunity, the Commission should not mention them explicitly lest it prejudge the situation regarding other categories of persons who might enjoy personal immunity. At the same time, several members of the Commission—indeed perhaps the majority—considered that, in the light of current trends in the conduct of affairs of State, the Commission would have difficulty in confining its study to the troika. However, even those who were in favour of extending its scope felt that the Commission should exercise very great caution. State officials who might enjoy immunity *ratione personae* had been cited, for example, ministers of defence, ministers of foreign trade, Presidents of Parliaments, Vice-Presidents and judges. The question of immunity for officials representing the constituent units of federal States had also been raised. Many members had proposed, as an alternative to listing State officials who enjoyed immunity *ratione personae*, the definition of criteria that could be invoked to determine the categories of eligible persons. He suggested that, in deciding on the approach to be adopted, a more thorough analysis of the judgment rendered by the ICJ in the *Certain Questions of Mutual Assistance in Criminal Matters* case should be undertaken.

30. The views of members of the Commission were more or less evenly divided on the question of whether the family members of State officials and their entourage should be included within the scope of the topic. Even those who were in favour of including them expressed a variety of reservations. For instance, one member considered that the question should be examined at a later stage and solely with a view to denying immunity to such persons. Some members held that only family members of high-ranking State officials should be taken into account. One member suggested that the only ground for addressing the question was to determine whether international comity was

the sole source of such persons' immunity. Many other members agreed. On the whole, the debate on the question had not convinced him that the view expressed in his preliminary report should be revised, but of course he was more than willing to review the arguments.

31. One member of the Commission had advocated including members of the armed forces within the scope of the topic.

32. With regard to the terminology and definitions, support had been expressed for the term "State official" but several members preferred "State representative" or "State agent". Many members emphasized the importance of defining "State official". One member proposed a different approach to the definition from that adopted in the preliminary report, and he agreed that such an approach might prove helpful.

33. Several members had also mentioned the need to define "immunity" and "immunity from criminal jurisdiction".

34. With regard to the content of his next report, he said that he had presented a preliminary broad description of the structure and logical sequence of the study on the topic in the Commission's report on the work of its fifty-eighth session,[277] which all members would have had an opportunity to read. In the fourth part of his presentation, entitled "Possible scope of consideration of the proposed topic", he had proposed 11 clusters of issues for examination and had stated, *inter alia*, that the core issue was the scope or limits of immunity of State officials from foreign criminal jurisdiction (point 6). His report was thus based on what he had announced two years previously. In general, he still felt that it was the right approach, although some modifications had been necessary. For instance, he had not yet addressed the question of exceptions to immunity.

35. In his capacity as a legal adviser, he was constantly reflecting on all the issues involved. As a result, his ideas had evolved and would probably continue to evolve as he pursued his study of the topic. At the outset, he had thought that the topic should be based on the relations between immunity and *jus cogens* norms prohibiting the most serious international crimes. That issue would, of course, be addressed in his next report, but it would not exhaust the question of the scope of immunity. The question could be formulated in the following terms: did the immunity of State officials from foreign criminal jurisdiction depend on the gravity of the crimes committed? It was necessary to consider the impact on immunity of universal jurisdiction for core crimes, but it should be borne in mind that, in practice, the question of immunity of State officials also arose in the case of less serious international crimes such as corruption and money laundering.

36. He also planned to consider whether State officials enjoyed immunity when they committed acts within the territory of the State exercising jurisdiction that breached the law of that State. Mention had been made in that context of espionage, and the *"Rainbow Warrior"* case might also be cited. He thus had every intention to consider whether exceptions to immunity existed. The question might be formulated in the following terms: did exceptions to immunity exist under general international law? If not, should exceptions be created? And if they existed or should be created, what exactly were the exceptions? There was no doubt in his mind that exceptions to immunity could be created by concluding an international treaty.

37. He further intended in his next report to consider the extent of immunity *ratione personae* and immunity *ratione materiae*. He was proceeding on the premise that immunity *ratione personae* was applicable only during the term of office of the person concerned. Other questions that needed to be addressed were: how could acts performed in an official capacity be distinguished from acts performed in a private capacity? What kinds of acts could be deemed to have been performed in an official capacity? Could illegal acts qualify as acts performed in an official capacity? The question of whether, for example, personal immunity should be extended to acts committed prior to the assumption of office would also be considered. In addition to examining which acts committed by a State official were covered by immunity and which were not, he proposed to consider from which acts of the State exercising jurisdiction immunity afforded protection and from which it did not. He also intended to study separately the question of the extent of the immunity of incumbent State officials and that of former States officials.

