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Summary record of the 3144th meeting

Topic:
Immunity of State officials from foreign criminal jurisdiction

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

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

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

55. It would also be interesting to know how the Special Rapporteur intended to approach the issue of the absolute or restricted nature of immunity *ratione materiae* (item 3.3

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

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

The meeting rose at 12.55 p.m.

3144th MEETING

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

Chairperson: Mr. Lucius CAFLISCH

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

²⁴⁷ See footnote 228 above.

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

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

[Agenda item 5]

PRELIMINARY REPORT OF THE SPECIAL
RAPPORTEUR (continued)

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

2. Mr. PARK pointed out that the divergence of opinion among States with regard to immunity continued to form an obstacle to the entry into force of the United Nations Convention on Jurisdictional Immunities of States and Their Property, which had been elaborated by the Commission²⁴⁹ and adopted by the General Assembly in its resolution 59/38 of 2 December 2004. Contrary to the Commission's expectations, as of July 2012 only 13 of the 30 States needed for its entry into force had ratified the Convention.²⁵⁰ Since a similar divergence of viewpoints might also arise with regard to the immunity of State officials from foreign criminal jurisdiction, the Commission should be extremely careful when charting the future course of its work. It should initially focus on *lex lata* and make a study of State practice, particularly national case law. *Lex ferenda* could be taken into consideration if that was generally deemed to be necessary. It might be the case, in the context of *lex ferenda*, that the immunity of State officials did not extend to international crimes or other grave violations of international law.

3. In determining the scope of immunity, the first step was to identify the persons who enjoyed immunity *ratione personae*. To extend immunity *ratione personae* to high-ranking officials other than the troika (Head of State, Head of Government and minister for foreign affairs) might be extremely problematic. Each State had its own ministerial and administrative structure, and the functions of an official in one State did not always correspond to those of a counterpart in another. A court in the forum State, meaning the State that might exercise criminal jurisdiction, would be hard pressed to determine whether a particular official did or did not enjoy immunity *ratione personae*. Questions would inevitably arise, such as whether it was the conclusion drawn by the forum State, or rather by the State of nationality of the official, that took precedence, and whether the forum State had to accept the conclusion reached by the State of nationality of the official. The extension of immunity *ratione personae* beyond the troika might also conflict with current efforts, in the interests of the international community, to limit immunity.

4. As regards immunity *ratione materiae*, the Commission must look into possible exceptions to the immunity of State officials through an analysis of national and international case law. The recent judgment of the International Court of Justice in the case concerning *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* and its judgment in the case concerning the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* were prime areas for research. The case law of the International Criminal Court was not relevant, but national case law was of great importance because it could help to shed light on any possible exceptions to criminal immunity that currently existed under general international law. If the Commission did not find State practice to be uniform and consistent, then the extent to which *lex ferenda* should be taken into consideration in future would have to be decided.

5. Referring to paragraph 57 of the report, he said that the Special Rapporteur appeared to view the purpose of immunity as being the preservation of the principles, values and interests of the international community. He was not sure, however, that that was the case. In positive international law, the concept of immunity was based on the principles of the sovereign equality of States and territorial sovereignty. The purpose of immunity was to enable the State to function properly and to ensure the stability of international relations. The values and interests of the international community could, however, be considered from the standpoint of *lex ferenda*.

6. In its debate on the preliminary report²⁵¹ of the former Special Rapporteur in 2008, the Commission had settled on the term “official” in English (“*représentant*” in French).²⁵² However, as the Special Rapporteur suggested, the Commission might consider using a term that more clearly reflected the basis for immunity *ratione materiae*. Possible alternatives included the terms “agent”, which had been adopted by the Institute of International Law in its 2009 resolution on the immunity from jurisdiction of the State and of persons who act on behalf of the State in case of international crimes;²⁵³ “State organ”, as found in the 2001 articles on responsibility of States for internationally wrongful acts;²⁵⁴ and “State official”, as had been suggested by the Special Rapporteur.

7. In his view, the term “State official” was appropriate for the topic under consideration. The International Court of Justice had used the term in its 2012 judgment in the *Jurisdictional Immunities of the State* case to which he had just referred. In terminology, what mattered most was not the label but the definition of the term to be used. It was therefore important to specify what the Commission meant by “State official” and which persons were to be included in the various categories of State officials enjoying immunity from foreign criminal jurisdiction. One objective in defining the term “State official” was

²⁴⁹ *Yearbook ... 1991*, vol. II (Part Two), para. 28, draft articles on jurisdictional immunities of States and their property and commentaries thereto.

²⁵⁰ *Multilateral Treaties Deposited with the Secretary-General* (the paper version of this publication was discontinued in August 2011, whereas the online version is updated daily and is available from <https://treaties.un.org/Pages/ParticipationStatus.aspx>), chap. III.13.

²⁵¹ *Yearbook ... 2008*, vol. II (Part One), document A/CN.4/601.

²⁵² *Ibid.*, vol. II (Part Two), para. 306; see also para. 288.

²⁵³ Institute of International Law, *Yearbook*, vol. 73, Session of Naples (2009), p. 226. Available from the Institute's website (<http://justitiaetpace.org>).

²⁵⁴ General Assembly resolution 56/83 of 12 December 2001, annex. The draft articles and commentaries thereto appear in *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, paras. 76–77.

to maintain a balance between the principles underlying immunity, namely sovereign equality and territorial sovereignty, the first being functional and the second representational in nature.

8. Mr. GÓMEZ ROBLEDÓ said that he agreed with the Special Rapporteur's proposed approach of going step by step yet clearly delineating the main themes to be addressed.

