

### **3<sup>ème</sup> Commission\***

Les droits fondamentaux de la personne face aux  
immunités de juridiction du droit international

*The Fundamental Rights of the Person and the  
Immunity from Jurisdiction in International Law*

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## I. TRAVAUX PREPARATOIRES

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**I. FIRST (14 JUNE 2004) AND SECOND (1<sup>ST</sup> JANUARY 2005) QUESTIONNAIRES, AND COMMENTS OF THE MEMBERS OF THE COMMISSION**

**1. 1<sup>st</sup> and 2<sup>nd</sup> Questionnaires**

**a) Questionnaire of 14 June 2004**

The views of the Members of the 3<sup>rd</sup> Commission are sought as to the nature and scope of its future work, leaving aside for the present whether such work would produce a Resolution of the Institute or some other outcome.

*As to the nature and scope of the human rights of the person to be studied, it is suggested that*

i) the rights should be restricted to :

a) the substantive rights relating to the physical integrity of the person – the right to life, prohibitions against torture or inhuman or degrading treatment, slavery, arbitrary detention.

It is suggested that the right to respect for private and family life, freedom of thought and expression and other human rights should not be included ; in particular employment disputes, claims for social security benefits and expropriation of property would not be included.

b) the procedural right of access to a court and due process requirements (in effect ICCPR articles 6-9 and 14 ; ECHR articles 2-6).

ii) such rights to be considered solely in respect of their serious violation contrary to customary international law by act or omission of a State or government, and in particular in respect of violations resulting from acts in exercise of sovereign authority

iii) such violations be studied in respect of acts performed by the foreign State or government in the territory of the forum State. It would also be for consideration to what extent violations committed outside the territory of the forum State are excluded from the jurisdiction of the forum State by operation of immunity.

*As to the nature and scope of the immunities to be studied it is suggested that they be restricted to*

iv) the immunities of the State and of government, not of heads of States,

or other individual officials. Further that immunities of international organisations raise different considerations and should also be excluded ;

v) the immunities afforded to States or governments in national courts, not those before international or hybrid courts and should be confined to claims against a foreign State for reparation in proceedings whether of a civil or criminal nature ;

vi) methods by which the award of reparation against a State might be satisfied, having regard to immunity of the State from execution ;

Finally, having regard to the most recent version of the International Law Commission's Articles on the Jurisdictional Immunities of States and their Property, approved by the *ad hoc* Working Group under the chairmanship of Mr Gerhard Hafner, which may be recommended for adoption by the UN General Assembly by its 6<sup>th</sup> Committee at the forthcoming autumn session in 2004 :

vii) whether a decision as to the future of the 3<sup>rd</sup> Commission be deferred until the 6<sup>th</sup> Committee's proposals have been adopted as a convention ;

viii) alternatively to what extent if at all the matters covered by such ILC Articles infringe the fundamental rights of the person as defined above.

**b) Additional questionnaire of 14 January 2005**

1. Do you consider that the present work of the Third Commission should exclude consideration on of immunities as a bar to the exercise of jurisdiction by international tribunals (see paras.8 to 12).

2. As regards the bar of immunities to the exercise of jurisdiction by national courts, would you accept it to be advisable to limit the work of the Third Commission to the immunities from criminal and civil jurisdiction afforded to States and their officials under international law, leaving aside for the present

i) immunities of international organisations (see para. 23) ;

ii) immunity of the State from enforcement jurisdiction (see para. 22) ;

iii) the exception to State immunity for employment contracts (see para. 27) ?

3. Should Heads of State and government, Ministers for Foreign Affairs, and members of the diplomatic missions when in office continue to enjoy personal immunity even when charged with the commission of

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an international crime ?

4. Would you extend this immunity to other officials ?

5. Which, if any, of the factors set out in paragraph 34 are to be taken into account when balancing the interests of the international community in freedom of communication between States and in prevention of impunity of perpetrators of grave violations of fundamental human rights ?

6. Should immunity from civil jurisdiction of the State and of State officials be subject to an exception in respect of the commission of an international crime ? If so, how would you formulate the exception ?

## **2. Comments of the Members**

### ***Comments by Mr James Crawford : 22 June 2004***

[...]

In general I am happy with the clarifications attached to your note, provided that these are read as focusing the work and do not exclude explanations in the commentary of the scope of exclusions. The distinction between national and international courts was made in the Arrest Warrant case and it is reasonable for us only to deal with national courts. The distinction between fundamental rights of physical integrity and other rights reasonably follows from the non-derogability of the former and (in general) their peremptory status. Having explained these distinctions in the commentary, it is reasonable for us to focus on the matters you identify.

I have doubts about "hybrid" courts as a category ; in my view a court is either national (e.g. the Dayton Agreement courts in Bosnia) or international (e.g. Sierra Leone, as now determined by that Court), and accordingly within or outside the scope of our study. On the other hand if you are only dealing with immunity of states and governments as such and not individual agents, these issues lose their relevance anyway

There are of course two prior categorical issues which we will need to consider :

(a) whether the status or significance of certain substantive norms carries any implications for jurisdiction or immunity. So far the ICJ has said no (East Timor, Arrest Warrant) ?

(b) whether the appropriate redress is not to be sought through state

responsibility mechanisms including human rights mechanisms rather than long-arm jurisdiction of certain national courts of allegedly "law-abiding countries" ?

[...]

**22 February 2005**

[...]

1. No. I think this is such an important problem that one has to look at all aspects of it — jurisdiction as well as immunity (valuable comments in Jones on this front), *aut dedere*, availability of ICC or other international jurisdiction. With international crimes the principle of complementarity acts as a sort of *forum conveniens* consideration, and I do not think immunity can be considered in isolation or as if the problem was exclusively to be resolved at national level.

2. I agree that each of these three areas should be excluded.

3. (a) Yes. The matter is settled by Arrest Warrant (as far as it goes).

(b) This is much more difficult. I would not extend the immunity for serving officials to all officials, but finding a principled basis for a distinction between some and others is not straightforward.

4. There is no question 4.

5. Most of these factors are relevant except waiver. No doubt the general rules of waiver apply but that assumes general immunity, which is the very issue we have to discuss.

6. As at present advised, I would (except for serving Heads of State, etc.) not allow immunity to be pleaded for individual officials or former officials charged with crimes against international law falling within the jurisdiction of the forum state either (a) because the act was committed there or (b) because that state's jurisdiction over the act is otherwise properly established under international law. But this is subject to the principle of complementarity and the requirement that a strong *prima facie* case is made out. Mere harassing allegations should not be allowed.

[...]

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***Comments by Mr Benedetto Conforti : 24 mars 2005***

[...]

Before replying to your Questionnaire, let me make some short general remarks.

In my opinion, the subject we have to deal with is to a large extent a subject in development, so that our task is not only to ascertain the existing rules of general international law but also to try to indicate if and how large there is room for the "progressive development" of international law. Customary law is not a crystallized set of rules and is exactly the task of both international and domestic courts (especially supreme courts) to encourage progressive, although prudent, changes of such rules. However, especially as far as immunity from jurisdiction is concerned, I think that the contribution of domestic courts is more important than that of the international ones, as it is shown, *inter alla*, by the overwhelming number of domestic judicial decisions compared with the number of the international ones. Domestic decisions show also a more progressive attitude : worth of noting, for instance, is the different approach taken by the ICJ in the *Arrest Warrant* case and by some domestic courts (in *Pinochet No.3* and other cases) as far as immunity of State officials no more in office is concerned. The difference is highlighted by you, at pages 16-17 of your Report. I have in mind another example, *i.e.* the case *Ferrini* decided by the Italian Court of Cassation (decision of March 23, 2004 n. 5776). This case has given raise to many discussions in the Italian legal doctrine but unfortunately has not yet been translated into English (a translation will appear in *The Italian Yearbook of Int. Law*, 2004, vol. XIV). The Cassation holds that a State cannot claim immunity from civil jurisdiction when crimes against humanity have been committed (in this particular case, the Nazi crimes), no matter whether in the territories of the forum State or abroad.

If my observations are correct, I have some doubts about one of your preliminary remarks at page 6 where you say that "...any continuing failure of States to comply with their HR commitments is best remedied by international measures, rather than the assertion of jurisdiction by the national courts of one State over the acts of another State", adding that "...such a view...may...colour their [of the members of the Commission] approach as to the proper resolution of obstacles to the national exercise



of jurisdiction to protect human rights arising from the application of jurisdictional immunities". I have always held the view that a correct application of international law is primarily entrusted with domestic institutions and related remedies rather than international (and almost imperfect) ones, and the subject we are dealing with is one where, in my humble opinion, this view proves particularly exact.

Consequently I think that, as a general approach, we should encourage domestic case-law in promoting an effective protection of human rights, restricting the immunities from jurisdiction to what is actually necessary in order to pay respect to essential sovereign functions of foreign States and their officials.

I now reply to your Questionnaire.

*Question 1.*

I agree to leave aside the consideration of immunities before international tribunals, a subject which has its peculiarity, being strictly linked to the international instruments grounding the jurisdiction of such courts. Of course, this does not mean that the case-law of international courts cannot be taken into account, when it is possible to use it as a guide for domestic courts in ascertaining the content of general international law. In your Report you wisely make use of the international case-law.

*Question 2.*

I agree not to take into consideration immunity of States from enforcement jurisdiction (point ii.), for the reasons you put forward. By contrast I am not sure that we should leave aside the consideration of State immunity for employment contracts (point iii.) and, consequently, the consideration of immunities of international organisations (point i.), the two subjects being to a large extent interrelated.

In my opinion, the subject of immunity for employment relations is of a great interest, involving a difficult and delicate balance between the right to claim immunity and the right to work. As you know, many national courts have made sensible progress in protecting the last right, both against foreign States and international organisations, denying immunity at least when pecuniary issues are at stake. We should encourage national courts in pursuing this trend. Also the question of admitting immunity before national courts when alternative means of settlement are afforded

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in the internal law of the entity claiming immunity should still be explored. In particular, we should try to state clearly when the alternative remedy complies with the requirement of general rules regarding access to courts. In this respect, the decision of the European Court of Human Rights in cases *Waite and Kennedy v. Germany* and *Beer and Regan v. Germany* (1999) is not convincing, since it does not enter into the details of the alternative mean offered by the internal law of the involved international organisation (the ESA). In fact, as some commentators have pointed out, the mechanism of settlement of disputes provided by ESA did not offer an effective protection of the workers. We should underline that such an effective protection should be granted, both by foreign States and international organisations claiming immunity, in accordance with usual human rights standards.

*Question 3.*

I am in favour of maintaining the personal immunity of Heads of State and Government, members of diplomatic missions accredited in the forum State and all members of Governments when they are in office and also with regard to international crimes. I think that we should suggest that the immunity customarily granted to Ministers for foreign affairs should be extended to other members of Governments, since in the today's world, and in the era of globalizations, international relations and communications are not within the exclusive competence of Heads of State, Ministries for foreign affairs and diplomats. In fact, very often each minister is called to engage in negotiations with/ visits to/ participation in international decision-making processes, etc., with his foreign colleagues. It seems to me that both the functional immunity and the personal one of such persons, *when in office*, is necessary in order to make them free from any obstacle to the exercise of their functions.

On the contrary, both personal and functional immunities should be denied to the above mentioned persons as far as international crimes are concerned, *once out of office*. In my opinion, we should extend the rule contained in Article 13 of Vancouver resolution on immunities of former Heads of State and Government, to the other persons enjoying immunities.

*Question 5.*

I think that factors a.), c.) and e.) should be taken into account. In my

opinion factor d.) (the *mens rea*) does not pertain to our subject, being related to the merit of a judgement on criminal matters and not to the exercise of jurisdiction. With regard to factor b.) I would not use the notion of *jus cogens*, which is still a mysterious concept. Perhaps it would be more useful to try to identify the most serious violations of human rights which should be avoided by granting immunities.

*Question 6.*

My answer is yes, when serious violations of human rights have taken place and also when they occurred outside the territory of the forum State. I do not agree with the decision of the European Court of Justice in the case *Al-Adsani v. The United Kingdom* (2001). Even the dissenting opinion of some of my former colleagues of the Court, grounded as it is solely on the peremptory character of rules on torture is not acceptable (see my answer to question 5) and, as you say at page 22, may prove too wide. I more simply think that a *communis opinio* is now emerging within the international community in the sense that State acts amounting to a gross violation of human rights, i.e. serious international crimes, cannot be covered by an exception to jurisdiction, no matter whether in criminal or civil matters. The decision in case *Ferrini* I have already quoted goes exactly in this direction.

[...]

***Comments by Mr Karl Doehring : 30 July 2004***

[...]

I agree with all your suggestions. They offer a good, wise and helpful frame for our work. The proposed restrictions are necessary. Only one point leads me to a reconsideration. Should we exclude the right of property ? An arbitrary expropriation could result, in extreme cases, in a serious threat to life conditions and the existence of an individual.

***Comments by Mr John Dugard : 29 July 2004***

[...]

I agree with (i) A and B and (ii), (v) and (vi).

I would like to see immunity for extraterritorial acts (*Al-Adsani*) included. I would also like to see the immunities of heads of state and government explored. I think the ICJ was horribly wrong in *Arrest Warrant* and I

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would like this to be considered. I do not think we should wait until 6<sup>th</sup> committee decides.

[...]

***Comments by Mr Hector Gros Espiell : 26 July 2004***

[...]

In general terms I agree with the approach you adopted as Special Rapporteur of the above Commission. Nevertheless I would like to make some suggestions with respect to point i).a) since it seems to me a little restrictive leaving aside rights like the freedom of thought and expression. I believe that there must be included other fundamental rights although I agree with you in not considering employment disputes, claims for social security benefits and expropriation of property.

With relation to point iv) in particular the immunities of Heads of States. even if it is not necessary to include them it should be clarified itself that we are not going to deal with the issue because there is already a resolution of the Institute about them.

Finally, I would prefer to defer our decision on the future work on the subject of the Commission until the next deliberations of the United Nations at its 2004<sup>th</sup> session takes place.

[...]

***Comments by Mr Louis Henkin : 22 June 2004***

[...]

In my view, it would be desirable for the commission to give priority to rights relating to the physical integrity of the person. Whether other individual rights should also be considered is a question which the Commission might postpone, but retain on its agenda for future consideration.

[...]

***Comments by Judge P.H. Kooijmans : 15 July 2004***

[...]

As to your draft proposal :

i) I agree that the report should confine itself to the rights relating to

physical integrity and to procedural due process right.

Maybe it would be advisable to include also the basic elements of the rights of freedom of thought, freedom of religion, and freedom of expression since their violation is often closely linked with the violation of the rights mentioned earlier, in particular that of prohibition of arbitrary detention and the right to a fair trial.

In that case we would limit ourselves to the rights which are essential for the existence of man as an individual human being.

ii) Yes ; it could be envisaged to insert after "customary international law" "as also reflected in regional or universal (or multilateral) conventions".

iii) Yes : I am in favour of retaining the first sentence.

iv) Yes ; I am in full agreement.

v) Yes.

vi) Yes, very much so.

vii) and viii) I would like to reserve my position till a later stage.

[...]

***Comments by Mr Franz Matscher : 20 May 2005***

[...]

In my 22 years' of service as a judge of the ECHR in Strasbourg we had only a few isolated cases where the jurisdiction of the Convention institutions was excluded by the fact that the defendant State could not be considered responsible because of the immunity of international bodies which were the "real responsables" of alleged violations of human rights. And therefore, the State was prevented to take the appropriate measures in order to ensure the protection of human rights.

All the cases in question did not concern gross violations of human rights which could be qualified as international crimes, but more or less "civil rights" in a wider sense :

In fact, the great majority of human rights violations complained of concern acts of State authorities or acts of individuals imputable to the State and never the question of a personal immunity of the actor was at stake. This is the situation at least as Europe is concerned.

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Of course, the situation is different as far as the jurisdiction of some recently created special international tribunals (e.g. ICC) is concerned, competent to deal with international crimes.

Without overlooking the importance of these new developments in international law, we have to avoid the impression that this is the most important issue in the field of human protection of human rights. The issue in question is important, but not comparable with that of every day protection of human rights by States and by the appropriate international institutions (ECHR, ACHR, Human Rights Committee of the UN), which is the real problem.

Nevertheless, the theme of the Third Commission deserves adequate attention.

Having regard to these general observations, please see my answers to the Questionnaire :

ad 1) No.

ad 2) I agree with the proposed program.

ad 3) Yes, as today the Ministers for Foreign Affairs have no more the monopoly to act on behalf of the State in the international relations, the other members of the government should be treated like Foreign Ministers as far as personal immunity is at stake. The same is true as far as other officials of the State are concerned - always regarding the (function ?) and limited to the commission of international crimes.

ad 5) To be discussed.

ad 6) Immunity from civil jurisdiction (or its denial) should follow the same rules as those governing the immunity from criminal jurisdiction. But immunity from civil jurisdiction (or its denial) may be important regarding the State, but in practice it is not relevant regarding heads of State, members of government and other officials.

[...]

***Comments by Mr Jacques-Yvan Morin : 15 June 2005***

[...]

La tâche qui attend la Troisième commission est la recherche de l'équilibre approprié entre la protection des droits et libertés de la

personne par des recours devant les institutions nationales et la protection de la souveraineté des États par les règles de l'immunité de juridiction. Compte tenu de l'évolution dans le domaine des droits de l'homme depuis un demi-siècle, mais également de l'état actuel de la société internationale, cet équilibre ne saurait être que transitoire, c'est-à-dire qu'il est appelé à de constants ajustements. Ce serait déjà un accomplissement de notre part que de clarifier le droit sur quelques points majeurs et, au besoin, d'orienter son développement, sans prétendre apporter des réponses " définitives " à toutes les perplexités que soulève cette question. C'est dans cet esprit que sont proposées les réflexions qui suivent.

*1. Les immunités devant les tribunaux internationaux.*

Les progrès dans la protection des droits et libertés accomplis depuis la 2<sup>ème</sup> Guerre mondiale doivent beaucoup à leur développement conventionnel dans les cadres onusien et régionaux. La constitutionnalisation des droits et du *rule of law* dans le cadre interne a été fortement influencée par les obligations assumées par les États dans les divers traités multilatéraux. S'ils y manquent, des mécanismes de contrôle et de sanction plus ou moins contraignants ont été établis qui ne laissent guère de place au principe de " l'immunité souveraine ", étant entendu que les États ont consenti à cette évolution. Il existe donc des liens étroits entre les normes internationales et les règles internes et ce système, tout complexe et incomplet qu'il soit, exerce une pression constante et diffuse sur les États, même chez ceux qui ne sont pas parties aux divers traités et protocoles, en faveur de la protection accrue des droits fondamentaux. Le Statut de la C.P.I. constitue l'aboutissement logique de cette démarche : le tribunal ne se substitue aux États que dans la mesure où ceux-ci ne peuvent ou ne veulent remplir leurs obligations. Cela ne peut manquer d'influencer l'attitude des États à l'égard des immunités de juridiction devant leurs propres tribunaux et ceux des autres États. C'est pourquoi, à mon avis, la Troisième commission devrait se pencher sur les immunités devant les tribunaux internationaux.

La question pourrait être abordée, par exemple, de l'existence d'une règle générale excluant les immunités dans les poursuites pour crimes devant les tribunaux internationaux, comme semble l'indiquer la décision du Tribunal spécial dans l'affaire *Taylor*.

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En ce qui concerne les immunités qui pourraient être opposées à une demande de la C.P.I. adressée aux instances nationales de lui livrer une personne accusée d'avoir commis un crime international, il me paraît tout à fait indiqué que notre Commission explore la question de savoir si ces immunités s'appliquent entre deux Etats parties au Statut de Rome, comme la pratique de certains le laisse entendre.

## *2. Questions à laisser de côté*

Comme je l'ai écrit dans une missive antérieure, je ne pense pas que la Commission doive inclure dans ses travaux les immunités des organisations internationales ; les buts visés, les acteurs et les moyens déployés ne sont pas les mêmes. En second lieu, la question de l'immunité d'exécution me paraît tout à fait distincte de ce dont nous avons à traiter. Quant à l'immunité relative aux contrats de travail, je suis enclin à l'exclure de nos discussions, comme le veut l'exposé préliminaire. Cependant, compte tenu de l'importance des violations du droit au travail, j'estime utile que nous en discutons lorsque notre Commission se réunira à Cracovie.

## *3. Les agents de l'État en exercice*

La question de savoir si les agents de l'État en exercice (Chefs d'État, ministre des Affaires étrangères et diplomates) doivent continuer de jouir de l'immunité personnelle, dans le cas où ils seraient accusés d'avoir violé les droits fondamentaux, se situe au centre de nos travaux. L'équilibre entre deux objectifs majeurs du droit international, la liberté des communications entre États et la protection des droits fondamentaux à l'encontre des détenteurs du pouvoir de l'États, est ici en cause. Dans l'état actuel de la société internationale, il me paraît prématuré, en matière criminelle, d'écarter l'immunité des Chefs d'États, ministres etc. *en exercice*. Cela conduirait vraisemblablement à des désordres plus grands que ceux auxquels on veut remédier. C'est pourquoi la distinction établie dans l'affaire *Pinochet* (n°3) entre l'ancien Chef d'État et celui en exercice me paraît refléter l'état du droit international. En revanche, il ne nous est pas interdit d'indiquer dans quelle direction le droit devrait être développé, particulièrement en ce qui concerne les contentieux civils découlant de violations des droits fondamentaux. L'immunité de juridiction, dont l'un des buts est de permettre à l'État mis en cause de remédier lui-même aux violations dont lui ou ses agents pourraient être



les auteurs, devrait être sujette à une obligation de comportement de sa part : il devrait mettre à disposition des recours effectifs, à défaut de quoi l'immunité serait levée à la suite d'une décision internationale. Toutefois, pareille évolution me paraît dépendre du succès de l'expérience encore à venir de la Cour pénale internationale.

4. *Convient-il d'étendre l'immunité de juridiction à d'autres agents de l'État ?*

Les raisons qui militent en faveur de cette immunité dans le cas du Chef d'État, du ministre des Affaires étrangères et des diplomates, en vue de protéger les rapports et le dialogue entre États, ne sont plus de saison lorsque sont mis en cause les agents publics subordonnés. C'est sans doute ce qui explique une jurisprudence récente refusant le plaidoyer d'immunité de ces agents alors même qu'ils sont en exercice. Je pense que la Troisième commission devrait prendre acte de cette évolution, qui s'impose tout particulièrement en vue de la protection des droits de l'homme.

5. *Facteurs à prendre en compte*

Dans la démarche visant à établir un équilibre entre la nécessité de favoriser la liberté de communication entre les États et l'objectif de réduire l'impunité des auteurs de graves violations des droits de l'homme, les facteurs suivants sont pertinents :

a) *La renonciation implicite (par l'État) à l'immunité*

La protection diplomatique relevant de la compétence discrétionnaire de l'État, celui-ci peut y renoncer ; encore faut-il qu'il le fasse expressément. C'est pourquoi il paraît aventuré de déduire une renonciation implicite du fait que les trois États parties à l'affaire *Pinochet* ont tous ratifié la Convention sur la torture. Sur ce point, la décision de la Cour internationale de Justice dans l'affaire du *Mandat d'arrêt* me paraît bien fondée. Il existe par ailleurs une raison majeure de s'en tenir à ce point de vue : tirer des traités des conséquences non prévues expressément, comme la renonciation à l'immunité de juridiction (et donc à un aspect essentiel de la protection diplomatique), ne peut que rendre les gouvernements hésitants devant la ratification des traités de protection des droits de l'homme.

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b) *La question du jus cogens*

Elle est complexe, mais ne saurait être évitée. D'une part, on doit admettre que la règle est applicable au delà du droit des traités, comme l'a laissé entendre la Commission du droit international (*Annuaire* 1966 – II, p. 248) et que ce point de vue est particulièrement important s'agissant des droits de l'homme, puisque les violations résultent presque toujours d'actes unilatéraux. Aussi peut-on admettre, comme dans l'arrêt *Furundzija*, qu'un État qui amnistierait des actes de torture mette en jeu sa responsabilité internationale et qu'il existe une obligation pour les États de ne pas reconnaître un tel acte unilatéral. Peut-on aller plus loin et soutenir que la règle de l'immunité ne saurait déroger à la norme impérative qui interdit la torture et doit céder le pas ? Quelques décisions, comme celle de l'*Audiencia Nacional* d'Espagne dans l'affaire *Pinochet* (5 nov. 1998) ou celle d'un tribunal grec dans *Prefecture of Voiotia c. Allemagne* (30 oct. 1997 ; voir 92 MIL 765) l'ont soutenu. Dans l'état actuel de la société internationale, la prudence paraît cependant de mise. Les décisions des tribunaux américains dans *Siderman de Blake v. Argentine* (1991, 265 F. 2d 699) et dans l'affaire *Princz* (1962, 26 F. 3d 1166), de même que l'arrêt *Jones*, que mentionne l'exposé préliminaire, me paraissent répondre à la question pour l'avenir prévisible, d'autant que la règle de l'immunité peut, à certains égards, être considérée comme étant elle-même de *jus cogens*.

c) *La notion de crime international*

Elle est certes pertinente, mais elle n'épuise pas le phénomène des violations des droits fondamentaux. Toutes les violations ne constituent pas des " crimes " et le droit international réserve cette appellation à certains actes particulièrement graves (voir par exemple le Statut de la Cour pénale internationale, art. 5 (par. 1). Devons-nous nous en tenir aux seuls crimes ? L'une de nos tâches sera de définir ce que nous entendons par " droits fondamentaux ". Même si la notion ne comprenait que les droits que la doctrine appelle " substantive human rights ", certaines violations ne sont pas qualifiées de " crimes ". Si l'on adopte une notion plus large, incluant l'accès à la justice et autres règles qui constituent l'État de droit ou les droits de procédure (" procedural human rights "), voire des droits économiques, sociaux et culturels, alors le mot " crime " n'est pas applicable ; il s'agit d'infractions ou de violations plus ou moins graves. Il pourrait alors être plus difficile de justifier l'exclusion de

l'immunité à l'égard de la violation de ces droits. Faudrait-il établir des catégories de droits et libertés par rapport à l'immunité de juridiction ?

d) *La question du mens rea*

Si l'on s'en tient à une définition des droits fondamentaux limitée à ceux dont la violation constitue un " crime ", la question de l'intention criminelle est évidemment pertinente : il ne saurait y avoir de responsabilité personnelle sans que la *mens rea* soit établie.

En revanche, si l'on élargit la notion de " droits fondamentaux " pour y inclure les droits et libertés dont la violation ne constitue pas (ou pas encore) un " crime ", il faudrait parler plutôt " d'intention de violer " une liberté ou un droit. Il faut admettre que la *mens rea* n'est plus pertinente et s'en tenir à la constatation que la violation a eu lieu, quelle qu'elle ait pu être l'intention de l'agent ou de l'État. L'individualisation de la violation (et de la peine) permet certes de contourner l'imputabilité de l'acte à l'État et la règle de l'immunité, mais elle n'est vraiment pertinente qu'à l'égard des actes considérés comme des crimes. Dans les cas de violations des droits qui ne sont pas qualifiées de crimes, l'individualisation paraît moins pertinente, d'autant que l'agent responsable n'a peut-être aucun moyen de réparer les dommages qu'il a causés ; il arrive que seul l'État soit en mesure de le faire. Je ne suis donc pas sûr que " l'individualisation " soit souhaitable en matière civile.

e) *Non-pertinence du statut officiel*

J'éprouve quelque difficulté à suivre l'opinion des juges Higgins, Kooijmans et Burgenthal dans l'affaire du *Mandat d'arrêt*, lorsque ceux-ci estiment que les crimes internationaux graves ne peuvent être considérés comme des actes officiels. Cela semble à première vue simplifier les problèmes, mais en réalité en soulève d'autres. Outre le fait qu'il faut définir ce qui constitue un " crime grave " (*serious crime*) par rapport aux actes qui ne le sont pas ou moins, cela va à l'encontre du principe bien établi selon lequel chaque État est libre de d'attribuer lui-même l'exercice de ses compétences à des personnes qu'il désigne comme ses agents.

f) *La juridiction extraterritoriale et l'immunité*

L'exclusion du principe d'immunité de l'État dans le cas de l'exercice extraterritorial de sa juridiction par un autre État, fût-ce en raison d'une obligation de celui-ci de faire respecter les droits fondamentaux, ne ferait

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qu'ajouter, à mon avis, aux difficultés et aux objections qui rendent déjà si malaisé l'exercice extraterritorial de juridiction.

*g) Un crime international " pleinement constitué "*

Comme il a été dit plus haut au sujet du *jus cogens*, on peut douter que le seul fait de qualifier une infraction de " crime " suffise à lever l'immunité de juridiction. Certains droits paraissent plus " fondamentaux " que d'autres et l'un des facteurs qui permettent de les identifier est sans doute l'établissement par convention de la compétence universelle des États parties à l'égard de tel ou tel crime (la torture par exemple) ou de l'obligation pour ces États d'extrader ou juger (*aut dedere aut judicare*). L'apparition de crimes " pleinement constitués " est, me paraît-il, un facteur décisif dans le recul de l'immunité de juridiction. Cette distinction entre les crimes signifie que certains droits paraissent plus " fondamentaux " que d'autres et cette idée paraît aller à l'encontre du principe d'indivisibilité des droits de la personne, mais le consensus sur la protection des droits ne saurait s'étendre que par étape.

*h) Autres méthodes possibles*

Le recours à la Cour pénale internationale serait une intéressante démarche à envisager : elle s'inspire de la complémentarité entre les juridictions internationale et nationales. Si l'on combine l'obligation de chaque État en vertu du Statut de Rome de remédier aux violations et celle de coopérer, avec les dispositions qui écarte l'immunité de juridiction devant la Cour (art. 27, par. 2), cela autoriserait un État tiers à faire appel à l'intervention de celle-ci. Encore faudrait-il que les États en cause soient parties au Statut. Dans une perspective d'avenir, notre Commission pourrait étudier la pertinence d'un tel développement.

*6. L'immunité de juridiction civile*

Avant de formuler une exception à la règle de l'immunité en matière civile, il paraît souhaitable d'attendre de connaître les conclusions des Cinquième et Dix-septième commissions, lesquelles seront exposées et discutées à Cracovie.

***Comments by Mr Georg Ress : 21 June 2004***

[...]

I welcome your proposals.

I agree that the rights should be restricted to the substantive rights relating to the physical integrity of the person. It is in this relation that the problem of the relations to immunity from jurisdiction as become apparent and difficult - as we all know from the case law of the European Court of Human Rights (*Al-Adsani, UK* and others). I also agree that the procedural right of access to a court and due process requirements should be included. Furthermore I find it justified to limit the commission's study to serious violations against customary international law by omissions of a State - in particular in the exercise of acts performed by the foreign States or governments in the territory of the forum State, but it is even more important for acts performed outside the territory of the forum State ; because quite a number of sovereign immunity statutes do not grant anymore immunity for acts in the territory of the forum State, therefore the acts outside the territory of the forum States are far more interesting (see the *McElhinney case, Ireland*). I agree with points IV and V, but as to Point VIII wonder whether this is not in itself a very extensive subject which might lead us into the stormy waters of the Greek cases.

I would not make our future work dependent on the outcome of the sixth committee' s proposals on the draft articles. We may in our proposal be in line with these draft articles or criticize them, so bringing fruit for thought for a future discussion in a state conference.

[...]

***Comments by Jean Salmon : 1 August 2004***

[...]

Vous détachez certaines questions sans que l'on sache vraiment ce qui justifie cette sélection et sans que l'on ait une vue d'ensemble du sujet. Je dois dire que je me serais attendu, selon l'usage, à un exposé préliminaire de l'ensemble de la question avec un exposé des problèmes qui sont apparus depuis une vingtaine d'années, montrant les solutions - anarchiques - qui poussent çà et là comme des champignons, des accélérations, des coups de frein, des compromis limités à certains cas de figure.

En un mot, je ne pense pas que l'on puisse aborder le thème de cette commission sans avoir d'abord fait un inventaire complet des problèmes et des solutions esquissées. On verra ensuite ce sur quoi il s'avère

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opportun et urgent que l'Institut se prononce.

La première chose à faire est de montrer en quoi il y a contradiction entre les droits de l'homme et les *immunités de juridiction* - ce qui, incidemment, doit nous faire écarter d'emblée la question de l' *immunité d'exécution*.

Il me semble que la contradiction existe essentiellement entre le droit de toute personne à ce que sa cause soit entendue par un tribunal indépendant (article 6 de la convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales et article 14 du Pacte international relatif aux droits civils et politiques) et les immunités dont peuvent jouir diverses personnes ou entités d'après le droit international. Accessoirement l'immunité des personnes se heurte au principe de l'égalité des citoyens devant la loi.

Il s'avère que devant ces contradictions diverses réponses ont été données en pratique :

- maintenir la contradiction avec les fausses réponses d'usage : voir l'arrêt de la Cour internationale de Justice dans l'affaire *Yérodia*, où il s'agissait de savoir si l'immunité d'un ministre des affaires étrangères devait faire obstacle à des poursuites pour appel au génocide, atteinte grave aux droits de l'homme s'il en est ;
- la restreindre dans certains cas (pour l'immunité de l'État, voyez projet CDI) ;
- la restreindre pour les conséquences dommageables de certains faits qui semblent pouvoir être traités sans porter atteinte au bon fonctionnement de l'organe que l'immunité est censée protéger (par exemple pour les accidents de roulage) ;
- maintenir l'immunité devant les juridictions nationales normalement compétentes, mais donner accès à des juridictions internationales ou arbitrales *ad hoc* pour entendre ces causes (la pratique des organisations internationales est à cet égard très riche en enseignements) ;
- instaurer des mécanismes pour restaurer l'égalité en poursuivant certaines personnes titulaires d'immunités devant des juridictions pénales internationales (CPI), etc.

Il me semble que cet état des lieux serait souhaitable pour envisager la question de manière globale et considérer les solutions présentées dans

une vue d'ensemble. Commencer nos travaux en excluant d'emblée les contentieux les plus évidents où les tribunaux internes s'en donnent à coeur joie dans la plus profonde ignorance du droit international ne me semble pas la meilleure méthode pour répondre à ce que l'Institut attend de nous. Les cas d'espèce où les tribunaux locaux refusent l'immunité concernent en majorité les questions de contrats d'emploi ou de travail.

Une décision récente de la Cour du travail de Bruxelles 4<sup>e</sup> chambre du 17 septembre 2003 (*Journal des tribunaux*, 2004, pages 617 et s.) repousse l'immunité de l'UEO dans un procès concernant la terminaison d'un contrat avec un employé du fait que la juridiction interne de l'UEO (une commission de recours) ne répondrait pas aux exigences d'une bonne justice requises par la convention européenne des droits de l'homme.

Un examen des différents cas où l'immunité est refusée et qui marque la révolte des tribunaux internes est nécessaire pour notre réflexion globale et la mise en perspective de solutions pour l'avenir transposables d'une matière à l'autre ou d'un organe à l'autre. C'est pourquoi j'estime qu'il ne faut écarter d'emblée aucune piste (notamment les problèmes que posent ici les organisations internationales).

Enfin le fait que la Commission du droit international traite un sujet ne doit pas faire obstacle aux travaux de l'Institut, en particulier si on commence par un état des lieux.

[...]

**1<sup>er</sup> October 2005**

[...]

On me pardonnera de ne pas suivre dans mes réponses l'ordre des questions. Il me semble important, en effet, d'insérer mes réponses dans un raisonnement qui les explique mieux.

*On peut partir de la première question qui concerne le point de savoir s'il faut s'occuper des immunités devant les juridictions internationales ou se borner à la manière dont elles concernent le juge interne ?*

Je ne pense pas qu'il faille s'occuper des immunités devant les juridictions internationales. L'immunité devant les juridictions pénales internationales relève d'une typologie distincte gouvernée par les instruments qui ont créé ces juridictions. Il s'agit d'un problème résolu au cas par cas.

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J'estime que notre Commission devrait se limiter aux immunités devant les juridictions nationales. Toutefois, on peut toujours — si les travaux de la Commission débouchent sur une résolution — adopter une clause de réserve à propos de cette hypothèse particulière.

*Immunités devant les juridictions nationales : pénales ou civiles ?*

Il me semble que nous devons envisager les immunités aussi bien devant les juridictions pénales que civiles. D'autant plus que « le pénal tient le civil en l'état » et que les conséquences civiles d'une infraction pénale ne peuvent être envisagées qu'après une décision sur la culpabilité. De ce fait, d'ailleurs, je suppose que la question 6 s'entend d'une situation où la culpabilité pour crime serait établie par une juridiction internationale ou nationale à la suite d'une levée de l'immunité pénale (voir *infra*).

*Exclusion de l'immunité d'exécution du champ d'examen de la Commission*

Je partage l'opinion de Lady Fox selon laquelle il conviendrait d'exclure l'immunité d'exécution du champ d'examen de notre commission. Cette immunité relève d'une typologie distincte. Elle suppose d'abord que la question de l'immunité de juridiction est refusée ou a fait l'objet d'une levée et que la question porte alors sur le point de savoir si une exécution de la décision sur le fond est possible. Cette question fait l'objet de réponses diverses, les plus souvent négatives ; ainsi pour les organisations internationales et les missions d'Etats. Lorsqu'elle est positive, elle porte essentiellement sur la nature des biens qui peuvent faire l'objet d'une mesure d'exécution. S'agissant de l'Etat, la question est réglée désormais par la convention des Nations Unies sur les immunités juridictionnelles des Etats (article 21).

Avant d'aborder les autres exclusions possibles (l'immunité des organisations internationales et des employés), il me semble nécessaire d'aborder la matière sous un autre angle.

*La contradiction entre les immunités de juridiction et les droits de l'homme*

A. L'excellent rapport de Lady Fox démontre de manière lumineuse qu'en cas de conflit entre les droits de l'homme et une immunité de juridiction aux contours bien assurés, ce conflit se résout au profit de l'immunité. L'affaire du *Mandat d'arrêt du 11 avril 2000 (R.D.C. c. Belgique)* l'a



démontré avec éclat. S'il y avait bien une situation où l'immunité de juridiction personnelle eût dû céder le pas devant l'allégation de crimes contre l'humanité commis par le bénéficiaire de l'immunité, c'était bien l'occasion pour la CIJ de le proclamer. Le choix effectué par la quasi-unanimité des juges du Palais de la Paix de confirmer le maintien de l'immunité même dans cette situation extrême montre que les actes accomplis par les ministres en exercice sont protégés par l'immunité de juridiction même pour les crimes les plus importants. De cet arrêt, qui s'impose aux juridictions nationales, il découle plusieurs conséquences pertinentes pour répondre au questionnaire.