38. With regard to the procedural aspects of immunity, he had previously taken the view that the only issues that needed to be addressed were those relating to the waiver of immunity, questions such as: who was entitled to waive State officials' immunity—the officials themselves or the State they served? What form should the waiver take? Was an implicit waiver conceivable? Could a State's consent to be bound by obligations flowing from the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which made no mention of immunity or a waiver of immunity, be regarded as an implicit waiver of immunity? However, he now thought that there were other important procedural questions, including the following: should the State on behalf of which the official was acting raise the question of immunity with the State seeking to exercise its criminal jurisdiction over the official concerned in order to ensure that it was taken into account? Should the State of which the official was a national declare or demonstrate, where the question of functional immunity arose, that the official's acts had been performed in an official capacity? The latter question was related to a point raised by two members, namely the question of the link between the immunity of a State official from foreign criminal jurisdiction and the responsibility of the State on behalf of which the official was acting. He considered that the issue merited further study.

39. With regard to the approach and methodology to be adopted, he was convinced, contrary to some members of the Commission, that the judgment of the ICJ in the *Arrest Warrant* case was correct and important and that it provided a clear picture of the current state of international law in the area under consideration. The judgment had been adopted by 13 votes to 3, an overwhelming majority. It differed in that respect from the judgement in the *Al-Adsani* v. *The United Kingdom* case by the European

[277] *Yearbook … 2006*, vol. II (Part Two), annex I, p. 191.

Court of Human Rights, which had been adopted by a one-vote majority. Moreover, at a meeting in 2002, CAHDI had emphasized the importance of the judgment in the *Arrest Warrant* case, describing it as a clear statement of international law on the matter.

40. He would continue to base his analysis of the foregoing issues on the sources used to prepare the preliminary report, namely: State practice, including legislation and judicial decisions; decisions of international courts and tribunals (particularly the ICJ); and academic writings. Decisions of national courts were another important source, not only in themselves but also because the material considered by the courts frequently reflected the position of the States concerned.

41. Furthermore, it was essential to analyse judicial and other practice from a dynamic and developmental perspective and to take into account the chronological sequence in which judicial decisions were adopted. It was inaccurate, in his view, to assert, for example, that there was a conflict between the judgment of the ICJ in the *Arrest Warrant* and the decision of the International Tribunal for the Former Yugoslavia in the *Prosecutor* v. *Blakšić* case or the *Pinochet* judgement. Admittedly, however, practice was not homogenous, and domestic decisions had been taken after the judgment in the *Arrest Warrant* case which were inconsistent with its conclusions. He emphasized, however, that judicial practice must be studied in the light of their chronological sequence.

42. Judicial decisions regarding immunity from civil jurisdiction should not be dismissed out of hand just because civil jurisdiction was different from criminal jurisdiction. The two forms of jurisdiction were admittedly different, but not to the extent that decisions regarding immunity from civil jurisdiction had no bearing on the topic under consideration. It was essential, in his view, to take into account international and national practice, and the practice and opinions of States. He cautioned against formulating abstract proposals on what international law should be, and against moving beyond the scope of the law in force and operating without reference to manifestations of existing international law.

The obligation to extradite or prosecute (*aut dedere aut judicare*) (*continued*)[*] (A/CN.4/588, sect. F, A/CN.4/599, A/CN.4/603)

[Agenda item 7]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*continued*)[*]

43. The CHAIRPERSON invited the Commission to continue its consideration of the third report on the obligation to extradite or prosecute (*aut dedere aut judicare*) (A/CN.4/603).

44. Ms. ESCARAMEIA commended the Special Rapporteur on his thorough and well-researched report. She intended to comment on the three draft articles proposed by the Special Rapporteur and on the next steps in the Commission's work on the topic.