9. All matters related to the legal regime governing the immunity of diplomatic and consular officials, as well as officials on special mission, should be viewed as falling outside the scope of the current topic: they were already covered by the 1961 Vienna Convention on Diplomatic Relations, the 1963 Vienna Convention on Consular Relations and the 1969 Convention on special missions, respectively. Those treaties nevertheless set out the essence of the institution of immunity and embodied various aspects of customary international law.

10. That point was relevant in view of the position, held by some, that immunity was absolute, a position that admitted of no exceptions to immunity and was tied to the personification of the State as the beneficiary of immunity. But representation of the State was quite different from personification of the State in the sense that sovereignty was vested in the ruler—sovereignty having shifted in today's world from the ruler to the nation.

11. The treaties he had just cited struck a reasonable balance between recognizing immunity as an essential element in maintaining friendly relations and cooperation among States—and thus stability in international relations—and acknowledging the need to ensure that perpetrators of an offence—whether the State itself, one of its officials or both—were held accountable for their actions. In the current transitional phase of the Commission's consideration of the topic, it was accordingly worth bearing the purpose of immunity in mind.

12. From a modern perspective, immunity from jurisdiction rested on two assumptions. The first was that immunity was eminently functional, in that it enabled States to operate fully as sovereign States. The domestic law of States regarding the immunity of officials was irrelevant for the purposes of the current analysis. All that mattered were those aspects that ensured the functional nature, and hence the stability, of inter-State relations.

13. The second assumption was that immunity from jurisdiction was not absolute and the State could exercise its jurisdiction over a person who enjoyed immunity in respect of acts allegedly constituting a crime. Between those two extremes lay a regime that could not be limited to an exercise *de lege lata* but had to allow also for some inclusion into the broader sphere *de lege ferenda*.

14. There was no doubt that mere doctrinal trends did not amount to rules of law. But certain developments in both international and regional legislation and case law over the past 15 years were more than trends and had the potential to alter the interpretation of immunity that had formerly prevailed. The functional nature of immunity was thus becoming the foundation of a legal regime

of immunity of State officials from foreign criminal jurisdiction that did not conflict with other principles and values of the international community that were in the process of incorporation into international law, as the Special Rapporteur had rightly pointed out in paragraph 58 of her preliminary report.

15. With regard to immunity *ratione personae*, the Commission must take steps to identify other entities capable of enjoying immunity, apart from the members of the troika. In today's world, a minister of trade was called upon to perform functions that had previously corresponded to those of the minister for foreign affairs. Accordingly, rather than to establish an exhaustive list that would not be capable of withstanding the test of time, it might be better to identify certain relevant criteria.

16. The most important question was whether immunity *ratione personae* was absolute or restricted in nature. Second, in respect of immunity *ratione materiae*, it would be useful to look into what should be understood by "State official". In his view, the relevant criterion was whether an act could be attributed to, or responsibility borne by, the State of nationality of the official.

17. Lastly, having cited paragraph 69 of the report on the procedural aspects of immunity, he said that the actual cases in which immunity must be respected, could be invoked to good effect or could be waived needed to be identified. If the purpose of immunity was to ensure the proper functioning of inter-State relations, then it was precisely when the authorities of a State in which a foreign official was present committed an act that infringed the inviolability of his or her person that it was most important for the scope and procedural aspects of immunity to have been clearly delineated. Certainly, the State of nationality of the official must take all steps to ensure that immunity was fully respected as soon as there were any signs that measures pertaining to the preparatory phase of judicial proceedings were being initiated.

18. Mr. MURPHY said that he supported the Special Rapporteur's proposal to prepare and submit draft articles following a step-by-step approach, with the aim of concluding a first reading of the draft articles in the course of the current quinquennium. To his mind, the best approach would be to prepare a small number of draft articles that addressed the core issues, rather than a larger number that provided detailed rules on all aspects of the topic.

19. He also supported the Special Rapporteur's view that it was not helpful to decide *ab initio* whether the project should be approached from the perspective of *lex lata* or *lex ferenda*. As was the case for all of the Commission's work, there would no doubt be elements of both in the project. He agreed with the Special Rapporteur's assessment that, initially, it would be useful to consider *lex lata* so as to see whether any settled State practice existed and, subsequently, to decide whether it was appropriate to move in a new direction.

20. It was important to maintain the scope of the topic as it currently stood. As the Special Rapporteur had indicated, the topic did not deal with questions concerning immunity from international criminal jurisdiction, immunity of an

official from the jurisdiction of the State of his or her nationality or immunity from the civil jurisdiction of another State.

21. While the topic must necessarily take into account the immunities that existed in treaty relations, it was concerned with identifying the relevant rules of customary international law, not treaty law. Those customary rules did not prevent States from according in their national law greater immunity than what was required under international law. The Commission's task was not to consider whether international law required a State to exercise criminal jurisdiction in certain circumstances: rather, it was to focus on whether a State, if it chose to exercise criminal jurisdiction, must nevertheless accord immunity to the official concerned.

22. The Special Rapporteur should maintain the distinction between immunity *ratione personae* and immunity *ratione materiae* in her methodological approach, as it appeared from paragraphs 54 to 58 of her report that she was inclined to do. He agreed with her assertion that the two types of immunity had the same general purpose, to allow for the continued performance of representative or other governmental functions and for stability in international relations. In his view, the existence of those immunities flowed to a large extent from the broader notion that States were generally immune from the national jurisdiction of other States, through both State immunity and official immunity, unless certain exceptions applied. That did not mean that State immunity and official immunity were identical, but he believed that they were both based on a presumption that, as a matter of customary international law, it was problematic for one State to pass judgment on another in its national courts, since that implicated not only the individual but also the other State. As the International Court of Justice had asserted in its 2008 judgment in the case concerning *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, a claim of immunity for a government official was, in essence, a claim of immunity for the State, from which the official benefited. Indeed, that was why a State could waive the official's immunity: it was meant to protect the State, not the official.