(i) En premier lieu, il résulte de cet arrêt que certaines personnes sont protégées par l'immunité en vertu de leurs hautes fonctions, pendant la durée de celles-ci. Certes, cette décision concernait un ministre des Affaires étrangères en exercice, mais il ne faut pas se leurrer, par identité de motifs, cette décision couvre a fortiori les chefs d'Etat et les chefs de Gouvernement en exercice (voyez la résolution de l'Institut de Vancouver). Elle couvre aussi tous les ministres qui aujourd'hui s'instaurent ministres des Affaires étrangères de leur propre ministère (Finances, Affaires sociales, Justice, Affaires économiques, etc.) et il y a lieu de penser que les sous-ordres, également en exercice, sont également protégés par l'immunité dans l'exercice des fonctions (ceci répond aux questions 3 et 4 du questionnaire).

(ii) En second lieu, il résulte également de cet arrêt que l'immunité ne s'efface pas devant la gravité de l'acte accompli. Il s'agissait ici d'un crime de génocide. Ceci répond donc aux questions du questionnaire qui font allusion à la gravité des crimes que l'on pourrait opposer au maintien de l'immunité : questions numéros 3, 5, b) c) d) f).

Il résulte de cette analyse que toutes les personnes jouissant d'une immunité, qu'il s'agisse d'Etats, d'entités assimilées, d'organisations internationales, de personnes physiques protégées par une immunité attachée à la personne, ne verront pas leurs immunités – une fois celles-ci reconnues - restreintes du seul fait qu'elles porteraient atteintes à l'exercice de droits de l'homme quelconques.

B. Ce n'est que si le droit international lui-même, ou plus exactement les Etats qui instituent les règles spécifiques concernant les immunités, limite dès l'origine celles-ci au profit de la protection de certains droits de

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l'homme, que ces immunités se verront retirées.

Faut-il rappeler quelques limitations apportées à l'immunité :

- de l'Etat au profit des personnes privées traitant avec lui *ratione gestionis* ;
- des personnes représentant l'Etat ou une organisation internationale, lorsque elles agissent en dehors de l'exercice de leurs fonctions ;
- les chefs d'Etat et hauts représentants ou fonctionnaires assimilés lorsqu'ils ne sont plus en exercice pour les actes qui n'entraient pas dans l'exercice des fonctions ;
- pour le personnel subalterne des missions d'Etats ou pour les fonctionnaires internationaux ;
- l'absence d'immunités pour les agents diplomatiques en ce qui concerne les procès civils ou administratifs en ce qui concerne les actions réelles, en matière de succession et relatives aux activités professionnelles ou commerciales (art. 31, § 1 de la convention sur les relations diplomatiques) et, en outre, pour les fonctionnaires consulaires, les actions intentées par un tiers pour un dommage résultant d'un accident causé dans l'Etat de résidence par un véhicule, un navire ou un aéronef (art. 43, § 2 *b* de la convention sur les relations consulaires) etc.

Il n'en demeure pas moins que l'immunité peut rester absolue dans diverses circonstances :

- les chefs d'Etat et hauts fonctionnaires assimilés lorsqu'ils sont en exercice ;
- les diplomates en fonction en matière criminelle ;
- les organisations internationales dans leurs relations avec leur personnel, avec les co-contractants, ou avec les victimes des actes engageant leur responsabilité quasi-délictuelle, etc.

On pourrait conclure de tout ceci que le sujet de notre commission est *un non sujet car les réponses sont évidentes et accablantes*.

Devant cette situation créatrice d'iniquités évidentes, à un moment où les droits de l'homme font l'objet d'une protection grandissante, les contradictions entre diverses catégories de droits de l'homme et les immunités sont de plus en plus criantes en ce qui concerne :

- la non-discrimination (droit à l'égalité des citoyens devant la loi) ;
- le droit à un procès équitable, le droit à être entendu par un juge impartial ;
- le droit de propriété ;
- le respect des droits économiques et sociaux ;
- le droit à une réparation pour violation des droits patrimoniaux ;
- le droit au respect d'engagements contractuels, etc.

*La révolte des tribunaux internes*

L'immunité s'oppose fréquemment à la jouissance de tels droits, ce qui conduit les juridictions internes à se révolter de plus en plus fréquemment quoique d'une manière anarchique (voir jurisprudence depuis quelques années).

Quel peut être le rôle de l'Institut face à une telle situation :

- appeler à une application correcte des règles de droit international, là où les juridictions internes commettent d'incontestables erreurs de doctrine ?
- envisager l'acte accompli dans l'exercice des fonctions de manière à ne pas y inclure les crimes d'Etat ?
- appeler les Etats à réviser les immunités personnelles pour les limiter autant que possible particulièrement dans des domaines sensibles : réparation aux victimes des accidents de roulage, co-contractants dans les baux à loyer, situation des salariés (droits du travail, sécurité sociale, assurances sociales, pensions, etc.) ?
- appeler les Etats ou les organisations internationales à lever l'immunité chaque fois que cela ne gêne pas sérieusement l'exercice des fonctions ?
- appeler les Etats hôtes à déclarer *persona non grata* ou inacceptables les personnes protégées par les immunités dont le comportement est abusif ; faire circuler entre Etats hôtes des listes noires les concernant ?
- envisager des recours alternatifs pour les personnes dont les droits de l'homme sont violés et qui ne sont pas indemnisés ?
- envisager des fonds d'assurance pour l'indemnisation des victimes ?
- proposer l'inclusion de clauses dans les accords de siège ?
- refuser l'immunité aux organisations qui n'ouvrent pas de recours

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internes ou alternatif (arbitrage) aux victimes de leurs agissements ?

[...]

***Comments by Mr Budislav Vukas : 1<sup>st</sup> August 2004***

[...]

You are right in stating that the time that has elapsed since the establishment of the Commission imposes the necessity of discussing the matters that should be included in our consideration. However, I cannot recall that the precise terms of reference of our Commission have ever been adopted.

Be that as it may, in these last ten years many events and documents have influenced the treatment of our subject. Reading your questions, I have come to the conclusion that our answers to your questions could not be of great help in your task of determining the terms of reference of the Commission. In my view, we should meet, and in a discussion determine the scope and the specific topic of our work.

[...]

**II. PROVISIONAL REPORT (14 JANUARY 2005)<sup>1</sup>**

1. This provisional report will be in two parts. Part I (paragraphs 4 to 27) will endeavour to set out shortly a general overview of the topic. Part II (paragraphs 28 to end) will proceed to examine the more specific issues raised by the proposed terms of reference. An annexed questionnaire will provide opportunity for members to express their views on both Parts.

It is hoped that this report and answers received from members will give focus to any discussion within the Commission during the Cracow meeting in 2005.

**Part I**

***2. Resolutions of the Institut on human rights***

The work of the Institut with regard to human rights has not previously directly addressed the relationship between such rights and immunities from jurisdiction. The 1929 New York and 1947 Lausanne Resolutions are limited to general declarations on Human Rights ; the 1989 Santiago

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<sup>1</sup> On the initial and additional questionnaire and the answers of the members of the Commission, see *supra*.

di Compostella Resolution, Article 1 proclaimed the obligation of every State both individually and collectively to ensure the effective protection of human rights but nothing was expressly said in respect of the listed measures which a State might lawfully take against a State in violation of such an obligation about the institution of proceedings in national courts against the offending State. Article 4 set out four conditions to be met before taking individual or collective measures designed to ensure the protection of human rights ; these include prior request to the offending State to desist ; proportionality of the measures to be taken by reference to the gravity of the violation of human rights ; the restriction of such measures to the State perpetrating the violation and account to be taken in having recourse to such measures of the interests of individuals, and of third States, as well as the effect of such measures on the standard of living of the population concerned.

The work of two current Commissions may be of relevance to our study ; that of the Seventeenth Commission (Rapporteur : Mr Christian Tomuschat) on 'Universal Criminal Jurisdiction with Respect to the Crimes of Genocide, Crimes against Humanity and War Crimes', and that of the Fifth Commission (Rapporteur : Mr Giorgio Gaja) on '*Erga Omnes* Obligations and Rights' ; the conclusions of both these commissions are due to be discussed in plenary in the Cracow meeting of the Institut of 2005.

### *3. Resolutions of the Institut on jurisdictional immunities*

As regards the Institut's work on jurisdictional immunities in international law, leaving aside the early resolutions on diplomatic immunities (Cambridge 1895, New York, 1929) and consular immunities (Venice 1896), there have been three resolutions (Hamburg, 1891, Aix en Provence 1954, Basle 1991) dealing with immunities of the State and one relating to immunities of the Head of State (Vancouver 2001). Only the last, where the reports of the Rapporteur Joe Verhoeven provide an illuminating review of the law, expressly addresses a possible conflict between protection of human rights and jurisdictional immunities. With regard to former heads of State, it provides a limited 'immunity from jurisdiction, in criminal, civil, or administrative proceedings,.. in respect of acts which are performed in the exercise of official functions and relate to the exercise thereof.' ; Article 13 of the Vancouver Resolution of 2001 expressly states it shall not apply where the Head of State is' prosecuted

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and tried for a crime under international law,' or when the acts ' are performed exclusively to satisfy a personal interest or when they constitute misappropriation of the State' s assets and resources.'

4. The core issue to be examined is the relationship between fundamental rights of the person and the jurisdictional immunities recognised by international law ; the French version in using the word 'face' indicates more clearly than the English the likelihood of some opposition or conflict between the two areas of law. The common link between these two areas is a third concept, that of jurisdiction. States, and to a lesser degree international organisations (see paragraph 23 below) are under obligation in certain circumstances to secure human rights by the exercise of jurisdiction, and immunity on occasion will constitute a bar to such exercise of jurisdiction.

Accordingly, in examining the triangular relationship between protection of human rights, the exercise of jurisdiction and the denial of jurisdiction by immunity, it will be necessary to consider the scope of the obligations upon States to exercise jurisdiction to secure respect and compliance with human rights, and the degree to which a plea of immunity to such exercise and its justification may prevent the protection of such rights.

5. No attempt is made in this preliminary Report to define fundamental rights of the person. The term "fundamental" is sometimes used to refer all human rights, as in the UN Charter's preamble "to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women", but more often to refer to "the basic rights of the human person including protection from slavery and racial discrimination" (*Barcelona Traction Case*). The category of non-derogable rights is probably too inclusive<sup>2</sup>, whilst a requirement that they be based on a peremptory norm of *jus cogens* is too open-ended (see further at paragraph 34). The conclusions of the Fifth and Seventeenth

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<sup>2</sup> Non derogable rights are rights for which no derogation is permitted even in time of war or public emergency ; In ECHR.15 these are the right of life(except in cases resulting from lawful acts of war), the prohibition of torture, slavery and non retroactivity of criminal offences. In the ACHR, the following rights are non derogable : the rights to judicial personality, life and humane treatment, freedom from slavery, freedom from *ex post facto* laws, freedom of conscience and religion, rights of the family, to a name, of the child and participation in government. By ICCPR.4 the rights to life, and recognition as a person, the freedoms of thought, conscience, and religion, the prohibition on torture, slavery, retroactivity of criminal legislation and imprisonment on ground solely of inability to fulfil a contractual obligation are non derogable Shaw *International Law*, 2003, 256.

Commissions may help to supply a definition. To date the jurisdictional bar of State immunity has been challenged in national courts in respect of the human rights of the right to life, prohibition of torture and slavery, right to equality and non discrimination and the rights of access to the court. Future challenges to State immunity, however, based on other human rights cannot be ruled out. The present report rather than seeking to define a fundamental right of the person concentrates on the various more specific grounds arising out of claims to human rights which have challenged the jurisdictional bar to human rights. Accordingly, unless the specific right is stated, reference throughout is to human rights (HR).

#### *6. Immunity and international tribunals*

The international protection of human rights has been brought about by the direct imposition of international obligations upon States to respect and secure such rights. The primary source of such obligations is treaty based on consent. Such obligations are set out in universal and regional conventions, chief among these being the UN sponsored International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), the European Convention on Human Rights (ECHR), the American Convention on Human Rights (ACHR) and the African Charter on Human and Peoples' Rights (AChHPR). Other conventions secure key human rights for specified groups, such as the Geneva Convention relating to the Status of Refugees 1951, the Convention for Elimination of All Forms of Racial Discrimination (CERD), the Convention for Elimination of All forms of Discrimination against Women, (CEDAW), and the UN Convention on the Rights of the Child 1989. Abuse of human rights is also the subject of many other international conventions, for example those which prohibit genocide, war crimes, crimes against humanity, and State torture. As Shelton writes 'there are close to one hundred human rights treaties adopted globally and regionally. Nearly all States are parties to some of them and several human rights norms have become part of customary international law (*Remedies in International Human Rights Law*, OUP 1999, p.14).

The international protection of human rights has developed historically and hence is incremental, multiple, unsystematic and overlapping. A degree of global supervision and direction is provided by the UN system with the Security Council's mandatory powers, the General Assembly's

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soft resolutions, the UN Commission on Human Rights with its 1235 and 1503 procedures, and working groups and the Office of the High Commissioner of Human Rights. Further monitoring is provided by the treaty bodies established by the various HR conventions, and, in particular, the Human Rights Committee established by ICCPR.<sup>28</sup> with its review of State reports, published General Comments and complaints procedure under the Optional Protocol. Under regional human rights conventions there are compulsory enforcement procedures and these will be examined further since they impose enforceable obligations upon States to exercise jurisdiction within their national systems to protect human rights.

7. Whilst in the last resort the enforcement of these HR treaty obligations is by State responsibility, the focus internationally has been on the progressive realization through cooperation and voluntary State acceptance of the human rights machinery of legal enforcement. Any exercise of jurisdiction over States at the international level or in international tribunals to secure compliance with human right obligations remains generally based on consent. Consequently there has been no occasion for a plea of immunity to be raised.

8. There are two exceptions where immunity appears to have relevance with regard to international tribunals :

9.

i) the first relates to the case of *Prosecutor v. Tihomir Blaskic*, Case No IT-95-14 Appeals Chamber, 29 October 1997, 110 ILR 609, where the Appeals Chamber ruled that it lacked authority to issue an order to a State or State official to produce documents required as evidence in a prosecution of war crimes. The Appeals Chamber in giving its reasons referred to a general rule of 'functional immunity' which, with the exception of genocide, crimes against humanity, war crimes and espionage results in absence of personal responsibility on the part of the official for acts performed in an official capacity. It would seem that imputability to the State of acts performed by officials on behalf of the State was the true ground of the decision (see below at paragraph 32), rather than any procedural immunity. The impact on the enforcement powers of international tribunals of 'the customary international law' which 'leaves it to each sovereign State to determine its internal structure'



certainly constitutes a restraint on the exercise of jurisdiction by international tribunals. It would be useful to have members' views whether the Third Commission should pursue this topic further ;

ii) the second relates to the declared irrelevance both of official status and the immunity based on such status before international criminal tribunals. The Nuremberg Tribunal, the Genocide Convention and the Statutes of the International Criminal Tribunals for former Yugoslavia and Rwanda all declared the irrelevance of official capacity in respect of the prosecution of individuals for international crimes. That principle is set out in Article 27.1 of the Rome Statute of the International Criminal Court (ICC) : "official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility". Unlike the previous instruments which were silent as to immunity, article 27.2 of the Rome Statute also removes immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law as a jurisdictional bar to the ICC. The decision of the Sierra Leone Special Court that the immunity of Charles Taylor as a serving Head of State at the time he committed the alleged offences constituted no bar to his prosecution before that court suggests ICC.27.2 reflects a general principle of the irrelevancy of a plea of immunity as regards criminal prosecutions before an international tribunal, *Prosecutor v. Charles Ghankay Taylor* Special Court for Sierra Leone, May 31, 2004.

The Statute of Rome confers jurisdiction on the International Criminal Court in respect of the criminal responsibility of individuals who commit acts of genocide, crimes against humanity and war crimes as defined in the Statute but such jurisdiction is restricted to acts committed in the territory or by persons of the nationality of a contracting State. The jurisdiction of the International Criminal Court is founded on a principle of complementarity, as proclaimed in the preamble, by which primary jurisdiction to prosecute the Statute offences is recognised as vested in the national court and the jurisdiction of the ICC is exercised only where proceedings in the national court have failed due to inability or unwillingness in order to shield the person concerned from criminal responsibility or by reason of undue delay or lack of independence or impartiality (Rome Statute.17).

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10. *Immunities and the request to surrender for international crimes to the ICC*

In consequence the question arises whether the requirement in Article 27 that immunity is no bar also confers jurisdiction on the national court of a receiving State to surrender a person whose immunity under international law requires abstention from the exercise of national jurisdiction. Article 98.1 is designed to deal with this problem ; it provides that the ICC may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.

Two possible extremes of interpretation in respect of this Article may mean : i) that State and diplomatic immunities remain unchanged in operation by the Rome Statute ; ii) that by virtue of ICC 27.2 they no longer apply in national courts where the ICC requests the surrender of an immune person for prosecution for alleged international crimes ; iii) the preferred interpretation, however, based on the practice of Australia, Switzerland, the UK and other countries, is that where both States have ratified the Rome Statute the receiving State may treat the ratification of the sending State as overriding its immunity, State or diplomatic, and hence permit the court of the receiving State to proceed to comply with the ICC request, even in circumstances where there has been no express waiver by the sending State.

There remains the situation where the State claiming immunity has not ratified the Rome Statute ; here ICC 98.1 authorises the receiving State to refuse a request to surrender an immune individual charged with the commission of an international crime on the basis of the State or diplomatic immunity of the sending State provided the immunity is one 'consistent with its obligations under international law'. The validity of raising an immunity in opposition to a request from the ICC is, thus it seems, determined by general international law. For example, if it is accepted that international law supports the distinction drawn in *Pinochet N° 3* , namely that, faced with an allegation of international crime, a former Head of State loses immunity but not a serving Head, then a national court may comply with a request of the ICC to surrender for prosecution of an international crime in respect of the former, but not of

the latter, *Ex parte Pinochet R Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (Amnesty International Intervening)*, (N° 3) [2000] I AC 147 ;[1999] 2 All ER 97.

Different views have been expressed as to the effect of this provision upon the exercise of criminal jurisdiction in the national systems of States.

11. It is for members to decide whether they wish to pursue the application of immunities in the specialised context of complementarity of the Rome Statute and the general obligation in Article 86 upon ratifying States to cooperate. Its determination will depend on the same factors which have arisen in criminal and civil proceedings in national courts relating to, the commission of international crimes and thus will be resolved in accordance with the general discussion set out in Part II. In practice, States in implementing the Rome Statute into their national legislation on ratification, have made provision for consultation with the ICC prior to any decision relating to surrender of an immune person.

But as regards the exercise of jurisdiction by the ICC itself the position is governed by Article 27(2) which makes clear that immunities under national or international law shall not bar *the Court* from exercising its jurisdiction..'(emphasis added). Immunity, then, has little relevance for the exercise of jurisdiction by the ICC itself. There is the fairly extensive published academic debate on the topic<sup>3</sup>, and, in the absence of any ICC practice, it may be thought there is little to add at present.

12. These two instances apart, at the international level, therefore, it seems correct to maintain that jurisdiction, not immunity, continues as the main obstacle to securing States' compliance with their human rights obligations.

The general recognition of the need for HR protection in all State action

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<sup>3</sup> Gaeta Official Capacity and Immunities in Cassese (ed.) *Int Criminal Courts* vol 1, Chap 24.3, p.975, Ascensio 'Privileges and Immunities' in *ibid*, Chap 8, p.289 ; K Prost and A Schlunck 'Article 98' in O. Tiffterer (ed) *Commentary on the Rome Statute of the ICC* (1999) 1131 ; Sarooshi 'The Statute of the ICC' 48 ICLQ (1999) 386 ; Sarooshi 'Aspects of the relationship between the international criminal court and the United Nations': 32 *Netherlands Yearbook of International Law* (2001), p. 27 ; Cryer "Current Developments, Public International Law : II Implementation of the ICC Statute in England and Wales", 51 ICLQ (2002) 733 ; McGoldrick *The Permanent ICC* (1999) Crim LR 627 ; S Wirth, *Immunities, related problems and Article 98* 12 Crim Law Forum (2001) 429 ; Broomhall, *International Justice and the International Criminal Court* 2003 Chap VII Immunity, 128.

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has been an extraordinary and surprising achievement over the past 50 years. Such a record - the use of both carrot and stick, to obtain consent and self enforcement - may justify the view that any continuing failure of States to comply with their HR commitments is best remedied by international measures, rather than the assertion of jurisdiction by the national courts of one State over the acts of another State. If such a view finds support among members, it may also colour their approach as to the proper resolution of obstacles to the national exercise of jurisdiction to protect human rights arising from the application of jurisdictional immunities. In particular as to whether any modification in the present position under international law is to be recommended, see Part II, para.34,(g.)

Having regard to the two rather limited areas where immunity may have some relevance before international tribunals, it is for the Commission to decide whether they would wish immunity before international tribunals to be covered in its discussions.

### *13. Immunity and national courts*

The main problem arising from the relationship between fundamental human rights and jurisdictional immunities lies not with international tribunals but in the exercise of jurisdiction by the courts of one State over the acts of another.

Under international conventions and in some degree supported by customary international law, there are five situations identifiable where a State is placed under direct obligation to exercise jurisdiction for the protection of human rights :

#### *i) An obligation as to the exercise of territorial jurisdiction.*

Regional human rights conventions (ECHR, ACHR, African Charter HPR) impose an obligation to respect and secure human rights within the jurisdiction of the contracting State. The obligation, in respect of the Convention rights and freedoms, is formulated in ECHR.1 as 'to secure to everyone within their jurisdiction'; in the ACHR.1 'to respect... and to ensure to all persons subject to their jurisdiction the free and full exercise'; in the African Charter.1 'to recognise... and... to adopt legislative and other measures to give effect to them.'

Prohibition of conduct contrary to the Convention HR is in general

restricted to conduct occurring within the territory of the contracting State. However, some extension extraterritorially of a contracting State's HR obligation to exercise territorial jurisdiction. has developed. *Soering v. UK* ECHR Ser A, vol. 161, 1989, p. 34 ; *Ng* case, Report of the UN Human Rights Committee, A/49/40 vol. II, p. 189 ; *Waksman* case 1 HRLJ (1980) 220.

In the *Loizidou* and *Bankovic* cases the ECHR has construed the obligation on States party to the ECHR to secure the Convention rights by the exercise of extra-territorial jurisdiction as exceptional : such an obligation only exists when the State, through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the government of that territory, exercises all or some of the public powers normally to be exercised by that government (*Loizidou v. Turkey* ECHR Ser. A vol. 310, 1995, p. 23 ; *Bankovic v. Member States of NATO* Application N° 52207/99 Grand Chamber, Admissibility, 16 December 2001 ; 41 ILM 517, 2002).

Over time human rights have come to be enforceable by individuals but in principle remain only enforceable against the State itself which has undertaken the obligation to secure human rights.

Exceptionally human rights which give expression to prohibitions amounting to international crimes, however, are distinctive in that the violation of human right imposes a direct obligation in international law upon the individual as well as the State. As discussed in Part II the transposition of this characteristic of international crime to certain fundamental human rights raises difficulties for the continued effectiveness of jurisdictional immunities.

Precisely because the obligation rests upon the territorial State itself to implement its obligated human rights, that obligation may not always be negative in form requiring a State to refrain from infringement of treaty rights but may be positive to secure effective protection, requiring the State to take positive action e.g. to conduct an enquiry as to loss of life, to provide legal aid. Claims brought by individuals to enforce such positive obligations relate more to administrative than private law, seeking judicial review and mandatory orders as to future conduct, rather than compensation for past violation. This element of enforcement of positive

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obligations by injunction has particular implications for the present accepted immunity of foreign States from enforcement measures (see paragraph 22 below).

ii) *An obligation where an offender is found in a State's territory to exercise criminal jurisdiction either by prosecution or extradition*

The *aut dedere aut punire* principle has become an important principle of treaty based extraterritorial jurisdiction which State have utilised to provide a system of cooperative exercise of jurisdiction to regulate and punish offences of common concern. The State's obligation to exercise jurisdiction arises first from the conferment of jurisdiction over the offending acts to the State of the territory where committed (or in the case of aerial hijacking, of whose security is endangered) or of the nationality of the offender and in some cases of the victim, and second by reason of the presence of the offender within the territory of the State. To give effect to the exercise of jurisdiction which the convention permits, a Contracting State undertakes to make the offences of extraterritorial effect in its criminal law and to exercise jurisdiction either by the institution of criminal proceedings against the offender when present within in the jurisdiction or by his extradition to one of the States having the jurisdiction as conferred by the convention.

Whilst the principle has been applied to the international regulation of conduct which does not directly constitute a violation of human rights, as with the 1971 Montreal and Hague Conventions relating to hijacking of aircraft, the 1961 Single Convention on Narcotic Drugs as amended by the 1972 Protocol, the 1980 Convention on the Physical Protection of Nuclear Material, the 1972 Convention on Prevention and Punishment of Crimes against Internationally protected Persons including Diplomatic Agents, other treaties apply the principle to conduct amounting to violation of human rights as the 1979 International Convention against the Taking of Hostages, the 1984 UN Convention against Torture and other Cruel and Inhuman or Degrading Treatment or Punishment.

Jurisdiction based on presence of the offender within the territory of the State exercising jurisdiction is primarily criminal. It goes beyond territorial jurisdiction in that the State is exercising jurisdiction over offences committed outside its territory, but it is not universal both because it requires a territorial link by the presence of the offender within

its territory and by the limitation of the obligation to extradite solely to States upon whom jurisdiction is conferred under the relevant convention. It has been described as 'treaty based broad extraterritorial jurisdiction,' 'a jurisdiction to establish a territorial jurisdiction over persons for extraterritorial events', Joint Opinion of Judges Higgins, Kooijmans and Buergenthal, *Arrest Warrant* case, paragraphs 41 and 42.

*iii) An obligation where an offence is one subject to the aut dedere aut punire principle to exercise civil jurisdiction to afford reparation*

The extension by international convention of the State's obligation to the exercise of civil jurisdiction so as to afford an individual a remedy to claim reparation for any damage caused by the offence is rare, and even more controversial is whether such an obligation requires the exercise of such civil jurisdiction extraterritorially against individuals who are not present in the forum State's territory and for damage occurring outside that State's jurisdiction. A provision imposing an obligation to exercise civil jurisdiction appears in Article 14 (1) of the UN Torture Convention which provides 'Each State shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible'. In the event of the death of the victim, his dependents shall be entitled to compensation.

The English Court of Appeal has construed this provision as requiring the State under obligation to provide a right of redress for torture committed in its territory and also for torture committed by its officials abroad, but considered that it was not designed to require every other State to provide redress although under Article 14.2 it remains permissible for such other State to provide redress in that State for torture committed either in another State or by another State's officials. *Jones v Ministry of Interior Saudi Arabia and Lt Col Abdul Aziz (Minister)* (2004) EWCA Civil 1394, para 19.

*iv) An obligation as contracting party to the Rome Statute to exercise criminal jurisdiction over international crimes committed on its territory or by its nationals*

This has been discussed in paragraphs 9 and 10 above. By reason that the applicability of immunity to the exercise of national courts' jurisdiction with regard to their States' obligations depends mainly on the

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interpretation of the Rome Statute, it has been suggested that this aspect of immunities should be omitted from the present enquiry.

v) *Universal jurisdiction*

Whilst piracy is the traditional example of the permissible exercise of universal jurisdiction, the exercise of such universal criminal jurisdiction by a State where neither the accused possesses its nationality nor the act is performed within its territory is generally accepted only for genocide, war crimes and crimes against humanity. Many of the acts involved in the commission of these three categories of international crime, which are now defined in the Rome Statute, constitute violations of fundamental rights of the person, e.g. in crimes against humanity, murder, enslavement, torture ICC. 7.1 (a), (c), (f) ; in war crimes, wilful killing, wilfully causing great suffering, or serious injury to body or health, unlawful confinement ICC 8. (i) (iii) (vii).

As international crimes these three categories are accorded the same higher status in international law as enjoyed by fundamental rights of the person. These qualities derived from *jus cogens* will be further examined in Part II.

In addition to the qualities which international crimes share with such human rights, they enjoy certain special characteristics. First the criminal responsibility in respect of such international crimes is that of the individual not of the State. Second, the official position or superior orders or any other rule of national law cannot be relied upon by way of substantive defence, mitigation of damages or procedural bar of immunity. Third, the three categories of international crime all relate to violation of collective rights : genocide relates to acts committed with intent to destroy in whole or in part a national, ethnic, racial or religious group ICC.6 ; murder, enslavement, imprisonment, torture and other offences listed in as crimes against humanity in ICC.7 only constitute a crime against humanity if they are 'committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack'. Similarly, in respect of war crimes the grave breaches defined in the 1949 Geneva Conventions which include attacks against buildings and property as well as persons, apply only in time of armed conflict.

14. The problems which have arisen in relation to the continued



effectiveness of jurisdictional immunities arise mainly by reason of the assumption that these special characteristics can be transposed to their counterpart fundamental human rights.

The collective nature of international crime when transposing it into a corresponding human right has not always been noted. Yet it is of some significance in explaining why the murder of a single person or his/her subjection to grievous assault has never been treated in international law as an international crime. Exceptionally it would seem that the 1984 UN Convention on Torture in defining the offence of torture by a public, official as 'any act appears to consider it capable of being committed by a single act.

15. In summary, of the five types of obligation to exercise jurisdiction set out above, the State in general is required to exercise territorial jurisdiction to secure human rights within its territory and in respect of human rights as defined in international conventions to exercise a limited degree of extraterritorial jurisdiction but one restricted to complement the primary jurisdiction granted in the Convention to the State of the territory or nationality. Only in respect of fundamental human rights amounting to international crimes is the exercise of true universal jurisdiction required.

16. *Certain immunities to be excluded from the present study*

Having identified the scope of jurisdiction which States are under obligation to exercise to secure human rights, the next stage is to examine the extent to which the plea of immunity prevents the exercise of such jurisdiction and hence the protection of fundamental rights of the person.

First, a proposal that in this first stage the Third Commission should exclude from its consideration State immunity from enforcement jurisdiction and the immunities of international organisations, followed by a few general remarks about immunity and its sources.

17. *Immunity from enforcement jurisdiction*

Customary international law makes a well recognised distinction between immunity from jurisdiction, that is from the adjudicative jurisdiction of the national courts of another State, and from enforcement jurisdiction which may be exercised by order of national courts but put into effect by the executive authorities of the forum State. Apart from an exception in respect of property in commercial use, State practice is continuing to

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differ on the precise extent of this exception, see UN Convention on State Immunity article 19, US Foreign Sovereign Immunities Act 1976 s. 1610(2), *Eurodif*, French Court of Cassation 14 March 1984 JDI 1984 598,77 ILR 513. Immunity of the State from coercive measures without its consent remains absolute. Such absolute immunity has recently been confirmed with regard to proceedings brought against both Greece as the forum State and Germany as the foreign State for failure to execute a judgment given by the Greek Supreme Court exercising adjudicative jurisdiction after rejecting a plea of immunity. *Kalogeropoulou v. Greece and Germany Admissibility* N° 00059021/00, 12 December 2002.

The absolute nature of immunity from execution derives from the practical inability of one State, short of use of force rendered unlawful by UN Charter article 2.4, to obtain another State's compliance with the orders of its national courts. Inevitably, in consequence, discussion as to any modification of the immunity by reason that the judgment sought to be enforced relates to violation of human rights would seem to move from the legal into the political arena. The consideration of any reduction in immunities from adjudicative jurisdiction by reason of human rights requirements addresses the major areas of conflict which also arise in respect of immunity from execution. The rendering of a judgment in exercise of adjudicative jurisdiction itself involves an element of execution ; it provides authoritative recognition of a violation of human rights and may also be an incentive to the foreign State to comply voluntarily with such judgment. To extend the consideration of a reduction in immunities to State immunity from enforcement jurisdiction requires an examination of enforcement by injunction of positive obligations relating to human rights-injunctions which would be directed to the internal administration of the foreign State. One course, taking account of the intrusive nature of such positive enforcement, would be to reaffirm the absolute nature of immunity from execution even in the face of violations of fundamental rights of the person. But I would prefer merely to exclude the relationship of immunity from execution to such rights from our enquiry. Accordingly, whilst one might envisage that the conclusions of the Third Commission may lead to a second investigation in the future as to the relationship between human rights and immunities from enforcement it is recommended that for the present the study be restricted solely to a consideration of immunities from the adjudicative jurisdiction of national courts.

18. *Jurisdictional immunities of international organisations and human rights*

The main reason for recommending the exclusion from the Third Commission's review immunities of international organisations is the different basis on which they are granted. International organisations though recognised as subjects of international law do not, like States enjoy the sovereign equality or reciprocity on which State immunity is based. The grant of immunities to international organisations is to ensure their independence and effective functioning. Immunities of international organisations are in general absolute rather than restrictive with respect to acts performed in accordance with the purposes of their constitution and derive from the treaty arrangements setting up the organisation and the Headquarters Agreement with the host State which may, dependent on the objects of the particular organisation and local circumstances, specify certain activities where the national court retains jurisdiction and provide for alternative dispute settlement procedures. Unlike State immunity where under the restrictive doctrine an exception for contracts of employment with a foreign State is widely recognised, immunity of international organisations generally exists in respect of disputes with employees and provision may be made for alternative means of settlement by arbitration of a special tribunal which can ensure uniformity of conditions of pay and employment in whatever State the work is performed. Recent case law before the European Court of Human Rights and in national courts suggests that such immunity may be incompatible with the procedural right of access to a court unless the employee had available reasonable alternative means to protect effectively his rights under the Convention. *Beer and Regan v. Germany*, *Rheinisch International Courts before National Courts*, 306-13.

Whilst this line of argument should be borne in mind in any consideration of the employment exception to State immunity to the procedural human right of access to court, the considerable difference in the nature, purpose and ambit of operation of an international organisation from a State would seem to make it advisable to exclude the jurisdictional immunities of international organisations from the proposed study.

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19. *The extent to which the plea of immunity prevents the exercise of jurisdiction to secure the protection of fundamental human rights*

A plea of immunity in international law bars the exercise of jurisdiction, in particular the adjudicative or enforcement powers of one legal person against another (For in-depth review of the subject, see the reports of Special Rapporteur, Professor Joe Verhoeven, AIDI, Session of Vancouver vol. 69 at 442-601).

International custom is the basis of State immunity and is derived from the settled practice of States in their foreign relations and decisions of their national courts. The immunities of members of the diplomatic mission and consular post are codified in the 1961 and 1963 Vienna Conventions on Diplomatic and Consular Relations (VCD, VCR), and the recently adopted UN Convention on the Jurisdictional Immunities of States and their Property (UN State Immunity Convention) provides a step towards the codification of the restrictive doctrine in relation to State immunity. Immunities relating to visiting forces are usually set out in treaty arrangements such as Status of Forces agreements.

Customary international law and international convention and legislative forms of State immunity continue to preserve a general presumption of immunity of the foreign State from adjudicative jurisdiction of national courts (though it may be necessary to establish that such status is recognised by the forum State), and exceptions to such immunity are required to be proved by the applicant. In practice, however, State immunity is generally restricted to acts in exercise of sovereign (or governmental) authority, *actes de puissance publique*, and foreign States are subject to national courts' jurisdiction in respect of commercial contracts and transactions.

Issues as to State succession apart, the immunity of a State sometimes rather misleadingly called subjectmatter immunity or immunity *ratione materiae* subsists unaltered throughout and regardless of changes in personnel carrying on its administration. Personal immunity, immunity *ratione persona* is only relevant in its application to individuals who represent the State and applies to certain officeholders during the period they hold office and terminates when they retire or vacate their posts. Such persons, when out of office, continue to enjoy immunity *ratione materiae*, subjectmatter immunity, for acts performed in the exercise of

their official functions. The precise nature of this conferment of immunity by reason of official status requires careful comparison with the irrelevancy of official status to impunity as regards international crimes.

20. *The nature of the obstacle of immunity to the exercise of jurisdiction to secure human rights*

The situations in which foreign State conduct may lead to a claim of violation of a human right are diverse and it would seem a barren if not impossible task to envisage the multiple ways by which a plea of State immunity may be challenged on the ground of violation of a human right. Instead a brief review of the scope of State immunity and the exceptions thereto in both its subject-matter and personal forms will be given followed by some comparison of the arguments adduced for and against its maintenance in the face of fundamental human rights.

In considering whether a foreign State's acts may stand in the way of the forum State discharging its obligation to exercise jurisdiction to secure human rights it is to be remembered that any proceedings for violation of human rights must relate to some failure on the State's part to secure the right in question. As set out above the obligation to secure the right is primarily territorial and hence the failure alleged must take place in the territory of the State. It is, therefore necessary to consider the law relating to the plea of immunity as regards violations of fundamental rights by a foreign State in proceedings before the court of another State and violations of fundamental human rights by the forum State in proceedings brought in its national courts against a foreign State and within these two categories to consider separately the immunity of the State itself and of the individual officials who act on its behalf in the course of official functions.

21. *Violations of fundamental rights by a foreign State in proceedings before the court of another State*

Acts of a foreign State occurring within the territory of the forum State and which hinder the latter's securing of human rights are likely to be rare, particularly when it is remembered that to constitute an international crime it must constitute an element in systematic violation of a collective group right.

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*i) Immunity from criminal jurisdiction*

The State enjoys absolute immunity from criminal jurisdiction of another State.

*ii) Immunity from civil jurisdiction*

The law relating to State immunity from civil jurisdiction is formulated as a general rule of subject to exceptions.

*iii) The exception for commercial transactions*

Insofar as a violation of human right arises in the course of commercial activity of the State they will be subject to the local jurisdiction ; proceedings relating to sale of goods, supply of service, loans and transactions of financial nature, and activity of a commercial, industrial, trading or professional nature and commercial transactions generally are not immune, UN State Immunity Convention, 2.1, US FSIA s.1605 (a)(2), UKSIA, s.3.1 and 3, *Empire of Iran Case* 1963 45 ILR 57. The exception applies to such commercial activity wherever it is committed but the private international rules of the forum State may impose requirements of a connection with the forum. Thus a US court dismissed an allegation of 'enslavement' by leasing for profit of individuals detained in concentration camps by the Nazi regime to German industrial companies as having no direct effect in the United States, without ruling whether the commercial exception, FSIA s.1605(a)(2), applied. *Princz v. Federal Republic of Germany* 26 F 3d 1166 (DC Cir 1994), 33 ILM 1483(1994) 103 ILR 594.