45. With regard to draft article 1, she would have preferred the title "Scope" to "Scope of application", since the latter gave the impression that the scope of the draft articles was confined to the principle of application, which was clearly not the case. She was in favour of including the temporal aspect, namely the establishment, content, application and effects, since it clarified the different aspects of the issue that would be covered. On the other hand, she proposed deleting the word "legal" in the phrase "legal obligation of States" since it was redundant in a legal document. With regard to the alternatives in square brackets, she preferred "under their jurisdiction", since it would make clear that the obligation was incumbent on States administering territories that were not their own. Moreover, as noted by Mr. Pellet, it was the term used in the European Convention on Human Rights.

46. With regard to draft article 2 (Use of terms), she supported the suggestions in paragraph 1. However, she would prefer subparagraph (*d*) (" 'persons under jurisdiction' means…") to be divided in two, with one subparagraph dealing with persons, since it should be clear that the term referred to natural and not legal persons, and another dealing with jurisdiction. She further suggested inserting a subparagraph containing a definition of universal jurisdiction.

47. She was unsure what purpose was served by paragraph 2. Given that paragraph 1 stated "For the purposes of the present draft articles", it seemed unnecessary to add that the definitions were "without prejudice to … the meanings which may be given to them [in other international instruments or] in the internal law of any State".

48. She emphasized the importance of draft article 3 (Treaty as a source of the obligation to extradite or prosecute), not only because it might lead to "the beginning of the formulation of an appropriate customary norm", as the Special Rapporteur put it, but above all because of the opinion stated by the United States in the comments and observations received from Governments.[278] According to the United States, a multilateral treaty created specific obligations for a State party only if the same obligations were contained in a bilateral treaty. In other words, only a bilateral treaty could be a source of obligations. She found that position quite strange and stressed that the purpose of draft article 3 was precisely to remove all ambiguity in that regard.

49. She proposed referring the three draft articles to the Drafting Committee. With regard to the next steps in the Commission's work on the topic, she shared certain concerns raised by Mr. Pellet, who considered that the Special Rapporteur had already gathered abundant information on the matter, that the Commission had sufficient sources of guidance and that it was therefore unnecessary to await further replies from States. The Special Rapporteur should simply proceed with his work. He had already outlined a large number of draft articles in paragraph 61 of his preliminary report.[279] In his fourth report, he might propose draft articles on the sources of the obligation, in

[*] Continued from the 2984th meeting.

[278] *Yearbook … 2007*, vol. II (Part One), document A/CN.4/579 and Add.1–4.

[279] *Yearbook … 2006*, vol. II (Part One), document A/CN.4/571.

particular a draft article 4 on the customary nature of the obligation, and a draft article 5 on the *aut dedere aut judicare* principle as a general principle of law founded on shared national laws, jurisprudence and practice. In that context, it might be helpful to analyse the relationship between the *aut dedere aut judicare* principle and, on the one hand, universal jurisdiction and, on the other, crimes under international law. Many more draft articles could be proposed in due course, for instance on universal jurisdiction and the "triple alternative" (involvement of an international criminal tribunal). As those issues were particularly complicated and gave rise to different opinions within the Commission, she suggested setting up working groups, not right away as proposed by Mr. Pellet, but after the Special Rapporteur had proposed draft articles on the various questions raised.

50. Lastly, she urged the Special Rapporteur to look into procedural questions such as the grounds for refusal to extradite, the safeguards to which persons to be extradited were entitled and the question of simultaneous requests for extradition.

51. Mr. DUGARD said that he would limit his comments to the third report on the obligation to extradite or prosecute. There were three main reasons, in his view, why the progress made by the Special Rapporteur fell short of what might have been expected. First, he failed to see why the Special Rapporteur attached so much importance to obtaining guidance from States. In paragraph 33 of his report, he claimed that the slow inflow of State opinions and comments adversely affected the progress of his work, and in paragraph 44 he noted that only about 20 States had responded. In his experience, however, it was highly unlikely that more States would respond. Moreover, the Special Rapporteur should bear in mind that the only countries sending in comments were those of Western Europe, so that the views of developing countries could not be taken into account, although the International Law Commission was supposed to serve the interests of a wide range of States.