23. With respect to immunity *ratione personae*, it appeared that customary international law accorded it to all members of the troika during their term of office, not merely to the Head of State and Head of Government. Such immunity had the main benefit of allowing a limited number of leading State officials to engage freely in inter-State relations. All the more reason, then, for it to be held by an incumbent foreign minister, whose work focused on promoting inter-State relations and who travelled to foreign jurisdictions more regularly than did the Head of State or Head of Government.

24. Covering all three members of the troika was consistent with the Court's reasoning in its 2002 judgment in the case concerning the *Arrest Warrant of 11 April 2000*, in which it had grouped the holders of the three posts together as enjoying full civil and criminal immunities while in office. Although it had not used the term "immunity *ratione personae*", the Court had seemed to be referring to that type of immunity by focusing on the status of the "incumbent" foreign minister, not on the specific conduct

of the foreign minister at issue in the case, and by indicating that a different situation arose after the minister ceased to hold office. The inclusion of all three troika members was also consistent with the Court's 2006 judgment in the case concerning *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*. Such reasoning likewise seemed to be prevalent in national court proceedings.

25. Turning to the question of whether immunity *ratione personae* under customary international law extended to other senior officials while in office, he said that current State practice and domestic case law seemed to point to only the troika. Furthermore, immunity *ratione personae* was a very powerful immunity, covering both official and private acts—hence the need for caution about expanding the pool of beneficiaries and thereby inviting the very inter-State frictions that immunity rules sought to avoid. Lastly, assuming that the alleged offender must be present in the territory of the foreign jurisdiction, the immunities of officials who were not part of the troika might be addressed through other means, such as special mission immunity.

26. However, in paragraph 51 of its judgment in the *Arrest Warrant of 11 April 2000* case, the International Court of Justice had referred to "holders of high-ranking office ..., such as" the troika, which suggested broader coverage. If the principal value of immunity *ratione personae* was to allow certain sitting officials to engage freely in representative functions on the international stage, and if that was accomplished regularly by ministers other than foreign ministers, then perhaps immunity *ratione personae* should be regarded as extending to a limited number of other senior officials. The problem was how to identify them. Although it might be possible to do so by specific office, such as ministers of defence or of trade or commerce, such an approach might be problematic given the differences in ministerial names and functions worldwide. In paragraph 53 of its judgment in the *Arrest Warrant of 11 April 2000* case, the International Court of Justice described the foreign minister as someone serving as the State's representative in international negotiations and intergovernmental meetings, explaining that his or her immunity was necessary "to ensure the effective performance" of such a role. The reasoning in paragraphs 51 and 53 of that judgment might be combined, so that immunity *ratione personae* would apply to the troika and to "holders of high-ranking office" when such immunity was necessary to ensure the effective performance of their functions on behalf of their respective States.

27. As the Special Rapporteur correctly observed in paragraph 62 of her report, immunity *ratione personae* covered all acts performed by the beneficiary, whether in an official or private capacity. The reasoning behind that assertion could be found in paragraph 55 of the Court's judgment in the *Arrest Warrant of 11 April 2000* case. An important question was whether, absent a waiver by the State of nationality or in a treaty regime, there were any exceptions to immunity *ratione personae*, including when there were allegations of serious international crimes. The Court had addressed the matter in paragraphs 56 to 58 of its judgment in the *Arrest Warrant of 11 April 2000* case and, after a careful review of State practice, had found that no such exceptions existed in customary international law.

28. Much attention had been paid to the joint separate opinion of Judges Higgins, Kooijmans and Buergenthal in the *Arrest Warrant of 11 April 2000* case. They had not dissented, however, from the Court's findings on immunity, including that there were no exceptions to the rule according immunity to an incumbent foreign minister. Indeed, the Court's decision that a sitting foreign minister was immune even when faced with allegations of having committed serious international crimes had been accepted by the majority of judges. Of the three who had voted against the immunity finding, Judge Oda had done so principally on grounds of admissibility of the case and had simply said that customary international law on immunity was not clear. Only Judge Al-Khasawneh and Judge *ad hoc* Van den Wyngaert could be fairly said to have definitively opposed the Court's finding that there was no exception to the rule on immunity for serious international crimes.

29. As far as immunity *ratione materiae* was concerned, customary international law appeared to accord it to a State official for acts performed in his or her official capacity, both during and after the person held office. However, such immunity did not extend to acts not performed in an official capacity, including acts committed before the person assumed office. He agreed with the Special Rapporteur on the need to analyse carefully the relationship between the rules on State responsibility and the rules on the immunity of officials in determining whether an official was acting in his or her official capacity. The International Court of Justice had established a link between a State's assertion of immunity and its responsibility for conduct when it had stated, in its judgment in *Certain Questions of Mutual Assistance in Criminal Matters*, that the State notifying a foreign court that, for reasons of immunity, judicial proceedings should not go forward against its State organs was assuming responsibility for any internationally wrongful act committed by such organs.

30. It was plausible to ask whether allegedly criminal conduct could be attributed to the official's State as a matter of State responsibility. If the answer was no, then the official's conduct could not be considered an "official act" and there should be no immunity *ratione materiae*. When considering that point, the Special Rapporteur might wish to explore the way that official acts were treated in the context of diplomatic, consular and other immunities, compared with in the rules on State responsibility, in order to ensure consistency in different domains of immunity.

31. If the conduct could be attributed to the State, then there were at least three possibilities that he invited the Special Rapporteur to consider in her future work. First, the conduct was *per se* an "official act" and therefore, in all circumstances, the official was entitled to immunity *ratione materiae*. Second, the conduct was *per se* an "official act", but there were some exceptional circumstances where immunity *ratione materiae* was denied, such as when the conduct was a serious international crime. Third, the fact that the conduct could be attributed to a State did not indicate *per se* that it was an "official act" for the purposes of immunity *ratione materiae*; it was then necessary to rely upon a different standard, possibly one derived from another area of international law governing immunity.