*22. The exception for contracts of employment with the foreign State and its proposed exclusion*

Contracts of employment by the foreign State come within a separate exception to State immunity. The absolute doctrine of immunity, particularly as it restricted claims of persons employed by one State working in another State, was a severe infringement of the right to work. Under the restrictive doctrine immunity is removed for proceedings in respect of a contract of employment between an individual and a State for work performed or to be performed in another State, but the right to proceed remains severely restricted (UN Convention on State Immunity, art. 11). Employment perform particular functions in the exercise of governmental authority and claims for 'recruitment, renewal of

employment or reinstatement of an individual' remain immune, as does dismissal or termination of employment on the basis of the security interests of the State, as determined by the Head of State or the Minister of Foreign Affairs. Proceedings also remain immune for nationals of the employer State, unless permanently resident in the State of the forum.

Undoubtedly the above position produces a conflict between jurisdictional immunities and the right to work in article 6 of the International Covenant on Cultural and Economic Rights. Considerable hardship and injustice is possible ; there have even been incidents of servants imported into the forum State in conditions of enslavement which would attract the human right prohibition against slavery. The subject, however, is restricted to a small section of the labour force, raises general issues as to regulation of government service, the organisation of diplomatic missions and the mandatory scope of national labour laws. It is for the decision of the committee whether this specialised area should not be the subject of a separate Commission and so far as our Commission is concerned should be excluded from the present study.

## Part II

### **Fundamental Rights of the person and jurisdictional immunities of States and their officials in respect of non contractual non commercial acts**

23. *The immunity of the State from civil jurisdiction in respect of non contractual non commercial acts of the foreign State*

*i) Non commercial intentional or negligent statements causing damage*

A largely hitherto uncontroversial area of immunity relates to liability for statements, intentional or negligent made on behalf of the State which cause loss *Krajina v. Tass Agency* [1949]2 All ER 274 ; *Yessenin-Volpen v. Novosti Press Agency* 443 F supp 849 (SDNY 1978). 63 ILR 127. Such immunity may conflict with an individual's rights relating to freedom of thought, conscience, religion, respect for family life, of the child, participation in government.

*ii) The exception for personal injuries and tangible loss of property*

Acts or omissions of the foreign State causing personal injuries or tangible loss to property is no longer immune but the scope of the exception remains uncertain. There is a body of State practice which

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supports the restriction of immunity to acts of a private nature such as injuries incurred by reason of negligent driving and retains immunity for claims in respect of injuries incurred in the course of public activity. The European Court of Human Rights in its review of State practice in *McElhinney v. Ireland and UK* Application 31253/96 ; Judgment 21 November 2001, 34 EHRR(2002) 13, applied this narrower version of the exception limited to private law acts ; it concluded that an allegation of assault committed within the territory of the forum State by a member of the armed forces of another State was immune.

24. The UN State Immunity Convention and the US and UK legislation adopt the wider version and apply the exception to all claims for personal injuries and tangible damage whether caused in the exercise of private or public activity :

*i) caused by the State within the territory of the forum State*

Common law and civil law systems both impose a territorial restriction ; State Immunity Convention.11, US FSIA s ;1605 , UKSIA s. 5. The UN Convention requires that not only the act or omission causing the damage be performed in the territory of the forum State but that the author of the act or omission be present at the time the damage was caused. The UK legislation omits the requirement of presence of the author.

This exception to State immunity provides a useful remedy by which damage caused by a visiting Head of State or a diplomatic agent in post against whom a civil suit is barred by personal immunity may be recovered from the State as their principal. It does, however, fall fout of a right of non-discrimination or equality in that as against a private individual the national courts of most States apply rules of private international law to permit proceedings in respect of delictual conduct committed outside the forum State' s territory where damage is caused within the jurisdiction.

On the basis of the wider delictual/tort exception, a violation of a human right committed by act or omission of the foreign State within the territory of the forum State resulting in personal injuries or loss of tangible property would not be immune. *Ferrini v. Federal Republic of Germany*, Italy court of Cassation, Judgment N°. 5044 of 11 March 2004.



*ii) caused by the State outside the territory of the forum State*

International custom supported by State practice maintains immunity in respect of personal injuries or tangible loss to property caused by a foreign State outside the territory of the forum State, even where violation of fundamental rights of the person is alleged. Injuries incurred as a result of the acts of police or prison authorities have been categorised as acts performed in exercise of sovereign authority, *Saudi Arabia v. Nelson* 123 L Ed 2<sup>d</sup> 47 (Sup Ct 1993) 100 ILR 544. (torture and beating in a Saudi prison of a 'whistleblower' regarding malpractice in a hospital where he worked).

Courts have rejected any modification to such immunity or provision of a new exception where the allegations relate to systematic torture *Al-Adsani v. Government of Kuwait and Others* CA 12 March 1996, 107 ILR 536 ; *Siderman de Blake v. Republic of Argentina* 965 F 2d 688 (9<sup>th</sup> Cir 1992), 103 ILR 454 ; *Bouzari v. Islamic Republic of Iran* Canada, Ontario, Superior Court of Justice Swinton J, 1<sup>st</sup> May 2002 125 ILR 428. *Bouzari* , Court of Appeal Ontario, 30 June 2004. The immunity has been recognised as extending to a central government department, *Jones v. Ministry of Interior Saudi Arabia and Lt Col Abdul Aziz* (2004) EWCA Civil 1394.

*25. Immunity of Head of State and diplomatic agent*

An original and prime purpose of immunity from criminal and civil proceedings of the courts of the receiving State is to ensure to the personal Head of State and the State's representatives the unhindered communication and efficient performance of functions free from interference. Thus a bar based on the status of the person of the State, immunity *ratione personae* recognised as extending to the Head of State, and to the diplomatic agent when either are in office. On the authority of the ICJ's decision in the *Arrest Warrant* case, a similar personal immunity extends to the serving head of government and Minister for Foreign Affairs when in office.

*i) Immunity from criminal jurisdiction in office*

The need for such immunity is primarily incurred when such a person enjoying immunity is present in the territory of the receiving State and on this account he or she, when in office and present in the territory of another State, enjoys inviolability of the person from arrest detention or

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coercive measures, and absolute immunity from criminal jurisdiction. VCD 31.1 provides 'A diplomatic agent shall enjoy immunity from criminal jurisdiction of the receiving State'. This immunity from criminal jurisdiction exists even where violation of human rights amounting to international crimes is alleged. The International Court of Justice declared itself unable to deduce from State practice 'that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Minister for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity'. para 58. The existence of this immunity to a serving Head of State or of government is confirmed by the decision of the French *Cour de Cassation* holding Colonel Khadafi as head of the Libyan Arab Jamahariya immune in respect of alleged acts of complicity in acts of terrorism leading to murder and the destruction on 19 September of a civilian aircraft over the desert. *In re Khadafi, SOS Attentat and Castelnau d'Esnault Khadafi*, Head of State of the State of Libya France, Court of Cassation, criM. chamber. March 2091. JDI (2002) 129, 803 n. Santulli<sup>4</sup>.

*ii) Immunity from criminal jurisdiction when office is vacated*

Once out of office the former Head of State or retired diplomatic agent loses personal immunity but in general continues to enjoy subject-matter immunity in respect of acts which, while in office, he performed in exercise of his official functions. In the case of the diplomatic agent who has vacated office the loss of personal immunity but the retention of subject-matter immunity for 'acts performed in the exercise of his functions as a member of the mission' is set out in VCD.39.2. Such subject-matter immunity affords immunity from criminal jurisdiction, save for acts performed in a private capacity and dicta of the International Court of Justice in respect of a former Minister for Foreign Affairs in the *Arrest Warrant* case support this rule.<sup>5</sup>

<sup>4</sup> See also the 2001 Vancouver Resolution of the Institut.<sup>2</sup> 'In criminal matters the Head of State shall enjoy immunity from jurisdiction before the courts of the foreign State for any crime he or she may have committed, regardless of its gravity.' By Article 15 .1 of the Vancouver Resolution 'The Head of Government enjoys the same inviolability and immunity from jurisdiction recognised in this Resolution, to the Head of State.

<sup>5</sup> After a person ceases to hold the office of Minister of Foreign Affairs, he or she will no longer enjoy all the immunities accorded by international law in other States. Provided that it has jurisdiction under international law, a court of one State may try a former Minister for Foreign Affairs of another State in respect of acts committed prior or

This generally accepted position in customary international law has been challenged by the English House of Lords' decision in *Pinochet No.3*, which refused to accord immunity to a former Head of State in respect of a request for his extradition to stand trial on a charge of State torture under the 1984 UN Torture Convention and, where there is a sufficient jurisdictional link with the forum State, the courts of other countries have reached a similar result, *Guatemalan Genocide Case*, Spanish Supreme Court, Judgment No.327/2003 (25 February 2003) ; *Pubic Prosecutor Jorgic, German Federal Constitutional Court*, 12 December 2001 ; *HAS v. Ariel Sharon*, Belgian Court of Cassation, 12 February 2003, 42 ILM 596(2003). Whilst the decision in *Pinochet N° 3* itself may be explained on narrower grounds of implied waiver by reason of the ratification of the UN Torture Convention by all States, in the particular case - the UK as the receiving State, Chile as the sending State and Spain as the State requesting extradition - the case has wider implication.

*iii) Immunity from civil jurisdiction*

The Head of State or diplomatic agent when in office also enjoys immunity from civil proceedings which in the case of the diplomatic agent is full, save for proceedings relating to private immovable property situated in the territory of the receiving State, succession or any professional or commercial activity carried on in the receiving State outside the person's official functions.

As with immunity from criminal jurisdiction, the Head of State or diplomatic agent when no longer in office loses personal immunity from civil jurisdiction but retains immunity *ratione materiae* in respect of acts performed in the course of official functions. As a restrictive doctrine of immunity of the State itself applies in respect of civil jurisdiction this subject-matter jurisdiction of persons entitled to immunity is also relative, and subject to exceptions as set out above in paragraphs 26 and 27.

*26. Lesser officials of the State whether in office or vacated office*

International law supports the principle that officials performing acts on behalf of the State in the course of their official functions enjoy State

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subsequent to his or her period of office, as well as in respect of acts committed during that period of office in a private capacity.' Arrest Warrant of 11 April 2000 (Democratic Republic of Congo/Belgium) Judgment Preliminary Objections and Merits ; 14 February 2002.ICJ Reports 2002.41 ILM 536 (2002),para.61.

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immunity, 'which affords to individual employees or officers of the foreign State protection *under the same cloak* as protects the State itself (see on imputability of acts of officials to the State below at paragraph 32).

However, on the authority of *Pinochet* and other cases, this principle has been held to be modified so as to remove immunity for criminal jurisdiction for such officials when they have vacated office, other than the Head of State or diplomatic agent and to permit third States to institute criminal prosecution for international crimes against them.

<sup>s</sup> VCD.31(a) (b) (c). This personal immunity from civil jurisdiction of the Head of State extends to acts performed at home in his own State; so far as his acts performed in a sovereign capacity they may be subject to the same exceptions as apply to the immunity of his State.

Recently the English Court of Appeal has greatly expanded such an exception to immunity in respect of an allegation of systematic torture committed outside the forum State's jurisdiction; it has ruled that there is no immunity *ratione materiae* for an official when in office as well as after he has vacated the office and that such removal of immunity applies not only to immunity from criminal jurisdiction but to immunity from civil jurisdiction thereby enabling suit for redress to be brought against individual officials. *Mitchell and Ors v. Ibrahim Al-Dali, Khalid Al-Saleh, Co. Mohammed al Said and Prince Naif* [2004] EWCAI Civil 1394. The case was referred back for consideration whether the circumstances warranted the exercise of the court's discretion to permit the exercise by the English court of extraterritorial jurisdiction.

*27. Violations of fundamental human rights by the forum State in proceedings brought in its national courts against a foreign State*

The substantive right of equality or non discrimination and the procedural right of access to court would appear to be the human rights most likely to be infringed by the application of immunity to bar suit brought against a foreign State in the national court of the forum State. So far as the substantive right of equality or non-discrimination, whilst the right is directed to prohibit discriminatory treatment of both groups and individuals, it would seem to have no application to the artificial person of a State. The ICCPR 2.(1) provides that all States parties undertake to respect and ensure to all individuals within their territories and within their jurisdictions the rights recognised in the Convention' without

distinction of any kind such as race, colour, sex, language, religion, political other opinion, national or social origin, property, birth or other status'. Article 26 stipulates that all persons are equal before the law and thus' the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any of the grounds as set out above. The persons protected by this right are variously described in the preamble as 'members of the human family', 'human person', 'the individual'. Whilst any distinction based on the grounds set out above which nullifies or impairs the enjoyment by all persons on an equal footing of the Convention rights and freedoms will constitute discrimination, the obligation applies to human beings ; to extend it to a State, an artificial legal person and a subject of international law, would be to treat unlike as like.

A better basis by which to challenge the application of immunity in proceedings in a national court of a forum State is provided by the procedural right to a fair hearing, which on the authority of *Golder UK A 18(1975) EHRR 524*, includes in civil proceedings a right of access to court. The ICCPR expressed both a procedural right to a fair hearing (though this right is only expressly affirmed in relation to criminal proceedings (art 14)) and a substantive right to an effective remedy (art 3(a)). The ECHR Art.6.1.provides that « in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law »<sup>6</sup>.

In *Al-Adsani v. UK*, ECHR Judgement 21 November 2001, the European Court of Human Rights ruled that the refusal of an English court to adjudicate civil proceedings, brought against a foreign State in respect of alleged torture in that State on the ground of the latter's state immunity, was a denial of access to court within the scope of Article 6.1 of the Convention. Nonetheless, by a narrow margin, eight to seven, it held such access was not absolute and that 'the grant of sovereign immunity to a State in civil proceedings pursued the legitimate aim of complying with international law to promote comity and good relations between States

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<sup>6</sup> Article 13 may also provide a basis for a claim against the forum State when its court dismisses suit by reason of state immunity ; it provides that «everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity».

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through the respect of another State's sovereignty' and the limitation of State immunity from civil suit was proportionate to that legitimate aim.

28. *Principle and factors to be taken into account in consideration of the relationship of State immunity to violation of the fundamental rights of the person*

Paragraphs 21 to 31 have sought to set out the present practice of national courts relating to retention of State immunity for violation of human rights. This final section looks at the arguments used to challenge the application of jurisdictional immunities of the State to bar claims arising in respect of violation of human rights.

First, two general points of principle :

(i) Developments in State practice relating to immunity as set out above reflect a 'balancing of interests'. As the Joint Opinion of Judges Higgins, Kooijmans and Buergenthal in the *Arrest Warrant* case states : « on the one scale we find the interest of the community of mankind to prevent and stop impunity for perpetrators of grave crimes against its members ; on the other, there is the interest of the community of States to allow them to act freely on the inter-State level without unwarranted interference » (par. 75).

It is suggested that the Third Commission in reaching any conclusions will therefore need, as declared by that Joint Opinion, to have regard that « a balance must be struck between the two sets of functions which are both valued by the international community ». It is suggested that in striking such a balance it is necessary to retain the personal immunity for serving high ranking officials even when charged with commission of international crime, as discussed in paragraph 29 above.

(ii) State practice in addressing the manner in which immunity may conflict with the obligation to protect human rights has regard to the general rule of imputability of acts of officials acting in official capacity to the State.

The general rule is well stated by Watts : « States as artificial persons can only act through individuals and from this comes the general rule in international law by which an act of an individual performed with the authority and in the name of the State becomes the act of the State. Such an act is solely the act of the State ; the individual is not a party nor incurs

liability in respect of the act. On this account any jurisdictional immunity available to the State in respect of the act is extended to the individual who performed the act on the State's behalf. Any other rule would permit indirect avoidance of the State's own jurisdictional immunity » (Legal Position in International law of Heads of States, Heads of Governments and Foreign Ministers, *Recueil des Cours* vol. 247-III at 82).

This rule has been applied by national courts in according immunity to State officials when performing acts in the course of their official functions, *Church of Scientology* case (1978) 65 ILR 193 BGH, German Supreme Court ; *Holland v. Lampen-Wolfe* (2000) 3 All ER 833 House of Lords, *Propend Finance Pty Ltd v. Sing* (1997) 111 ILR 611 Court of Appeal, 2 May 1997 ; *Jaffe v. Miller* (1993) 95 ILR 446 Canada, Appeal Court of Ontario ; *Herbage v. Meese* 747 F Supp. 60 (DC Cir.1990).

29. Without denying the substantive rule of imputability which underlies the procedural rule of subject matter immunity, national courts have identified an exception which permits the taking of jurisdiction and the removal of immunity in certain defined circumstances.

The moral opprobrium against impunity of individuals who commit international crimes strongly supports the general acceptance into international law of this exception. As Watts puts it « [ ] for international conduct which is so serious as to be tainted with criminality to be regarded as attributable only to the impersonal State and not to the individuals who order it is both unrealistic and offensive to common notions of justice » (*op.cit.* 82).

But there are logical difficulties as to status, type of proceedings and exercise of jurisdiction extraterritorially in admitting any removal of immunity for a violation of international law. There is the logical difficulty of limiting the exception to officials who have left office. If past conduct is considered so serious as to remove the customary immunity bar for criminal acts committed in the name of the State, is there not a stronger case to remove the bar so as to prevent its prevent commission by an official in office ? Equally illogical it may be argued is to deny civil reparation in respect of an act where criminal proceedings are permitted. And third, if the obligation to secure the human rights extends extraterritorially, why should not immunity be removed not solely for acts committed within the territory of the forum State but

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elsewhere ?

30. *Factors to be taken into account*

It is no easy task to identify the circumstances which permit an exception to imputability and determine where the line is to be drawn in allowing proceedings for violation of human rights and refusing jurisdiction on the ground of immunity.

Tentatively, and as a prelude to full discussion, the following factors are identified as ones which have been invoked as relevant to determination when such an exception should apply. They are set out here and members are invited to elaborate, rank or add to them.

*i) Waiver, actual or implied, by the State in whose service the alleged violation of human rights occurred.*

International law requires waiver to be express and by the State. The International Court of Justice refuted the suggestion that the extension of national criminal jurisdiction over defined international crimes by international convention constituted an implied waiver by the ratifying States of jurisdictional immunities :

« Although various international conventions on the prevention and punishment of certain serious crimes impose on States obligations of prosecution or extradition, thereby requiring them to extend their criminal jurisdiction, such extension of jurisdiction in no way affects immunities under customary international law, including those of Ministers for Foreign Affairs. These remain opposable before the courts of a foreign State, even where those courts exercise such a jurisdiction under these conventions » (*Arrest Warrant*, para. 59).

But the House of Lords in *Pinochet No.3* seem to have concluded that the entry into force for the three interested States,- the receiving, sending and requesting State-of the UN Convention on Torture constituted their waiver of any immunity enjoyed by a public official charged with such an offence ; further they interpreted the convention to include a former Head of State in the jurisdiction conferred on States Parties by reason of the Convention's express requirement that the commission of the offence of torture be 'by... a public official or other person acting in a public capacity'.

In proceedings before US federal courts against Marcos express waiver



by the Philippine government who had succeeded him was treated as removing any immunity to which he was entitled for acts performed when Head of State, *In re the Estate of Marcos Human Rights Litigation* 978 F 2d 493(9<sup>th</sup> Cir.1992). But the US courts have rejected implied waiver insisting on an element of intentionality - implied waiver depends upon the foreign government's having at some point indicated its amenability to suit. - *Princz v. Federal Republic of Germany* 26 F 3d 1166 (DC Cir 1994), 33 ILM 1483(1994) 103 ILR 594.

ii) *A violation of a peremptory norm of jus cogens.*

A well established quality of such peremptory norms is their non derogability by which any derogation from a peremptory norm by treaty (VCT.53) or by unilateral action is of no effect. Whether the effect of non-derogability applies solely to bar no derogation from the substantive prohibition itself or has wider effect so as to override rules of procedure and hence of immunity as well as substantive rules of international law is a matter of dispute. The dissenting opinion of six judges in *Adsani*, Judgment of 21 November 2001, asserted that a peremptory norm overrules any other rule which does not have the same status :

'The consequence of such prevalence is that the conflicting rule is null and void, or in any event does not preclude legal effects which are contrary with the content of the peremptory norm... Due to the interplay of the *jus cogens* rule on the prohibition of torture and the rules of State immunity, the procedural bar on State immunity is automatically lifted, because those rules, as they conflict with a hierarchically higher rule, do not produce any legal effect' (para.1-3.).

But the judgment of the Court itself distinguished between a substantive and a procedural rule : 'The grant of immunity is to be seen not as qualifying a substantive right but as a procedural bar on the national court's power to determine the right.' (para 48).

The same position has recently been taken by the English Court of Appeal which explained the distinction :

The recognition under general principles of international law of civil immunity on the part of a State from civil suit in a State other than that of the alleged torture does not sanction the torture or qualify the prohibition upon it. It qualifies the jurisdictions in which and by means by which the peremptory norm may be enforced. *Jones v. Ministry of Interior Saudi*

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*Arabia and Lt Col Abdul Aziz* (2004) EWCA Civil 1394, para.17.

To justify removal of immunity on the sole ground of the peremptory character of the norm asserted may prove too wide. Violations of human rights relating to the physical integrity of the person - the right to life, prohibitions of torture and enslavement - are generally agreed to be based on *jus cogens* norms but so are principles prohibiting genocide, racial discrimination, aggression, acquisition of territory by force, the forcible suppression of the right of peoples of self determination and obligations under international humanitarian law *Furundzija* Case IT-95-17/1 ; 10. It would not seem that the right of access to court or to a fair trial is a *jus cogens* norm . 'It is the means by which a claimant may assert a claim for breach of a peremptory rule of international law. It is not itself peremptory or unqualified.' *Jones v. Ministry of Interior Saudi Arabia* fn 35 per Mance LJ at para 25.

Further, it is arguable that in some respect the rule of State immunity, certainly in its personal form, may also be regarded as a peremptory norm of *jus cogens*. In the *US Diplomatic and Consular Staff in Tehran* case ICJ Reports 1980, p.3 at paras. 91-2, the ICJ recognised the 'fundamental character' of the international rules' of diplomatic and consular law and spoke of 'the edifice of law carefully constructed by mankind over a period of centuries, the maintenance of which is vital for security and well-being of the complex international community of the present day'.

iii) *International crime*

As regards substantive human rights, the conduct alleged appears to be always assumed to amount to commission of an international crime.

iv) *Criminal intent of individual Offender*

An essential element in the conduct alleged is criminal intent, *mens rea*, on the part of the individual who commits the criminal act and in consequence incurs direct personal criminal liability for the act.

The requirements in c) and d) in addition to the *jus cogens* quality of the violated norm would appear to derive from the need to 'individualise' the violation so as to enforce the norm at the level of the individual rather than the State. As noted above (para.18 ) this is achieved by the fact that the criminal responsibility in respect of such international crimes is made that of the individual not of the State, there being no equivalent criminal

responsibility for States whose accountability remains solely horizontal between States by way of State responsibility. The imposition of personal criminal liability and the accompanying requirement of criminal intent permits the discarding of the general rule of imputability of the act to the State, and the exemption of the individual for all responsibility incurred for acts performed in the course of official functions. The obligation of the State to secure human rights by the exercise of jurisdiction is refined into an obligation to exercise criminal jurisdiction to prosecute and punish the individual offender.

It may be the 'individualisation' of the violation can proceed further to remove immunity from civil proceedings. Such a development would reduce the obligation to provide restitution of the violated human right merely to one of payment of damages ; further it would raise the issue whether a State, as municipal law provides in respect of other employers, regardless of the intentional wrongdoing of the individual , is not obliged to indemnify such damage caused by its official where it results from the closeness of the official duties with the performance of the offence or where the offence is 'non depourvu de tout lien avec le service'. *Lister v. Hesley Hall* (2001) UKHL 22, 2002 1 AC 215, (2001) 2 All ER 769 ; *Lemonier*, 26 July 1918/7918./Rec 262.

One restriction on using international crimes as a foundation for proceedings in national courts should be noted. In the case of the three categories of international crime defined in the Rome Statute, a single act is insufficient ; systematic violation of the right to life, torture, enslavement is required. In the case of torture, however, the existence of an international Convention which defines the international act of state torture as 'any act' makes it possible to allege such an international crime by the performance of a single act.

v) *Irrelevancy of official status*

A consequence of the setting aside of the rule of imputability is that it also sets aside the official status.

A mandate to disregard official status clearly contradicts the international rule of imputability. To declare that the commission of international crime cannot be treated an official function, or if so treated enjoys no immunity conflicts directly with the international law rule which allows the State to determine by its own law its internal organisation. See the

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ILC Articles on State Responsibility. 4.1 and Commentary thereto, para.13 ; 'It is well known that customary international law protects the internal organisation of each sovereign State ; it leaves to each sovereign State to determine its internal structure and in particular to designate the individuals acting as State agents or organs' *Blaskic*, at para 8 supra.at para.41.

Judges Higgins, Kooijmans and Buergenthal would solve the conflict by treating international law as prohibiting the classification of acts amounting to international crime as official functions : It is now increasingly claimed in the literature (see e.g., Andrea Bianchi "Denying State Immunity to Violations of Human Rights", 46 *Austrian Journal of Public and International Law*(1994), p.24 that serious international crimes cannot be regarded as official acts because they are neither normal State functions nor functions that a State alone (in contrast to an individual) can perform : (Goff J.(as he then was) and Lord Wilberforce articulated this test in *I Congreso del Partido* (1978) QB 500 and (1938) AC 244 at 268, respectively). This view is underscored by the increasing realization that State-related matters are not the proper test for determining what constitutes public State acts. The same view is gradually also finding expression in State practice, as evidence in judicial decisions and opinions (for an early example, see the judgment of the Israel Supreme Court in the *Eichmann* case ; Supreme Court, 29 May 1962, ILR 312). See also the speeches of Lords Hutton, and Phillips of Worth Matravers in *Re v. Bartle and the Commissioner for the Metropolis and Others, ex parte Pinochet (Pinochet III)* ; and Lords Steyn and Nicholls of Birkenhead in *Pinochet I*, as well as the judgement of the Court of Appeal in the *Boutersee* case (Gerechtshof Amsterdam, 20 November 2000, para.4.2.) *Arrest Warrant* case, Joint Opinion, para. 86

vi) *Jurisdiction*

Immunity originated as a bar to the exercise of clearly established territorial jurisdiction. It is for consideration whether it has any application where a foreign State exercises extraterritorial jurisdiction over acts abroad or persons not present in the forum State territory. Does the question become one for determination by application of private international law principles ? Do the principles of non-intervention in the internal affairs of another State and the obligation to respect the other State's sovereignty and independence which underlie the plea of

immunity continue to apply where extraterritorial jurisdiction is exercised, particularly if exercised in accordance with an obligation to secure human rights ? Restrictions relating to jurisdictional connection or non-retrospectivity imposed on such exercise by national legislation, may prevent national courts independently of the plea of immunity from exercising such jurisdiction.

*vii) A fully international constituted crime*

Practice would seem to recognise that the *jus cogens* status of a prohibition relating to a human right is not of itself sufficient to displace State immunity. An additional conferment of jurisdiction and in particular an obligation on the State of the national court before whom the plea to proceedings is raised to exercise either universal jurisdiction or *aut dedere aut punire* jurisdiction derived from international conventions in respect of the international crime is required. As stated in *Pinochet No.3* 'not until there was some form of universal jurisdiction for the punishment of the crime of torture could it really be talked about as a fully constituted international crime. The UN Torture Convention did provide what was missing, universal jurisdiction' *Pinochet No.3* per Lord Browne-Wilkinson, 114. That conferment of jurisdiction may depend on national as well as international law.

*viii) Alternative methods of redress*

Even though immunity secures free inter-State communication without undue interference', its enjoyment may be construed as subject to condition particularly when claimed in respect of civil proceedings relating to the commission of international crime by the State and its serving officials. The underlying purpose of the plea of immunity is to give the foreign State the opportunity to remedy the situation by means of its own choice in conformity with international law. Hence the foreign State is afforded the opportunity to provide local remedies or settlement of the dispute by peaceful means. Accordingly, the enjoyment of such immunity may be seen to be conditional upon the foreign State's undertaking to make available and to resort to reasonable alternative methods of settlement which are sufficient to secure redress for its violation of fundamental rights of the person. Such alternative methods might include fact finding, mediation, conciliation or arbitration between the victim and the State or interstate dispute settlement. Failure by the

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foreign State to honour such an undertaking might permit concerned third party States to request the International Criminal Court to initiate criminal proceedings against named officials even though still in office, and ultimately, on notice, removal of immunity before national courts.

31. *Concluding remarks.*

I hope the above survey of the subject provides members with sufficient material to formulate their views and replies to the questionnaire set out below. I look forward to replies to the questionnaire, suggestions for reformulation of the law or advice as to the way forward (cf. *supra*, I, 1, b).

**III. MINUTES OF THE 5<sup>TH</sup> PLENARY MEETING OF THE INSTITUT AT SANTIAGO (23.10.07, 12H45).**

Troisième Commission

Les droits fondamentaux de la personne face aux immunités de  
jurisdiction du droit international

*Third Commission*

*The fundamental rights of the person and the immunity from jurisdiction  
in international law*

**Rapporteur :** Lady Fox

La séance est ouverte à 12 h 45 sous la Présidence de M. Orrego Vicuña, Président.

The *President* invited Rapporteur Lady Fox to initiate her presentation on the state of work of the Third Commission and the issues it had encountered. Given the short time before the break, the Rapporteur agreed to discuss in the time available the first of three parts of her presentation to the Session. The President remarked that there would on this occasion be no substantive discussion of the Third Commission's work by the members and that discussion would instead be taken up in the following Session.

The *Rapporteur Lady Fox* thanked the President, the Secretary General and the Bureau for allowing the Third Commission and its Rapporteur to make this presentation. She directed the members to a shorter version of the final Report and a draft Resolution in English and French, which had been made available to the Members.

**Draft Resolution**

*Jurisdictional Immunities of States  
and the violation of fundamental human rights by international crimes*

Preamble

*Mindful* that the Institut has addressed the jurisdictional immunities of States in the 1891 Hamburg Resolution on the jurisdiction of courts in proceedings against foreign States, sovereigns and heads of State, the 1954 Aix en Provence Resolution on Immunity of foreign States from jurisdiction and measures of execution, the 1991 Basle Resolution on the Contemporary problems concerning immunity of States in relation to questions of Jurisdiction and enforcement and the Vancouver 2001 Resolution on Immunities from jurisdiction and execution of Heads of State and of Government in International Law ;

*Mindful* further that the Krakow Resolution 2005 addressed universal criminal jurisdiction ;

*Recognizing* that the 1998 Statute of the International Criminal Court (ICC) provides that the official capacity of a Head of State or Government, or other officials of the State shall in no case exempt a person from criminal responsibility nor bar the ICC from the exercise of criminal jurisdiction over perpetrators of international crimes ;

*Acknowledging* that pursuant to the principle of complementarity under the 1998 Rome Statute the primary obligation to prosecute international crimes is placed upon the national courts of the State with the closest link of either territory or nationality ;

*Recognising*, however, that international criminal tribunals operate a regime different to that of national courts with regard to immunities of a Head of State or of Government and the other officials of the State ;

*Convinced* of the need to identify a regime of jurisdictional immunities for application in national courts in case of violation of human rights by international crimes :

*Adopts* the following Resolution.

Principle I

Pursuant to international convention and customary international law, a State is under obligation to afford protection of human rights to all persons within its jurisdiction, especially where the violation of such

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rights constitutes a universally prosecutable international crime ; when it fails in that obligation, it is incumbent upon other States, acting in the interests of the international community and by means in conformity with international law, to seek to remedy its default ;

#### Principle II

Immunities are provided to enable an orderly allocation of jurisdiction in disputes concerning States in accordance with international law, to respect the independence and equality of States as regards their internal administration, and to ensure the effective performance of the functions of persons who act on behalf of the States ;

#### Principle III

A balance is to be achieved in resolving conflict arising from the application of the above principles relating to such violation of human rights and the jurisdictional immunities of States and persons acting on their behalf.

In the light of the above Principles the following rules are set out :

#### *Part I Definition of the violation of human rights to which this Resolution applies*

1. This Resolution applies solely to violation of fundamental human rights which constitute international crimes for which a State may exercise universal jurisdiction (hereafter prosecutable violation of human rights). Such prosecutable violations of human rights include those relating to genocide, crimes against humanity, crimes under the 1984 UN Convention against Torture, grave breaches of the 1949 Geneva Conventions for the protection of war victims or other grave violations of international humanitarian law committed in international or non-international armed conflict.

#### *Part II. No Immunity for prosecutable violation of human rights*

2. Save as set out in articles 5, 6 and 7, neither the State nor any person who acts on behalf of the State enjoys immunity in proceedings brought in the courts of another State in respect of prosecutable violation of human rights. Such prosecutable violation of human rights, whether or not attributable to the State as its act, enjoys no functional immunity, (immunity *ratione materiae*).



3. The removal of immunity in paragraph 2 above relates solely to functional immunity (immunity *ratione materiae*) and not to personal immunity (immunity *ratione personae*).

*Part III. Immunity of the State*

4. A State may not claim immunity for a prosecutable violation of human rights committed within the territory of another State in proceedings brought in the courts of that other State. The exception to immunity for personal injuries and damage to property committed by one State in the territory of another State in whose court proceedings are brought, shall, as set out in Article 12 of the UN Convention on State Immunity, be construed as applying to such prosecutable violation of human rights.

5. A State may not claim immunity for a prosecutable violation of human rights committed within its own territory in proceedings brought in the courts of another State where a competent international body has found that the State :

- i) being ,under an obligation pursuant to UN or regional human rights conventions or customary international law to afford reparation for such violation,
- ii) has failed either  
to institute an enquiry, or  
to conduct it in a manner consistent with the justice of the case, or  
to take other appropriate measures to afford reparation.

*Part IV. Personal Immunity of persons who act on behalf of the State*

6. The following shall enjoy personal immunity from criminal and civil jurisdiction in proceedings brought in the courts of another State for prosecutable violation of human rights :

- i) The serving Head of State and the serving Head of the Government throughout the period of their office wherever they may be ;
- ii) Other members of the central government of a State when on an official mission when present in the territory of a receiving State ;
- iii) Members of special Missions within the meaning of the Convention of 1969 on special Missions, members of permanent missions to international organisations (and delegations to conferences of

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international organisations) when present in the receiving State.

iv) Serving members of the diplomatic and consular mission when present in the territory of a receiving State or in transit in a third State.

7. For the purposes of the members of central government in paragraph ii) and of special missions in paragraph iii) above, a mission, official or special, means a mission, representing the State, which is sent by one State to another State or States with the consent of the latter for the purpose of dealing with such State or States on specific questions or of performing in relation to such State or States a specific task.

8. When the functions of a person enjoying personal immunity have come to an end such personal immunity shall cease.

*Part V. Functional Immunity*

9. Taking into account Part I. and notwithstanding that personal immunity has ceased in accordance with Part III article 8 above, functional immunity shall continue in proceedings brought in the courts of another State to subsist for the persons as referred to in Part III article 6 above, save in respect of acts which constitute prosecutable violation of human rights.

10. Whether or not their acts are attributable to the State, all other persons shall not enjoy functional immunity in proceedings brought in the courts of another State in respect of prosecutable violation of human rights.

*Part VI. Exclusions*

11. The above provisions are without prejudice to :

- i) State immunity from measures of constraint against the State or its property in connection with proceedings before the courts of another State ;
- ii) State immunity from criminal jurisdiction in connection with proceedings before the courts of another State ;
- iii) The immunity of international organisations from the adjudicative or enforcement jurisdiction of the national courts of States.

## **Projet de Résolution**

### *Les immunités de juridiction des Etats en cas de crimes internationaux violant les droits fondamentaux de la personne*

#### Préambule

*Rappelant* que l'Institut s'est prononcé sur les immunités de juridiction des Etats dans la résolution de Hambourg de 1891 sur la compétence des tribunaux dans les procès contre les Etats, souverains ou chefs d'Etat étrangers, dans la résolution de Aix-en-Provence de 1954 sur l'immunité de juridiction et d'exécution forcées des Etats étrangers, dans la résolution de Bâle de 1991 sur les aspects récents de l'immunité de juridiction et d'exécution des Etats, et dans la résolution de Vancouver de 2001 sur les immunités de juridiction et d'exécution du chef d'Etat et de gouvernement en droit international ;

*Conscient* en outre de la résolution de Cracovie de 2005 relative à la compétence universelle en matière pénale à l'égard du crime de génocide, des crimes contre l'humanité et des crimes de guerre ;

*Reconnaissant* que le Statut de la Cour pénale internationale (CPI) de 1998 dispose que la qualité officielle de chef d'Etat ou de gouvernement, ou celle d'autres agents de l'Etat n'exonère pas une personne de sa responsabilité pénale, pas plus qu'elle n'empêche la CPI d'exercer sa compétence pénale à l'égard des auteurs de crimes internationaux ;

*Reconnaissant* qu'en vertu du principe de complémentarité prévu au Statut de Rome de 1998, l'obligation première de poursuivre les auteurs de crimes internationaux revient aux juridictions de l'Etat entretenant avec le crime le lien de rattachement le plus proche, de territorialité ou de nationalité ;

*Reconnaissant* cependant que les régimes des tribunaux pénaux internationaux sont différents de ceux que les tribunaux nationaux appliquent lorsqu'il s'agit des immunités du chef d'Etat ou de gouvernement ou de celles des autres agents de l'Etat ;

*Convaincu* de la nécessité d'établir un régime d'immunités de juridiction applicable par les tribunaux nationaux en cas de violation des droits de l'homme par suite de crimes internationaux ;

*Adopte* la résolution suivante :

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#### Principe I

Conformément aux conventions internationales et au droit coutumier international, un Etat a l'obligation d'assurer la protection des droits de l'homme à toutes personnes relevant de sa juridiction, spécialement lorsque la violation de ces droits constitue un crime international universellement punissable ; lorsque cet Etat manque à cette obligation, il appartient aux autres Etats, agissant dans l'intérêt de la communauté internationale et par des moyens conformes au droit international, de rechercher à remédier à ce manquement ;

#### Principe II

Les immunités sont accordées afin d'assurer conformément au droit international une répartition ordonnée de la compétence juridictionnelle en cas de différends concernant des Etats, de respecter l'indépendance et l'égalité des Etats quant à leur administration interne, et de permettre aux personnes agissant au nom des Etats de remplir effectivement leurs fonctions.

#### Principe III

Un équilibre doit être recherché en vue de résoudre le conflit résultant de l'application des principes ci-dessus relatifs à la violation des droits de l'homme et ceux relatifs aux immunités de juridiction des Etats et des personnes agissant en leur nom.