52. The lack of progress was also due to substantive problems, since it appeared that the Special Rapporteur had not yet made up his mind about core issues such as whether there was a customary basis for the obligation to extradite or prosecute, and whether or not the topic should be linked to the question of universal jurisdiction. Such crucial issues should be resolved at the outset. The third issue that troubled him was the time factor, since it seemed unlikely that work on the topic could be completed by the end of the current quinquennium.

53. He agreed with Ms. Escarameia that it was essential at the outset to establish whether a customary basis existed for the *aut dedere aut judicare* obligation. In the absence of such a rule, the Commission would be hard put to proceed with its work. Secondly, the issue of the relationship between the *aut dedere aut judicare* obligation and universal jurisdiction should be resolved. It was unnecessary to embark on a full-scale examination of the principle of universal jurisdiction, since it was applicable almost exclusively to the most serious crimes, and the same was true of the obligation to extradite or prosecute. According to the Special Rapporteur, some States had made the nonsensical claim that the latter obligation was applicable to all crimes. The customary rule to extradite or prosecute, if it existed, could only concern the most serious crimes. In that connection, the views of China and Sweden, reflected in the footnotes to paragraph 98 of the Special Rapporteur's report, were particularly helpful.

54. The Special Rapporteur should consider the question of whether the obligation to extradite or prosecute existed only where an accused person was present in the territory of the State concerned. He was inclined to think that treaties and common sense demanded an affirmative answer to that question. For instance, a State that did not have custody of the accused could not be required to request a third State to extradite the person concerned. The Special Rapporteur should also take a decision on whether the State which had control over or custody of the accused had a choice between prosecution and extradition. He thought that the choice lay with the territorial State. With regard to the "triple alternative", it would be very difficult at that stage, in his view, not to take account of the option of surrendering the accused to the International Criminal Court. Another question that should be considered was whether the obligation to extradite or prosecute arose only if another State requested extradition. Ms. Escarameia had also raised a number of procedural matters such as the existence of obstacles to extradition and whether the requested State had a margin of appreciation. The Commission's work on the topic would inevitably involve a certain amount of progressive development. The Special Rapporteur had rightly taken into account the number of national court decisions, which would probably prove more helpful than the views expressed by States.

55. He did not think that the draft articles could yet be referred to the Drafting Committee, since they required further consideration. Draft article 1 was still too uncertain; indeed, the Special Rapporteur himself seemed to be undecided about its content. Draft article 2, as currently worded, could not be referred to the Drafting Committee either. In the case of draft article 3, account must be taken of the various international treaties containing clauses regarding the obligation to extradite or prosecute. He suggested compiling a list of such treaties, which might indicate the existence of a customary rule in cases not covered by those treaties. The Special Rapporteur should therefore continue his work and produce draft articles to which he was more firmly committed. In that connection, he was not in favour of Mr. Pellet's proposal to set up a working group; he also considered that it was inappropriate for the Special Rapporteur to await further comments and information from States.

56. Mr. PELLET said that, unlike Mr. Dugard, he did not think that the Commission's work would prove irrelevant if no customary rule governing the obligation to extradite or prosecute was identified. The *aut dedere aut judicare* clauses contained in treaties were often vague and lacking in detail, so that a draft article on the matter would be helpful in clarifying their content and addressing the complex problems involved in their implementation. He continued to consider that the creation of a working group to support the Special Rapporteur would be a good idea, given the very large number of questions of principle raised by Mr. Dugard and Ms. Escarameia and the

hesitations of the Special Rapporteur and other members of the Commission regarding certain aspects of the topic under consideration. However, it was for the Special Rapporteur himself to decide.

57. Mr. GAJA thanked the Special Rapporteur for his useful and clearly drafted third report. He wished to comment on the direction that future work on the topic should take. He hoped that his remarks would prove helpful, although they differed to some extent from those just made by Mr. Dugard and Ms. Escarameia. They both considered that the complex question of the existence of an obligation to extradite or prosecute under customary international law should be addressed at the outset. That was also the opinion of the Special Rapporteur, as reflected in paragraphs 88 and 89 of his report, in which he analysed recent interesting cases, and in paragraph 125, where, briefly commenting on a draft article concerning treaties as a source of the obligation, he cited the view that the conclusion by a State of several treaties containing some form of clause on the obligation to extradite or to prosecute provided evidence of an existing rule of customary law to the same effect.