32. On the subject of whether serious international crimes should be regarded under customary international law as acts that by their nature could not be performed in an "official capacity", he noted that, in their joint separate opinion in the *Arrest Warrant of 11 April 2000* case, Judges Higgins, Kooijmans and Buergenthal had discerned a trend in that direction. However, they had been cautious in how they characterized the trend, saying that it was "increasingly claimed" that serious international crimes could not be regarded as official acts and that the idea was only gradually finding expression in State practice. Since the Court had not addressed the matter in the *Arrest Warrant of 11 April 2000* case or in any other judgment, he encouraged the Special Rapporteur to do so, although he found it somewhat strange to characterize serious international crimes, by definition, as not constituting "official" acts. International criminal tribunals, including the International Criminal Court, seemed to assume that serious international crimes were or at least could be undertaken in an "official capacity". Indeed, the purpose of article 27 of the Rome Statute of the International Criminal Court was to deny immunity to persons acting in an "official capacity". Furthermore, the idea that State officials who were involved in genocide or crimes against humanity were not engaging in "official" acts seemed to downplay the role of the State, as though those officials were renegade actors who had suddenly decided to engage in bad acts in their private capacity. Thus, if there was a move to codify an exception to immunity in that area, it might be better to characterize the commission of serious international crimes as "potentially official" acts, but to deny their perpetrators immunity.

33. A further question was whether customary international law regarded those who were alleged to have committed serious crimes, even as official acts, as not being entitled to immunity *ratione materiae* in national criminal courts. In its 2012 judgment in the *Jurisdictional Immunities of the State* case, the International Court of Justice had found that customary international law did not treat a State's entitlement to immunity as dependent upon the gravity of the act of which it was accused or the peremptory nature of the rule that it was alleged to have violated. Although the Court had made a point, in paragraph 91 of its judgment, of saying that it was assessing only State immunity, not official immunity, its basic reasoning was relevant to the Commission's work on the topic, on several grounds.

34. First, the Court saw a problem in stripping away State immunity based on the allegation of a serious international crime, because doing so invited a litigant to craft the allegations skilfully solely to negate the immunity. In essence, the Court was saying that allowing litigation to proceed whenever the commission of heinous acts was alleged would deprive an immunity regime of much of its purpose, as it would no longer shield the State from exposure in national courts. That same reasoning might be applied to immunities of State officials. The problem of "artful pleading" arose whenever immunities were being restricted, however: a crafty lawyer could always tailor allegations to fit whatever exceptions were available. The solution did not necessarily lie in denying the existence of an exception to immunity, but instead, in requiring the prosecutor to make a *prima facie* showing that the official

was not entitled to immunity, thereby allowing the court to screen out baseless accusations.

35. Second, with reference to *jus cogens*, the Court had concluded that an allegation of a violation thereof did not alter existing rules on State immunity from national jurisdiction and that a *jus cogens* rule and an immunity rule addressed two different issues and were not in conflict. The *jus cogens* rule might establish that the act was substantively unlawful, but that did not mean that the illegal act, as a procedural matter, could be litigated in a national court. Again, the same reasoning seemed relevant to the immunity of officials and, if so, refuted arguments concerning *jus cogens* advanced by Lord Millet in the *Pinochet* (No. 3) case; by the Italian Court of Cassation in the *Lozano v. Italy* case; and by the dissenting judges in the case of *Al-Adsani v. the United Kingdom* [GC] before the European Court of Human Rights. Moreover, if a *jus cogens* rule should supersede immunity *ratione materiae*, then, logically, it should also supersede immunity *ratione personae*—yet few seemed to take that position.

36. Third, the Court had not agreed that stripping away State immunity whenever necessary to ensure accountability was appropriate. It had found no evidence that the right to State immunity was conditional upon the availability of a venue other than national courts for pursuing redress. By the same token, State officials should not be denied the immunity to which they were entitled before national courts simply because it might be difficult to prosecute in another forum. In the *Arrest Warrant of 11 April 2000* case, the three judges who had appended a joint separate opinion had also taken that position, as borne out by paragraph 79 of that text. Of course, recognition of immunity *ratione materiae*, even for allegations of serious crimes, did not necessarily lead to impunity. An official might be prosecuted in his or her own State; that State might waive immunity on an *ad hoc* basis or through a treaty regime; or immunity might not apply to prosecution before an international criminal court.

37. Lastly, the basic methodology of the Court had been to conduct a survey of practice in national courts, and it had found no support for the proposition that State immunity could be limited based on the gravity of the violation. In other words, it had assumed the existence of State immunity, then looked for an exception based on State practice. The Commission might wish to do the same with regard to immunity *ratione materiae*. The Special Rapporteur should accordingly revisit carefully the practice of national courts, relating to immunity *ratione materiae*, taking account of the research done by Mr. Kolodkin and the Secretariat as well as subsequent developments. For example, in some cases where former officials had been prosecuted by foreign courts for serious international crimes, a defence of immunity had not been raised, or immunity had been waived by the official's State, making those cases weak support for the existence of a rule under which immunity *ratione materiae* was denied.

38. If State practice was not settled, then perhaps there was some sign of a trend towards a new rule, *de lege ferenda*, whereby immunity *ratione materiae* was denied

when an official was charged with a serious international crime. That became a question of legal policy, in which the potential for disruption of friendly relations among States must be weighed against the desire to avoid impunity for heinous crimes. To mediate between the two, any new rule might be limited in certain ways. It might allow only for the State where the crime was committed or whose nationals were harmed by the crime to deny immunity, or for a State to deny immunity in cases when the offender was physically present or the prosecution had been authorized by the minister of justice or a comparable State official. However, several of the points raised with regard to the *Jurisdictional Immunities of the State* case would seem to militate against acknowledging the existence of a new rule: for example, the need to avert divergences between State and official immunities whereby a State could not incur liability for harm caused by serious international crimes, but the State's official could be subject to criminal prosecution for the same crimes.