A la lumière des Principes ci-dessus, les règles suivantes sont exposées :

#### *Partie I. Définition de la violation des droits de l'homme auxquels cette résolution s'applique*

1. Cette résolution s'applique uniquement aux violations de droits de l'homme fondamentaux constituant des crimes internationaux à l'égard desquels un Etat peut exercer la compétence universelle (ci-après : les violations des droits de l'homme poursuivables). De telles violations des droits de l'homme poursuivables incluent celles relatives au génocide, aux crimes contre l'humanité, aux crimes visés par la convention des Nations Unies de 1984 contre la torture, aux violations graves des conventions de Genève de 1949 relatives à la protection des victimes de la guerre ou aux autres violations graves du droit international humanitaire commises en temps de conflit armé international ou non-international.

*Partie II. Absence d'immunité pour les violations des droits de l'homme poursuivables*

2. Sauf dans les cas visés par les articles 5, 6 et 7, ni l'Etat ni aucune personne agissant au nom de l'Etat ne jouit de l'immunité devant les juridictions d'un autre Etat à l'égard de violations des droits de l'homme poursuivables. De telles violations, qu'elles soient ou non attribuables à l'Etat, ne bénéficient d'aucune immunité fonctionnelle (immunité *ratione materiae*).

3. L'exclusion de l'immunité visée au paragraphe 2 ci-dessus ne porte que sur l'immunité fonctionnelle (immunité *ratione materiae*) et non sur l'immunité personnelle (immunité *ratione personae*).

*Partie III. Immunité de l'Etat*

4. Un Etat ne peut demander le bénéfice de l'immunité pour une violation des droits de l'homme poursuivable, qui a été commise sur le territoire d'un autre Etat lorsque la procédure a été portée devant les juridictions de ce dernier Etat. L'exception à l'immunité en cas de d'atteinte à l'intégrité physique d'une personne ou de dommage à la propriété dus à un acte attribuable à l'Etat sur le territoire d'un autre Etat dont les juridictions sont saisies doit être interprétée comme s'appliquant aux violations des droits de l'homme poursuivables, conformément à l'article 12 de la Convention des Nations Unies sur les immunités juridictionnelles des Etats et de leurs biens.

5. Un Etat ne peut se prévaloir de l'immunité à l'encontre d'une violation des droits de l'homme poursuivable commise sur son territoire dans une procédure portée devant les juridictions d'un autre Etat lorsqu'une institution internationale compétente a constaté que l'Etat :

- i) est, par suite d'une convention relative aux droits de l'homme conclue dans le cadre des Nations Unies ou dans un cadre régional, ou de la coutume internationale, obligé de réparer une telle violation,
- ii) fait défaut soit d'ouvrir une enquête, soit de la mener d'une manière conforme à la justice, soit de prendre d'autres mesures appropriées en vue d'offrir réparation.

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*Partie IV. Immunité personnelle des personnes agissant au nom de l'Etat*

6. Les personnes suivantes jouissent d'une immunité personnelle de juridiction civile et pénale devant les juridictions d'un autre Etat à l'égard des violations des droits de l'homme poursuivables :

- i) Le chef d'Etat en fonction et le chef de gouvernement en fonction, pendant la durée de leur fonctions où qu'ils se trouvent ;
- ii) Les autres membres du gouvernement central d'un Etat lorsqu'ils sont en mission officielle et présents sur le territoire de l'Etat d'accueil ;
- iii) Les membres des missions spéciales au sens de la convention de 1969 sur les missions spéciales, les membres des représentations permanentes auprès d'organisations internationales (et les délégués à des conférences d'organisations internationales) présents sur le territoire de l'Etat d'accueil ;
- iv) Les membres en exercice des missions diplomatiques et consulaires lorsqu'ils sont présents sur le territoire de l'Etat d'accueil ou en transit dans un Etat tiers.

7. Pour les besoins des paragraphes ii) et iii) ci-dessus, une mission officielle ou spéciale s'entend d'une mission temporaire, ayant un caractère représentatif de l'Etat, envoyée par un Etat auprès d'un autre Etat avec le consentement de ce dernier pour traiter avec lui de questions spécifiques ou pour y remplir une tâche déterminée.

8. Lorsque les fonctions d'une personne titulaire d'une immunité personnelle viennent à cesser, l'immunité prend fin.

*Partie V. Immunité fonctionnelle*

9. Compte tenu de la Partie I et nonobstant le fait que l'immunité personnelle a pris fin conformément à l'article 8 de la Partie IV ci-dessus, l'immunité fonctionnelle devant les juridictions d'un autre Etat subsiste au bénéfice des personnes visées à l'article 6 de la Partie IV, sauf en cas d'actes constitutifs de violations des droits de l'homme poursuivables.

10. Que ses actes soient ou non imputables à l'Etat, toute autre personne ne bénéficie pas de l'immunité fonctionnelle devant les tribunaux nationaux d'un autre Etat en cas de violation poursuivable des droits de la personne

*Partie VI. Exclusions*

11. Les dispositions qui précèdent sont sous toutes réserves de :

- i) l'immunité des Etats à l'égard des mesures d'exécution dirigées contre eux ou leur propriété en cas de litige porté devant les tribunaux d'un autre Etat ;
- ii) l'immunité de juridiction pénale des Etats en cas de litige portée devant les tribunaux d'un autre Etat ;
- iii) l'immunité de juridiction ou d'exécution des organisations internationales devant les tribunaux nationaux des Etats.

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The *Rapporteur* proposed to talk about the problems the Commission was facing in analysing its remit and refining it down to a manageable task. She referred to Part I and paragraph 22 in Part II of the shorter Report, dealing with exclusions from the Commission's scope of work. More details would be given in the full version of the Report.

The title of the Commission's remit had not provided much guidance. The *Rapporteur* had taken over in 2003 and had worked with the Commission in the Bruges and Krakow Sessions. She had also met in London with seven members of the Commission who had provided written comments. The Commission's work had therefore been well discussed. The Commission's work had a bearing on two matters of interest in the present Session : first, the President's concern with the position of the individual ; and, secondly, the remarks of the Secretary General in his opening address to the Session to the effect that "l'Institut a aujourd'hui franchi l'Atlantique pour s'efforcer de réaliser avec l'aide d'un "nouveau" monde les objectifs de paix et de justice qui font l'orgueil de sa devise : *Justicia et Pace*".

The *Rapporteur* posed the question as to what type of court or tribunal was relevant to the Commission's work on immunity : international courts and tribunals or national courts ? The issue of immunity does occasionally arise before international courts, but the main problems are posed with respect to national courts. Once an issue of immunity arose before a national court, what sort of immunity would the Commission examine : diplomatic immunity or State immunity and would the latter include the immunity of State officials ? Diplomatic immunity was well

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addressed by the 1963 Vienna Convention on Diplomatic Relations and would therefore not be discussed by the Commission. The immunity of State officials, by contrast, would be included in the Commission's work.

The Rapporteur posed the further question of whether the immunity of international organisations would be examined. One member of the Commission wished to address the abuses that arise out of employment contracts of international organisations and the economic and social rights of local employees in the forum State. The Rapporteur said, however, that the immunity of international organisations was different from the immunity of sovereigns: it was governed by headquarters agreements rather than by the body of international customary law of State immunity as codified in part by the 2005 United Nations Convention on the jurisdictional immunities of States and their property. The Commission would therefore examine only the immunity of States. The Commission would have regard, in this respect, to the definition of "State" in the 2005 United Nations Convention. Article 2(1)(b)(iv) of the Convention provides that the expression "State" includes the representatives of the State. Article 3 of the Convention, however, excludes the *ratione personae* immunity of heads of State and diplomatic officers.

The Rapporteur referred to the question of whether the Commission would address both civil and criminal proceedings in its work. She said the Commission had been influenced by the fact that, at the time of the United Nations Resolution adopting the 2005 Convention, there had been statements (including by Mr Hafner) that it was generally accepted that criminal proceedings fell outside the scope of the Convention. The Commission would therefore address only the question of civil proceedings and more particularly proceedings in which measures of reparation were sought with respect to acts of the State.

The Rapporteur referred to the question of whether the Commission would examine immunity from execution as well as immunity from adjudication. The 2005 Convention refers to both but is very limited in its provisions on coercive measures. The Commission had considered that execution was a second stage beyond the initial stage of adjudication that would properly be discussed by a further, future commission. The Commission would therefore examine only immunity from adjudication.

The Rapporteur stated that whilst there was general agreement on the



Commission's subject, it had to refine what type of violations of human rights it would be looking at. The expression "fundamental rights" (or *droits fondamentaux*) was not very helpful. The Commission had therefore opted to examine the rights concerning the physical integrity of the person. Violations such as killings, torture and unlawful detention would be examined. The Commission would also take into account related procedural rights such as access to justice. A paragraph of the shorter Report refers to the provisions of the 2005 United Nations Convention regarding access to justice. The European Court of Human Rights has applied the corresponding standard in Article 6(1) of the European Convention very rigorously.

Paragraph five of the shorter Report reads as follows :

5. No attempt is made in this preliminary Report to define the fundamental rights of the person. The term "fundamental" is sometimes used to refer to all human rights, as in the UN Charter's preamble "to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women", but more often to refer to "the basic rights of the human person including protection from slavery and racial discrimination" (*Barcelona Traction Case*). The category of non-derogable rights is probably too inclusive, whilst a requirement that they be based on a peremptory norm of *jus cogens* is too open-ended. The conclusions of the Fifth and Seventeenth Commission may help to supply a definition. To date the jurisdictional bar of State immunity has been challenged in national court in respect of the human rights of the right to life, prohibition of torture and slavery, right to equality and non-discrimination and the rights of access to the court. Future challenges to State immunity, however, based on other human rights cannot be ruled out. The present report rather than seeking to define a fundamental right of the person concentrates on the various more specific grounds arising out of claims to human rights which have challenged the jurisdictional bar to human rights. Accordingly, unless the specific right is stated, reference throughout is to human rights (HR).

The Rapporteur stated that one Commission could not come up with all the potential conflicts between human rights and immunity and give sensible suggestions. The Commission would therefore focus on the violation of rights concerned with physical integrity.

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The Rapporteur said that in so defining its remit, the Commission had had regard to the scope of the 2005 United Nations Convention. The only exception there to immunity that was beyond the “commercial transaction” test was found in its Article 12, which was discussed at paragraph 33 of the shorter Report. This was an exception in regard of acts causing death or personal injury to persons or damage to property carried out by or on behalf of a State but where the perpetrator was within the territory of the forum State. This provides an example of one way in which the conflict between human rights violations and immunity can be addressed : by extending the exceptions to immunity to a certain narrow class of violations, associated with the notion of international crimes, but committed in the territory of the offending State. This same approach was reflected in Articles 4 and 5 of the provisional draft Resolution. The gist of both provisions was to remove the immunity of the State where civil proceedings are brought for reparation. This was a proposal *de lege ferendae* wishing to give expression to an aspiration of the international community. The Commission thought it could not stay within the law as it was. This is a tentative and small step by which to improve the injustice of the present situation.

The *President* thanked Rapporteur Lady Fox for her presentation of the first part of her account to the session and said that the session would receive parts two and three of the Rapporteur’s presentation as soon as it was able.

La séance est levée à 13 h 15.

#### **IV. FINAL REPORT AND RESOLUTION**

1. A full account of the obligations of States and consequent exercise of jurisdiction with regard to the protection of human rights has been given in the Preliminary Report together with a detailed account of the extent to which the jurisdictional immunities of States restrict such protection. Here it will be sufficient in Part I to remind of the main features of these two areas of law and the manner in which they may come into conflict. In Part II the proposals of the Committee for an adjustment of the law to alleviate this conflict will be explained. A Resolution giving effect to these proposals will be found at the end of the Report which will be brought to plenary of the Institut at its meeting in Naples in 2009.

Part I

*Resolutions of the Institut*

2. In addressing the task assigned to it the Third Commission has had regard to the previous work of the Institut. The relationship between human rights and jurisdictional immunities of States has not previously been directly addressed in its work on human rights. The Declarations of New York (1929) on 'International Human Rights' and of Lausanne (1947) on 'Fundamental Human Rights as a Basis for restoring International Law' are limited to general declarations on Human Rights ; Article 1 of the 1990 Santiago Compostella Resolution on 'The Protection of Human Rights and the principle of non intervention in the internal affairs of States' proclaimed the obligation of every State both individually and collectively to ensure the effective protection of human rights ; but in its list of measures which a State might lawfully take against a State in violation of such an obligation it did not refer to proceedings in national courts.

3. As regards the Institut's work on jurisdictional immunities in international law, leaving aside the early Resolutions on diplomatic immunities (Cambridge 1895, New York 1929) and consular immunities (Venice 1896), there have been three Resolutions : Hamburg 1891 on 'The jurisdiction of courts in proceedings against foreign States, sovereigns and heads of State' ; Aix en Provence 1954 on ' Immunities of Foreign States from jurisdiction and enforcement ' ; Basle 1991 on ' Contemporary problems concerning the jurisdictional immunities of States ' dealing with immunities of the State and one dealing solely with the immunities of the Head of State (Vancouver 2001 on 'Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law'). Only the last, where the reports of the Rapporteur Mr Joe Verhoeven provide an illuminating review of the law, expressly addresses a possible conflict between protection of human rights and jurisdictional immunities (see paras. 29-31 below).

4. At the 2005 session in Krakow the Institut adopted two Resolutions relevant to the Commission's work ; the Resolution on 'Universal Criminal Jurisdiction with respect to the crimes of genocide, crimes against humanity and war crimes' (Rapporteur Mr Christian Tomuschat), and the Resolution on on 'Erga omnes obligations and rights' (Rapporteur Mr Giorgio Gaja) and they have guided our approach in

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determining where the line is to be drawn in achieving a balance in resolving conflict relating to the protection of human rights and the jurisdictional immunities of States.

*Overview*

5. The subject of the Commission's work is the conflict which arises from the exercise of jurisdiction by States in pursuance of their obligations to secure the protection of human rights, and the application of jurisdictional immunities of other States which on occasion will constitute a bar to such exercise of jurisdiction. To understand and suggest solutions to reduce that conflict some further examination is required of the aspects of these two areas of international law which bring them into conflict.

*The exercise of jurisdiction by States in pursuance of their obligations to protect human rights*

6. Today, both by international convention and customary law, all States are under obligation to respect and secure human rights and such obligations are given effect by the exercise of jurisdiction, at both the international and the national level. So far as international conventions are concerned the source of such obligation is to be found :

- first in universal and regional conventions, chief among these being the UN sponsored International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), the European Convention on Human Rights (ECHR), the American Convention on Human Rights (ACHR) and the African Charter on Human and Peoples' Rights (AChHPR) ;
- second, in conventions which secure key human rights for specified groups, such as the Geneva Convention relating to the Status of Refugees 1951, the Convention for Elimination of all Forms of Racial Discrimination (CERD), the Convention for Elimination of All forms of Discrimination against Women (CEDAW), and the UN Convention on the Rights of the Child 1989 ; and
- third, and most important for the purposes of our Resolution, in customary international law, international conventions and decisions of the Security Council under Chapter VII of the UN Charter, which make the violation of fundamental human rights international crimes and require States to enact such crimes into their penal codes and to

take jurisdiction for their prosecution.

7. These conventions relate to the most heinous violation of human rights, to genocide in the 1948 Convention, grave breaches for the protection of war victims in the 1949 Geneva Conventions, crimes under the 1984 UN Convention against Torture. The 2001 Statute of the International Criminal Court provides an inclusive re-enactment of these crimes along with crimes against humanity as coming within the ICC's jurisdiction.

8. The jurisdiction which the first and second type of conventions place States under obligation to exercise is primarily territorial jurisdiction. The obligation, in respect of the Convention rights and freedoms, is formulated in ECHR.1 as 'to secure to everyone within their jurisdiction' ; in the ACHR.1 'to respect...and to ensure to all persons subject to their jurisdiction the free and full exercise' ; in the African Charter.1 'to recognise...and ...to adopt legislative and other measures to give effect' to theM.

9. Exceptionally, however, some extension extraterritorially of a contracting State's HR obligation to exercise jurisdiction has developed when the State, either through the effective control of the relevant territory and its inhabitants or through the consent, invitation or acquiescence of the government of the State of that territory, exercises all or some of the public powers normally to be exercised by that State. *Soering v. UK* ECtHR Ser A, vol.161, 1989, p. 34 ; *Ng* case, Report of the UN Human Rights Committee, A/49/40 vol.II p.189. *Waksman* case 1 HRLJ (1980) 220. *Loizidou v. Turkey* ECHR Ser, A vol.310, 1995, p. 23 ; *Bankovic v. Member States of NATO* Application No. 52207/99 Grand Chamber, Admissibility, 16 December 2001 ; 41 ILM 517 (2002).

10. This distinction whereby the obligation to protect human rights is treated primarily as a matter for the exercise of territorial jurisdiction and is only extended extraterritorially where the State has put itself by control of territory in a position to secure human rights is one that would seem to justify, as is proposed in Part II, a greater reduction of jurisdictional immunities where the violation of human rights by one State occurs in the territory of the State in whose courts proceedings are brought for the violation (See the Resolution Part III article 2).

11. The third type of convention confers jurisdiction first and most

strikingly, upon an international tribunal to exercise criminal jurisdiction directly over individuals committing such violations in the manner defined in the convention. Unlike the first and second type of convention where the jurisdiction conferred is exercisable solely against the State placed under obligation to protect human rights, criminal responsibility in respect of the commission of these third type convention crimes is thus made the direct criminal liability of the individual committing the act, and not of the State which orders or is otherwise implicated in the act. Second, with regard to the individual's criminal liability official position or superior orders or any other rule of national law cannot be relied upon by way of substantive defence or, even in most cases, in mitigation of sentence. The Nuremburg Tribunal, the Genocide Convention and the Statutes of the International Criminal Tribunals for former Yugoslavia and Rwanda all have declared the irrelevance of official capacity in respect of the prosecution of individuals for international crimes. That principle is set out in Article 27.1 of the Rome Statute of the International Criminal Court (ICC): 'official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility'.

12. Third, although the direct responsibility of the State for authorisation of such criminal conduct on the part of its officials is left to State responsibility (that is to proceedings by the victim State or other States as regards *erga omnes* obligations) all States generally may be placed under an obligation at the international level to cooperate with the prosecution of such international crimes or at the national level to enact the crimes as offences in their penal codes and to exercise criminal jurisdiction either by extradition or prosecution of persons present within their territory. Thus by article 29 of the Statute of ICTY States are placed under an obligation to cooperate in the investigation and prosecution of accused persons, including to assist without undue delay in their arrest and detention whereas under the *aut dedere aut punire* conventions such as 1979 International Convention against the Taking of Hostages, the 1984 UN Convention against Torture and other Cruel and Inhuman or Degrading Treatment or Punishment States undertake to make the prohibited conduct offences of extraterritorial effect in their criminal law and to exercise jurisdiction either by the institution of criminal proceedings against the offender when present within the jurisdiction or

by his extradition to one of the States having the jurisdiction as conferred by the convention. Exceptionally in the UN Torture Convention 1984 article 14 imposes an obligation upon State parties to exercise civil jurisdiction, that is 'to ensure in its legal system that the victim of torture obtains redress and has an enforceable right to fair and adequate compensation...'

*Jurisdictional immunities of States before international tribunals*

13. Jurisdictional immunities bar one State from exercising jurisdiction in its national courts over another State in respect of matters relating to the exercise of sovereign authority and especially over matters relating to the internal administration of that State. Based on respect for the equality and independence of States these immunities will rarely be a relevant issue in relation to an international tribunal, whether criminal or civil, because any exercise of this international jurisdiction for the protection of human rights is either by adjudication of an international tribunal or Resolution of the Security Council of the United Nations. In either of these situations no question of immunity arises ; the international tribunal's jurisdiction is based on consent of the States appearing before it or, if imposed pursuant to Chapter VII, on the decision of the UN Security Council which overrides any claim to immunity based on the sovereignty of the responsible State.

14. This irrelevance of jurisdictional immunities is not total. First, as the decision in *Blaskic* of the Appeal Chamber of the International Criminal Tribunal for former Yugoslavia (ICTY) demonstrates, where the international tribunal's orders remains dependent on the cooperation of the State parties to the proceedings, a claim of 'functional immunity' of a State official may bar its enforcement. But this has no relevance to the matter under consideration, first because the true ground of the decision was the limited powers of enforcement conferred on ICTY by the UN Security Council and second because the decision relates to immunity from enforcement jurisdiction which as discussed in paragraph 40 below is excluded from the consideration of the present Commission.

*Jurisdiction conferred by the Rome Statute*

15. More relevant however are the provisions of the Rome Statute on the International Criminal Court relating to jurisdictional immunities of States because of the principle of complementarity with national courts

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upon which the ICC's jurisdiction is based.

16. The entire contents and spirit of the preamble of the Rome Statute make no allowance for any continuing separation of national and international criminal jurisdictions. In particular, the State Parties to the Statute determine to put an end to impunity for perpetrators of international crimes and thus to contribute to the prevention of such crimes (preamble, paragraph 5); recall their duty to exercise their criminal jurisdiction over those responsible for international crimes (paragraph 6); and emphasise that the International Criminal Court established under the Statute shall be complementary to national criminal jurisdiction.

17. This principle of complementarity has been confirmed in Article 1 which establishes the ICC as a permanent institution to exercise jurisdiction over the most serious crimes of international concern and one complementary to national criminal jurisdictions, and also in Article 17. Under the provisions of Article 17, paragraph 2, the ICC shall take actions in cases where the national criminal jurisdiction of a State : (a) shields the person concerned from criminal responsibility for crimes within the jurisdiction of the ICC ; (b) there has been an unjustified delay in the national proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice ; (c) the national proceedings were or are not being conducted independently or impartially.

18. The irrelevance of official status reiterated in Article 27.1 of the Rome Statute of the ICC is not solely concerned with a defence to the merits ; but also, unlike the previous instruments which were silent as to immunity, Article 27.2 of the Rome Statute removes 'Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law' as a jurisdictional bar to the ICC (see the denial of immunity for international crimes to the head of State of Liberia in *Prosecutor v. Charles Ghankay Taylor* Special Court for Sierra Leone, May 31, 2004, 128 ILR 239).

19. At the present time there is a continuing debate, and one unresolved by application of the general principle of complementarity, as to the extent of the removal of immunity effected by this article when read in conjunction with article 98 of the Statute which relates to national



criminal proceedings. Article 98.1 provides that the ICC 'may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity'. As discussed in the Provisional Report, this Article can be construed in one of three ways, as barring a plea of immunity in all situations, as barring it where forum and respondent State are parties to the Statute, or as permitting the bar of immunity and requiring the ICC to make any request for surrender direct to the State for whose official immunity is claimed in a third State.

20. By reason of this uncertainty as to the extent to which its provisions render inapplicable immunity as a bar to national criminal proceedings, the Commission has not been able to derive direct guidance from the ICC Statute, though the principle of complementarity of international tribunals to national courts has informed its consideration of how the protection of human rights should limit the scope of immunity in civil proceedings.

*Jurisdictional immunities of States before national courts*

21. The conflict which exists between jurisdictional immunities of States and States' obligations to exercise jurisdiction in national courts arises from the widely accepted rule that a State may not be sued in the national courts of another State without its consent, save for acts of a private law or commercial nature. The recent codification in the 2004 UN Convention on State Immunity suggests that state immunity is a rule of international law and not merely based on comity or furtherance of foreign policy (as at 1<sup>st</sup> May 2009 there were 28 signatures and four ratifications, (Austria, Norway, Portugal and Romania) to the UN Convention). Whilst the scope of the public acts in exercise of sovereign authority, *jure imperii*, for which the rule confers immunity before national courts is increasingly restricted by the imposition of international standards and obligations, the maintenance of the immunities conferred on the State and persons who act on its behalf (with the immunities of certain such officials specially covered in the 1961 Vienna Convention on Diplomatic Relations, the 1963 Convention on Consular Relations, and status of forces agreements with host States for members of the armed forces) continues to be recognised as indispensable to the conduct of

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friendly relations between States. This value is well expressed in the joint separate opinion of Judges Higgins, Kooijmans and Buergenthal in the *Arrest Warrant* case ICJ Reports 2000 :

‘The law of privileges and immunities retains its importance since immunities are granted to high State officials to guarantee the proper functioning of the network of mutual inter-state relations, which is of paramount importance for a well-ordered and harmonious international system’ (para. 75).

22. Today there is increasing change in the traditional understanding of the structure of the international community which in turn has introduced pressure for change in the law relating to jurisdictional immunities. Externally by the imposition of international standards and internally by devolution of powers to local communities or their pooling in regional organisations, the exclusive sovereignty of the State is being progressively reduced. The International Law Commission’s Articles on State Responsibility recognise that a serious breach by the State of an obligation arising under a peremptory norm of general international law gives rise to an obligation on other States to bring such breach to an end through lawful means ; and similarly the Institut’s 2005 Krakow Resolution on Obligations *erga omnes* declares breach of such an obligation owed to the community enables all States to take action. There is a growing recognition that state sovereignty, the basis of jurisdictional immunities of states, ‘implies a dual responsibility : externally – to respect the sovereignty of other States, and internally, to respect the dignity and basic rights of all the people within the State’ and further when the State fails in that obligation, the responsibility falls upon the international community (2001 Report of the International Commission on Intervention and State Sovereignty, set up on the initiative of Canada).

23. The increasing significance of the individual in the international community and the importance of the fundamental rights of the person have highlighted aspects of jurisdictional immunities of States and of the persons acting on behalf of the State which bar the exercise of jurisdiction in the protection of such rights.

#### **The main areas of conflict**

*As regards the State*

24. Taking first the main ways as regards the State itself in which such

exercise of human rights jurisdiction may be barred : they are in respect of proceedings brought in a national court for violation of human right committed on State orders constituting an international crime ; and the procedural right of a victim of such human rights violation to access to bring such proceedings.

25. As to the former, international crimes committed on the orders of a State- such as unlawful detention, torture and killings- remain largely excluded from the restrictive rule of State immunity now codified in the 2004 UN Convention. Whilst an exception to State immunity exists for acts or omissions of the foreign State causing personal injuries or tangible loss to property (UN Convention, article 12), the application of the exception to international crimes committed on State orders is uncertain, particularly since the commission of such crimes is treated as an exercise of sovereign authority. In any event, as with the exceptions for commercial transactions, this personal injuries exception is not applicable to acts committed outside the territory of the State in which proceedings are brought. There are conflicting court decisions on these issues. The European Court of Human Rights in *McElhinney v. Ireland and UK* Application 31253/96 ; Judgment 21 November 2001, 34 EHRR (2002) 13 in an incident relating to an assault by a border guard, and the German court in the *Distomo Massacre Case*, German Supreme Court, June 2003 BGH-1112R 248/98, relating to reprisals on civilians committed by German occupying forces, have upheld immunity on the basis that the acts were performed in the exercise of sovereign authority ; whereas Greek and Italian courts have held war damage caused by occupying forces constitutes an international crime and enjoys no immunity, Prefecture of *Voiotia v. Federal Republic of Germany*, case No.11/2000, Areios Pagos (Hellenic Supreme Court, 4 May 2000, relating to the same incident as in the German case, *Ferrini v. Federal Republic of Germany* Italy, Court of Cassation, Judgment No. 5044 of 11 March 2004, relating to forced deportation, held by the court to be an international crime, of an Italian national by German forces to work in a German industrial concern during the Second World War. An application by Germany is pending in the International Court of Justice against Italy for violation of its immunity arising out of the last two mentioned cases *Jurisdictional Immunities of the State Jurisdictional Immunities of the State (Germany v. Italy)* ICJ Application filed 23 Dec 2008.

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26. Whilst a sufficient connection with the forum State's territory may be a requirement of private international law rules applicable to all proceedings whether brought against a State or a private party, state immunity bars any consideration of the sufficiency of such a jurisdictional connection in the case of proceedings brought against foreign States for acts committed outside the forum State's territory.

27. The use of state immunity to obstruct the procedural right of access to court of a private litigant may also on occasion appear as a misapplication of jurisdictional immunities. Certainly the ICCPR confers both a procedural right to a fair hearing [though this right is only expressly in relation to criminal proceedings (art. 14)] and a substantive right to an effective remedy [art. 3(a)]. The ECHR Art.6.1. is more specific providing that 'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law...' ; and a considerable case law has caused States parties to the convention to ensure that national methods of determination of civil rights satisfy this article.

28. The scope of such a right when applied to remedies required to be provided by another State's law or under international law is less certain. Provided State immunity pursues a legitimate aim and is proportionate the present rule permits the exercise of jurisdiction to be deferred in favour of other ways of pursuing recovery. Thus, in *Al-Adsani v. UK* ECHR, (2001) 34 EHRR 273 the European Court of Human Rights held by a majority of eight to seven, that there was no breach of the procedural right of access where a national court applied State immunity so as to bar its jurisdiction to hear a claim relating to torture committed in a foreign State by officials acting on its orders ; it ruled that 'the grant of sovereign immunity to a State in civil proceedings pursues the legitimate aim of complying with international law to promote comity and good relations between States through the respect of another State's sovereignty' (a decision followed in *Kalogeropoulos v. Greece and Germany*, European Court of Human Rights, N°0059021/00 Judgment on Admissibility, 12/12/2002).

*As to Persons acting on behalf of the State*

29. As regards persons who act on behalf of the State the exercise of

human rights jurisdiction may be barred as to high ranking officials, who include heads of State and of government and diplomats, by the operation of the personal immunity which they enjoy for acts performed on behalf of the State in the course of their official functions ; and also more generally as regards the functional immunity which all other persons enjoy by operation of the attribution of acts performed on its State's behalf even where charged with the commission of an international crime.

30. On the authority of the ICJ's decision in the *Arrest Warrant* case it is clearly established that certain high ranking officials enjoy personal immunity while in office even in respect of the commission of war crimes or crimes against humanity. The decision related to a serving Minister for Foreign Affairs but has now been stated to be applicable to a serving Head of State or Head of government : *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)* Judgment 4 June 2008. The position of other ministers of central government is less certain ; the ICJ in regard to the status of a Minister of Justice, recognised other persons 'exercising powers, in the field of foreign relations' may bind the State 'by their statements in respect of matters falling within their purview', but did not address the question of their immunity : *Armed Activities in the territory of the Congo (New Application) (Congo v. Rwanda)* ICJ, Judgement 3 February 2006, Jurisdiction and Admissibility, paras.47.48. Such ministers when on an official mission together with Members of special Missions within the meaning of the Convention of 1969 on Special Missions and members of permanent missions to international organisations (and delegations to conferences of international organisations) would all seem to enjoy personal immunity conditional, however, on their being present in the receiving State. Serving diplomats while in post also enjoy comprehensive personal immunity pursuant to the 1961 Vienna Convention on Diplomatic Relations.

31. Dicta of the ICJ in the same case seem to assert that after leaving office when their personal immunity ceases, the functional immunity which continues for acts performed in the course of official functions continues even in respect of the commission of international crime. Such a position has been criticised and the English courts in *R v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (N°3)*

[2001] 1 AC 61, in respect of a claim for extradition of a former head of State for the crime of State torture, and other courts in similar cases have disregarded such functional immunity where in criminal proceedings before a national court the commission of an international crime is alleged : *re Sharon and Yaro* Belgium, Ct of Cassation 12 February 2003, *Xuncax v. Gramajo* (1995) 886 F Supp 162 104 ILR 165, *Enahoro v. Abubakar*, 408 F.3d. 877, 892 (7<sup>th</sup> Cir. 2005). Similarly for those persons who do not enjoy personal immunity but act on the State's behalf it is contended that they too should lose immunity where such criminal prosecutions are brought against them.

32. As well as immunity from criminal jurisdiction of the national court, the question has arisen whether persons acting on behalf of the State should continue to enjoy immunity from civil jurisdiction when claims are brought for reparation for violation of human rights as a result of the commission of an international crime. Whilst the removal of immunity from criminal jurisdiction may be justified on the basis of the personal criminal intent of the individual which is a necessary element in the proof of an international crime, to allow the removal of immunity from civil jurisdiction from the individual who acts on the State's behalf must indirectly result in the removal of immunity of the State from civil jurisdiction and consequently indirectly achieve a result which as explained above the current law relating the State immunity does not at present allow. The maintenance of a distinction between criminal and civil jurisdiction is also justified on the ground that unlike civil claims for reparation a criminal prosecution is instituted or under the control of the forum State. Certainly these arguments in favour of retaining the distinction have been adopted by the English House of Lords which, in reversing the Court of Appeal, has held that both the State of Saudi Arabia and its individual officials when in office charged with the commission of State torture in its prison are immune in civil proceedings brought to recover damages by the victims of such treatment (*Jones v. Saudi Arabia* (2006) UKHL 26, (2007) 1AC 270, 129 ILR at 713).

33. This concludes Part I which has endeavoured to present a survey of current international law as regards the major conflicts between jurisdictional immunities and the exercise of jurisdiction by States in the protection of human rights.

## Part II

*The work of the Commission*

34. In undertaking its work the Commission has had regard to the original view which led to the drafting of its terms of reference, namely the perception that State immunity blocked claims of victims of violations of human rights. It recognises that international law is undergoing a period of change ; in Italy, Greece, Croatia and elsewhere the law is evolving ; and there are forceful voices demanding the complete abandonment of all jurisdictional immunities for States. To restate existing rules of international law would not meet these demands. The task of the Commission is not to formulate the existing rules relating to State and diplomatic immunity but to respond to the demands for better protection of human rights and to channel them in a way that would not be destructive of the whole structure of the present international system. In the light of court decisions in *Pinochet*, *Al-Adsani* and the *Arrest Warrant*, rules are required to be stated but they need to take account of developments in general international law. Any proposals put forward by the Commission to the Institute should both conserve what is essential - the acknowledgement of diplomatic immunity and the relevance of some protection for the operation of States,- but at the same time provide for some new element, some proposals *de lege ferenda*. This would be a contribution to the future.

*Format*

35. In both the 2006 and 2008 meetings of the Commission it was strongly argued that the proposals of the Commission should be presented in the form of a Resolution. It was argued that to state in Resolution form the specific modifications proposed to the existing law relating to States' jurisdictional immunities would ensure full agreement by members of the Commission on the precise extent of such modifications and enable other members of the Institut to appreciate the changes proposed. Members were familiar with the procedures associated with the adoption of a Resolution which gave ample opportunity for full and fair discussion and the expression of opposing views. To present the Commission's conclusions in the form of a Resolution would thus achieve an immediate point in its favour and dispel any mistrust or lack of favourable reception. These views having been approved by all members of the Commission the form of a Resolution in revised form has been adopted and is attached

at the end of this Report.

*The Structure of the Resolution*

36. The Commission's proposals are confined to the modification of the immunity from civil jurisdiction of the State and of the functional immunity of its representatives from civil and criminal jurisdiction in respect of proceedings in national courts for acts constituting violations of the fundamental rights of the person. The Resolution says nothing about and in no way affects the responsibility of the State for such violations of the fundamental rights of the person.

37. The Resolution consists of a Preamble, Definitions which provides a definition of 'the fundamental rights of the person', and 'jurisdiction' and sets out matters excluded from the resolution, and two Parts, a First Part *De Lege Lata* and a Second Part *De Lege Ferenda*. The First Part which sets out the current international law in force has three sections: the first states three principles which govern the specific rules which follow; the second section covers two categories of person who enjoy to some extent immunity from the jurisdiction of national courts of other States: category A refers to the persons who as representatives or agents of one State enjoy personal immunity while on mission and functional immunity on termination of the mission from the jurisdiction of national courts of other States; and category B refers to the persons who only enjoy functional immunity. In respect of both categories this section makes plain, that acts which constitute violations of the fundamental rights of the person enjoy no functional immunity from jurisdiction. Section III of the Resolution covers the immunity of the State stating in article III.1 that a State enjoys immunity from the criminal jurisdiction of the national courts of other States and III. 2 setting out in respect of immunity from the civil jurisdiction of such courts the exception for personal injuries and damage or loss to tangible property in the same terms as provided in the 2004 UN Convention on the Jurisdictional Immunities of States and their Property. The matters relating to the immunity of the State in Section III are stated in article 3 not to affect State responsibility and to be without prejudice to international conventions relating to the status of the visiting armed forces on the territory of another State.

38. Finally the Second Part contains a proposal *De Lege Ferenda* that, regardless of where the violations of the fundamental rights of the person



take place, a State shall enjoy no immunity from civil jurisdiction of national courts of other States unless it has performed its obligations to make reparation in accordance with the applicable international convention or customary international law.

### *Definitions*

39. To make clear the narrow scope of its provisions, after the preamble, the Resolution begins with a section on Definitions. Two matters are required to be defined - the human rights which are the subject of the Resolution and the jurisdictions from which immunity may be enjoyed by the State and its representatives.

The Commission gave much thought as to the meaning and scope of 'the fundamental rights of the person' in its terms of reference. As discussed in the provisional Report: '5. ... The term 'fundamental' is sometimes used to refer all human rights, as in the UN Charter's preamble 'to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women', but more often to refer to 'the basic rights of the human person including protection from slavery and racial discrimination' (*Barcelona Traction Case*). The category of non-derogable rights<sup>7</sup>, is probably too inclusive, whilst a requirement that they be based on a peremptory norm of *jus cogens* is too open-ended.'

One view forcibly argued was that fundamental human rights included the right of employment and other social and economic rights which when opposed by claims of States to immunity raised practical problems daily in national courts, and that the Commission should direct its attention to this area along with the procedural right to access. Members, however, agreed that it was open to the Commission to apply a restrictive interpretation of the mandate given it by the Institut and that it could not

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<sup>7</sup> Non derogable rights are rights for which no derogation is permitted even in time of war or public emergency. In ECHR.15 these are the right of life(except in cases resulting from lawful acts of war), the prohibition of torture, slavery and non retroactivity of criminal offences. In the ACHR, the following rights are non derogable: the rights to judicial personality, life and humane treatment, freedom from slavery, freedom from *ex post facto* laws., freedom of conscience and religion, rights of the family, to a name, of the child and participation in government. By ICCPR.4 the rights to life, and recognition as a person, the freedoms of thought, conscience, and religion, the prohibition on torture, slavery, retroactivity of criminal legislation and imprisonment on ground solely of inability to fulfil a contractual obligation are non derogable (Shaw *International Law*, 2003, 256).

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be expected to make proposals to cover the whole range of human rights.