58. Recognition of a basis in customary international law for the obligation to extradite or prosecute raised the complex question of universal jurisdiction which, as noted by Mr. Wako, was a controversial matter. It would therefore be more expedient, in his view, to take up first issues relating to the *aut dedere aut judicare* obligation, whatever its source. In any case, the rule or principle was generally understood as having one and the same meaning, which could be stated subject to the exception of a *lex specialis*.

59. He proposed that the Commission should examine what Mr. Dugard and Ms. Escarameia referred to as procedural questions at the outset. The Special Rapporteur could first consider the conditions triggering the obligation to prosecute pursuant to the rule or principle of *aut dedere aut judicare* and then examine the content of that obligation. With regard to the conditions, the first question to be addressed was whether the presence of an alleged offender in the territory of the State concerned had to be voluntary, and the nature of the territorial State's obligation to ascertain that an alleged offender was present in its territory. A second question was whether the existence of a request to extradite by a State enjoying primary jurisdiction over the crime was always necessary for an obligation to prosecute to arise. The point at which a State could be said to have refused a request to extradite should be clarified. A third condition concerned the existence of jurisdiction over the crime, which could exist independently of a treaty or other rule of international law making its exercise compulsory. One question was which organ of the State would be in a position to ascertain the existence of jurisdiction. Another question was the extent to which jurisdiction would be affected by the immunity that the alleged offender might enjoy in the State where he or she was present.

60. The content of the obligation to prosecute also raised a number of questions. How could the obligation be reconciled with the discretion that prosecutors enjoyed in many countries? What bearing should the availability of pertinent evidence have on the obligation to prosecute? Should the alleged offender necessarily be held in custody pending trial? Could extradition of the alleged offender to a State other than the requesting State qualify as compliance with the obligation to prosecute? To respond to that list of questions, which was not exhaustive, the Special Rapporteur should discuss with the Secretariat the modalities of undertaking a thorough study of available practice. The results of such a study would probably elicit more focused and hence more useful comments from States.

61. Mr. FOMBA noted that, despite the difficulties encountered by the Special Rapporteur in obtaining and compiling responses from States, his report contained some interesting preliminary conclusions. Addressing the question of whether and to what extent the obligation to extradite or to prosecute formed part of customary international law, the Special Rapporteur described what he considered to be the current legal situation: the existence of a large number of international treaties dealing with the obligation and of a growing number of national laws and judicial decisions; the creation and development of legal practice, which was a crucial element for the establishment and acceptance of emerging customary norms; and the existence of a measure of State receptiveness in that regard. As to whether that legal situation actually reflected an *opinio juris*, the Special Rapporteur was inclined to think that it did, arguing in paragraph 125 of his report that

> [i]f a State accedes to a large number of international treaties, all of which have a variation of the *aut dedere aut judicare* principle, there is strong evidence that it intends to be bound by this generalizable provision, and that such practice should lead to the entrenchment of this principle in customary law.[280]

He agreed that such an interpretation was acceptable. However, it referred to a specific case that did not seem to be generally applicable in the context of the Commission's study. In any event, if the provisional outcome of the Special Rapporteur's research and analysis was acceptable to the Commission, one might set aside concerns arising from the sluggishness of States' responses and conclude that it was no longer necessary to seek fresh reactions, thereby enabling the Special Rapporteur to proceed with his work.

62. With regard to the question whether *aut dedere aut judicare* was an alternative obligation, he failed to understand the argument against treating it as such, unless there were several possible interpretations of the term "alternative", which, in his view, was not the case. In any event, it was quite clear that the obligation should be formulated in alternative terms. Four options were conceivable: simply extraditing the suspect; simply prosecuting the suspect; first extraditing and then prosecuting the suspect, which raised the issue of trial *in absentia* and its possible consequences; or, lastly, first prosecuting and then extraditing the suspect, which raised questions such as dual criminal liability and enforcement of the sentence. In any case, the question arose of whether and to what extent those options, particularly the third and fourth, were relevant and under what circumstances they would be implemented. With regard to the "triple alternative", he wondered what kinds of situations it might cover, apart from the surrender of suspects to the International Criminal Court.

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[280] Enache-Brown and Fried, *loc. cit.* (see footnote 254 above).