39. He agreed with the Special Rapporteur that procedural aspects of immunity should be an element of work on the topic and that many of those covered in Mr. Kolodkin's third report²⁵⁵ were uncontroversial. Ultimately, developing a single procedural regime should be feasible, although the final approach to the substantive aspects might need to be differentiated. While he understood the Special Rapporteur's inclination to deal with substantive elements first and procedural ones later, he considered that there were aspects of procedure such as the degree of discretion granted to a prosecutor that, if resolved at an early stage, might facilitate consensus on substantive issues.

40. Mr. TLADI said that two points raised in Mr. Murphy's highly interesting statement required clarification. First, if he had understood Mr. Murphy correctly, it appeared that under customary international law the troika had immunity *ratione personae*. His argument seemed to be based partly on the proposition that it was necessary to assume the existence of immunity *ratione personae* and to prove exceptions to such immunity. While he had no difficulty with that particular assertion, he would stress that it did not necessarily flow from the general assumption of immunity that all members of the troika had immunity *ratione personae*.

41. Second, Mr. Murphy had rightly recalled that only Judges Al-Khasawneh and Van den Wyngaert had been able to find exceptions to immunity under international customary law. Even though, in their joint separate opinion in the *Arrest Warrant of 11 April 2000* case, Judges Higgins, Kooijmans and Buergenthal had been unable to find any such exceptions, it was important to recall that their point of departure had been not immunity *ratione personae* but immunity *ratione materiae*. Indeed, they had entered into a discussion of whether the commission of serious international crimes constituted official acts precisely because they considered that foreign ministers were entitled to immunity *ratione materiae*.

42. Mr. KAMTO said that while he endorsed Mr. Tladi's remarks, he wished to point out that the judgment in the

²⁵⁵ *Yearbook ... 2011*, vol. II (Part One), document A/CN.4/646.

Arrest Warrant of 11 April 2000 case had not clearly defined the temporal scope of immunity, in other words whether the State official's immunity produced its effects only during that person's term of office or continued to do so thereafter. It was difficult to tell whether the reference in the judgment to "complete immunity" related to immunity *ratione materiae* or immunity *ratione temporis*.

43. Mr. Murphy had referred to article 27 of the Rome Statute of the International Criminal Court. That provision made it clear that official capacity did not exempt a person from criminal responsibility. Article 27, paragraph 2, stated that

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

Hence, if a Head of State or a minister for foreign affairs committed an offence, immunity as a State official was no longer operative.

44. Mr. PETRIČ said that, to some extent, he agreed with Mr. Tladi's view regarding the troika. While he did not disagree with Mr. Murphy's comments, it should not be forgotten that immunity *ratione personae* was connected not with the function but with the status of an official who personified State sovereignty. The Commission should therefore define immunity *ratione personae* very narrowly.

45. Mr. SABOIA said that the Special Rapporteur's carefully prepared preliminary report was a good starting point for further consideration of the complex topic of immunity of State officials from foreign criminal jurisdiction. It would enable the Commission to draw on aspects of the previous Special Rapporteur's reports, which it largely supported, while exploring ways of going beyond his strictly *de lege lata* approach. The technical aspects of his reports had been generally well received, but his summaries and conclusions had not been discussed or endorsed and therefore the current Special Rapporteur was in no way bound by them.

46. There was consensus that it was useful to differentiate between immunity *ratione personae* and *ratione materiae*, both of which served the same purpose, namely to preserve principles, values and interests of the international community as a whole. Several legal issues remained open to debate, however. He agreed that, in view of the differences between the two types of immunity, establishing separate legal regimes for them would help to avoid confusion and grey areas. He also supported the Special Rapporteur's view that, as both categories of immunity had an essentially functional basis, the Commission should focus on the key element of functionality.

47. He did not share some members' critical attitude to an approach that would take account of the international community's values and trends in international law. Law did not exist in a vacuum: its purpose was to preserve and promote the values that were important to society, including that of justice. *Pacta sunt servanda* was one example of a norm derived from an ethical value. Trends should not be ignored either, especially as exceptions to immunity were not a new issue. When the Commission

had drawn up the draft Code of Crimes against the Peace and Security of Mankind,²⁵⁶ it had devoted an article, article 7, to the individual criminal responsibility of officials, including Heads of State, for the commission of crimes listed in that instrument. Similarly, when it had formulated the Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal ("Nuremberg Principles"),²⁵⁷ it had included a principle concerning the responsibility of Heads of State for the commission of grave international crimes (Principle III).

48. Developments such as the establishment of international criminal tribunals and the International Criminal Court, the increasing interest in clarifying the nature and content of universal jurisdiction and the growing recognition of the coexistent and complementary nature of the universal responsibility of States and the criminal responsibility of individuals should not be disregarded. At a lecture given at The Hague Academy of International Law, Professor Cançado Trindade,²⁵⁸ who had since become a judge of the International Court of Justice, had suggested that grave international crimes were most often planned and committed under the command of the State apparatus and that the elements of intention and guilt on the part of individuals and the State therefore made both sides criminally responsible. Like Hans Kelsen and Sir Elihu Lauterpacht, he had taken the view that the compartmentalization of responsibility regimes was an obstacle to the realization of justice.