40. The majority considered that its proposals should be directed to the most serious violations of the fundamental rights of the person and be narrowly defined to cover violations in consequence of a crime recognised by the international community as particularly grave. To particularise the general description 'recognised by the international community as particularly grave', a short summary of such international crimes has been added as including 'crimes under the 1984 UN Convention against Torture, crimes against humanity, grave breaches of the 1949 Geneva Conventions for the protection of war victims or other grave violations of international humanitarian law committed in international or non-international armed conflict, and genocide'. This summary follows closely the list provided in Article 3 (a) of the Institut's 2005 Krakow Resolution on Universal Criminal Jurisdiction of international crimes for which universal criminal jurisdiction is established by international convention or customary international law.

*Exclusions*

41. The term 'jurisdiction is defined in the Resolution to mean 'the criminal, civil and administrative jurisdictions of the national courts of one State as they relate to the immunities of another State conferred by international convention or customary international law'. Its provisions with regard to the immunity of the State and its representatives therefore apply solely to immunity from the adjudication of national courts of other States. The arguments for treating the Commission's proposals as confined to the immunity of the State and its officials from the adjudicative jurisdiction, and not to the enforcement jurisdiction of national courts are fully set out in the Provisional Report. It may be, following the conclusion of the work of the Third Commission, that a second investigation of the relationship of human rights and the immunity from enforcement could be undertaken but the present Resolution is confined to immunity from jurisdiction. So far as the State is concerned, the Resolution effects no change to State immunity from the criminal jurisdiction of national courts; and the provision in article III.1 makes that plain.

42. The inclusion of the jurisdictional immunities of international organisations was supported by two members, particularly having regard

to recent decisions of national courts relating to employment contracts asserting jurisdiction despite a claim to immunity on the basis of the inadequacy of the alternative remedies made available by the international organisation seeking immunity. However, the considerable difference in the nature, purpose and ambit of operation of an international organisation from a State, and the separate treatment of government service and mandatory scope of national labour laws as discussed in paragraphs 23 and 27 of the Provisional Report, seemed to make it advisable to exclude the jurisdictional immunities of international organisations as well as those relating to employment contracts from the Commission's work and this was agreed at the meeting held in Krakow in August 2005. Again this might well be a topic for a later Commission to examine.

43. In its discussion and as set out in the Provisional Report, the Commission has had regard to the core values of international criminal law as confirmed in the Statute of the International Criminal Court, in particular that the official capacity of a Head of State or Government, or other officials of the State, in no case exempts a person from criminal responsibility nor bars the ICC from the exercise of criminal jurisdiction over perpetrators of international crimes; and that the principle of complementarity under the 1998 Rome Statute places the primary obligation to prosecute international crimes upon the national courts of the State with the closest link of either territory or nationality. However, as discussed in the Provisional Report, the ICC Statute gives rise to its own problems of interpretation. More generally it was considered that the operation of international tribunals is wholly different from the jurisdiction of national courts.

44. On this count the exclusion of all the above three areas from the Resolution is given effect in the Definitions as follows: The present Resolution does not apply to international tribunals, nor does it apply to immunity from the jurisdiction of international organisations or to the immunity of States from execution.

45. Although not included in the Definitions section, it is clearly set out in Section II C and Section III.2 that the Resolution only deals with the immunity of the State and persons who act on its behalf in respect of acts constituting violations of the fundamental rights of the person and in no way deals with State responsibility, or responsibility under international

law of such persons or the attribution to the State of the their acts. The provisions in A 2. and B relate solely to acts which constitute violations of the fundamental rights of the person as defined in the Resolution and declare such acts and they alone, as regards the application of immunity from jurisdiction, are in no circumstances to be considered as acts in the performance of a function of the State.

46. In the course of discussion of the Third Commission's proposals in the Institut's meeting in Santiago in October 2007 the draft Resolution, as then presented by the Rapporteur, was construed as making 'damage caused by armed forces... susceptible to being brought before the Courts of a State in which the acts were committed' with the consequence that 't[T]his would "privatise" the settlement of war damages rather than, as was currently the case, arriving at a global settlement.' The revised Resolution contains in Section III.3 (b) (c) and (d) express exclusions which deals with this criticism and prevents such a wide consequence of the loss of functional immunity; they provide that neither Part I nor Part II is retrospective and/or that it has no application in respect of international or non- international armed conflict, and further is without prejudice to international conventions relating to the status of visiting armed forces of a State on the territory of another State.

***First Part of the Resolution De Lege Lata :***

*Principles*

47. A first principle in finding a solution to competing values is to stress that proceedings relating to the violation of fundamental human rights are not solely of concern to the individual victim and the alleged offending State but also, and in particular where no effective remedy is available, of concern to all other States and the international community. Accordingly the First Principle acknowledges the primary obligation of a State, pursuant to UN and regional human rights conventions, and international customary law, to afford protection of human rights, and also, when a State fails in that obligation, affirms that other States, acting in the interests of the international community have a legitimate interest to seek to remedy its default. This principle, so precisely summarised by Theodor Meron as 'there has been a growing acceptance in contemporary international law of the principle that... all state have a legitimate interest in and the right to protest against significant human rights violations,

wherever they may occur, regardless of the nationality of the victims', AJIL 80 (1986) 1 at 11, is founded on Articles 42 (b) and 48.1 of the ILC Articles on State Responsibility. The Second Principle acknowledges the function of immunity as a means for allocation of jurisdictions between States and of ensuring respect for equality and independence as regards its internal administration, and gives effect to the value expressed in the Joint Opinion of Judges Higgins, Kooijmans and Buergenthal in the *Arrest Warrant* Case, see paragraph 21 above. The Third Principle requires a balance to be achieved between the first two principles and the rules which then follow are designed to achieve that balance.

#### *Personal Immunity*

48. Drawing on the established distinction in international law, as particularly provided for in the Vienna Convention on Diplomatic Relations Article 31(1) and 39(2) between personal and functional immunity, the opportunity has been taken to clarify in article A.1 of the Resolution the persons and their circumstances who enjoy personal immunity under international law. With regard to the position of Heads of State and Heads of Government the 2001 Vancouver Resolution in setting out their immunities from jurisdiction draws a clear distinction in respect of the prosecution and trial of such persons for a crime under international law, retaining immunity when such persons were in office and withdrawing it once office was vacated (Articles 1 and 13). The members of the Commission agreed; they were unanimous that such persons while serving in office enjoyed personal immunity from criminal and civil jurisdiction wherever they may be. Serving members of the diplomatic mission enjoy a similar personal immunity but one restricted to when present in the receiving State or in transit in a third State as in conformity with the 1961 and 1963 Vienna Conventions on Diplomatic and Consular Relations. The extent to which other members of government enjoy similar or lesser jurisdictional immunities was debated, having regard to the International Court of Justice's ruling in the *Arrest Warrant* case in respect of the immune status of a serving Minister for Foreign Affairs. The recent decision of that Court in *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)* Judgment 4 June 2008 suggest a general unwillingness to extend personal immunities too widely. The members of the Commission were of the view that the immunities of members of government, other than heads of State and

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heads of government, is recognised by international law to apply to such persons when on an official mission in the receiving State. The personal immunity of Article II A 1. also extends to members of Special Missions within the meaning of the Convention of 1969 on Special Missions, to members of permanent missions to international organisations and delegations to international conferences of international organisations, and this is given effect in A(iii) and (iv). It should be understood that Article A 2. relates to the functional immunities derived from the sending State in respect of the persons listed under A.1 and does not deal with the jurisdictional immunities of any international organisation to which such persons may be accredited, these being excluded by the Definitions provision, see paragraph 43 above.

#### *Functional Immunity*

49. In section I of the First Part, whilst no exclusion of the violations of fundamental human rights is made in respect of the personal immunity conferred by international convention or customary international law in respect of the representatives and agents of the State as listed under A (i) to (v), the functional immunity enjoyed by such persons when their mission has come to an end is expressly stated not to continue in respect of acts which constitute such violations. Similarly in B for those persons who only enjoy functional immunity it is stated that they enjoy no such functional immunity for acts which constitute violations of the fundamental rights of the person as defined in the Resolution. Here it is important to note that the loss of functional immunity relates solely to the application of immunity from jurisdiction. The Resolution in no way affects the determination by national courts of issues of responsibility.

50. The rules contained in A 2. and B deal solely with functional immunity and address directly the issue of the operation of immunity for violations of fundamental human rights which an individual official has performed in the course of his or her functions as an official of the State (and for which he or she may also be criminally prosecuted). Where proceedings are brought for such violations, this Article makes plain that international law denies the official the protection of functional immunity and denies to the State the possibility of affording protection to itself or its official in proceedings for such violation by a grant of immunity.

51. The Commission has approached this aspect of the conflict between

human rights and jurisdictional immunities by treating the issue of immunity as distinct from issues of imputability and responsibility. By doing so it has avoided the ongoing discussion whether an act constituting a violation of a fundamental human right can qualify as a function of the State for the purposes of attribution and responsibility. In their joint separate opinion Judges Higgins, Kooijmans, and Buergenthal in the *Arrest Warrant* case stated :

‘It is now increasingly claimed in the literature ... that some international crimes cannot be regarded as official acts because they are neither normal State functions nor functions that a State alone (in contrast to an individual) can perform ...’ paragraph 83.

Other writers maintain that such a claim conflicts with the position both in fact and law that a State may act in contravention of international law. Without engaging in this controversy, and leaving aside whether the functions of the State are to be restricted to lawful acts under international law, the method which has been adopted in the Resolution is to separate the conferment of immunity for an act of a State official or its representative from its attribution to the State. Thus section II A 2. as regards persons enjoying personal immunity listed in A 1. and as regards persons under B who only enjoy functional immunity, makes plain that both categories of person enjoy no immunity for acts which constitute violations of the fundamental rights of the person.

52. Although the Resolution states that the commission of such acts is barred by international law from attracting functional immunity by reason of their violation of fundamental human rights, Article II C states clearly that the Resolution says nothing as to the responsibility under international law of such persons nor whether such violations are attributable to the State, and consequently whether the State may be responsible. The Commission sees the responsibility for these ‘non-immune’ acts as a matter separate and distinct from their entitlement to immunity. Despite such acts being treated as not immune, the responsibility of the persons performing the acts and/or of the State are independent issues over which the national court may or may not decide to exercise jurisdiction. Such non-immune acts may generate responsibility of the State either by reason of agency or of independent obligations, both negative and positive, upon the State to prevent and repress such violations of fundamental human rights. On the other hand,

with immunity rid of the implication that the official's act is attributable to the State, a national court will be free to decide the issues de novo – that is, whether to take jurisdiction, the issues of responsibility and attribution, and whether, having regard to any criminal prosecution of the official, and to any measures of rehabilitation and making amends taken by the State, to make an order for monetary reparation.

*Immunity of the State*

53. Part III of the Resolution addresses the position of the foreign State when proceedings are brought against it in the national court of another State for violation of a fundamental human right as defined in the Resolution. The Commission considers that the accepted precedence of territorial jurisdiction supports the making of a distinction as regards the exercise of jurisdiction by reference to where the acts constituting violation of the fundamental human right were alleged to have occurred. If such acts (including omissions) occurred within the territory of the forum State, the European Court of Human Rights has identified 'a trend in international and comparative law in limiting State immunity in respect of personal injury caused by an act or omission within the forum State, but that this practice is by no means universal' (*McElhinney v. Ireland and UK*, Judgment 21 November 2001, 34 (2002) 13 at paragraph 38). The territorial link, together with the obligation on the forum State itself to secure human rights within its territory including the right of access to court, provides additional ground for the removal of the foreign State's immunity. Article 12 of the 2004 UN Convention on State Immunity provides for an exception to State immunity where death or injury to the person or damage or loss to tangible property is caused by an act or omission attributable to the State if the act or omission occurred in whole or in part in the territory of the forum State, and if the author of the act or omission was present in the territory of the forum State at the time of the act or omission. This exception, as with the previous European Convention of State Immunity 1972 and national legislation, including the US FSIA 1976, UK SIA 1978 and the Australian Foreign States Immunities Act 1978 appears without any restriction as to the nature of the act or omission and extends to acts whether of a private or public nature (*acta jure gestionis, acta jure imperii*). Despite the European Court of Human Rights's view that immunity continues to attach to suits in respect of such torts committed by *acta jure imperii* the Commission



considers that an extension of the tort exception to the violation of fundamental human rights as defined in Article 1 would be a permissible innovation, not out of line with currently accepted international standards, and would bring jurisdictional immunities of States in line with the third principle above stated of achieving a balance between the competing values.

***Part II of the Resolution De lege Ferenda***

54. With regard to the violation of fundamental human rights where the acts occurred outside the jurisdiction of the forum State the competing jurisdiction of the forum State is based on weaker grounds having regard to the exclusive jurisdiction accorded by international law to a State with regard to its internal administration. Accordingly an alternative approach *de lege ferenda* has been adopted, building on the obligations of States under international convention or customary international law to respect and take measures to give effect to human rights within their jurisdiction. In the event of a commission of a violation of fundamental human rights as defined in the Resolution wherever committed, immunity is removed unless it is established that the foreign State has instituted an enquiry, afforded compensation or taken other appropriate measures to make reparation in accordance with the applicable international convention or customary international law.

55. The proposals of the Third Commission as explained are set out in the Resolution which follows this Report.

**DRAFT RESOLUTION**

*The Institute of International Law*

*Mindful* that the Institut has addressed the jurisdictional immunities of States in the 1891 Hamburg Resolution on the Jurisdiction of courts in proceedings against foreign States, sovereigns and heads of State, the 1954 Aix en Provence Resolution on Immunity of foreign States from jurisdiction and measures of execution, the 1991 Basle Resolution on the Contemporary problems concerning immunity of States in relation to questions of jurisdiction and enforcement and in the Vancouver 2001

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Resolution on Immunities from jurisdiction and execution of Heads of State and of Government in International Law ;

*Conscious* of the underlying conflict between immunity from jurisdiction of States and the fundamental rights of the person and desirous of making progress towards a resolution of that conflict ;

*Adopts* the following Resolution :

### **Definitions**

For the purposes of the present Resolution 'violations of the fundamental rights of the person' means violations in consequence of a crime recognised by the international community as particularly grave, such as crimes under the 1984 UN Convention against Torture, crimes against humanity, grave breaches of the 1949 Geneva Conventions for the protection of war victims or other grave violations of international humanitarian law committed in international or non-international armed conflict, and genocide.

For the purposes of the present Resolution 'jurisdiction' means the criminal, civil and administrative jurisdictions of the national courts of one State as they relate to the immunities of another State conferred by international convention or customary international law.

The present Resolution does not apply to international tribunals, nor does it apply to immunity from the jurisdiction of international organisations or to the immunity of States from execution.

## **Part I. DE LEGE LATA**

### **I. Principles**

I. Pursuant to international convention and customary international law, a State has an obligation to afford protection of human rights to all persons within its jurisdiction; when it fails in that obligation, other States, acting in the interests of the international community and by means in conformity with international law, have a legitimate interest to seek to remedy its default;

II. Immunities are provided to enable an orderly allocation of jurisdiction in disputes concerning States in accordance with international law, to respect the independence and equality of States as regards their

internal administration, and to ensure the effective performance of the functions of persons who act on behalf of the States;

III. A balance is to be achieved in resolving conflict arising from the application of the above principles relating to the protection of human rights and the jurisdictional immunities of States and persons acting on their behalf.

## **II. Immunity of persons who act on behalf of a State**

### **A. Personal Immunity**

1. The following persons enjoy personal immunity from jurisdiction as conferred by international convention or customary international law as follows :

- I) The serving Head of State and the serving Head of the Government throughout the period of their office wherever they may be;
- II) Other members of the central government of a State when on an official mission and present in a receiving State ;
- III) Members of special missions within the meaning of the Convention of 1969 on Special Missions, and members of permanent missions to international organisations (and delegations to conferences of international organisations) when present in the receiving State ;
- IV) Serving members of the diplomatic and consular mission when present in a receiving State or in transit in a third State ;
- V) All other persons acting on behalf of the State who enjoy personal immunity under international convention or customary international law.

2. When the mission of a person enjoying personal immunity has come to an end such personal immunity ceases. But functional immunity from jurisdiction continues to subsist save that acts which constitute violations of the fundamental rights of the person as defined in the present Resolution are in no circumstances, as regards the application of immunity from jurisdiction, to be considered as acts in the performance of a function of the State.

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**B. Functional Immunity**

For the same reasons persons who only enjoy functional immunity from jurisdiction enjoy no such immunity for acts which constitute violations of the fundamental rights of the person as defined in the present Resolution.

**C. The above provisions in no way affect :**

- a) the responsibility of the persons referred to in A and B above under international law; nor
- b) the attribution to the State of the acts of any such person constituting violations of the fundamental rights of the person as defined in the Resolution.

**III. Immunity of the State**

1. A State enjoys immunity from the criminal jurisdiction of the national courts of another State.

2. As provided in Article 12 of the UN Convention on the Jurisdictional Immunities of States and Their property, unless otherwise agreed between the States concerned, a State may not claim immunity from civil jurisdiction before the national courts of another State, which is otherwise competent, in a proceeding in respect of a violation of the fundamental rights of the person as defined in the Resolution which relates to pecuniary compensation for death or injury to the person, or damage to or loss of tangible property, caused by an act or omission which is alleged to be attributable to the State, if the act or omission occurred in whole or in part in the territory of that other State, and if the author of the act or omission was present in that territory at the time of the act or omission.

3. The above provisions

- a) in no way affect the responsibility of the State concerned under international law;
- b) without prejudice to the application of any rules of international law which apply independently of this Resolution, are not retrospective;
- c) have no application in respect of international or non- international armed conflict;

- d) are without prejudice to international conventions relating to the status of visiting armed forces of a State on the territory of another State.

## **Part II. DE LEGE FERENDA**

A State may not enjoy immunity from the civil jurisdiction of the national courts of another State for violations of the fundamental rights of the person as defined in the present Resolution wherever committed unless it is established that the State has performed its obligations to make reparation in accordance with the applicable international convention or customary international law.

## II. DELIBERATIONS DE L'INSTITUT

**Première séance plénière**      Vendredi 4 septembre 2009 (après-midi)

La séance est ouverte à 12 h 20 sous la présidence de Mme *Lamm*, qui donne connaissance du projet de résolution élaboré par la 3<sup>ème</sup> commission.

### **Draft Resolution**

*The Institute of International Law,*

*Mindful* that the Institute has addressed the jurisdictional immunities of States in the 1891 Hamburg Resolution on the Jurisdiction of courts in proceedings against foreign States, sovereigns and heads of State, the 1954 Aix-en-Provence Resolution on Immunity of foreign States from jurisdiction and measures of execution, the 1991 Basle Resolution on the Contemporary problems concerning immunity of States in relation to questions of jurisdiction and enforcement and in the Vancouver 2001 Resolution on Immunities from jurisdiction and execution of Heads of State and of Government in International Law ;

*Conscious* of the underlying conflict between immunity from jurisdiction of States and the fundamental rights of the person and desirous of making progress towards a resolution of that conflict ;

*Adopts* the following Resolution :

### **Definitions**

For the purposes of the present Resolution 'violations of the fundamental rights of the person' means violations in consequence of a crime recognised by the international community as particularly grave, such as crimes under the 1984 UN Convention against Torture, crimes against humanity, grave breaches of the 1949 Geneva Conventions for the protection of war victims or other grave violations of international humanitarian law committed in international or non-international armed conflict, and genocide.

For the purposes of the present Resolution 'jurisdiction' means the criminal, civil and administrative jurisdictions of the national courts of one State as they relate to the immunities of another State conferred by

international convention or customary international law.

The present Resolution does not apply to international tribunals, nor does it apply to immunity from jurisdiction of international organisations or to the immunity of States from execution.

### **Part I. *DE LEGE LATA***

#### **I. Principles**

I. Pursuant to international convention and customary international law, a State has an obligation to afford protection of human rights to all persons within its jurisdiction ; when it fails in that obligation, other States, acting in the interest of the international community and by means in conformity with international law, have a legitimate interest to seek to remedy its default ;

II. Immunities are provided to enable an orderly allocation of jurisdiction in disputes concerning States in accordance with international law, to respect the independence and equality of States as regards their internal administration, and to ensure the effective performance of the functions of persons who act on behalf of the States ;

III. A balance is to be achieved in resolving conflict arising from the application of the above principles relating to the protection of human rights and the jurisdictional immunities of States and persons acting on their behalf.

#### **II. Immunity of persons who act on behalf of a State**

##### **A. Personal Immunity**

1. The following persons enjoy personal immunity from jurisdiction as conferred by international convention or customary international law as follows :

- i) The serving Head of State and the serving Head of the Government throughout the period of their office wherever they may be ;
- ii) Other members of the central government of a State when on an official mission and present in a receiving State ;
- iii) Members of special missions within the meaning of the Convention of 1969 on Special Missions, and members of permanent missions to international organisations (and delegations to conferences of international organisations) when present in the receiving State ;
- iv) Serving members of the diplomatic and consular mission when present in a receiving State or in transit in a third State ;

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v) All other persons acting on behalf of the State who enjoy personal immunity under international convention or customary international law.

2. When the mission of a person enjoying personal immunity has come to an end such personal immunity ceases. But functional immunity from jurisdiction continues to subsist save that acts which constitute violations of the fundamental rights of the person as defined in the present Resolution are in no circumstances, as regards the application of immunity from jurisdiction, to be considered as acts in the performance of a function of the State.

#### B. Functional Immunity

For the same reasons persons who only enjoy functional immunity from jurisdiction enjoy no such immunity for acts which constitute violations of the fundamental rights of the person as defined in the present Resolution.

C. The above provisions in no way affect :

a) the responsibility of the persons referred to in A and B above under international law ; nor

b) the attribution to the State of the acts of any such person constituting violations of the fundamental rights of the person as defined in the Resolution.

### III. Immunity of the State

1. A State enjoys immunity from the criminal jurisdiction of the national courts of another State.

2. As provided in Article 12 of the UN Convention on the Jurisdictional Immunities of States and their Property, unless otherwise agreed between the States concerned, a State may not claim immunity from civil jurisdiction before the national courts of another State, which is otherwise competent, in a proceeding in respect of a violation of the fundamental rights of the person as defined in the Resolution which relates to pecuniary compensation for death or injury to the person, or damage to or loss of tangible property, caused by an act or omission which is alleged to be attributable to the State, if the act or omission occurred in whole or in part in the territory of that other State, and if the author of the act or omission was present in that territory at the time of the act or omission.

3. The above provisions

a) in no way affect the responsibility of the State concerned under international law ;



- b) without prejudice to the application of any rules of international law which apply independently of this Resolution, are not retrospective ;
- c) have no application in respect of international or non-international armed conflict ;
- d) are without prejudice to international conventions relating to the status of visiting armed forces of a State on the territory of another State.

**Part II. DE LEGE FERENDA**

A State may not enjoy immunity from the civil jurisdiction of the national courts of another State for violations of the fundamental rights of the person as defined in the present Resolution wherever committed unless it is established that the State has performed its obligations to make reparation in accordance with the applicable international convention or customary international law.

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*L'Institut de droit international,*

*Rappelant* que l'Institut s'est prononcé sur les immunités de juridiction des Etats dans la résolution de Hambourg de 1891 sur la compétence des tribunaux dans les procès contre les Etats, souverains ou chefs d'Etat étrangers, dans la résolution de Aix-en-Provence de 1954 sur l'immunité de juridiction et d'exécution forcée des Etats étrangers, dans la résolution de Bâle de 1991 sur les aspects récents de l'immunité de juridiction et d'exécution des Etats, et dans la résolution de Vancouver de 2001 sur les immunités de juridiction et d'exécution du chef d'Etat et de gouvernement en droit international ;

*Conscient* du conflit latent entre les immunités de juridiction et les droits fondamentaux de la personne et de progresser vers la solution de ce conflit ;

*Adopte* la résolution suivante :

**Définitions**

Pour les besoins de la présente résolution « violations des droits fondamentaux » s'entend des violations résultant d'un crime considéré comme particulièrement grave par la communauté internationale, tels que les crimes prévus par la Convention des Nations Unies de 1984 sur la torture, les crimes contre l'humanité, les violations graves des conventions de Genève de 1949 sur la protection des victimes de la guerre et les autres violations graves du droit international humanitaire commises au cours des conflits armés internationaux et non internationaux, ainsi que le génocide.

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Par « juridiction » la présente résolution entend la juridiction criminelle civile et administrative devant les juridictions nationales. La présente résolution ne s'applique ni à l'immunité de juridiction pénale devant les tribunaux internationaux, ni aux immunités des organisations internationales ou à l'immunité d'exécution devant les juridictions nationales.

**Première Partie. DE LEGE LATA**

**I. Principes**

1. Conformément aux conventions internationales et au droit coutumier international, un Etat a l'obligation d'assurer la protection des droits de l'homme à toutes personnes relevant de sa juridiction; lorsque cet Etat manque à cette obligation, les autres Etats, agissant dans l'intérêt de la communauté internationale et par des moyens conformes au droit international, peuvent légitimement chercher à remédier à ce manquement.

2. Les immunités sont accordées en vue d'assurer une répartition ordonnée de la juridiction dans les litiges entre Etats conformément au droit international le respect de l'indépendance et l'égalité des Etats quant à leur administration interne, et de permettre aux personnes agissant au nom des Etats de remplir effectivement leurs fonctions.

3. Un équilibre doit être recherché en vue de résoudre le conflit résultant de l'application des principes relatifs à la protection des droits de l'homme et de ceux qui concernent la sauvegarde des immunités de juridiction des Etats et des personnes agissant en leur nom.

**II. Immunités des personnes**

**A. Immunité personnelle**

1. L'immunité personnelle conférée par la coutume ou les conventions internationales aux agents de l'Etat interdit à leur égard tout exercice de juridiction des tribunaux internes dans les conditions suivantes :

- i) Le Chef d'Etat en fonction et le chef de gouvernement en fonction, pendant la durée de leur fonction où qu'ils se trouvent ;
- ii) Les autres membres du gouvernement central d'un Etat lorsqu'ils sont en mission officielle et présents sur le territoire de l'Etat d'accueil ;
- iii) Les membres des missions spéciales au sens de la convention de 1969 sur les missions spéciales, les membres des représentations permanentes auprès d'organisations internationales (et les délégués à des conférences d'organisations internationales) présents sur le territoire de l'Etat d'accueil ;

iv) Les membres en exercice des missions diplomatiques et consulaires lorsqu'ils sont présents sur le territoire de l'Etat d'accueil ou en transit dans un Etat tiers ;

v) Toute autre personne bénéficiant d'une immunité personnelle en vertu du droit international.

2. Lorsque la mission d'une personne jouissant d'une immunité personnelle prend fin son immunité de juridiction cesse de s'appliquer, mais celle-ci subsiste pour les actes accomplis dans l'exercice de ses fonctions. Toutefois les actes constitutifs d'une violation des droits fondamentaux au sens de la présente résolution ne peuvent en aucun cas être considérés comme des actes relevant des fonctions d'un Etat pour ce qui concerne l'application de l'immunité de juridiction.

#### B. Immunité fonctionnelle

Pour les mêmes motifs, les personnes jouissant seulement d'une immunité internationale fonctionnelle ne peuvent invoquer leur immunité de juridiction quant aux actes constitutifs d'une violation des droits fondamentaux au sens de la présente résolution.

C. Les dispositions qui précèdent ne sont en aucune façon applicables :

a) à la responsabilité des personnes mentionnées aux paragraphes A et B ci-dessus en vertu du droit international ;

b) à l'attribution des actes de ces personnes constituant des violations des droits fondamentaux de la personne tels que définis dans la présente résolution.

### III. Immunité de l'Etat

1. L'Etat étranger bénéficie en toutes circonstances d'une immunité de juridiction pénale devant les tribunaux du for, (même pour les actes constitutifs d'une violation des droits fondamentaux au sens donné dans la présente résolution.)

2. Conformément à l'article 12 de la Convention des Nations Unies sur les immunités juridictionnelles des Etats et de leurs biens du 16 décembre 2004 et à moins que les Etats concernés n'en conviennent autrement, un Etat ne peut invoquer l'immunité de juridiction devant le tribunal civil d'un autre Etat, compétent en l'espèce, dans une procédure portant sur une action en raison d'une violation des droits fondamentaux de la personne tels que définis dans la présente résolution se rapportant à la réparation pécuniaire en cas de décès ou d'atteinte à l'intégrité physique d'une personne, ou en cas de dommage ou de perte d'un bien corporel, dus à un acte ou à une omission prétendument attribuables à l'Etat, si cet

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acte ou cette omission se sont produits, en totalité ou en partie, sur le territoire de cet autre Etat et si l'auteur de l'acte ou de l'omission était présent sur ce territoire au moment de l'acte ou de l'omission.

3. Les dispositions qui précèdent

- a) n'affectent pas la responsabilité internationale de l'Etat en vertu du droit international ;
- b) ne sont pas rétroactives, sans préjudice de l'application de toute règle de droit international qui est applicable indépendamment de la présente résolution ;
- c) ne sont pas applicables aux conflits armés, internationaux ou non;
- d) sont sans préjudice des conventions internationales portant sur le statut des forces armées étrangères stationnées sur le territoire d'un Etat.

***Deuxième partie. DE LEGE FERENDA***

L'Etat ne devrait pas bénéficier d'une immunité de juridiction devant les tribunaux civils d'un autre Etat pour les actes constitutifs d'une violation des droits fondamentaux au sens donné dans la présente résolution, quel que soit le lieu où ils ont été accomplis sauf s'il est constant que cet Etat a satisfait à ses obligations de réparation conformément aux conventions internationales applicables ou au droit international coutumier.

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The *President* invited Lady Fox, Rapporteur, to present her report on the work of the Third Commission on the fundamental rights of the person and the immunity from jurisdiction in international law.

The *Rapporteur* thanked the President and expressed her gratitude for the opportunity to present the Third Commission's work. She drew Members' attention to the last few pages of the report where the English version of the draft Resolution was located. She indicated that the French version of the draft Resolution was yet to be approved by the Third Commission but was broadly along the same lines as the English one. For the purposes of her presentation, the English version would be used as the authoritative text.

The Rapporteur recalled that the Third Commission was the longest standing Commission with its work to date incomplete. The Commission's mandate dated to the Institut's 1995 Lisbon Session.

The Rapporteur recalled that the reconciliation of the State's obligations to protect the human rights of the individual as opposed to the

jurisdictional immunities of States and of State officials in the exercise of their functions was a highly topical and controversial issue in modern international law. The title in the French text, which referred to the term «face aux», stressed more clearly than the English the tension between the two concepts in international law.

Since 1995, there had been considerable developments in this area of international law, some elucidating the law, but others leaving inconsistency and some uncertainties.

The Rapporteur indicated that she would divide her introduction into three parts. The first part would briefly recall recent developments in this branch of the law; the second would indicate which matters were excluded from the Commission's work; and the third would indicate the Commission's proposals.

The Rapporteur briefly recalled recent developments in this branch of international law. The topic had for a long time been debated in national courts and had at last been addressed at the international level by the European Court of Human Rights, international tribunals and by the International Court of Justice. Indeed, it had also reached the form of an international convention. Three cases were decided by the Strasbourg court in 2000, one relating to discrimination in selection of employment as a State official, the second to a border incident concerning an assault by a member of the armed forces of a foreign State, and the third – the best known – Al Adsani, relating to alleged torture in a State prison. In these cases, the European Court of Human Rights decided definitively that State immunity was a principle of general international law compatible with the individual's right of access to national courts provided that the immunity was for a legitimate purpose and was proportionate to that purpose.

Turning to international criminal tribunals, the Rapporteur stated that two serving Heads of State had been prosecuted: Milosevic in the International Criminal Tribunal for the former Yugoslavia; and Taylor whose trial was proceeding in The Hague before the Special Court for Sierra Leone. In addition, the International Criminal Court had issued an arrest warrant for the serving Head of State of Sudan, President Al-Bashir.

In 2002 the International Court of Justice in the *Arrest Warrant* case upheld the personal immunity of a serving Minister for Foreign Affairs from criminal proceedings relating to the commission of specified international crimes, namely war crimes and offences against humanity, and held Belgium in breach of international law for issuing an international arrest warrant for such a person in respect of such crimes.

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The Rapporteur pointed out that four further applications involving State immunity were currently pending before the International Court of Justice: two brought against France investigated the extent to which preliminary steps preparatory to a criminal investigation were compatible with the immunity of a serving Head of State, particularly when such a Head of State was present in the forum State. A case brought by Belgium against Senegal raised the nature and extent of the obligation upon a State to prosecute or extradite a former foreign Head of State present within its territory and who was alleged to have committed international crimes. Finally, in 2008 Germany brought an application alleging violation of German State immunity in civil proceedings relating to war damage in World War II, those civil proceedings having been, or currently being, brought against Germany in Italian courts.

These proceedings had resulted in clarification of the law relating to State immunity but uncertainties remained. Of particular relevance was the scope of paragraph 63 in the *Arrest Warrant* judgment as requiring the retention of immunity before another national court in respect of a Minister for Foreign Affairs when he had left office in respect of the commission of grave international crimes. A further difficulty arose as regards State immunity, namely whether it was illogical and possibly morally unjustifiable that an individual official might currently be subject to criminal prosecution in national courts but that the State which ordered the acts might be sheltered by immunity from civil proceedings for reparation for the consequences of such crimes.

The final development was the adoption by the General Assembly of the 2004 UN Convention on the Jurisdictional Immunities of States and their Property, signed by 28 States and ratified by six States, 30 ratifications being required for the Convention to enter into force.

The Rapporteur stressed the importance of recalling the law which she had just outlined and turned her attention to the second part of her introduction: matters excluded from the scope of the Third Commission's proposals.

The Rapporteur indicated that whereas a consideration of State immunity in relation to the protection of human rights covered a vast and diverse range of topics and areas of law since 2003 the Commission recognised the need to narrow the scope of its investigations. It therefore excluded from its considerations immunities of international organizations; immunities before international tribunals; immunity from execution; and consideration of employment issues between the State and individuals in the service of the State. All these exclusions were explained in the final

report. Moreover, the draft Resolution did not apply to international or non-international armed conflicts and excluded military matters, notably the special regime applicable to visiting armed forces of one State present on the territory and with the consent of another State. Moreover, any proposals adopted should not be considered to have retrospective effect.

In the light of the above, it could be seen that the Commission's proposals were confined to a very narrow category of outrageous, heinous crimes, as set out in the draft Resolution's Definitions section: the commission of a crime recognised by the international community as particularly grave, such as State torture, grave breaches of international humanitarian law and grave breaches of the Geneva Conventions of 1949. She stressed that, insofar as State officials were concerned, the proposals related to functional immunity and that no change had been made in respect of the personal immunity of high-ranking officials such as the serving Head of State when in office and in diplomatic posts.

The Rapporteur turned to the third part of her introduction, consisting in the general outline of the proposals and indicated that the draft Resolution was divided into two parts, the first being *de lege lata* and the second *de lege ferenda*.

The first section sought a balance between two competing principles; namely, that jurisdiction might be asserted more widely when it came to such serious crimes, but equally that the law of privileges and immunities must be recognised, as reflected in the joint separate opinion of Judges Higgins, Kooijmans and Buergethal in the *Arrest Warrant* case. The balance to be struck was articulated in the Principles section of Part I of the draft Resolution. Part I, Section II, dealt with State officials, these having in turn been divided into high-ranking officials and other officials who enjoyed functional immunity. In respect of both these types of persons, functional immunity was removed insofar as it related to the allegation of these narrowly defined crimes. As to State immunity, criminal jurisdiction had no application but when it came to civil jurisdiction, the tort exception to State immunity as provided for in Article 12 of the UN Convention on State immunity was retained. The Rapporteur recalled that Article 12 of the UN Convention related to delictual or tortious acts of the State within the territory of the State where the civil proceedings were brought before a national court. It was thus limited to territorial acts. This exception to immunity also covered the specified criminal acts in the draft Resolution's definition. The Rapporteur was of the view that this was *lege lata* since Article 12 was not expressed to be limited.

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Part II was *lege ferenda*. This was because there should be no immunity regardless of the territory on which the acts were committed for this very narrow category of offences. Stated otherwise, there should be no immunity even though the act was committed outside the territory of where the national court was sitting. However, it was not possible to find in this respect a rule such as Article 12 of the UN Convention on State immunity and for this reason it was put forward *de lege ferenda*.

In conclusion, the Rapporteur recalled Justice Breyer's comments in the case of *Sosa v. Alvarez-Machain* as they related to universal criminal jurisdiction. In that case Justice Breyer indicated that tort jurisdiction for a sub-set of universally condemned behaviour was perfectly acceptable and would not upset practical harmony between States but would instead be consistent with principles of international comity.

The Rapporteur stated that by lifting the bar of immunity in the very small way proposed human rights law would be more adequately enforced. The Rapporteur urged Members to give the report and draft Resolution their serious consideration. It was important to remember that immunity was a bar to proceedings, not the right to support a State's actions in all circumstances.

The *President* warmly thanked the Rapporteur for her comprehensive introduction to the Third Commission's report and gave the floor to Mr Degan.

Mr *Degan* congratulated the Rapporteur for her excellent report and for the draft Resolution which he would vote for wholeheartedly. He indicated that the definition of international crimes at the beginning of the draft Resolution was within the meaning of the obsolete Article 19 of the penultimate draft Articles on State Responsibility. He considered that if one added to that enumeration international terrorism, slavery, slave trade and piracy on the high seas, there would be very little change in the text of the draft Resolution. It would simply complement the draft Resolution. He remarked that the International Law Commission had deleted the notion of international crimes in the final text of its Articles on State Responsibility due to political pressure. However, international crimes were much better defined than the notion of *jus cogens* of which they were also a part.

Mr *Sucharitkul* congratulated the Rapporteur on her report and the excellent draft Resolution. He recalled that it had taken several years for the Draft Articles on Jurisdictional Immunities of States and their Property to materialise into a convention. He also recalled that criminal jurisdiction was excluded from the work of the International Law



Commission. He found it correct that the Rapporteur referred to Article 12 of the United Nations Convention on Jurisdictional Immunities of States and their Property. He also considered that “immunity of jurisdiction” meant immunity before national courts. In this context, he pointed out that the Rapporteur had dealt very fairly with the allocation of jurisdiction not only in criminal matters but also in civil matters. He gave his approval to every part of the Rapporteur’s presentation and was satisfied that developments in international law had been fully taken into account in the Third Commission’s report.

La séance est levée à 13 h 05.

**Deuxième séance plénière**      Vendredi 4 septembre 2009 (après-midi)

La séance est ouverte à 15 h 30.

Le *Président* invite Mme Lamm, deuxième vice-président, à assurer la présidence durant la suite de la discussion sur le rapport de Lady Fox et du projet de résolution qu’elle a présenté.

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*The President, Mrs Lamm*, proceeded to request Members to make general remarks in continuation of the discussion.