63. The ruling rendered by the Spanish criminal court on 28 April 2008, cited in paragraph 88 (*c*) of the report, was interesting in that it illustrated, in a somewhat novel way, the legal regime applicable in the event of refusal of extradition. It established two conditions: first, that the territorial State must prosecute the suspect in its own courts; and second, that the trial should take place solely if so required by the State requesting extradition. The latter was a condition characterized by the Special Rapporteur as "new and so far unknown", but it was a condition of which one must be absolutely sure. In conclusion, he noted that the Special Rapporteur was clearly running up against difficulties that were beyond his control. He therefore thought that Mr. Pellet's idea of setting up a working group to assist the Special Rapporteur was a wise proposal, provided that the group's terms of reference were specified. In response to the Chairperson's appeal, he said that he reserved the right to revert to the issues raised and to deal with other issues at the following session.

64. Mr. CANDIOTI, referring to the comments by Mr. Gaja, noted that he had spoken only of the obligation to prosecute, as though it was the sole obligation flowing from the *aut dedere aut judicare* principle. Mr. Fomba had listed four possible options for the obligation to extradite or prosecute. Under the circumstances, he suggested that it might be helpful to adopt a single working definition of the obligation involved; that would facilitate the Commission's work on the topic and perhaps elicit fresh responses from States.

The meeting rose at 1 p.m.

2988th MEETING

Thursday, 31 July 2008, at 10.05 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.

The obligation to extradite or prosecute (*aut dedere aut judicare*) (*concluded*) (A/CN.4/588, sect. F, A/CN.4/599, A/CN.4/603)

[Agenda item 7]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

1. The CHAIRPERSON invited the Special Rapporteur to sum up the debate on the obligation to extradite or prosecute (*aut dedere aut judicare*).

2. Mr. GALICKI (Special Rapporteur) thanked all the members of the Commission who had participated in the debate for their constructive and friendly criticism. Most of that criticism had been aimed at the approach he had adopted in his third report, which consisted of the continued consideration of material covered in his preliminary[281] and second reports,[282] and at the slow pace of progress on the topic. While he attributed those shortcomings chiefly to the reluctance or failure of many Governments to submit the comments and information requested of them, he agreed that a more expeditious and proactive approach was needed, and that the situation should not stand in the way of determining the basic structure and content of the topic. At the current stage, input from Governments should be viewed as valuable support, but not as a prerequisite for the further development of the study. In the light of those comments, he would continue his efforts with a view to presenting a more substantive set of draft articles in his next report.

3. With regard to the draft articles proposed in the third report, some members had been of the view that draft article 1 (Scope of application) should not specify the various time periods corresponding to the establishment, operation and effects of the obligation, while others had taken the contrary view that their inclusion would help to provide a structure for the future work of the Commission on the topic. On the question whether the adjective "alternative" should be replaced by "legal", the prevailing opinion had been that any adjective was redundant, and Mr. Fomba had pointed out that the phrase "alternative obligation" could be interpreted in at least four ways. He would therefore refrain from qualifying the obligation in any way, and would also shorten the title of the draft article to "Scope".

4. As to the substantive element of draft article 1 and the delimitation of the crimes and offences to be covered by the obligation, the view had been expressed that the obligation, and also the principle of universal jurisdiction, arose only in connection with serious crimes under international law. That view was supported by statements made by the representatives of Sweden and China in the Sixth Committee.[283] Mr. Candioti had suggested that the Commission's primary focus should be on determining the exact nature and content of the obligation on the basis of the various opinions expressed by members during the current session. The need for such a determination as a precondition for any further development of the topic had been unconditionally endorsed by all members who had spoken in the debate.

5. With regard to the personal element, there had been fairly widespread support for the formulation "persons under their jurisdiction", given that the matter was essentially regulated by existing treaties on extradition. The point had also been made that the obligation arose only when the alleged offender was present in the territory of the requested State, which had the discretionary power

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[281] *Yearbook … 2006*, vol. II (Part One), document A/CN.4/571.

[282] *Yearbook … 2007*, vol. II (Part One), document A/CN.4/585.

[283] *Official Records of the General Assembly, Sixty-second Session, Sixth Committee*, 22nd meeting (A/C.6/62/SR.22), paras. 33 and 62, respectively.