49. During the debate on the current topic, many references had been made to the judgments of the International Court of Justice in the *Arrest Warrant of 11 April 2000* and *Jurisdictional Immunities of the State* cases. The separate or dissenting opinions on both judgments contained important elements of *opinio juris* pointing to nascent trends in international law that should be also taken into account. Another significant case, to which Judge Cançado Trindade had referred in his dissenting opinion in the *Jurisdictional Immunities of the State* case, was that of *Al-Adsani v. the United Kingdom* [GC]. While the European Court of Human Rights had upheld the immunity granted to Kuwait, the vote had been very close, and in their joint dissenting opinion, eight judges had concluded the following:

In the event of a conflict between a *jus cogens* rule and any other rule of international law, the former prevails. The consequence of such prevalence is that the conflicting rule is null and void, or, in any event, does not produce legal effects which are in contradiction with the content of the peremptory rule.²⁵⁹

50. Although most of the rapidly emerging trends and developments in the law and practice of the United Nations had a political basis, they could not fail to have an

²⁵⁶ *Yearbook ... 1996*, vol. II (Part Two), para. 50.

²⁵⁷ *Official Records of the General Assembly, Fifth Session, Supplement No. 12 (A/1316)*, paras. 95–127. The Nuremberg Principles are reproduced in *Yearbook ... 1985*, vol. II (Part Two), para. 45.

²⁵⁸ See A. A. Cançado Trindade, "International law for humankind: towards a new *jus gentium* (I and II)", *Collected Courses ...*, vols. 316 and 317 (2005).

²⁵⁹ Joint dissenting opinion of Judges Rozakis and Caflisch joined by Judges Wildhaber, Costa, Cabral Barreto and Vajić, para. 1, which was endorsed by Judge Loucaides.

impact on international law. For example, the notion of a responsibility to protect and its application by the Security Council had resulted in decisions under Chapter VII of the Charter,²⁶⁰ and thus binding on all countries, which authorized the use of force, the establishment of no-fly zones and the imposition on States and Heads of State or Government of sanctions such as blocking their accounts and preventing them from travelling abroad. Those actions were a response to a perceived need for urgent measures to contend with massive, systematic violations of human rights that not only threatened international security but also constituted unacceptable international crimes. Such actions were also indicative of an excessive widening of the Security Council's competence, contrasting with the General Assembly's slow pace in adopting international law instruments. Unless the scope of international law were expanded to enable it to respond to such challenges and prevent and repress grave crimes of international concern, action would continue to be dictated by political impulses that were frequently inappropriate or selective.

51. With reference to the questions raised in the preliminary report, he said that he was against expanding the troika and thought that the list of persons who enjoyed immunity should be closed. When other high officials travelled abroad, they were usually sent in a capacity such that they would be covered by the immunities granted to the heads and members of special missions.

52. He was in favour of exceptions to the troika's immunities in the cases mentioned in paragraph 64 of the preliminary report of the Special Rapporteur and of exceptions to the immunity *ratione personae* of less high-ranking officials when they had allegedly committed grave crimes of international concern. At the same time, there was a need to avoid the risk that high officials and representatives of a sovereign State might be exposed to vexatious or politically motivated criminal prosecution in a foreign State. High thresholds must therefore be set for presumptions of evidence against the alleged offender. It would also be advisable to consult sources such as the statutes of the International Criminal Court and of other international tribunals and the Guidelines on the Role of Prosecutors²⁶¹ to see what safeguards they provided, although ensuring foreign courts' compliance with those safeguards would be a major challenge.

53. The Commission should strive to arrive at a more restrictive definition of the circle of officials who were covered by immunity *ratione materiae* than that offered by the previous Special Rapporteur in his reports. The articles on responsibility of States for internationally wrongful acts²⁶² might offer some clues. While article 4 gave a very broad definition of the organs of a State, article 5 introduced more restrictions regarding persons or entities exercising elements of governmental authority. The expressions "provided the person or entity is acting in that capacity in the particular instance" and "governmental authority" might serve as a starting point for restricting the categories

of officials entitled to immunity *ratione materiae*. The term "governmental authority" might also help to establish some elements of a definition of an "official act", which, in turn, would supply a basis for limiting categories of acts that could give rise to immunity *ratione materiae*.

54. He was in favour of the comprehensive, substantive workplan suggested in the last chapter and of the step-by-step approach proposed in paragraph 75 of the report. Initially, it might be wise for the Commission to approach the topic by considering *lex lata*, but an analysis *de lege ferenda* was also essential and would contribute to a more balanced result consistent with the Commission's dual mandate to codify and progressively develop international law.

55. Mr. WISNUMURTI said that the fresh methodological and conceptual approaches proposed in the Special Rapporteur's preliminary report would help the Commission to find common ground and achieve further progress.

56. Focusing on some of the questions raised in the report, he said that it would be futile to become embroiled in a debate on whether to examine the topic from the perspective of either *lex lata* or *lex ferenda*, or whether to take both aspects into consideration. It would be logical for the Commission to continue its work on codification, but at the same time it should not ignore progressive development and the international community's need to promote peace and justice by combating impunity. Caution and prudence were, however, of the essence in such a politically charged field.

57. As for immunity *ratione personae* and immunity *ratione materiae*, a clear distinction should be drawn between personal and functional immunity, and a separate legal regime should be established for each. Separate treatment would enable the Commission to gain a clear understanding of their respective nature and make it easier to draft articles pertaining to them. He agreed that immunity *ratione personae* and immunity *ratione materiae* had a functional link to the general purpose of preserving the principles and values of the international community, although it was necessary to be cautious about what was meant by that phrase; a broad interpretation would be counterproductive. In his opinion, it referred specifically to the international community's need to fight impunity.

58. Another issue deserving the Commission's attention was the relationship between the international responsibility of a State and the international responsibility of individuals. The definition of "official act" and the attribution of that act to the State were of central importance in that respect. The elements mentioned in paragraph 60 of the report had to be taken into account when considering the notion of "official acts" and its link to State responsibility.