M. *Guillaume* exprime à Lady Fox toute son admiration pour son rapport et le projet de Résolution. Il fait toutefois part de sa perplexité sur un point particulier de la Résolution. Le paragraphe II.A.2. stipule que les actes constitutifs d’une violation des droits fondamentaux ne peuvent en aucun cas être considérés comme des actes relevant des fonctions de l’Etat pour ce qui concerne l’immunité de juridiction. Par ailleurs, le paragraphe III.1 stipule que l’Etat étranger bénéficie *en toutes circonstances* d’une immunité de juridiction pénale devant les tribunaux du for, même pour les actes constitutifs d’une violation des droits fondamentaux de la personne tels que définis dans la présente Résolution. M. *Guillaume* estime que ces deux affirmations sont contradictoires. Il estime par ailleurs que, même si elle reflète un développement peut-être souhaitable du droit international, l’affirmation selon laquelle les violations des droits fondamentaux ne relèvent pas des fonctions de l’Etat ne reflète pas la *lex lata*. Certes, les juges Higgins, Kooijmans, et Burgenthal ont défendu cette position dans leur opinion individuelle commune jointe à l’arrêt de la Cour internationale de Justice dans l’affaire du *Mandat d’arrêt*. Toutefois, l’opinion de ces juges ne suffit pas à ériger ce principe en une règle du droit positif. M. *Guillaume* a d’ailleurs lui-même exprimé son désaccord sur ce point dans l’opinion

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qu'il a jointe au même arrêt. Il faudrait, selon M. Guillaume, indiquer clairement que ce principe ne constitue pas de la *lex lata*.

Il indique enfin que le texte français de la Résolution en projet est généralement plus précis que le texte anglais et qu'il faudrait y être attentif.

Mr *Collins* expressed his admiration for the report and the presentation of the Rapporteur. He raised a practical and procedural problem that he believed was often overlooked. This was the question of whether immunity was removed simply by virtue of an unproven violation of rights. The Resolution dealt with the jurisdiction of national courts to adjudicate on acts outside the scope of immunity. Since it could not be assumed that a defendant was guilty of or responsible for a breach of fundamental human rights, the question of immunity would need to be decided at the outset of the proceedings. Consequently, when the Resolution spoke of acts in violation of fundamental human rights, it really meant acts *alleged* to constitute such violations. What was needed was a mechanism to ensure that purely political allegations were not able to proceed when the State or agent might be entirely innocent and there might be matters that should not be adjudicated.

Mr *Ronzitti* thanked the Rapporteur for the thoughtful report. He raised a question concerning Article III (3)(c) of the draft Resolution, which stated that the provisions on State immunity did not apply in respect of international and non-international armed conflicts. This meant that if any international crimes were committed during an international or non-international armed conflict, there would be no assumption of State responsibility for those crimes. This created a problem since most international crimes were committed during international armed conflicts. He also pointed out that the threshold of armed conflict was lower in common Article 3 of the Geneva Conventions of 1949 than that obtained in Article 1 of the Additional Protocol II. He asked why there was a need to exclude the reach of the Resolution in such situations, since this would prevent justice being done. He further noted that the topic was currently under discussion before the International Law Association.

Mr *Meron* joined his confrères in expressing admiration to the Rapporteur for the excellent report and presentation. He noted that this was the first opportunity he had had to make comments on the issue since he was not present at the Institut's last session. He wished to share some reflections and hesitations about the draft Resolution. He noted that the title of the Resolution referred to «immunity from jurisdiction in international law»; however, if one looked at the exclusions or derogations within the Resolution, one could see an outright exclusion of

anything to do with international courts or tribunals. Although international courts and tribunals must apply their statutory instruments and therefore much of their practice turned on treaty or statutory interpretation, this did not conclude the subject. International practice and *opinio juris* were constantly influenced by the decisions of international courts and tribunals. Moreover, there was an important synergy between international and national courts. Therefore, he questioned whether it would be right to totally exclude from the subject the work of international courts and tribunals.

Mr *Dinstein* expressed his admiration for the oral exposition by the Rapporteur as well as an excellent written text of the Resolution. He put two questions to the Rapporteur and the Commission, for which he requested clarification. First, he asked for clarification in regard to the position of serving Foreign Ministers. He noted that paragraph 48 of the report suggested that the International Court of Justice showed unwillingness to extend personal immunities too widely in the recent *Certain Questions of Mutual Assistance in Criminal Matters* case, whereas in the *Arrest Warrant* case, the Court upheld the immunity of serving Ministers of Foreign Affairs. The position of serving Foreign Ministers should therefore be clarified. Second, he pointed out that there was a certain inconsistency as regards war crimes. On the one hand, there was an exclusion of matters relating to international and non-international armed conflicts, as reflected in Article III (3)(c). On the other hand, the definitions section referred to crimes such as « grave breaches of the 1949 Geneva Conventions for the protection of war victims or other grave violations of international humanitarian law committed in international and non-international armed conflict ». As indicated in Article 8 of the 1998 Rome Statute of the International Criminal Court, “grave breaches” of the Geneva Conventions clearly constituted war crimes. That being the case, how could war crimes be excluded in time of international or non-international armed conflicts? Was it suggested that war crimes were applicable in peacetime? The Commission had to make up its mind whether it wanted to bring war crimes into the fold of the Resolution or to keep them out.

M. *Ranjeva* rend hommage au Rapporteur pour son travail. Il indique que le rapport et le projet de Résolution le mettent mal à l’aise à certains égards. C’est notamment le cas eu égard aux contradictions entre l’idée contenue au paragraphe III.1 du projet de Résolution selon lequel l’Etat jouit de l’immunité en *toutes circonstances* et le paragraphe III.3 qui formule des restrictions à cette immunité.

Il souligne également que la volonté de trouver un équilibre entre la

protection des droits fondamentaux et l'immunité constitue un objectif tout à fait louable. Toutefois, cet équilibre n'est pas, selon lui, atteint. La distinction entre la *lex lata* et la *lex ferenda* l'illustre bien. Sur ce point précis, l'équilibre proposé par le Rapporteur pose en fait plus de problèmes qu'il n'en résout. M. Ranjeva se réfère plus particulièrement à l'articulation des concepts d'immunité et d'impunité et à l'opinion individuelle commune des juges Higgins, Kooijmans et Burghenthal jointe à la décision de la Cour internationale de Justice dans l'affaire du *Mandat d'arrêt*. Selon M. Ranjeva, cette opinion exprime le souhait de voir le droit positif se développer pour limiter l'impunité. Elle ne reflète cependant pas le droit positif. Pour M. Ranjeva, si l'Institut veut suggérer et participer au développement du droit international, il peut certainement le faire, mais il ne doit pas considérer comme de la *lex lata* ce qui n'est en fait que de la *lex ferenda*.

M. Ranjeva fait également remarquer qu'il ne faut pas perdre de vue que l'impunité est une question qui concerne avant tout les juridictions nationales, dans la mesure où la répression des crimes internationaux leur revient par priorité. Il conclut en soulignant que ses remarques n'enlèvent en rien aux mérites de Lady Fox.

Mr Cassese had two points to make, the first of which had been dealt with by Mr Ronzitti, and the second which was mentioned by Mr Dinstein. He shared Mr Ronzitti's view that it did not make sense to say that there was State immunity from civil proceedings abroad in regard to crimes committed during armed conflict since the worst crimes were usually committed during armed conflict. He observed that international criminal liability did not replace State responsibility. He suggested that it would be absurd if a State official could be tried before a court for crimes committed during an armed conflict, whereas the State to which the individual belonged could not be sued before a civil court for the same breach, not even before a court where that breach occurred. He illustrated his point by noting that the Italian military in Libya and Ethiopia committed serious crimes including war crimes and crimes against humanity. According to this formula, the Libyans or Ethiopians could bring to trial the officers responsible; however a Libyan or Ethiopian court could not bring the Italian State to account. In his view, such an outcome was contrary to international law principles.

Secondly, he agreed with Mr Dinstein that there was a contradiction in the draft Resolution with regard to armed conflicts. In his view, the wording could be easily changed to amend this. He suggested that Article III (2) should be amended by deleting the reference to the paragraphs on definitions. This was not a question of terminology, but one of substance. It

was wrong in his view to exclude from the Resolution any criminal offence committed in armed conflict. He suggested that the Institut should engage in progressive thinking and suggest new ideas. In light of the gist of current international law, which was based on the protection of human beings and human dignity, State sovereignty could also be limited. He agreed with the territorial limitation on the jurisdiction of national courts, which he felt was a good compromise based on Article 12 of the UN Convention on the Jurisdictional Immunities of States and Their Property.

Mr *Reisman* suggested that Mr Cassese's first point reflected a misreading of the draft Resolution.

Mr *Gaja* congratulated the Rapporteur on her clear and «almost» persuasive presentation. In his view, the part on definitions merely related to the scope of the Resolution. The first indication was that the scope did not go beyond violations of fundamental human rights, and then gave a narrow definition of such violations. This was slightly unfortunate drafting since it suggested that the violations of fundamental rights of persons constituted a small category. In his view, the Institut should not sponsor a narrow definition of the violations of the rights of the person. Secondly, with regard to the non-applicability of the Resolution to armed conflicts, he noted that this related to claims made against States, not individuals. However, even if the non-applicability only related to States, this was something that affected the scope and therefore, in a provision on the scope, it would be useful to say that matters relating to armed conflict were not covered unless proceedings were taken against individuals. Finally, he noted with regard to the third paragraph of the definitions that there were serious problems with regard to the immunity from jurisdiction of international organisations which also concerned violations of fundamental human rights, but not as they were defined in paragraph 1. Again, this related to the scope of the Resolution.

Mr *Lee* congratulated the Rapporteur for her excellent report and presentation, especially in regard to new areas, which he welcomed. He had two comments to make on these new areas. First, he welcomed a broad definition of the violations of the rights of persons, meaning a violation in consequence of crimes recognised by the international community. He took issue, however, with the examples listed after the words «such as», which gave the impression that these were less than what was defined under the Rome Statute of the International Criminal Court.

Second, with regard to the first principle, he welcomed the idea that when a State has failed to afford protection of human rights to all persons within its jurisdiction, then all other States have a legitimate interest to

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seek to remedy its default. On an editorial point, he suggested that alternative wording to « remedy its default » might be found. He posited that the principle may be too broadly construed as presently drafted since it sounded very akin to the Responsibility to Protect principle. In his view, the principle should be further circumscribed in conformity with international law.

Finally, in respect of the personal immunity of persons who act on behalf of a State, as referred to in Article II (2), he agreed that when the mission of the person enjoying personal immunity has come to an end such personal immunity ceases. However, in his view the Resolution should deal further with the consequences of such immunity ceasing. Did this mean, for example, that investigations or prosecutions could be initiated ? In his view, he would give a positive answer, but he believed that the reader could be aided by further explanation.

M. *Morin* entend formuler une remarque qui concerne la forme plutôt que le fond et qu'il a déjà évoquée en commission. Il juge utile d'y revenir. Selon M. *Morin*, les trois principes fondamentaux énoncés dans la première partie consacrée à la *lex lata* s'appliquent en fait à l'ensemble de la Résolution y compris à la seconde partie relative à la *lex ferenda*. C'est particulièrement le cas du troisième principe. En conséquence, ces principes devraient être énoncés dans une section préliminaire.

Mr *Hafner* joined those who had congratulated the Rapporteur and the Commission for the excellent report and presentation. In respect of Article III (1), he questioned whether there was any case before a national criminal court in which a State had been accused by an attorney of another State for a criminal act. Since he did not think it was the case or that this was really an issue, he suggested that this provision might be deleted without doing the Resolution any harm. He noted, however, that there was some risk that an individual could escape responsibility by claiming that they were working for a State, which in turn could not be prosecuted.

With regard to Article II (A)(1)(ii), which referred to « other members of the central government of a State when on an official mission and present in a receiving State », he observed that in federal States, the constituent parts of such States did not enjoy such personal immunity.

In relation to paragraphs 15 *et seq.* of the report which refer to the principle of complementarity under the Rome Statute of the International Criminal Court and particularly to Articles 17 and 98 of the Statute, he observed that Article 98 gave rise to different interpretations and that a dichotomy remained between international and national jurisdictions.

Finally, with regard to Article 12 of the UN Convention on the

Jurisdictional Immunities of States and Their Property and the *de lege ferenda* principle, he noted that there was a discussion on the denial of immunity in the International Law Commission and later in the General Assembly. In both forums, the majority decided not to go along with the broader principle since it would jeopardise the adoption of the Convention itself.

Mr *Tomuschat* expressed his appreciation for the work done. In his view, it was not desirable to combine immunity from civil jurisdiction and criminal jurisdiction in the one Resolution since there were different criteria to take into account. He disagreed with Mr Cassese who wished to have all types of jurisdiction dealt with in one Resolution. He agreed with Mr Lee in respect to Principle I, which he also felt was too broad and went beyond the principle of protection embraced by the General Assembly. He asked whether this principle amounted to an approval of humanitarian intervention. In respect of Principle II, he questioned the restriction to « internal administration », and suggested guidance could be sought from the Friendly Relations Resolution 2625. He agreed with Mr Dinstein and Mr Hafner on Article II (A)(1)(ii), which in his view amounted to a denial of the holding of the International Court of Justice in the *Arrest Warrant* case with respect to serving ministers of foreign affairs. He also agreed that the Resolution did not take into account the situation of federal States and noted that prime ministers should also benefit from a regime of immunity. He was in agreement with Mr Hafner that Article III (1) could be deleted since there were few who believed that States could be sued in domestic criminal courts.

Mr *Orrego Vicuña* was in favour of the idea of balancing two legitimate interests – jurisdictional immunities and the protection of human rights – but he noted that the balance is liable to be upset in collective works and that in this case the balance had generally been upset to the detriment of sovereign jurisdiction. He raised the issue of who should decide on what is an international crime or a violation of a fundamental human right. He further pointed out that national judges are not all learned in international law, which may lead to bad decisions being made, suggesting the need for better definitions to avoid this risk. He noted that the draft Resolution excluded the question of the immunity from the jurisdiction of international organisations. While this was fine for the purpose of the Resolution, there were also a number of cases in which international organisations themselves had been in breach of fundamental human rights before national courts. He asked whether there should be recognition of the immunity of international organisations before national courts when there had been a breach of fundamental human rights. In his view, this

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should not be included as it did not flow clearly from the text.

M. *Bucher* s'associe à ses confrères pour féliciter le Rapporteur pour son rapport et le projet de Résolution. Il fait toutefois part de sa perplexité quant à la distinction entre la *lex lata* et la *lex ferenda*. Selon lui, si ce projet de Résolution est adopté, ce serait la première fois dans l'histoire de l'Institut que celui-ci consigne une telle distinction dans une résolution. Cela pose des questions, notamment eu égard à l'article 2 du Statut de l'Institut et de ses missions. Selon cette disposition, l'Institut a en effet pour fonction de favoriser les progrès du droit international. Il n'a cependant pas pour mission d'en établir le statut actuel. Or, c'est précisément l'impression véhiculée par le projet de Résolution. Il souligne que l'on pourrait y remédier de manière très simple. Il suffirait de supprimer purement et simplement la distinction entre *lex lata* et *lex ferenda*.

Selon M. *Bucher*, les rapports qu'entretiennent le paragraphe III.2 relatif à la portée de l'immunité de juridiction dans la partie relative à la *lex lata* et les développements relatifs à la compétence des tribunaux dans la partie concernant la *lex ferenda* confirment l'inopportunité de la distinction entre la *lex lata* et la *lex ferenda*. Le paragraphe III.2 reproduit en effet l'article 12 de la convention sur les privilèges et immunités des Nations Unies. Or, l'article 12 de cette convention reflète les concessions faites pendant les négociations de cet instrument pour en assurer l'adoption. Il n'y a pas de raison toutefois que l'Institut fasse des concessions similaires. Ces restrictions sont en effet trop importantes. Si elles sont appliquées cumulativement, une lecture *a contrario* emporterait en effet que la victime d'un crime de droit international ne pourra obtenir réparation devant les tribunaux d'un Etat tiers.

Il souligne enfin que la mention, dans la deuxième partie du projet de Résolution, de l'hypothèse où l'Etat s'est conformé aux obligations de réparation qui lui incombent en vertu du droit international coutumier ou conventionnel est malheureuse car elle emporte une confusion entre recevabilité et fondement de l'action.

M. *Kirsch* s'associe à ses confrères pour féliciter le rapporteur et lui exprimer son admiration pour le travail accompli. Il se demande pourquoi, dans le paragraphe du projet de Résolution relatif aux définitions, il n'est pas fait référence au Statut de la Cour pénale internationale. Le projet de résolution discuté ici définit en effet les violations des droits fondamentaux par référence aux crimes de droit international tels qu'ils sont définis dans le droit international conventionnel et coutumier. M. *Kirsch* dit ne pas comprendre pourquoi il n'y est pas fait référence au Statut de Rome et aux Eléments constitutifs



des crimes adoptés par la conférence préparatoire qui constituent la consolidation la plus récente du droit relatif aux crimes internationaux.

Il s'interroge également sur les rapports qu'entretiennent entre eux les trois principes énoncés dans la première partie. M. Kirsch fait tout spécialement remarquer que les trois principes ne sont pas rédigés de la même manière : le premier est formulé sous la forme d'une obligation, le second demeure singulièrement flou et le troisième semble rechercher un équilibre entre les deux premiers. M. Kirsch se demande en outre si le rapporteur a cherché à établir une hiérarchie entre ces trois principes.

Mr *Nieto-Navia* congratulated the Rapporteur and the Commission for their work. He first stated that he was not sure whether it was conventional or customary law that when a State failed in the obligation of affording human rights protection to all persons within its jurisdiction, other States had a legitimate interest to seek to remedy its default. For this purpose there were human rights tribunals, unless the provision was dealing with humanitarian intervention. Secondly, with respect to Part II, *De Lege Ferenda*, where it stated « unless it is established that the State has performed its obligations to make reparation », he suggested that the text need clarification as to who would decide that a State had performed its obligation to make reparation or not and when such a decision would be taken.

M. *Bennouna* indique qu'il prend la parole en sa qualité de membre de l'Institut et non en tant que juge. Il souligne que l'expertise de Lady Fox est largement reconnue dans ce domaine et il lui exprime sa reconnaissance. Il estime toutefois que le projet de Résolution est trop englobant en ce qu'il cherche à régler simultanément un trop grand nombre de questions. Il faudrait resserrer le projet. D'un côté, celui-ci semble vouloir restreindre l'immunité en cas de torture ou de crimes de droit international devant une juridiction nationale. D'un autre côté, il traduit l'idée que des mesures nationales d'exécution par l'Etat du for ne sont pas nécessaires pour qu'un Etat ou son agent soit privé de leur immunité devant les tribunaux du for – à l'instar de l'argument formulé par le Sénégal dans le cadre de l'affaire l'opposant à la Belgique devant la Cour internationale de Justice. Le texte devrait indiquer plus clairement l'objectif poursuivi.

Il attire en outre l'attention de l'Institut sur les incertitudes entourant l'immunité fonctionnelle, notamment dans le cadre des missions spéciales. Il mentionne par ailleurs le problème, déjà évoqué par certains confrères, des conflits armés. Selon M. *Bennouna*, on ne peut pas exclure du champ d'application de la Résolution l'hypothèse d'un conflit armé

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alors que le projet conçoit les violations des droits fondamentaux comme des crimes de guerre.

M. Bennouna conclut que l'objectif du projet est louable, mais que le texte en projet doit être amélioré afin d'éviter les confusions conceptuelles susmentionnées.

M. *Momtaz* félicite Lady Fox pour son introduction, son rapport et le projet de Résolution soumis. Il entend cependant attirer l'attention sur trois points particuliers. S'agissant d'abord de la terminologie utilisée dans la Résolution, M. *Momtaz* souhaite un réexamen des termes utilisés dans celle-ci, en particulier en ce qui concerne les références au concept de violations graves (*grave breaches*) qui ne correspondent pas toujours aux expressions consacrées. Il partage l'opinion de M. Kirsch à propos de la référence au statut de la Cour pénale internationale, lequel devrait être mentionné dans la Résolution. Il faudrait, selon lui, également faire référence au premier protocole additionnel à la Convention de Genève.

Il estime par ailleurs que la clause de sauvegarde contenue au paragraphe III.3 c) relative aux conflits armés est malheureuse et il partage les préoccupations déjà exprimées à cet égard. Selon lui, c'est à l'occasion des conflits armés que les droits fondamentaux sont le plus souvent bafoués.

M. *Momtaz* fait également part de la perplexité que lui inspire la distinction entre la *lex lata* et la *lex ferenda*. Dans la pratique de l'Institut, cette distinction n'a pas sa place. Y faire référence peut en outre affaiblir le rôle que peut jouer l'Institut dans le développement progressif du droit international.

Mr *Reisman* shared his admiration of the Rapporteur's presentation and report. He pointed out that the Resolution assumed the ability of national courts to apply such principles. Mr Orrega Vicuña had earlier questioned such capacity. It was useful to bear in mind that the quality of national courts across the territories of the international community varied considerably. While some were independent of executive influence, many were not. Even where judges were assumed to be independent, they might be ignorant of international law. Moreover, they were being assigned factual determinations of difficult circumstances in foreign countries. He noted that in international commercial arbitration, there had been a comparable attempt to recruit national courts as the ultimate control agents. But since 1958, the effort had been to confine as much as possible the discretion of national courts and limit their role in arbitration review. By contrast, this Resolution gave them a wider substantive role. He recognised that it was difficult to find an enforcer of international law and therefore it was understandable to turn to national courts, but he was

uneasy to give so much power to national courts.

Mr *Lowe* noted that the issue of immunity was likely to arise in transit because people avoided going to places where they were likely to be prosecuted. But in Article II, he noted that there were still categories of persons who did not have immunity while in transit. He raised the question whether this was a wise distinction to maintain.

Mr *Meron* recalled that several confrères had spoken of the problem in paragraph 1 of the Definitions which contained no reference to the Rome Statute of the International Criminal Court or any other international tribunal or their jurisprudence, in particular, he noted the intervention of Mr *Kirsch* in this respect. He pointed out that the only judicial institutions which had a proven track record of applying and interpreting those crimes listed were international courts and tribunals. Paragraph 3 of the Definitions might discourage reference to the jurisprudence of the international courts and tribunals. While this was probably not the intention of the language used it might be an indirect result of this wording, taken together with paragraph 1, and might produce a result that was nonsensical. He therefore suggested that paragraph 1 should contain a reference to the International Criminal Court or other international courts and jurisprudence. Paragraph 3 could have a corresponding amendment.

La séance est levée à 18 h.

### Troisième séance plénière

Samedi 5 septembre 2009 (matin)

La séance est ouverte à 10 h 10 sous la présidence de Mme *Lamm*.

The *President* wished to remind that a very long discussion on the excellent report of Lady Fox took place the day before with more than 20 speakers.

The *Rapporteur* was very grateful for the discussion. She intended to summarize the collective effort of the Commission, and the progress it has made in reviewing the draft Resolution. There have been diverging attitudes, some Members were in favour of the draft resolution while others would like to have it deeply amended. Mr *Sucharitkul* reminded that jurisdictional immunities was something the International Law Commission had struggled with for a long period. Mr *Hafner* was thanked for his remarks on the 2004 UN Convention and on the part referring to violations of human rights that was not included in that UN Convention. The *Rapporteur* emphasized that it was the third time the subject was addressed, but the Institut is a different body which has different considerations, *de lege ferenda* as much as *de lege lata*. Coming

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to those not in favour of the Resolution, the Rapporteur made the example of Mr Cassese who would like to abolish all immunities. However, the Commission and the Rapporteur would hold a different view. Other people were silent on the subject, they did not express their views but shortly they will have to express their views. The Rapporteur had other comments and reservations as well. Her attitude was said to be incremental. She proposed to take one little step after the other. The purpose of the Commission was not to define what are fundamental rights, but to say something about functional immunities namely, that it should not work in respect of certain officials (Section II, A, 2 and B of draft Resolution 1). The Commission did not want to put individuals in jail, and let States go away. It would like very timidly to identify a very narrow point with a jurisdictional connection so to have civil recovery against the State. The Commission wanted to remove immunity from civil proceedings where the offensive act happened in the territory of the (forum) State where the court is acting, because that is a strong territorial jurisdiction.

The Rapporteur moved to the text of the draft Resolution, and proposed to progress through the various parts (preamble, definition, and articles). It was suggested to add in the preamble a reference to the 2004 UN Convention. The Rapporteur could not see any objection to that proposal, but she drew the attention of the plenary on the fact that the preamble talked about the Vancouver Resolution of 2001. In particular, according to Article 13 functional immunity of former heads of State is removed when they have allegedly committed a crime under international law. The Rapporteur reminded that at that time reference to international crimes was not opposed, and similarly the plenary should stay focused on immunity.

As to the draft's definitions, the Rapporteur admitted that they raised some criticisms. Mr Dinstein had very properly said that armed conflicts had been left out and yet the definitions included war crimes. Logically, this was a point. Mr Gaja had made a very proper point noting that, apart from international crimes, there were other fundamental human rights that were seriously endangered without being in the front page of the newspapers, and these cases should be addressed in dealing with State immunity. Mr Kirsch had expressed a moderate opinion, and proposed to refer to the International Criminal Court's Statute and also to the Elements of Crime. The Commission found that proposal instructive and intended to proceed with a re-definition in line with the Vancouver definition. Accordingly, the Resolution was intended to underline when immunity should be lifted after cessation of duties. Some Members objected that the draft Resolution excluded part of State practice, but the

Rapporteur expressed the view that separate opinions in the International Court of Justice are not State practice. The view of the Commission was that paragraph 3 of the definitions is misleading (“The present resolution does not apply to international tribunals, nor does it apply to immunity from jurisdiction of international organisations or to the immunity of States from execution”) and should be deleted.

Coming to principles, the Rapporteur acknowledged that according to some Members (Mr Orrego Vicuña, Mr Lee) the principles were too broad. She agreed with them, and stated that the principles had to be redrafted. Therefore, the first part of Principle I would not change (« Pursuant to international convention and customary international law, a State has an obligation to afford protection of human rights to all persons within its jurisdiction »), while the second part would read « when it fails in that obligation, other States may act in the interest of the international community as provided in this Resolution ». As regards Principle II, the Commission will strike out “as regards their internal administration”. It had also been suggested that States ought to be free to run their foreign policy including as regards their external administration and the Commission did not want to get into that and decided to strike it out.

Section II, A on Personal Immunity was intended to state the existing law, but three points were made. Paragraph 1, ii) referred to « central government » and not « federal ». Therefore, the Rapporteur said that « central » would be deleted. A second point concerned paragraph 1, iv) and the protection that is afforded to diplomatic and consular missions « in transit » in a third State, but not extended to ii) and iii). This was in accordance with existing law, the Vancouver Resolution, as well as the Vienna Convention on Diplomatic Relations. Finally, the Rapporteur addressed the issue of specifically mentioning foreign ministers in the draft. Reference was made to the Vancouver Resolution. In the *Arrest Warrant* case, the International Court of Justice stated authoritatively that foreign ministers had to be put on the same level as heads of State and heads of government. The Rapporteur considered that travelling foreign ministers were protected under paragraph 1), points ii) and iii) of the draft. Turning to the core proposal of the draft Resolution, it seemed to be an agreement on section II, A, 2 and B.

As to section III, the Rapporteur acknowledged the very valuable contribution of Mr Hafner and stated that paragraph 1 would be deleted, since no criminal action can be taken against a State in the national context. Paragraph 2 dealt with the proposal of the Commission concerning the exercise of civil jurisdiction removing State immunity. In very narrow circumstances, which had already been envisaged in Article

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12 of the UN Convention, immunity should go and there should be a possibility of obtaining some form of reparation against the State where functional immunity has been removed in the earlier article. This was the core proposal of the Commission. A very valid point was made about armed conflict in this context. The only armed conflict could be a military occupation by the State where the court is. Otherwise it would be the case of torture, genocide or less easy to define violations of human rights that satisfy the International Criminal Court standard. The Rapporteur did not want to venture into that. Then the Rapporteur took into account the exclusions listed in the draft Resolution. Acknowledging that points b) and c) were controversial, the Rapporteur stated that point c) could be easily deleted since it only related to an Article 12 situation. Finally, Part II of the draft Resolution was entitled « *De lege ferenda* ». Mr Bucher had proposed to delete the subtitle and the last few lines (« unless it is established that the State has performed its obligations to make reparation in accordance with the applicable international convention or customary international law »), adding as new title “*De lege lata*”. However, the Rapporteur would rather take a more cautious, incremental approach and stick to Article 12 and the territorial connection. Another question was raised concerning the spectrum of offences and the body competent to decide when to remove immunity. But, since a territorial connection is required, immunity can be lifted only if the acts alleged occurred in the territory of the State where the court is sitting. Therefore, the Rapporteur concluded that allegations could be tolerated, but only very narrowly.

The *President* thanked Lady Fox for her very detailed and eloquent presentation, and asked whether there were any remarks or comments on it.

Mr *Lowe* was hesitant towards Lady Fox's report. The Convention on special missions protects their members who are in transit, while a similar protection afforded to other categories of State officials would rather be *de lege ferenda*. Since the purpose of granting immunity to State officials is to prevent the third State from interfering with their duty to act on behalf of their national State, he asked why according to the draft Resolution this protection would not apply as much to the State through which such missions travel in transit.

Mr *Cassese* raised a first point regarding occupation. Military occupation had to be regarded as part of international humanitarian law. Then, if armed conflicts were ruled out, he did not see what kind of egregious violations committed by a State on the territory of another State in peace time could be covered by the Resolution. The only case he could envisage was torture committed in the embassy of a foreign country. Otherwise, outside armed conflicts he did not see how a State might seriously

infringe upon fundamental rights of human beings in the territory of another sovereign State.

The *Rapporteur* replied that the point concerning the protection in transit could be looked at again. As to the point raised by Mr Cassese, she accepted that the scope was very narrow, but it could cover cases of torture, or illegal renditions. This limited protection of human rights could however be expanded *de lege ferenda*, beyond what is already provided under section III, paragraph 2 of the draft Resolution.

M. *Salmon* propose d'interrompre la discussion. Alors que certaines questions ont été résolues, d'autres demandent une révision plus profonde du projet. C'est le cas du titre et de la portée précise de la résolution, ou des relations entre la résolution et les tribunaux internationaux. La Commission n'est pas en mesure de donner au stade actuel de ses travaux une réponse complète à ces questions et doit donc poursuivre son travail. Quant à la question du transit, M. *Salmon* souligne qu'elle est très délicate. Bien que prévue dans la convention sur les missions spéciales et la convention de 1961 sur les relations diplomatiques, cette immunité n'est pas garantie par tous les pays. C'est pour cela qu'il suggère d'éliminer toute référence à la question du transit dans la résolution, sauf pour les chefs d'Etat.

M. *Guillaume* soulève une objection concernant les immunités personnelles. Il se dit fondamentalement hostile à la dernière phrase du paragraphe 2, selon laquelle les actes accomplis en violation des droits fondamentaux de la personne ne peuvent en aucune circonstance être regardés comme étant des actes d'Etat pour ce qui concerne l'immunité de juridiction. Cette disposition ne correspond pas à la *lex lata*. Bien que soutenue par les juges Kooijmans, Higgins et Buergenthal, cette affirmation ne correspond pas, selon lui, à l'arrêt de la Cour internationale de justice. *De lege ferenda*, l'Institut peut bien entendu faire toute suggestion qu'il croit opportune. Encore faut-il ne pas considérer comme du droit positif ce qui, à son avis, n'en est pas.

M. *Bucher* remercie Lady Fox pour son résumé de la discussion. Si le Rapporteur déclare vouloir rester prudente, elle laisse aux privatistes le soin d'être plus courageux, sans que cela transparaisse dans le projet de résolution. Il se permet de remarquer que la résolution porte aussi sur l'immunité de juridiction en matière civile et qu'elle a dès lors un lien avec le sujet de la première Commission sur la compétence universelle en matière civile. Il considère, d'une part, que l'on peut être moins restrictif en matière civile qu'en matière pénale et, d'autre part, que l'Institut pourrait trouver opportun d'adjoindre à la Commission quelques

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spécialistes du droit international privé.

Mr *Dugard* considered that Mr Cassese had touched upon the most important issue raised by the draft Resolution, namely whether to extend the Resolution to cases of military occupation. He wished the Commission to debate this issue until it has further views on this subject. Mr Dugard asked whether the Commission would be satisfied with a « without prejudice » clause instead of the present exclusion in paragraph III, c). In any case he recommended a cautious approach to that issue.

Mr *Ronzitti* thanked Lady Fox for her detailed report on the discussion that took place in the Commission, and drew the attention of the Members on the fact that wrongful acts can be committed on the territory of a foreign State. Apart from military occupation, the case of a third State intervention in a civil war might be taken into account. Under such circumstances, the third State would be responsible for example if it engages in acts of torture in the territory of the forum State.

The *Rapporteur* thanked the Members for their measured response and expressed her wish to reconvene the Commission in order to provide the plenary with a revised draft Resolution.

Le *Secrétaire général* suggère que toutes les Commissions se réunissent et que la séance plénière reprenne à 15h30.

La séance est levée à 11 h 10.

#### **Quatrième séance plénière**          Samedi 5 septembre 2009 (après-midi)

En l'absence du Président de l'Institut, le *Secrétaire général* ouvre la séance à 15 h 50 et donne la parole à Mme *Lamm*, deuxième vice-président, en invitant les Membres à prendre connaissance du projet de résolution révisé.

#### **Draft Resolution 2**

*The Institute of International Law,*

*Mindful* that the Institute has addressed the jurisdictional immunities of States in the 1891 Hamburg Resolution on the Jurisdiction of courts in proceedings against foreign States, sovereigns and heads of State, the 1954 Aix-en-Provence Resolution on Immunity of foreign States from jurisdiction and measures of execution, the 1991 Basle Resolution on the Contemporary problems concerning immunity of States in relation to questions of jurisdiction and enforcement and in the 2001 Vancouver Resolution on Immunities from jurisdiction and execution of Heads of



State and of Government in International Law ;

*Conscious* of the underlying conflict between immunity from jurisdiction of States and their agents and claims arising from international crimes [contrary to the rights of persons] ;

*Desirous* of making progress towards a resolution of that conflict ;

*Conscious* of the fact that the present Resolution reflects both international law as it stands and future trends and developments ;

*Adopts* the following Resolution :

#### **Article I : Definitions**

1. For the purposes of the present Resolution « International crimes » means crimes recognized by the international community as particularly grave, such as genocide, crimes against humanity, torture, grave breaches of the 1949 Geneva Conventions for the protection of war victims, and other serious violations of international humanitarian law committed in international or non-international armed conflicts.

2. For the purposes of the present Resolution « jurisdiction » means the criminal, civil and administrative jurisdiction of the national courts of one State as they relate to the immunities of another State and its agents conferred by international conventions or customary international law.

#### **Article II : Principles**

1. Pursuant to international conventions and customary international law, a State has an obligation to afford protection of human rights to all persons within its jurisdiction. When it fails in that obligation, other States may act in the interest of the international community to seek to remedy its default in accordance with the present resolution.

2. Immunities are provided to enable an orderly allocation of jurisdiction in disputes concerning States in accordance with international law, to respect the independence and equality of States and to ensure the effective performance of the functions of persons who act on behalf of the States.

3. A balance is to be achieved in resolving conflict arising from the application of the above principles relating to the protection of human rights and the jurisdictional immunities of States and persons acting on their behalf.

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**Article III : Immunity of persons who act on behalf of a State**

**A. Personal Immunity**

1. The following persons enjoy personal immunity from jurisdiction as conferred by international convention or customary international law as follows :

- i) The serving Head of State and the serving Head of the Government throughout the period of their office wherever they may be ;
- ii) [Foreign ministers and] other members of the government of a State when on an official mission and present in a receiving State, or in transit in a third State ;
- iii) Members of special missions within the meaning of the Convention of 1969 on Special Missions, and members of permanent missions to international organizations (and delegations to conferences of international organizations) when present in the receiving State, or in transit in a third State ;
- iv) Serving members of the diplomatic and consular mission when present in a receiving State, or in transit in a third State ;
- v) All other persons acting on behalf of the State who enjoy personal immunity under international convention or customary international law.

2. When the post or the mission of a person enjoying personal immunity has come to an end such personal immunity ceases. But functional immunity from jurisdiction continues to subsist save that acts which constitute international crimes as defined in the present Resolution are in no circumstances, as regards the application of immunity from jurisdiction, to be considered as acts in the performance of a function of the State.

**B. Functional Immunity**

For the same reasons persons who only enjoy functional immunity from jurisdiction enjoy no such immunity for acts which constitute international crimes as defined in the present Resolution.

**C. The above provisions in no way affect :**

- a) the responsibility of the persons referred to in A and B above under international law ; nor
- b) the attribution to the State of the acts of any such person constituting international crimes as defined in the present Resolution.

#### **Article IV : Immunity of the State**

1. A State enjoys no immunity from civil jurisdiction before the national courts of another State in a proceeding in respect of international crimes as defined in the present Resolution caused by an act or omission of the State, if the act or omission occurred in whole or in part in the territory of that other State.
2. A State enjoys no [should not enjoy] immunity from the civil jurisdiction of the national courts of another State for international crimes as defined in the present Resolution wherever committed unless it is established that the State has performed its obligations to make reparation in accordance with the applicable international conventions or customary international law.
3. The above provisions
  - a) in no way affect the responsibility of the State concerned under international law ;
  - b) are not retrospective in so far as they reflect a progressive development of the law ;
  - c) are without prejudice to international conventions relating to the status of visiting armed forces of a State on the territory of another State.

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#### **Projet de resolution 2**

*L'Institut de droit international,*

*Rappelant* que l'Institut s'est prononcé sur les immunités de juridiction des Etats dans la résolution de Hambourg de 1891 sur la compétence des tribunaux dans les procès contre les Etats, souverains ou chefs d'Etat étrangers, dans la résolution de Aix-en-Provence de 1954 sur l'immunité de juridiction et d'exécution forcées des Etats étrangers, dans la résolution de Bâle de 1991 sur les aspects récents de l'immunité de juridiction et d'exécution des Etats, et dans la résolution de Vancouver de 2001 sur les immunités de juridiction et d'exécution du chef d'Etat et de gouvernement en droit international ;

*Conscient* du conflit latent entre les immunités de juridiction des Etats et de leurs agents, et des réclamations liées à des crimes internationaux [contraires aux droits des individus] ;

*Désireux* de progresser vers la solution de ce conflit ;

*Conscient* du fait que la présente Résolution reflète tant le droit international existant que des tendances et développements futurs ;

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*Adopte* la résolution suivante :

#### **Article I : Définitions**

1. Pour les besoins de la présente résolution, « crimes internationaux » s'entend des crimes reconnus par la communauté internationale comme particulièrement graves, tels que le génocide, les crimes contre l'humanité, la torture, les violations graves des conventions de Genève de 1949 sur la protection des victimes de la guerre, et d'autres violations sérieuses du droit international humanitaire commises durant un conflit armé international ou non international.
2. Pour les besoins de la présente résolution, « juridiction » s'entend de la juridiction pénale, civile et administrative des cours et tribunaux nationaux d'un Etat dans la mesure où elle se rapporte aux immunités conférées à un autre Etat et à ses agents par le droit international conventionnel ou coutumier.

#### **Article II : Principes**

1. Conformément au droit international conventionnel et coutumier, un Etat a l'obligation d'assurer la protection des droits de l'homme à toute personne relevant de sa juridiction. Lorsque cet Etat manque à cette obligation, les autres Etats peuvent agir dans l'intérêt de la communauté internationale et conformément à la présente Résolution afin de remédier à ce manquement.
2. Les immunités sont accordées par le droit international en vue d'assurer une répartition ordonnée de la juridiction relative aux litiges impliquant des Etats, de respecter l'indépendance et l'égalité des Etats, et de permettre aux personnes agissant au nom des Etats de remplir effectivement leurs fonctions.
3. Un équilibre doit être recherché en vue de résoudre le conflit résultant de l'application des principes relatifs à la protection des droits de l'homme rappelés ci-dessus et de ceux relatifs à la sauvegarde des immunités de juridiction des Etats et des personnes agissant en leur nom.

#### **Article III : Immunités des personnes**

##### *A. Immunité personnelle*

1. Les personnes suivantes jouissent, en vertu du droit international conventionnel ou coutumier, de l'immunité de juridiction personnelle, dans les conditions précisées ci-dessous :
  - i) le Chef d'Etat en fonction et le chef de gouvernement en fonction, pendant la durée de leur fonction où qu'ils se trouvent ;

- ii) les [ministres des affaires étrangères et les] autres membres du gouvernement d'un Etat lorsqu'ils sont en mission officielle et présents sur le territoire de l'Etat d'accueil, ou en transit dans un Etat tiers ;
- iii) les membres des missions spéciales au sens de la convention de 1969 sur les missions spéciales, les membres des représentations permanentes auprès d'organisations internationales (et les délégués à des conférences d'organisations internationales) présents sur le territoire de l'Etat d'accueil, ou en transit dans un Etat tiers ;
- iv) les membres en exercice des missions diplomatiques et consulaires lorsqu'ils sont présents sur le territoire de l'Etat d'accueil ou en transit dans un Etat tiers ;
- v) toute autre personne bénéficiant d'une immunité personnelle en vertu du droit international conventionnel ou coutumier.

2. L'immunité de juridiction personnelle prend fin au terme de la fonction ou de la mission de la personne qui en bénéficie. Néanmoins, l'immunité de juridiction fonctionnelle subsiste, sauf en ce qui concerne les actes constitutifs de crimes internationaux tels que définis par la présente Résolution, lesquels ne peuvent en aucun cas être considérés comme des actes relevant des fonctions d'un Etat pour ce qui concerne l'application de l'immunité de juridiction.

#### B. Immunité fonctionnelle

Pour les mêmes motifs, les personnes jouissant seulement d'une immunité de juridiction fonctionnelle ne bénéficient pas d'une telle immunité pour les actes constituant des crimes internationaux tels que définis par la présente Résolution.

#### C. Les dispositions qui précèdent sont sans préjudice :

- a) de la responsabilité en vertu du droit international des personnes mentionnées aux paragraphes A et B ci-dessus ;
- b) de l'attribution à l'Etat des actes de ces personnes constituant des crimes internationaux tels que définis par la présente Résolution.

### **Article IV : Immunité de l'Etat**

4. Un Etat ne bénéficie pas de l'immunité de juridiction civile devant les juridictions nationales d'un autre Etat dans le cas d'une procédure relative à des crimes internationaux tels que définis par la présente Résolution et résultant de l'action ou de l'omission de cet Etat, si cette action ou cette omission a eu lieu en tout ou en partie sur le territoire de cet autre Etat.

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5. Un Etat ne bénéficie pas [ne devrait pas bénéficier] de l'immunité de juridiction civile devant les juridictions nationales d'un autre Etat pour les actes constitutifs de crimes internationaux tels que définis par la présente résolution, où qu'ils aient été commis, sauf à établir que l'Etat a exécuté son obligation de réparation conformément au droit international conventionnel ou coutumier.

6. Les dispositions qui précèdent :

(a) sont sans préjudice de la responsabilité internationale de l'Etat en vertu du droit international ;

(b) ne sont pas rétroactives, dans la mesure où elles reflètent un développement progressif du droit ;

(c) sont sans préjudice des conventions internationales portant sur le statut de forces armées étrangères présentes sur le territoire d'un autre Etat.

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Le *Président* donne la parole au Rapporteur afin que celui-ci présente aux Membres les changements apportés au projet de résolution.

The *Rapporteur* indicated that no change had been made to the first paragraph of the preamble. The second paragraph however reflected the considerable changes in the terminology used throughout the draft Resolution. First, the new draft Resolution covered the immunity from jurisdiction of States « and their agents ». Second, and more importantly, the new draft Resolution covered claims arising from « international crimes », as opposed to « violations of fundamental rights of the person ». Those two changes were also reflected in the title of the new draft Resolution which read « International Crimes and Immunities from jurisdiction of States and their agents » as opposed to the previous « The Fundamental Rights of the Person and the Immunity from Jurisdiction in International Law ».

The fourth preambular paragraph reflected a significant change in the structure of the draft Resolution. The new draft reflected « both international law as it stands and future trends and developments », meaning both *lege lata* and *lege ferenda*, as would become apparent from the text of the Articles.

New Article I defined « international crimes » and mentioned « armed conflicts » as proposed by some Members. New Article I.2 contained very few changes and former Article I.3 had been deleted. More importantly, the Commission had endeavoured to restrict the scope of the

draft Resolution by amending the text of the Article on « Principles » i.e. new Article II. New Article II.1 had been narrowed down to the sole issue of immunities. New Article II.2 contained no mention of a State's internal administration and Article II.3 was unchanged.

On personal immunities, the Commission had taken up suggestions made by the Members and dropped the reference to members of a State's « central » government, while adding an explicit reference to « Foreign ministers ». Members might want to hold a vote on this, since some confrères apparently preferred the wider reference to all « ministers ». The mention of transit in a third State, which had previously only covered diplomatic personnel, now covered all individuals enjoying personal immunity from jurisdiction. There was no reason why members of a diplomatic mission in transit in a third State would enjoy immunity, while Ministers and members of special missions would not. Also new Article III.2 further specified the events terminating personal immunity by mentioning « the post or the mission » instead of simply « the mission ». The rest of Article III remained unchanged.

The Rapporteur beseeched Members to devote their full attention to new Article IV which had undergone considerable changes. Article IV.2 was in fact the former *de lege ferenda* provision in the former draft Resolution, reflecting the mix of *lege lata* and *lege ferenda* in the new draft. It had been cut down significantly however and all references to other instruments had been deleted. In particular there was no reference in the new draft to the UN Convention on the Jurisdictional Immunities of States and their Property.

Article IV.3 should be read in relation to Articles IV.1 and IV.2. Subparagraph A was unchanged. The Rapporteur understood that subparagraph B had been discussed by the Commission during a brief visit she had had to make to another Commission.

The Rapporteur invited Members to read the French version of the draft Resolution which had just been circulated and awaited their comments. She hoped that confrères and consœurs would look at the new draft with a cooperative eye and acknowledge the considerable changes made by the Commission following comments made during the previous sitting. Despite those changes, she believed the new draft Resolution still reflected the spirit and principles which had inspired the work of the Commission and she hoped that Members would endorse those principles.

Le *Président* remercie le Rapporteur de son exposé détaillé, et ouvre la discussion générale sur le nouveau projet de résolution.

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M. *Pocar* remercie chaleureusement le Rapporteur d'avoir pris en compte les remarques faites par les Membres au cours des séances précédentes. Le nouveau projet de résolution est bien meilleur que l'ancien, M. *Pocar* se félicitant notamment du passage de la notion très large de violation de droits fondamentaux à celle, plus étroite, de crimes internationaux. Il s'étonne toutefois que ce changement, apparaissant notamment dans le titre, ne soit pas reflété dans l'article consacré aux « principes ». La formulation de l'article II (« assurer la protection des droits de l'homme ») est encore très large et devrait être modifiée pour se référer aux seuls « crimes internationaux ».

The *Rapporteur* thanked Mr *Pocar* for a very valid point and said that she would make the necessary changes in the draft Resolution.

Mr *von Hoffmann* welcomed the significant restructuring efforts made by the Commission. He was particularly impressed by the incredible move made by the Commission in recognising that a State with no connection to a human rights violation could take up jurisdiction over such violation. He was concerned that, although such a step was highly desirable, it reflected *lex ferenda* rather than *lex lata*, while the purpose of the Institut should be to restate *lex lata*. Still, he supported the Commission's view and hoped that the change from « violation of human rights » to « international crimes » might encourage some of the more conservative Members to adopt the Resolution.

Mr *Kooijmans* agreed with narrowing down the draft Resolution to « international crimes ». He said however that the draft Resolution needed to make clear that its scope was limited and that the relation between international crimes and immunities gave rise to many more problems than those addressed by the draft Resolution.

Mr *Sucharitkul* referred to the title of the draft Resolution. He stated that the English title was a little confusing whereas the French version was quite clear. He proposed to change the English title to « International Crimes and jurisdictional Immunities of States and their agents » instead of « International Crimes and Immunities from jurisdiction of States and their agents ». Mr *Sucharitkul* then turned to the second preambular paragraph where the same proposal applied. As regards Article II.2, Mr *Sucharitkul* expressed the view that it would be more precise to replace the wording « orderly allocation of jurisdiction in disputes » by the phrase « jurisdiction orderly exercised ». The problem addressed in this sentence was one of « abstention or exercise of jurisdiction » and not one of « allocation » of jurisdiction.

Mr *Gaja* proposed to discuss the draft Resolution article by article.



The *President* asked whether the plenary agreed with this proposal.

Mr *Ronzitti* raised the concern that some subjects might better be discussed in a systematic way rather than article by article. Turning to the question of visiting armed forces, he pointed out that Article IV.3(c) had aroused much attention. By contrast, Article III.B, which provided for the exclusion of functional immunity to State agents in the case of international crimes, seemed to apply to visiting armed forces. Referring to this gap, Mr *Ronzitti* felt uncomfortable that the exception concerning visiting armed forces addressed immunity of States only and not of their soldiers. As regards Article IV.2, Mr *Ronzitti* expressed the view that the wording was very wide. It excluded immunity and provided for universal jurisdiction in the case of international crimes even in cases where the crime was not committed in the territory of the forum State. The consequence of this was that immunities granted by an agreement between the provider of troops and the territorial State might be ignored by third States. Finally, Mr *Ronzitti* expressed the view that the text of the draft Resolution in general had been very much ameliorated.

Mr *Meron* thanked the third Commission for considerably improving the draft Resolution in a very short time. He was pleased that Article I.3 had been deleted as he had suggested. Mr *Meron* also endorsed the modification of Article I.1. The term « International crimes » was more precise than « violations of the fundamental rights of the person ». Still, Mr *Meron* insisted that a reference to the statutes of international courts and tribunals was missing.

Mr *Feliciano* raised several points concerning the text of the draft Resolution. First, he felt that the second sentence of Article II.1 stating that « other States may act in the interest of the international community » needed to be clarified. It was intended to signify « on behalf and with authorization of the international community ». Second, Mr *Feliciano* was puzzled by the opening phrase of Article III.C, which read « above provisions in no way affect ». Mr *Feliciano* noted that this formulation was different from Article IV.3(c). The phrase used there read « The above provisions are without prejudice to ... ». To him, the phrase « in no way affect ... » was intended to mean « without prejudice to international law with respect to ... ».

Mr *Lee* welcomed the revised text as an excellent improvement. However, he raised two points. First, the fourth preambular paragraph, which explicated that the Resolution was « conscious of the fact that » it reflected « both the law as it stands and future trends and developments », might eclipse the fact that the content of the Resolution referred to *lex lata* much

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more than to *lex ferenda*. Effectively, only one paragraph was *lex ferenda*. Accordingly, phrasing the preamble this way reduced the ambit of existing law. For this reason, Mr Lee submitted that the preamble should be rearranged. Second, concerning Article IV.3(c) and other undesignated provisions, Mr Lee proposed to replace the phrasing « international conventions and customary international law » by « international treaties and customary international law » in order to include bilateral treaties. Furthermore, Mr Lee suggested replacing the phrase « visiting armed forces », which he considered to be too strict, by a broader formulation including peacekeeping arrangements and similar issues.

M. Pellet adresse ses félicitations au Rapporteur mais ne souhaite pas déroger à la coutume de l'Institut consistant à accompagner celles-ci des critiques les plus variées. Le texte proposé cet après-midi lui semble être de bien meilleure facture que le précédent, notamment en raison de sa référence aux conflits armés. Il souhaite toutefois attirer l'attention de l'Institut sur l'article II.1, qui constitue à ses yeux une régression grave par rapport au texte de l'article 41 du Projet d'articles de la Commission du droit international sur la responsabilité des Etats. L'article II.1 prévoit que « les autres Etats peuvent agir » pour remédier à une violation des droits humains, alors qu'il s'agit bien là d'une obligation et non d'une faculté. Les articles IV.3.b et IV.3.c lui semble par ailleurs superflus, voire même préoccupants, dans la mesure où les questions qu'ils abordent sont déjà réglées par des instruments de *lex specialis*. Enfin, M. Pellet attire l'attention du Rapporteur sur les divergences entre les textes français et anglais du projet, la version française lui semblant à bien des égards plus précise.

The *President* pointed out that the French text had just been finished and had not been checked by the Committee so far.

M. Torres Bernárdez félicite également la commission et remarque que l'amélioration du texte est considérable. Il estime cependant, contre la tendance générale, que la formulation « crimes internationaux » dans l'article I.1 est trop restrictive, et lui préfère la formule « droits fondamentaux ». Il rejoint la perplexité, voire l'inquiétude, de M. Pellet quant aux articles IV.3.b et IV.3.c et souhaite leur suppression pure et simple.

M. Bennouna souhaite faire quelques observations, même s'il se félicite de la nouvelle mouture de ce projet de résolution qui semble, à chaque session, renaître tel le sphinx. Il souligne ainsi que le nouveau titre correspond plus au contenu que le précédent. Comme M. Meron, il critique l'absence de référence aux tribunaux internationaux et propose de

l'intégrer dans les définitions.

Il ne croit pas non plus que l'article I doive s'intituler « définitions » dans la mesure où celles-ci n'ont pas de prétentions à l'exhaustivité. L'article II ne lui semble pas davantage traiter de « principes », mais bien plutôt constituer une forme d'introduction au sujet. Il est en accord avec M. Pocar pour dire que la référence aux droits de l'homme ne se concevrait que dans le préambule, et non dans l'article II.

M. Bennouna attire par ailleurs l'attention de ses confrères sur l'article III.A.2 du projet. Celui-ci traite de l'immunité de juridiction fonctionnelle de certains individus, alors même que ce type d'immunité fait l'objet d'une disposition spécifique à l'article III.B. Il conviendrait par conséquent de rassembler la seconde phrase de l'article III.A.2 et l'article III.B dans une seule disposition. M. Bennouna souhaiterait également obtenir des éclaircissements quant aux articles IV.1 et IV.2. Il n'est pas certain de la signification des mots « actions ou omissions » de l'Etat, ni de l'exception « d'exécut[ion] de l'obligation de réparation ». Cette dernière s'envisage notamment différemment selon qu'elle a ou non fait l'objet d'un jugement. M. Bennouna marque son accord avec M. Pellet sur le défaut de clarté de l'article IV.3.b, et indique que l'article IV.3.c, qui ne correspond pas à l'esprit du nouveau projet de résolution, est susceptible de créer des difficultés importantes en pratique. A l'inverse, l'ajout d'une référence aux ministres aux affaires étrangères à l'article III.A.1.ii est particulièrement bienvenu. Au final, M. Bennouna pense que la Commission est sur la bonne voie et se montre confiant dans le succès de son entreprise.

Mr Rao appreciated the work of the Rapporteur on issues of deep concern to the entire international community. The new draft Resolution was an extremely useful document. However, it failed to reflect that other avenues often existed for the long-term resolution of disputes involving international crimes. The draft Resolution purportedly afforded the power to take up jurisdiction to all national courts. In practice, however, all confrères and consœurs knew that only those courts of the most powerful countries were likely to exercise such jurisdiction. It was debatable whether such courts were always the best forum for resolving difficult, long-lasting conflicts afflicting foreign communities. In South Africa for example, the best solution had proven to be reconciliation. The draft Resolution should acknowledge that the communities involved could often resolve their problems without the help of courts, let alone foreign courts. Reconciliation and other efforts should not be undermined and the draft Resolution should include, for example in the preamble, a specific mention of that flexibility.

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Mr Rao also insisted that *in abstentia* trials should be prohibited and that Foreign Ministers should be explicitly covered by Article III on personal immunity since they were more likely to travel than their colleagues.

M. *Momtaz* remarque que l'article II.1 doit être formulé de manière à tenir compte des articles de la Commission du droit international sur la responsabilité internationale des Etats, ainsi que de la résolution adoptée par l'Institut à Cracovie sur les obligations *erga omnes*. Il s'interroge par ailleurs sur la nouvelle formulation de l'article II.1. Alors que l'ancienne version insistait sur la conformité de l'action de l'Etat « avec le droit international », le nouveau projet se borne à exiger le respect des termes de « la présente résolution ». La première formulation semblait beaucoup plus appropriée.

M. *Guillaume* marque son accord avec M. Rao et insiste pour que le projet de résolution mentionne l'existence d'autres formes de réparation des crimes internationaux. Il est également en accord avec M. *Momtaz* pour conserver la référence au droit international à l'article II.1 : il ne s'agit pas de donner, avec le projet de résolution, carte blanche aux Etats les plus puissants pour agir à leur convenance.

Enfin, M. *Guillaume* exprime ses doutes quant à la formulation actuelle de l'article III.A.2. Même si l'idée exprimée semble recueillir l'accord général des membres de l'Institut, elle ne correspond pas au droit positif. L'article III.A.2 devrait donc prévoir que les actes constitutifs de crimes internationaux « ne devraient », et non « ne peuvent », relever des fonctions de l'Etat.

M. *Salmon* revient sur la remarque de M. *Lee*, qu'il approuve vigoureusement. La formulation du quatrième paragraphe du préambule est pour le moins malheureuse, dans la mesure où elle semble indiquer que l'ensemble du projet de résolution peut se lire *de lege ferenda*. Il serait bien plus simple de changer au fil du texte le temps des verbes conjugués. L'indicatif présent indiquerait à l'évidence une disposition *de lege lata* tandis que l'usage du conditionnel désignerait au lecteur le droit « espéré » par l'Institut.

Mme *Infante Caffi* adresse ses félicitations au Rapporteur pour le travail effectué. Elle regrette de ne pas bien connaître le détail de la question des immunités, mais s'interroge tout de même sur la possibilité de parler de compétence civile pour la réparation des crimes internationaux.

Mr *Yee* stated that Article IV.1 should mention a threshold in terms of the evidence and/or the magnitude of international crimes. He also expressed the view that certain courts enjoyed interfering with the internal affairs of other States. He submitted that the doctrine of clean hands should be

applied to such courts. Where a court had failed to address the problems of its own country in the past, it should not be allowed to take up jurisdiction as per the draft Resolution.

M. *Kirsch* marque son plein accord avec MM. Salmon et Lee et plaide pour la suppression du quatrième paragraphe du préambule. La distinction entre *lege lata* et *lege ferenda* découlera naturellement, comme l'a indiqué M. Salmon, de l'usage circonstancié du présent et du conditionnel.

M. *Salmon* souhaite revenir sur une question d'organisation et invite les Membres à préparer leurs amendements par écrit et les faire reproduire. Il lui semble utile de commencer les discussions par la question du titre de la résolution. De plus, il suggère que le président lise les versions anglaise et française de chaque article avant la discussion.

The *President* considered this to be a good suggestion and asked for contributions concerning the title of the draft Resolution.

Mrs *Xue* preferred to skip the discussion of the title, address the Articles first and come back to the title and the preamble at the end.

Mr *Salmon* objected that the problem of title was extremely important because it was directly related to the general scope of the Resolution. Accordingly, if somebody wanted to change the title again, this question should be raised first.

Le *Secrétaire général* rappelle que c'est le contenu de la résolution qui doit déterminer le titre. Il propose de discuter le fond de la résolution d'abord et d'adapter le titre et le préambule plus tard.

The *President* then asked for contributions concerning the Articles of the Resolution and suggested coming back to the title later.

M. *Bennouna* répète qu'il lui semble nécessaire d'introduire une référence aux tribunaux internationaux dans le projet de résolution.

The *President* asked him to submit his proposal in writing.

M. *Kirsch* invite les Membres qui s'intéressent à cette question à présenter un texte commun.

Mrs *Xue* stated that Article I.1 had been changed greatly, especially with reference to international crimes. She submitted that the phrase « crimes recognized by the international community » should be changed to « crimes recognized in international law ». This formulation would particularly refer to the Rome Statute of the International Criminal Court.

Mme *Bastid-Burdeau* critique la limitation de la définition au conflit

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armé international ou non international. Un chef d'Etat qui a organisé des actes de torture en dehors de tout conflit armé ne doit pas en être exclu.

Mr *Dinstein* returned to a point he had already raised. He preferred the phrase « grave breaches of the 1949 Geneva Conventions for the protection of war victims, and other serious violations of international humanitarian law committed in international or non-international conflicts » to be simply replaced by « war crimes » as defined in Article 8, paragraph 2, lit.(a) to (c) of the Rome Statute of the International Criminal Court.

The *Rapporteur* explained that the formula had been taken from the Resolution adopted in Krakow in 2005 on universal criminal jurisdiction. The Commission had simply tried to remain coherent with that Resolution.

Mr *Tomuschat* argued that the Rome Statute was not ratified by all States and that it was problematic to regard it as universally binding law. By contrast, the 1949 Geneva Conventions were binding on all States and were reflected in customary international law as well.

M. *Kirsch* indique sa préférence pour une liste plus limitative. Le statut de Rome contient déjà lui-même certaines redondances. Ainsi, la torture peut-elle être qualifiée tout autant de crime de guerre que de crime contre l'humanité.

The *President* proposed to turn to Article II of the draft Resolution on principles.

Mr *Tomuschat* referred to Article II.1. While the first sentence mentioned the obligation to afford protection of human rights in general and not only of fundamental human rights, the consequences in the second sentence did not really follow in the case of simple violations. Mr *Tomuschat* suggested a hierarchy of consequences in the case of human rights violations. First, the responsible State should offer proper reparation because there was a primary responsibility of State itself. Second, there could be a response by international tribunals. Third, and only in cases of grave violations, other States might act.

Le *Secrétaire général* approuve la position de M. *Tomuschat*.

Mr *Feliciano* returned to a point concerning Article II.1 which had already been raised in the general debate. The second sentence said that « other States may act in the interest of the international community ». As to this phrase, Mr *Feliciano* required a clarification in legal terms which indicated that State action had to be “on behalf and with authorization of” the international community in order to exclude unilateral interventions.

Furthermore, Mr Feliciano suggested changing the last phrase of the sentence from «in accordance with the present resolution» to «in accordance with international law».

Mr *Pocar* also supported Mr Tomuschat's proposal. Still, he raised doubts as to whether preference should be given to international courts and tribunals over third State action. The answer to this question depended on the relationship between the principle of universal jurisdiction and the principle of complementarity. Accordingly, the priority between international courts and tribunals on the one side and third States on the other side should be left open. Finally, Mr *Pocar* shared the view already expressed that Article II, referring to "human rights" in general and not to international crimes only, was too broad.

M. *Degan* indique que la deuxième phrase de l'Article II.1 reprend simplement l'idée du dédoublement fonctionnel développée par Georges Scelle.

En ce que concerne la première partie du paragraphe, M. *Salmon* approuve M. *Pocar*. De plus, selon lui, il ne suffit pas d'introduire la restriction «conformément au droit international» à la fin de la proposition. Dans l'esprit de la résolution, l'intervention présuppose la juridiction des Etats tiers qui ont compétence. En conséquence, M. *Salmon* regrette la disparition dans la résolution du terme «compétence». Il indique que, personnellement, la seconde partie de l'article lui déplaît.

M. *Pellet* indique que le paragraphe ne lui plaît pas non plus. La première phrase lui paraît déplacée dans le cadre d'un projet de résolution ne couvrant que les crimes internationaux. Quant à la seconde phrase, M. *Pellet* réaffirme qu'elle constitue une régression par rapport à l'article 41 des articles sur la responsabilité de l'Etat pour fait internationalement illicite. Il indique qu'il remettra sa proposition d'amendement au secrétariat par écrit.

M. *Bucher* exprime sa sympathie pour la formule de M. *Pellet*. Il doute du bien-fondé d'une introduction du terme «compétence», soulignant que le titre de la résolution se réfère uniquement à l'immunité et ne fait pas allusion à la question de compétence.

Le *Président* remercie ses confrères de leurs interventions et clôt la discussion générale. Le Rapporteur souhaitant attendre la fin de la discussion détaillée du projet de résolution pour y répondre, le *Président* ouvre la discussion du projet de résolution article par article.

La séance est levée à 18 h 35.

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**Cinquième séance plénière**

Lundi 7 septembre 2009 (matin)

La séance est ouverte à 9 h 50 sous la présidence de M. *Roucounas*, premier Vice-président. Elle est consacrée à la poursuite de la discussion du projet de résolution de Lady Fox.

The *President* proceeded to open the discussion on the draft Resolution. He noted that a number of written proposals for modification of the draft Resolution had been submitted and invited all those Members who had new ideas for modification to put them in writing and to submit them to the Rapporteur. He then gave the floor to the Rapporteur to give her general appreciation of the amended draft Resolution.

The *Rapporteur* thanked members for the amendments that had been suggested so far which had been enormously helpful. She proceeded to request any comments on Article II, paragraphs (2) and (3).

Mr *Cançado Trindade* submitted two proposals to Articles I and II, in a constructive way, so as to ameliorate the drafting of 'Definitions' and 'Principles'. As to Article I (1), he believed that the Definition should bring together the operation of both national and international courts. With regard to the latter, he had in mind the case-law not only of the International Court of Justice, the European Court of Human Rights, and contemporary international criminal tribunals, but also of the Inter-American Court of Human Rights. He pointed to a series of decisions of the latter, such as its judgments in the cases of *Barrios Altos* (2001), *Plan de Sánchez* (2004), *Mapiripán* (2005), *Moiwana Community* (2005), *Pueblo Bello* (2006) and *Ituango* (2006). In those cases, as well as that of *Myrna Mack Chang*, the Court was faced with State-planned and State-perpetrated crimes, engaging aggravated State responsibility, and removing any bar to exercising jurisdiction, either at the national level or international levels.

In light of this consideration, he suggested that the following words be added to Article I (1): « For the purposes of the present Resolution, 'international crimes' means crimes recognised by the international community, and set forth in international conventions and instruments and in international case-law, as particularly grave, such as genocide, crimes against humanity, torture, grave breaches of the 1949 Geneva Conventions for the protection of war victims, and other serious violations of international humanitarian law committed in international or non-international armed conflicts. »

His second suggestion was to modify Article II (1) of the draft Resolution, by way of two additions, so as to bring together international



human rights law and general international law, and thus to enhance the formulation of the principle. Article II (1) would then read as follows: « Pursuant to international conventions and customary international law, a State has an obligation to afford effective protection of human rights to all persons within its jurisdiction. When it fails in that obligation, other States may, parallel to inter-State complaints under [certain] human rights conventions, act in the interest of the international community to seek to remedy its default in accordance with the present Resolution. »

His intention in submitting these two amendments to the draft Resolution was to foster an interrelation between international human rights law and international humanitarian law, as well as international criminal law, and to bring into the picture general international law. Furthermore, he intended to bring together national and international tribunals.

M. *Bucher* se réjouit que le Rapporteur ait reçu de nombreuses propositions d'amendement, mais il souhaite que ces propositions soient présentées à l'ensemble des membres de l'Institut et pas uniquement au Rapporteur.

Le *Président* précise que les propositions d'amendement doivent être présentées à la Commission, qui les soumet ensuite à l'ensemble des membres.

M. *Ranjeva* trouve que les propositions d'amendement devraient être simultanément soumises à la Commission et à l'ensemble des membres.

The *President* then opened the floor for discussion on Article II (2) of the draft Resolution.

Le *Secrétaire général* précise qu'étant donné le très grand nombre de propositions, il est trop tôt pour engager la procédure d'amendement sous peine de perdre inutilement du temps.

M. *Remiro Brotons* fait une remarque relative à l'article III.A.2 et suggère que l'on formule la seconde phrase d'une manière affirmative (« les actes constitutifs de crimes internationaux, tels que définis par la présente Résolution ne peuvent en aucun cas être considérés comme des actes relevant de la fonction »).

Le *Secrétaire général* s'exprimant à titre personnel souligne que l'article II.3 de la Résolution en projet lui semble inutile en ce qu'il ne voit pas quel est l'équilibre qui doit être recherché par le texte. Il dit ne pas non plus comprendre de quel conflit il est question car, selon lui, il n'y a pas de conflit de principe entre les droits de l'homme et l'immunité. Il y n'aurait véritablement conflit que si l'immunité privait la victime de tout accès à un juge. Or, il n'en est rien. Il n'y a pas d'exclusion générale et

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absolue du recours à un juge. La formulation actuelle laisse erronément croire que tout individu est en droit d'avoir accès à n'importe quel juge de son choix, ce qui est clairement démenti par les pratiques qui réservent à un for particulier la connaissance de certains litiges.

The *Rapporteur* thanked the Secretary General for his comment and said that she would take on board his criticism of paragraph 3. In relation to what had already been said, she was of the view that the reference to the « protection of human rights » was too broad and could possibly be replaced by the more limited reference to « international crimes » which would convey the element of balance. She stressed that the idea of balance between conflicting principles was critical to the original conception of the Resolution, but said that she would re-consider the paragraph.

M. *Salmon* pense qu'il existe bel et bien une contradiction entre les droits de l'homme et les immunités. Certes, il n'y a pas de contradiction entre l'immunité elle-même et les droits de l'homme car l'immunité est, selon lui, un processus technique. La contradiction se situe entre les droits de l'homme et l'impunité qui résulte de l'immunité.

M. *Bucher* dit partager les doutes du Secrétaire général concernant la recherche d'un équilibre. Si on ne trouve pas une bonne formule sur ce point, il faudrait, selon lui, supprimer ce paragraphe qui n'est pas indispensable. Il précise cependant ne pas être d'accord avec le Secrétaire général s'agissant de l'existence de voies de recours pour l'individu. La pratique montre généralement que les voies de recours sont quasi inexistantes dans les Etats responsables d'actes de torture ou de génocide.

Mr *Gaja* expressed his concern that one could draw from this paragraph as it was currently written an implication which should not be encouraged – that is that when an international crime was not at stake, immunities always prevailed over access to justice in order to protect fundamental human rights. It was one thing to restrict the scope of the text to international crimes and another to give the impression that when international crimes do not occur, immunity was something that the Institut found completely acceptable and that there may not be any residual problems in terms of protecting fundamental human rights. He suggested that this idea could be reflected in the context or the preamble. He noted that such matters were just as important since these rights were violated more frequently than the occurrence of international crimes. Therefore, the Institut should avoid endorsing the idea that immunities should be granted in such cases.

M. *Ranjeva* partage les préoccupations exprimées par les membres de la

commission concernant l'utilité du troisième paragraphe de l'article II, du moins dans sa forme actuelle. Il indique que le paragraphe 3 trouverait mieux sa place dans le préambule, juste après l'actuel paragraphe 2 du préambule. Si l'on décidait néanmoins de conserver ce paragraphe, il faudrait, selon M. Ranjeva, se limiter à l'essentiel, c'est-à-dire à l'affirmation de la contradiction entre l'impunité générée par l'immunité et les droits de l'homme.

Mrs *Xue* shared some concerns with other speakers regarding the element of balance. In her view, current paragraph 3 was not clear as to what the balance was for. In her view, the balance to be achieved was not between immunities and the protection of human rights which were both too broad and made it difficult for a reader to understand what was being said. She also noted that the Resolution seemed to place a heavy reliance on national courts, and pointed out that national courts were only one of the options to deal with international crimes.

Mr *Treves* said that the main difficulty with the paragraph was its location in the Article on Principles. The way the Resolution was structured, the Principles seemed to address the substance of the Resolution. In his mind, the need to achieve a balance was more than a substantive principle and an inspiring principle for the Institut in drafting these provisions. For this reason, he agreed with Mr Ranjeva's submission to move the language concerning the balance to be achieved to the preamble. He noted that the preamble already contained language pertaining to the conflict between immunity from jurisdiction of States and their agents and claims from international crimes, but would prefer to move the idea of the balance from the text into the preamble with an appropriate amendment.

Mr *von Hoffman* suggested that the Rapporteur might want to reconsider the point about balance. In his view, it was conceptually wrong to speak of a balance when what was really being said was that there were two conflicting interests. A balance meant that fifty per cent would be given to one principle, and fifty per cent to the other. This was not what was being suggested in the Resolution. Rather, the Institut was weighing the different principles and in a certain group of cases, it was giving preference to one principle over the other. The result was that the Institut was giving preference to the principle of State immunity in quite a number of situations, but in the limited area of international crimes, it gave preference to the protection of human rights. He wished this to be made clear in the approach in paragraph 3, striking out the word « balance » and instead referring to the conflict of principles. He added that the traditional understanding was that immunity prevailed over

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human rights, but that today, a consensus was emerging that in cases of international crimes, the protection of human rights had to prevail.

M. Pellet indique que, contrairement aux opinions qui viennent d'être formulées, ce paragraphe relatif à la recherche d'un équilibre est très clair. Selon lui, il ne faut pas adopter une compréhension mathématique de la notion d'équilibre. M. Pellet est toutefois favorable à la proposition de faire remonter ce paragraphe dans le préambule et de le combiner avec le paragraphe faisant référence au conflit latent entre les immunités et les réclamations relatives à des crimes de droit international. M. Pellet souligne également être d'accord avec Lady Fox sur la nécessité de recentrer le texte de la Résolution en projet sur les crimes internationaux. Enfin, il dit ne pas partager les craintes de M. Gaja selon lesquelles le texte pourrait donner l'impression que l'immunité subsiste automatiquement pour les violations qui ne sont pas des crimes au sens de la Résolution.

Mr Skubiszewski stated that what was important with regard to paragraph 2 was to be quite specific on what was established law and what were future developments, in other words, the distinction between *lex lata* and *lex ferenda*. This had been present in the first draft Resolution, but had been removed in the second draft Resolution. He noted that preambular paragraph 4 referred to this distinction, but that each paragraph in the Resolution which contained future trends and developments should say so in order to avoid confusion in this respect. As to Article II, in his view, this part did not list principles, but rather reflected general rules. He felt that to call them principles might lead to some misunderstanding, since it was unclear whether these were general principles of international law or general principles of law recognised by civilised nations. In view of this, it was best to avoid the word « principles ». Moreover, Article II did not constitute exclusively of principles. He also suggested deleting the words « in the interest of the international community » in paragraph 1. While he recognised the reference to the *dictum* of the International Court of Justice in the *Barcelona Traction, Second Phase*, case, he argued that this *dictum* did not mean much as proved in the *East Timor* case.

Finally, he observed that the word « balance » in paragraph 3 had presented certain difficulties and suggested that the meaning of balance be further specified in the paragraph to augment its substance and meaning.

Mr Lee observed the difficulty of making incremental improvements of existing law, which were liable to be criticised as being either too liberal or too restrictive. Paragraph 3 represented this situation. He was of the view

that given the impact of the Institut's work on legal and academic society, it was right to take a progressive approach and therefore to maintain the spirit of paragraph 3. He welcomed improvements to the language as had been suggested, particularly those of Mr Cançado Trindade. He noted that paragraph 3 was like an open chapeau provision which introduced Articles III and IV. Therefore, in his view paragraph 3 was still meaningful as a chapeau provision for the substantive provisions to come.

The *President* indicated that the discussion would move to Article III of the draft Resolution.

Mr *Dinstein* returned to the subject that had been raised in the general debate – the position of serving Foreign Ministers. He was puzzled by the reference to foreign ministers in Article III (1)(ii). The International Court of Justice, in the *Arrest Warrant* case, made it abundantly clear that serving Foreign Ministers enjoyed immunity from jurisdiction on an equal footing with Heads of States or Governments. In this view, it was a mistake to depart in the Resolution from the Court's position.

Mr *Tomuschat* agreed with Mr *Dinstein*.

M. *Ranjeva* trouve que l'expression « en fonction » dans le paragraphe i) est superflue. Il invite également à modifier la formulation du paragraphe ii) afin de ne pas mettre les ministres des affaires étrangères sur le même pied que les autres ministres. Le paragraphe ii) devrait, selon lui, formuler un principe général s'agissant des ministres des affaires étrangères tandis qu'il devrait, concernant les autres membres du gouvernement, commencer par préciser les circonstances dans lesquels ils jouissent de l'immunité. Cela respecterait la philosophie de la Cour internationale de Justice telle qu'elle l'a exprimée dans l'affaire *Djibouti c. France* et dans l'affaire *Yerodia*.

Le *Président* invite M. *Ranjeva* à mettre sa proposition par écrit.

Le *Secrétaire général* attire l'attention sur un point de procédure et souligne qu'il faut, selon lui, bien distinguer les amendements formels des propositions. Il précise que la procédure d'amendement n'a pas encore été formellement engagée et que ce ne sera le cas qu'une fois que le texte de la Résolution en projet aura provisoirement été arrêté. Il invite à ne pas engager la procédure formelle d'amendement prématurément sous peine de retarder excessivement les travaux.

Mrs *Xue* concurred with the opinion expressed by Mr *Dinstein* with regard to the position of serving ministers of foreign affairs. She pointed out that in the Vienna Convention on the Law of Treaties, Heads of Government and Foreign Ministers were given full powers and were

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considered as representatives of the State. In her view, while sub-paragraph (i) reflected established international principle, sub-paragraph (ii) was partly established law and partly *lex ferenda* because there were still some cases pending before the International Court of Justice. She suggested that the Resolution further clarify that apart from the categories of persons entitled to immunity under paragraph (i), there were other government members who were also entitled to immunity. If the position of the Institut differed from the state of the law, then this should also be made clear.