59. As far as the list of persons possessing immunity *ratione personae* was concerned, customary international law established that such immunity was held by Heads of State, Heads of Government and ministers for foreign affairs. He disagreed with the view that ministers for foreign affairs did not have personal immunity, because

²⁶⁰ See, in particular, resolutions 1970 (2011) of 26 February 2011 and 1973 (2011) of 17 March 2011, para. 9.

²⁶¹ See footnote 238 above.

²⁶² General Assembly resolution 56/83 of 12 December 2001, annex. The draft articles adopted by the Commission and commentaries thereto appear in *Yearbook ... 2001*, vol. II (Part Two), paras. 76–77.

as the highest government officials in charge of foreign affairs, they represented the State, and personal immunity was essential for the discharge of those duties. On the other hand, it was doubtful whether there was any need to widen personal immunity to take in senior officials other than the troika.

60. Whether immunity *ratione personae* was absolute or restricted was a more difficult issue, since it was necessary to decide whether restrictions on or exceptions to personal immunity should apply to acts contrary to *jus cogens* and whether an exception should cover Heads of State or of Government while they were in office, after their term of office, or in both cases. While exceptions were necessary in addressing impunity, it was important to take account of the need to safeguard stability in international relations and to ensure the right balance between the two concerns.

61. The question of whether immunity *ratione materiae* was subject to exceptions or restrictions was also a controversial matter that had to be addressed. There had been greater support for a possible exception in the case of immunity *ratione materiae* than in that of immunity *ratione personae*. The Commission would have to examine the scope of functional immunity as well as the definitions of “official” and “official act”. At the same time, it must determine whether one set of procedural rules should cover both personal and functional immunity, or if two separate sets of rules were necessary. Lastly, the workplan proposed in paragraph 72 of the report would be a useful tool to enable the Commission to advance in its work on the topic and to guide the Special Rapporteur in preparing her next report.

62. Mr. HASSOUNA said that the preliminary report, while concise, was clear and comprehensive. The Special Rapporteur had stated her intention to build on the work of Mr. Kolodkin who, despite a sometimes subjective approach, had always demonstrated flexibility and deserved thanks for his important contribution. As to the approach to be taken to the topic, he said that he supported the view, widely expressed in discussions in the Commission and in the Sixth Committee, that the Commission should strike a balance between the need to uphold the principle of immunity and the need to preclude immunity for serious crimes under international law.

63. The points of contention identified in the report and the workplan were key issues that needed to be addressed for the work on the topic to be comprehensive. Differentiating the regime of immunity *ratione materiae* from the regime of immunity *ratione personae* might dispel persisting uncertainty regarding the beneficiaries and scope of the two types of immunity. It also seemed important to define what constituted an “official act”: that, too, would help to clarify the scope of the two immunities, and an analysis of the attribution of an “official act” to a State would elucidate the relationship between immunity and State responsibility. In that effort, it would be helpful to highlight any correlation with the Commission’s work to develop the United Nations Convention on Jurisdictional Immunities of States and Their Property. For the purposes of that Convention, representatives of a State acting in their official capacity were assimilated to

the State itself. The commentary to the relevant provision (art. 2, para. 1 (b) (iv)) explained that the phrase “in that capacity” was meant to make it clear that such immunities were accorded to representatives for their representative capacity *ratione materiae*.²⁶³

64. With regard to the definition of an “official act”, the report suggested that the Commission might find it useful to distinguish between official acts and unlawful acts. However, the relevance of that distinction had been questioned in the memorandum by the Secretariat on immunity of State officials from foreign criminal jurisdiction.²⁶⁴ The analysis there indicated that if unlawful or criminal acts were considered, as a matter of principle, to be “non-official” for the purposes of immunity *ratione materiae*, the very notion of immunity would be deprived of much of its content. Immunity covered all activities related to official functions, irrespective of their legality, since its rationale was to prevent States from sitting in judgment over the acts of other sovereign States.

65. The current Special Rapporteur was right in planning to continue to survey and analyse the practice of States with respect to the immunity of State officials from foreign criminal jurisdiction, so as to take into account practice not reviewed by her predecessor. Special attention should be given, in that context, to the recent ruling of the International Court of Justice in the *Jurisdictional Immunities of the State* case. The legal analysis therein, though it pertained to State immunity, might provide a helpful framework for considering several issues. The Court, for example, had elaborated on the *opinio juris* and the State practice relevant in the context of immunity and had analysed the relationship between *jus cogens* and State immunity.

66. While the need to ground the results of work on the current topic in State practice was beyond question, it was also important to understand immunity’s place in the system of values and principles of contemporary international law. The suggestion in the report that the rationale underlying immunity should be elaborated was worthy of support, because the boundaries between *lex lata* and *lex ferenda* were often contentious. A clear account of the place of immunity in contemporary international law would be useful in evaluating various trends, such as possible exceptions to immunity in cases of *jus cogens* violations or international crimes.

67. While he supported the Special Rapporteur’s proposal to approach the topic step by step, a road map and a time frame should be developed to point the way forward and respond to the General Assembly’s request that the Commission should give the topic priority in its programme of work.

68. Ms. JACOBSSON said that the Special Rapporteur’s preliminary report was well reasoned and well structured and, together with the introduction, outlined a constructive way for the Commission to proceed with the topic. She supported the Special Rapporteur’s proposal to tackle

²⁶³ *Yearbook ... 1991*, vol. II (Part Two), draft articles on jurisdictional immunities of States and their property, para. 28, in particular paragraph (17) of the commentary to draft article 2, para. 1 (b) (v).

²⁶⁴ A/CN.4/596 and Corr.1, para. 160 (document available from the Commission’s website).

the various aspects of immunity in clusters, which would speed up the work.

69. Of the principal points of contention relating to substantive aspects of the topic listed in paragraph 53 of the report, she herself attached particular importance to the relationship and the distinction between the international responsibility of the State and the international responsibility of individuals and their implications for immunity.

70. The Special Rapporteur suggested that the procedural aspects of immunity discussed in paragraphs 69 and 70 of the report should be taken up after the substantive ones, when a decision could be made on whether a single procedural regime or two—for immunity *ratione personae* and immunity *ratione materiae*—were needed. The issue of immunity was intrinsically linked to procedure, however. Perhaps, instead of taking the traditional approach to a topic—tackling first substance, then procedure—it would be better to start with procedure. Such an approach had several advantages. Procedural matters were less controversial; irrespective of how many procedural regimes were chosen, many of the provisions would be the same; and, finally, being able to visualize the procedural structure would make it easier to agree on the substantive part.

71. Turning to specific aspects of the report, she said that the Special Rapporteur was right to consider functional immunity as the cornerstone of immunity and to plan to address what constituted an “official act”. Her reference to the interests, values and principles of international law and the international community reflected her view that immunity could not be addressed solely from a *lex lata* perspective. The Special Rapporteur appeared to be saying that the Commission’s task was to address the question of immunity against the backdrop of the Commission’s mandate, a statement that was neither new nor revolutionary. The same point had been made by the previous Special Rapporteur in his syllabus.²⁶⁵ He had emphasized two concepts: first, that State officials should bear responsibility for crimes and that a State should be able to exercise its criminal jurisdiction in respect of suspected perpetrators of crimes; and second, that officials acting on behalf of their States should be independent *vis-à-vis* other States in order to ensure that relations between States were stable and predictable. He had then asserted that the Commission could make a contribution to ensuring a proper balance between those concepts through the codification and progressive development of international law.²⁶⁶ It was on that basis that the Commission had decided to include the topic in its long-term programme of work. The Special Rapporteur made the same point in paragraph 58 of the report.

72. Regarding the workplan in the last chapter of the report, she noted that the definition of an “official act” under item 3.2 would also be relevant under item 2.2. The Special Rapporteur also needed to consider the inclusion of a “without prejudice” clause with respect to international crimes, perhaps giving examples of such crimes, in order to preclude an extensive discussion of what was meant by the term “international crimes”.

73. Mr. HMOUD said that the preliminary report was well written and well researched and reflected a deep understanding of the issues involved. It indicated that the Special Rapporteur intended to formulate conclusions on the basis of doctrine, practice and jurisprudence, rather than to start from legal and methodological premises and endeavour to prove them.

74. While he agreed that the Commission should take into account its past work on the topic and the research material contained in the reports of the previous Special Rapporteur, the approach taken in those reports had been adversarial and one dimensional. The rulings of both domestic and international courts indicated an absence of uniform State practice or rules of customary international law. On the contrary, there were many grey areas that needed to be addressed if the Commission was to move forward, as the Special Rapporteur noted in her report.

75. He did not think that the Commission’s work on the topic, and any draft articles that might result therefrom, should be divided on the basis of relevance to codification or to progressive development. Such an approach would be fruitless and would ignore the fact that the legal issues involved were interrelated. Rather, as the Special Rapporteur suggested, the Commission should study the distinction between immunity *ratione personae* and immunity *ratione materiae*, looking carefully into their respective foundations and the functionality that was common to the two.

76. However, the personification of the State that was a basis for immunity *ratione personae* should be construed as being limited. In its ruling in the *Arrest Warrant of 11 April 2000* case, the International Court of Justice had noted that the immunities accorded to ministers for foreign affairs were not granted for their personal benefit but to ensure the effective performance of their functions on behalf of their respective States. The Court had not discussed the distinction between the two forms of immunity, which was significant considering that the case involved core international crimes. Had the Court been convinced that an act attributed to a minister for foreign affairs was an act of State, and that the minister would thus be immune from jurisdiction, it would have said so instead of relying on the functionality argument. The Court had also stated that it could not deduce, from State practice, any exception under customary international law to the rule according immunity to incumbent ministers for foreign affairs, and that the immunity ended once the official left office.

77. In its ruling in the *Jurisdictional Immunities of the State* case mentioned earlier by Mr. Hassouna, the Court had again had a chance to rule that the act of an official and that of the State were identical for the purposes of immunity in the case of serious crimes under international law. Instead of doing so, it had emphasized that it was addressing only the immunity of the State itself from the jurisdiction of other States’ courts and that the question of whether, and if so to what extent, immunity might apply in criminal proceedings against a State official was not at issue. By so doing, the Court had distinguished between the act of a State and the act of an official, even if the act might be susceptible to dual attribution.

²⁶⁵ *Yearbook ... 2006*, vol. II (Part Two), annex I.

²⁶⁶ *Ibid.*, paras. 17–18.

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

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

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

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

The meeting rose at 1 p.m.

3145th MEETING

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

Chairperson: Mr. Lucius CAFLISCH

Present: Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gómez Robledo, Mr. Hassouna, Mr. Hmoud, Mr. Huang,

Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

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

[Agenda item 5]

PRELIMINARY REPORT OF THE SPECIAL RAPporteur (*continued*)

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

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

3. The Commission must base its work on case law and, possibly, on national legislation on immunities, since it also reflected State practice. But it had to be remembered that the Commission’s role was to set forth general rules, whereas judicial bodies, such as the International Court of Justice, had to apply the rules to a specific case. In the absence of treaties, the Commission’s chief task would be that of codifying the rules of customary international law. It must also take account of its earlier work, especially the draft Code of Crimes against the Peace and Security of Mankind adopted by the Commission at its forty-eighth session²⁶⁸ and the Rome Statute of the International Criminal Court.

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

²⁶⁷ See footnote 262 above.

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