M. *Salmon* partage l'opinion du Secrétaire général selon laquelle il ne faut pas engager prématurément la procédure d'amendement, mais il exprime le souhait que tous les documents préparés pour Lady Fox soient distribués à l'ensemble des membres de la commission.

Il ajoute par ailleurs que, sur le fond, il est indispensable de mentionner dans le paragraphe ii) du texte de la Résolution que tous les ministres jouissent de l'immunité quand ils se déplacent sur le territoire d'un autre Etat. Il précise cependant qu'il faut maintenir la distinction établie entre le chef d'Etat et le chef de gouvernement dont il est question dans le paragraphe i) et le ministre des affaires étrangères dont il est fait mention dans le paragraphe ii).

M. *Bucher* souligne qu'il va de soi que c'est pour des actes commis sur le territoire d'un Etat étranger que les personnes mentionnées au paragraphe A.1 jouissent de l'immunité. C'est sous-entendu. Mais il faudrait le préciser.

M. *Kamto* prend la parole pour la première fois et saisit l'occasion pour saluer ses confrères. Il dit regretter de n'avoir pas pu être présent plus souvent. Sur le fond, il dit ne pas trouver la distinction entre le ministre des affaires étrangères et les autres ministres entièrement justifiée. Il reconnaît que cette distinction se retrouve dans l'arrêt de la Cour internationale de justice dans l'affaire *Yerodia*, mais souligne que cette partie de l'arrêt n'est pas très convaincante. Il reconnaît que les ministres des affaires étrangères posent parfois des actes que d'autres ministres n'ont pas le pouvoir de poser mais cela ne justifie pas, selon lui, la distinction susmentionnée. Il en veut pour preuve l'arrêt de la Cour internationale de Justice dans l'affaire des *essais nucléaires* en 1974 où la Cour, lorsqu'elle recensa les déclarations faites par les différents membres du gouvernement, n'a fait aucune distinction entre ceux-ci, hors le chef d'Etat et le chef de gouvernement.

Mr *Mensah* expressed his support with respect to the position of foreign minister expressed by other Members. While the Resolution might try to

progressively develop international law, he was of the view that the position assigned to foreign ministers in the Resolution was a retrograde step because the general view had been that foreign ministers were able to commit the government to which they belonged and such a position was recognised in the Vienna Convention on the Law of Treaties. Therefore, he supported moving the reference to foreign ministers from sub-paragraph (ii) to sub-paragraph (i). He also thought that the term « serving » was misleading, since paragraph 2 spoke of the post or the mission of a person enjoying personal immunity coming to an end.

In addition, he had a problem with sub-paragraph (v) which spoke of « all other persons acting on behalf of the State », which did not mention their situation in transit, unlike all the other sub-paragraphs on categories of persons, except for sub-paragraph (i). This implied that such persons would enjoy immunity regardless of where they were. This would be strange since in most conventions, the immunities assigned were only in accordance with the convention or applicable customary international law. He therefore suggested to add the words “in accordance with the conventions or customary international law” to sub-paragraph (v).

The *President* said that Mr Mensah's suggestion would be taken note of.

Mme *Bastid-Burdeau* indique que, contrairement à la version anglaise, le paragraphe v) dans la version française ne précise pas qu'il s'agit de toute autre personne *agissant au nom de l'Etat* (« acting on behalf of the State » dans la version anglaise) et qu'il faudrait le rajouter.

M. *Ranjeva* attire l'attention sur les problèmes particuliers rencontrés par les juges internationaux, et particulièrement par les juges de la Cour internationale de Justice lorsqu'ils sont en déplacement et qu'ils ne jouissent pas d'un passeport diplomatique.

The *Rapporteur* questioned whether the sorts of people that Mr Ranjeva was referring to would come under international organisations rather than States. She noted that judges did not act on behalf of a State. It was this that troubled her about international civil servants, but she would look into the matter.

Mr *Lee* observed that Article III (A)(1) was trying to identify the persons entitled to immunity; it was not trying to be consistent with the Vienna Convention on the Law of Treaties or other relevant conventions. He expressed a preference for the original text since in his view, foreign ministers were covered by the reference to « other members of the government of a State ». He also noted that other members of the government were more likely to be involved in the commission of international crimes than foreign ministers.

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M. *Salmon* dit partager l'opinion de M. Lee. Il faut, selon lui, conserver la mention « en fonction » (« serving ») dans le paragraphe i) pour montrer qu'il ne s'agit pas d'ancien chef d'Etat. Dans le même ordre d'idée, il faut conserver la mention « en mission officielle » dans le paragraphe ii).

The *President* said that the discussion would continue on Article III (A)(2).

M. *Ranjeva* indique, concernant le paragraphe III.A.2, que l'expression « prend fin au terme de la fonction » est ambiguë car cette formulation sous-entend qu'il s'agit d'une échéance fixe et irréversible. Or, il peut y avoir des interruptions ponctuelles des fonctions pendant lesquelles les personnes concernées cessent de jouir de l'immunité.

M. *Salmon* déclare être d'accord avec M. *Ranjeva* et suggère de remplacer l'expression « au terme de » par « à l'issue de ». Cela permettrait également de prendre en compte l'existence d'un délai pour la terminaison des immunités.

The *President*, consulting with the Rapporteur, said that the suggestion to replace the words « au terme » in the French version with « à l'issue de » would correspond with the English words “has come to an end” and would be acceptable.

Le *Secrétaire général*, s'exprimant à titre personnel, ne comprend guère la référence à une immunité « fonctionnelle » qui ne correspond à aucune pratique internationale claire. Si, par le biais de la notion d'immunité fonctionnelle, on entend simplement préciser que le but poursuivi par l'immunité est de permettre l'exercice effectif des fonctions qui sont confiées à une personne, il faut le formuler autrement. Et si cela revient simplement à dire que l'immunité est limitée aux actes accomplis dans l'exercice de fonctions officielles, cela ne modifie en rien le caractère personnel de cette immunité.

Mr *von Hoffmann* took issue with the words « international crimes as defined in the present Resolution », noting that the Resolution did not actually define the international crimes it referred to; it merely listed examples of such crimes. Secondly, he expressed concern about the second sentence, which stated that « functional immunity from jurisdiction continues to subsist save that acts which constitute international crimes ... are not to be considered as acts in the performance of a function of the State ». Did this mean that in the case of an international crime being committed, immunity always came to an end or that there was a specific class of international crime which could not be considered as acts in the performance of a function of the State, and



hence there was no immunity? He noted that torture was a classic example of an international crime. An official who ordered torture would almost always do so in some State interest, even if this interest was wrongly conceived. However, under this formulation the official could only be prosecuted where the torture was not an act of a State. Therefore, in his view, there should not be any further qualification; whenever an international crime was committed, there should not be any immunity.

The *President* stated that this was what was said in paragraph 2. He asked Mr von Hoffman if he would be satisfied if the words « as referred to » were substituted for « as defined ».

Mr *von Hoffmann* confirmed that he would be satisfied with that amendment.

Mr *Brownlie* had an analytical problem that underlined the Resolution. He constantly had the feeling that the drafting did not fully observe the basic distinction between the ordinary concept of immunity – which concerned the question of who decides – and the substantive question of immunity where the jurisdictional immunity does not apply and the government or individual must go before a court. The question then became one of material immunity or substantive law. Where there was jurisdiction and no immunity, the question was whether there was a substantive defence based on the concept of immunity. In his view, in Article III, this distinction was not sufficiently maintained and this led to confusion.

M. *Kamto* souligne que le paragraphe III.A 2 ne prend pas en compte l'hypothèse où les fonctions du bénéficiaire de l'immunité ne cessent jamais.

M. *Ranjeva* attire l'attention de l'Institut sur la ligne 4 du paragraphe III.A.2 et en particulier l'expression « tel que définis par la présente Résolution ». Selon lui, il ne revient pas à l'Institut de définir les crimes internationaux mais au droit international. L'Institut ne fait que rappeler certains crimes auxquels la Résolution s'applique. Il suggère en conséquence l'utilisation de la formule suivante : « tel que définis par le droit international et rappelés par la présente Résolution ». Par ailleurs, il indique rejoindre M. Brownlie sur la nécessité d'une clarification terminologique.

M. *Salmon* partage la proposition de MM. von Hoffman et Ranjeva consistant à remplacer de l'expression « Tel que défini par la présente Résolution » par « Visé par la présente Résolution ». Il entend aussi clarifier le sens de l'affirmation contenue dans le paragraphe 2 et selon laquelle « les actes constitutifs de crimes internationaux ne peuvent en

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aucun cas être considérés comme des actes relevant des fonctions d'un Etat ». Ce que l'on veut dire c'est qu'il n'est pas dans les fonctions de l'Etat de commettre pareils crimes. Contrairement à ce qu'a suggéré précédemment M. Guillaume, il ne faut donc pas en avoir une lecture trop formaliste. L'affirmation susmentionnée ne veut pas dire qu'il s'agit d'actes privés car personne ne conteste que les crimes de droit international sont commis avec l'aide de l'appareil étatique et à l'occasion de l'exercice des fonctions officielles.

Mr *Mensah* thought that the point made by Mr Brownlie was important. In his view, the words « as regards the application from immunity from jurisdiction » were creating the problem. He suggested instead to insert the words « within the scope of the present Resolution ». He noted that if that was what was being said, then the Institut was giving the impression that there were cases where such acts could be considered as official acts. He also noted a problem with the word « post », which he found to be confusing and inelegant. He suggested instead « term of office ».

M. *Torrez Bernárdez* partage l'opinion de MM. Brownlie et Salmon. Il souligne l'ambiguïté suscitée par la référence au caractère fonctionnel de l'immunité au paragraphe A.2 qui est consacré à l'immunité personnelle. Cela semble en effet indiquer que le paragraphe s'applique à toutes les catégories énumérées dans le paragraphe 1. Or, s'agissant des membres des missions spéciales, il existe une immunité fonctionnelle qui subsiste au delà de la cessation des fonctions. Au demeurant, cette immunité fonctionnelle n'est codifiée dans aucun instrument international et le droit coutumier est très incertain à cet égard.

Mr *Tomuschat* said that he agreed with the substance of paragraph 2, and that most issues were a matter of drafting. It should not be suggested that acts which constituted international crimes were private acts because that would mean that international crimes cannot be acts of States, which would be unfortunate. He suggested using the words « acts in the performance of the legitimate functions of a State ». This would avoid the possibility of a State rejecting its responsibility by saying that the international crime was the result of some official's private behaviour.

M. *Bucher* exprime son accord avec MM. Salmon et Verhoeven et regrette l'ambiguïté suscitée par la distinction entre l'immunité fonctionnelle et l'immunité personnelle. L'immunité personnelle est également une immunité fonctionnelle. Il invite à supprimer toute référence à celle-ci, ce qui ne changerait rien au sens de la Résolution.

M. *Pellet* partage l'opinion de M. Bucher sur la distinction entre immunité fonctionnelle et immunité personnelle et suggère la formulation

suivante : « l'immunité de juridiction prend fin au terme de la fonction ou de la mission ».

Le *Secrétaire général*, s'exprimant à titre personnel, rappelle qu'il faut nécessairement qu'il y ait une juridiction qui se soit prononcée pour que la réalité du crime soit établie. Il ne peut suffire d'alléguer l'existence d'un crime pour que l'immunité prenne fin. C'est pourquoi il invite les membres de l'Institut à trouver une meilleure formulation, même si ce n'est pas facile.

Mr *Brownlie* stressed that jurisdictional immunities are not about sub-legality but rather who decides which municipal court or other existing court has jurisdiction. The first question was always about the jurisdiction, because if there was no jurisdiction, there was no immunity. Only once jurisdiction had been established did one ask whether there was jurisdictional immunity. If there was none, then at that stage, it was a question of substantive law, as noted by Mr Tomuschat, i.e. whether what was done by a State official was lawful or not. He pointed out that a more up to date consideration concerned acts by way of peacekeeping. The categories of legitimate State acts were quite wide. There were a new series of lawful State acts when the international community decided to tell a State that it had not acted lawfully because it hadn't prosecuted those alleged to have violated human rights. There was a need to make clear distinctions between these subjects.

The *Rapporteur* clarified the approach of the Commission in terms of what she saw as fundamental in relation to international crimes as regards their commission and the effect they have on the immunity of agents or officials who act on behalf of the State. She agreed with Mr Brownlie's three stages in principle, although she also drew attention to the fact that in the *Arrest Warrant* case, the International Court of Justice dodged the first stage (jurisdiction) and went straight to the question of immunity. This could be interpreted as indicating a consensus on the part of the parties that jurisdiction was there, but in international law terms, she was not sure that that stood up as a general proposition. On her own behalf, she thought that she would make the concession that the Resolution was dealing with jurisdiction insofar as it related to the immunity of officials in the area of international crimes, but not in respect of jurisdiction in anything else. It was possible to separate immunity as a jurisdictional problem from the attribution of responsibility in substantive law and other jurisdictional aspects of sufficient connection, such as nationality, residence, etc. What the Resolution was trying to say, which was conveyed by the words "as regards the application of immunity from jurisdiction", was that immunity was being dealt with in isolation. While

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the loss of immunity was a matter of actual law, the jurisdictional requirement that the crime be committed in the forum State had been inserted. She acknowledged that this was a development and required a rethinking, since the Resolution did not enter into the two second stages that Mr Brownlie referred to.

M. *Ranjeva* reconnaît que Lady Fox a apporté d'utiles clarifications. Il indique toutefois que l'utilisation de l'adverbe « néanmoins » dans la première phrase continue d'être une source de confusion car la seconde phrase n'est pas nécessairement une exception à la première phrase en ce qu'il ne s'agit pas de la détermination de la fin des fonctions. Selon M. *Ranjeva*, la seconde phrase est en outre relative à trois différentes questions qu'il conviendrait de distinguer. On y parle d'abord de l'absence de justification de l'immunité, ensuite d'une question de juridiction et enfin de l'immunité proprement dite. Il s'agit de trois problèmes différents qu'il faudrait distinguer et traiter dans l'ordre qu'il vient d'énoncer. M. *Ranjeva* propose en conséquence que l'on rédige un paragraphe 2bis. Le paragraphe 2 devrait se limiter à la première phrase. Le paragraphe 2bis concernerait les crimes de droit international qui ne peuvent pas être rattachés à l'exercice des fonctions de l'Etat. Dans ce nouveau paragraphe, il faudrait également supprimer le verbe « subsiste » qui n'a de sens que s'il est rattaché à la première phrase.

Le *Président* invite M. *Ranjeva* de mettre sa proposition par écrit.

M. *Kamto* n'est pas convaincu que la proposition de M. *Salmon* dissipe tous les problèmes suscités par l'hypothèse d'un chef d'Etat qui s'accroche indéfiniment au pouvoir et qu'il a précédemment évoquée.

Mr *Tomuschat* stated that there were two stages of jurisdiction. The first stage was based on universality, territoriality, nationality, etc. while the second stage looked at whether there was a bar of immunity. As far as second level was concerned, what was lacking was a rule on the implementation of personal immunity or functional immunity. He noted that the problematic area was implementation and the issuance of arrest warrants and suggested that the Resolution might need to deal with this. While it was not necessary to deal with this in relation to State immunity, since one cannot arrest a State, it was necessary to consider powers of arrest in relation to persons. In his view, it would not be sufficient for an authority to arrest a person on the basis of a bare allegation. He suggested that it was necessary to have a rule on how the defence of immunity could be implemented.

M. *Salmon* revient sur la question des allégations auxquelles a fait référence le Secrétaire général. Selon lui, il s'agit d'un problème très

général de preuve qui concerne toute procédure pénale et qui dépasse le cadre des travaux de l'Institut. Il indique en outre que ce problème lui paraît insoluble.

Il souligne également la nécessité de distinguer entre immunité fonctionnelle et immunité personnelle. Le projet de Résolution entend rappeler que l'immunité ne se conçoit pas de manière identique pour toutes les personnes qui en bénéficient. Certaines personnes jouissent d'une immunité qui est attachée à leur personne – dans cette hypothèse l'immunité est totale – alors que pour d'autres l'immunité elle n'est attachée qu'à leur fonction.

M. Salmon indique enfin que l'immunité, par hypothèse, s'applique aussi longtemps que le bénéficiaire est en fonction. Si cette personne s'accroche au pouvoir, la seule solution est de faire une révolution. La question n'est pas différente dans les Etats démocratiques où certains dirigeants essaient d'obtenir le renouvellement de leur mandat. Ce problème ne regarde pas l'Institut. Il s'agit pour l'Institut de prendre une position très claire pour dire qu'à l'issue des fonctions, les crimes ne peuvent jamais être considérés comme une fonction de l'Etat. Cette question ne se pose par conséquent qu'après la fin des fonctions.

Mr *von Hoffman* referred to the problem raised by Mr Verhoeven and other speakers concerning whether one can base jurisdiction over international crimes on a simple allegation vis-à-vis a person or how much one had to go into the substance of the case to found jurisdiction. He argued that this Resolution did not confer jurisdiction to any State in cases of international crimes. The jurisdiction of a given State must be given by its own State law. Once that was established, the bar to the jurisdiction by reason of the immunity claim would arise. Therefore, an authority which wanted to prosecute a person in a third country had to plead that the ground for jurisdiction was satisfied. In this context, there might also be the question of whether it was sufficient to simply plead the commission of an international crime. He drew the attention of the non-private international lawyers to the fact that there were several situations in which jurisdiction was based on material facts. In tort litigation, the place of commission of the tort founded the place of jurisdiction. Therefore it was necessary to go to the substance of the case to base the jurisdiction. Contractual jurisdiction was based on the place of the execution of obligations under contract. One would need to look into the contract to establish the place of execution. This Resolution did not deal with the founding of jurisdiction over acts committed in third States. He stressed that there were often situations where jurisdiction was based on material facts.

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M. *Ranjeva* attire l'attention sur la nécessité d'établir une distinction entre immunité pénale et immunité civile. L'avis consultatif du 29 avril 1999 de la Cour internationale de Justice relatif à *l'immunité de juridiction d'un rapporteur spécial de la Commission des droits de l'homme* montre en effet que le bénéficiaire d'une immunité peut être inquiété tant sur le plan pénal que sur le plan civil. Selon lui, il faut indiquer que, quand l'immunité disparaît, il ne peut subsister d'obstacles aux actions civiles.

Mr *Gaja* suggested amending the wording of paragraph 2 and paragraph B on functional immunity by inserting the phrase: « no immunity from jurisdiction other than personal immunity applies with regard to international crimes ». In his view, neither text as presently drafted said more than that.

Mr *Brownlie* commented on the practicalities of introducing a provision dealing with prosecutions and arrests of suspects. He noted that there was an occasional tendency at the Institut to think that everything was governed by international law and to forget about States. In his view, the precise procedure for introducing a case was within the lawful domain of the State. He observed that it was still common that a point of law precisely on the immunity question would go to the supreme court, as was currently happening in Hong Kong in an important case. The Rapporteur and the Commission should not be burdened with matters which were issues of domestic resolution.

Mr *Cançado Trindade* stressed the importance of adjudicatory powers. International crimes as established or determined by national and international tribunals, human rights as well as international criminal tribunals, did engage properly the international responsibility of States as well as the international criminal responsibility of individuals. He suggested that what were perhaps missing in the present draft Resolution were implementation rules on removing bars to jurisdiction or waiving or removing immunity in such circumstances for the determination of the occurrence of international crimes with all the consequences for States and individuals so as to avoid impunity.

Le *Secrétaire général*, s'exprimant à titre personnel, répète qu'il est nécessaire d'attirer l'attention sur le fait que l'immunité ne peut être exclue sur la seule base d'une allégation et que cela doit partant être mentionné. Si le juge écarte l'immunité alors que le crime n'est pas établi, il faut au moins être assuré que les exigences élémentaires du procès équitable seront respectées. Il faudrait, par conséquent, que le texte précise que des précautions supplémentaires doivent d'une manière

ou d'une autre être prises en ce sens. On ne peut pas complètement ignorer la question.

M. *Pellet* fait remarquer que le Secrétaire général a atténué sa première intervention. Il exprime aussi quelque réserve à l'égard de l'emploi du terme «juridiction». Il invite ensuite à exclure les questions de compétence de l'examen de la Résolution en projet. Certes, l'établissement de la compétence est fondamentale car l'immunité ne se pose que si la compétence est établie. La compétence n'est pas pour autant une question qu'il faut examiner ici.

Mr *Skubiszewski* commented on the question of who issues the arrest warrant. The obvious answer was, if you had a criminal court or tribunal, it depended on the court that acts. The same applied on the international plane. He gave the example of the issuance of the arrest warrant for the President of Sudan by the Prosecutor of the International Criminal Court. He noted that the Security Council Resolution first played an important function, and then the procedures of the International Criminal Court were put into play. If there was an international prosecutor, the matter became fairly simple.

M. *Bucher* partage l'idée qu'il faut laisser de côté les questions périphériques comme celle de la compétence. Il rappelle à cet égard que lors de la session de Cracovie, la distinction entre compétence et immunité a été bien établie lorsque l'Institut a examiné la question de la compétence universelle. Il reconnaît être d'accord avec le Secrétaire général sur l'idée que de simples allégations ne peuvent suffire à exclure l'immunité. Les allégations doivent être fondées *prima facie*. Il indique toutefois qu'il s'agit de problèmes de preuve qui ne doivent pas figurer dans le texte de la Résolution. Il suffit, selon lui, de les avoir présents à l'esprit.

The *President* stated that the discussion had ended with regard to paragraph 2.

La séance est levée à 12 h 55.

### **Sixième séance plénière**

Lundi 7 septembre 2009 (après-midi)

La séance est ouverte à 15 h 15 sous la présidence du premier Vice-président, M. *Roucounas*.

The *President* welcomed the arrival of Mrs Brigitte Stern, who was elected as an Associate Member of the Institute at the Naples Session.

He recalled that the Members were considering the Third Commission's report on International Crimes and Immunities From Jurisdiction of

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States and Their Agents. He indicated that if Members had no further observations to make in respect of Article III (B), Articles III (A)(2) and III (B) would be referred to the Commission with a view to their combination.

The *President* proceeded to consider Article III (C) of draft Resolution 2. He reminded Members that the decision had been taken in respect of Article III (C) that the word “defined” was to be replaced with the words « referred to ».

The *Rapporteur* noted that in the course of the general discussion Article III (C) was compared to a later article, the question being whether paragraph C should read « without prejudice to », consistently with the later article where that term was used. Although she did not have the authority to say so, the *Rapporteur* expressed the view that this has been noted.

The *President* moved to Article IV.

Mr *Feliciano* admitted to being the person who had raised the matter just addressed by the *Rapporteur*. He wished to specify that his original suggestion had been that paragraph C should at the beginning read as follows: « that the above provisions are without prejudice to the application of international law relating to ... ». He stressed that the term application was critical.

The *President* took note of Mr Feliciano’s intervention and proceeded to Article IV (1) relative to immunity of the State.

Mr *Ronzitti* stated that he was quite happy with the paragraph but the problem was one of consistency in referring to international crimes. The paragraph needed to be formulated in order to ensure consistency with previous paragraphs.

Mr *Tomuschat* raised the issue of whether the paragraph should refer to civil proceedings or whether the nature of the proceedings should be left open. Criminal matters had been ruled out in paragraph 1 where it was clear that it related to civil proceedings. He left the matter in respect of Article IV (1) to the *Rapporteur*.

The *President* noted that there were no further observations on paragraph 1 and proceeded to paragraph 2. He drew attention to the fact that there were three words in brackets; namely, the words « should not enjoy ».

Mr *Tomuschat* stated that he did not fully understand paragraph 2 as it seemed to open up a new chapter and one related to jurisdiction. Thus it seemed to add a complement to the Institut’s Krakow Resolution. In any



event, it was not clear to Mr Tomuschat what paragraph 2 meant. The term « wherever committed », could be read as establishing universal jurisdiction in cases where an action was brought against a State anywhere in the world. This would be very unfortunate and indeed dangerous. It constituted a considerable broadening of the clause in paragraph 1 which was derived from the Council of Europe Convention and the UN Convention. That was a traditional clause. Paragraph 2 on the other hand went very much further and was neither necessary nor advisable.

M. *Bucher* estime que M. Tomuschat introduit une confusion. Cette disposition, contrairement au premier paragraphe, ne porte pas sur la compétence des tribunaux ni sur la compétence en général. Elle se réfère simplement à la portée de l'immunité de juridiction ou à son exclusion, alors que le premier paragraphe suppose un lien entre l'action qui est en cause et le territoire de l'Etat dont les tribunaux sont saisis. Ce lien n'est pas exigé au deuxième paragraphe. Les explications sont dans le rapport. Ce dernier explique que ce paragraphe figure dans la partie *de lege ferenda*. Le paragraphe 2 supprime l'exigence d'un lien du lieu de l'action avec le territoire du tribunal qui est saisi. Bien que l'on puisse être d'accord ou non, dire que cela va au-delà de ce qui est dit par la Convention des Nations Unies et par la Convention du Conseil de l'Europe semble être particulièrement faible ; l'Institut a en effet le droit de proposer d'aller plus loin. La Convention du Conseil de l'Europe a, par exemple, près de quarante ans.

M. *Bucher* passe à un autre point, qui porte sur la toute dernière partie de la disposition, à partir du terme « sauf à établir ». Il considère que ceci porte sur le fond du litige et que cette partie de la disposition devrait être supprimée. Il laisse cependant cette question à la Commission.

Le *Président* invite M. *Bucher* à formuler sa proposition par écrit.

M. *Bucher* dit que cela serait un peu excessif, car il suggère simplement de supprimer une partie de la disposition.

S'exprimant à titre personnel, le *Secrétaire général* souligne qu'il ne comprend pas l'intérêt du deuxième paragraphe. Si l'Etat a volontairement réparé, la question de l'immunité ne se pose plus dès lors qu'il n'y a plus de litige au civil. Et si l'Etat n'a pas volontairement réparé, on ne voit pas comment on peut lui enlever son immunité alors qu'il n'est pas établi qu'il doit réparer.

M. *Bennouna* rappelle qu'il a précédemment souligné la difficulté d'articuler les paragraphes 1 et 2. En effet, soit il n'y a pas d'immunité de juridiction du tout, quel que soit le lieu, et on n'a pas dès lors besoin du paragraphe 1 qui est plus restrictif, soit on est dans la situation où l'on

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distingue entre la *lex lata* dans le premier paragraphe et la *lex ferenda* dans le deuxième paragraphe. Il pense que si le paragraphe 1 est maintenu, on ne comprend pas pourquoi le paragraphe 2 est présent. Mais si le paragraphe 2 est maintenu, il faudrait supprimer le paragraphe 1 parce que le paragraphe 2 est beaucoup plus large que le premier. M. Bennouna estime en outre que l'Institut ne devrait pas se prononcer sur le deuxième paragraphe aujourd'hui, car ce débat aura lieu ailleurs. Enfin, il estime que la dernière partie de la phrase porte sur une question de fond et ne devrait pas figurer dans la Résolution. Il propose même que la Commission supprime le paragraphe 2.

Mr *Ronzitti* stated that he considered that paragraph 2 was very clear. The question was whether it was advisable to leave the paragraph where it was. He proceeded to identify two problems. The first was whether the proposal was *lex lata* or *de lege ferenda*. If it was the latter, then it seemed to him strange to have one paragraph *lex lata* and another *de lege ferenda*. The paragraph was in his view very clear because there was a parallel between universal criminal jurisdiction and universal civil jurisdiction. But there were two problems. Firstly if the paragraph was kept, the statement in paragraph 1 would be undermined. The second problem was in relation to the second part of the paragraph which referred to reparations made by a State. Reparation meant not only compensation but might also entail satisfaction; whereas an individual who had suffered from an international crime would only seek compensation. That said, he agreed with Mr Bennouna and would like paragraph 2 to be deleted.

Mr *Pocar* found the two paragraphs problematic. He began with the second part of paragraph 2, indicating that it was clearly unnecessary since it pertained to the merits and not to the question of immunity. Moreover, in theory, if accepted in respect of paragraph 2 it should work also for paragraph 1. This was no doubt the source of the difficulty since the aim was probably to place more restrictions on the exercise of jurisdiction in paragraph 2. If one accepted the principle that once the State had made reparation for unlawful conduct, in theory the principle should apply in all situations. Nonetheless he was of the view that that part of the paragraph should be removed. As to the paragraph as a whole, were it to be removed but paragraph 1 retained, then the Institut would not be taking a position, in which case, it should explicitly say so.

Mr *von Hoffmann* stressed that neither paragraphs dealt with international jurisdiction. Neither conferred jurisdiction on a State. Nonetheless, paragraph 1 took a criterion which was commonly connected with international jurisdiction since it referred to acts or omissions which had

taken place in other States and this allowed a waiver of immunity insofar as civil and criminal law was concerned. But according to paragraph 2, in the event that there was no local connection of the forum with the commission of the international tort, then there was only restricted immunity in civil jurisdiction. This was in his view inconsistent as it mixed up criteria of immunity and criteria of international jurisdiction. He recalled that in respect of Article II, the Members did not state that a waiver of immunity was justified by reason of a certain proximity between the forum State and the place of the commission of the international crime. Therefore he felt that the Members should refrain from introducing the jurisdictional aspect of a connection between the crime and the forum State. Instead there should be a unique regime for the removal of immunity and the only ground for such removal was that there be an international crime, whether it be in respect of a civil or criminal matter.

Mr *Dugard* stressed that it was important to understand the purpose of the two provisions, neither of which was to confer jurisdiction on a court, but rather to deal with the immunity which might be raised if jurisdiction already existed. Paragraph 1 of the draft Resolution stated that under existing law, if a foreign State caused the death of a person in the forum State and raised the plea of immunity, then immunity would not apply in respect of the international crime. Thus it was concerned with immunity only. Paragraph 2 was concerned with a State having universal civil jurisdiction legislation, such as the United States' *Alien Tort Claim Act* which enabled US federal Courts to exercise jurisdiction over anyone or any State responsible for committing an international crime in any State in the world. Paragraph 2 stipulated that the State would not have immunity if the conduct constituted an international crime. Mr *Dugard* pointed out that this was controversial. As was well known, States often raised immunity and this was frequently upheld. In contrast, the paragraph, which might be *de lege ferenda*, stated that it should not be upheld, but nonetheless qualified this insofar as reparation may have been made. Thus it was only concerned with immunity.

M. *Pellet* se rallie à la suggestion de M. *Pocar* de supprimer le membre de phrase « sauf à établir que l'Etat a exécuté son obligation de réparation conformément au droit international conventionnel ou coutumier ». Il estime que l'appréciation de l'exécution par l'Etat de son obligation de réparation ne peut se faire *ex ante*, c'est-à-dire sans détermination de la juridiction au préalable. Il constate qu'il existe un problème d'articulation entre le paragraphe 2 et le paragraphe 1 si les deux paragraphes sont formulés au présent. Si l'on souhaite conserver les deux paragraphes, le

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paragraphe 1 doit être rédigé au présent et le paragraphe 2 au conditionnel. C'est pourquoi il indique qu'il est nécessaire de déterminer s'il faut rédiger le paragraphe 2 au conditionnel ou à l'indicatif du présent. Exprimant son désaccord avec M. Bennouna, il propose de conserver le paragraphe 2 dans la mesure où le préambule du projet de Résolution précise que cette dernière est *de lege lata* et *de lege ferenda*. Il suggère de supprimer le paragraphe 1 et de libeller le paragraphe 2 comme suit : « Un Etat ne bénéficie pas de l'immunité de juridiction civile devant les juridictions nationales d'un autre Etat pour les actes constitutifs de crimes internationaux tels que définis dans la présente résolution, où qu'ils aient été commis ».

Le *Président* invite M. Pellet à préciser s'il souhaite introduire un amendement.

M. *Pellet* suggère de supprimer le paragraphe 1 et de conserver le paragraphe 2 à l'indicatif du présent sans le dernier membre de phrase relatif à la réparation.

M. *Salmon* fait part de sa perplexité en ce qui concerne les deux paragraphes. Il se rallie à la suggestion des Membres qui l'ont précédé de supprimer le dernier membre de phrase relatif à la réparation. Il indique que si l'on ne conserve que le premier paragraphe, on introduit implicitement un élément pour établir le fondement de la compétence : la compétence territoriale. L'immunité ne serait en cause que si il y a compétence et si celle-ci est territoriale. Certains intervenants ont certes soutenu qu'il ne convenait pas de traiter les questions de compétence et qu'il fallait se limiter aux questions d'immunités proprement dites. Ce point de vue est discutable. L'idée est que la victime ne doit pas se voir opposer une immunité, peu importe le fondement sur lequel la juridiction est saisie. La victime doit également bénéficier de la protection en cas de compétence personnelle fondée sur la nationalité de la victime. Il suggère de prévoir une formule générale qui préciserait que l'interdiction prévue au paragraphe 1 ne concerne que la question de l'immunité et est sans préjudice de la question de la recevabilité. Cela permet de ne pas changer les positions de l'Institut quant aux conditions nécessaires pour la recevabilité en cas de compétence universelle. Il propose donc de fusionner les deux paragraphes, tout en insérant une formule qui indique que ledit paragraphe est sans préjudice des questions de compétence.

Mr *Tomuschat* said that paragraph 2 should not be in the draft Resolution as it stands and should be deleted. The ideas behind this paragraph were not clear. He agreed with Mr Dugard and Mr Bucher that there was a distinction to be made between jurisdiction and immunity. But the line

between the two was a very thin one. He indicated that the issue should be looked at more carefully by the First Commission on Universal Jurisdiction in Civil Matters in Private International Law. Responding to Mr Bucher, he indicated that the drafting of paragraph 2 was confusing for the reader who might not be aware of where the distinction lay between the two topics.

Mr *Müllerson* said that, in his opinion, there should be only one paragraph. He observed that it was not important to determine which paragraph should be kept since both had to be modified. As regards paragraph 2, he would suggest deleting « wherever committed », and adding the phrase « if a foreign court has jurisdiction under international law », in order to avoid the confusion between jurisdiction and immunity.

Le *Secrétaire général*, s'exprimant à titre personnel, ne juge guère convaincantes les références à la jurisprudence américaine, et plus particulièrement à l'application qui a été faite de l'*Alien Tort Statute* par les tribunaux dont les décisions sont pour le moins sujettes à caution. Cela dit, il rappelle que l'Etat n'est qu'une entité abstraite qui n'agit jamais que par l'intermédiaire de personnes physiques. Il lui semble que l'immunité personnelle dont celles-ci bénéficient le cas échéant peut être mise en cause par une condamnation de l'Etat, par exemple à la suite d'actes accomplis par un chef d'Etat ou un ministre des affaires étrangères. Ce serait une façon assez aisée de détourner l'immunité dont bénéficient en principe ceux-ci. Convendrait-il dès lors d'introduire quelque clause cherchant à prévenir la destruction de l'immunité personnelle sur la base d'une décision fondée sur la faute de la personne abstraite ? Il n'y est pas personnellement favorable, mais la commission pourrait y réfléchir.

M. *Bennouna* déclare ne pas être sûr de la portée de la remarque de M. Dugard. Il exprime une réserve quant à sa suggestion visant à lire le paragraphe 2 à la lumière de la pratique américaine et notamment de l'*Alien Tort Claims Act*. Il souhaite appuyer l'interprétation de M. Pocar sur la relation entre le paragraphe 1 et le paragraphe 2. Il indique que le fait de conserver le paragraphe 1 n'implique pas *a contrario* une suppression du paragraphe 2. Il suggère que le paragraphe 2 puisse devenir une clause de réserve formulée comme suit : « L'Institut réserve la question de l'immunité de juridiction civile devant les juridictions nationales d'un autre Etat pour les actes constitutifs de crimes internationaux tels que définis par la présente résolution, où qu'ils aient été commis ». Il exprime son soutien à M. Salmon et indique que la suppression du paragraphe 2 ne doit pas laisser supposer que le projet de Résolution se limite à la juridiction territoriale. Il lui semble qu'il faut

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éviter de s'aventurer dans une *lex ferenda* futuriste et imaginative. Il trouve regrettable que le projet de Résolution couvre tant l'immunité de juridiction pénale que l'immunité de juridiction civile. C'est là la raison des difficultés que connaît le projet. Il aurait fallu se limiter à l'immunité de juridiction pénale.

M. *Bucher* se rallie aux commentaires de M. Tomuschat. Il recommande que le débat sur la compétence universelle soit réservé à la 1<sup>ère</sup> commission. Il invite à la prudence sur la suppression du paragraphe 2 car il pourrait être inféré *a contrario* du paragraphe 1 qu'il existe une immunité de juridiction dans les hypothèses où il n'existe pas de lien entre l'acte et le territoire de l'Etat dont les tribunaux ont été saisis. Si cette interprétation doit prévaloir, les tribunaux ne seraient pas compétents pour une raison juridictionnelle. Il précise que cette interprétation préjugerait également des travaux sur la compétence universelle des tribunaux en matière civile. Il considère que la solution de sagesse est celle qui est proposée par M. Pocar. Le paragraphe 1 doit refléter la *lex lata* et le paragraphe 2 réserver la question.

Le *Président* prend note de la proposition de réserver le paragraphe 2.

Mr *Lowe* asked if situations in which a State made an *ex gratia* payment without admitting liability would be covered by paragraph 2.

The *Rapporteur* said that the Third Commission left for elucidation elsewhere a great number of matters. She considered that if the Institut were to allow *lex ferenda* then the phrase would be "should not enjoy immunity" rather than a positive statement of an existing rule. She added that the preamble of the draft Resolution should make absolutely clear that compensation was only one of many measures and solutions. Other solutions should also be pursued. She indicated that the First Commission had no *Rapporteur* and it was not likely that it would be producing any work in the next session.

The *President* invited Members to move on to the consideration of paragraph 3.

M. *Kohen* remercie le Président et félicite le Rapporteur pour son excellent rapport. Il souhaite attirer l'attention du Rapporteur sur les alinéas b) et c). Il estime qu'il n'est pas nécessaire de se référer explicitement dans une résolution de l'Institut au problème de la rétroactivité des dispositions compte tenu du fait que la non-rétroactivité est la règle générale. Il indique, en outre, que l'alinéa b) prête à confusion car il laisse croire que les dispositions du projet pourraient être rétroactives si elles sont de *lex lata*. Il suggère de supprimer l'alinéa b). Il propose également la suppression de l'alinéa c) car il va à l'encontre de

l'économie générale du projet. Il exprime des doutes sur la pertinence d'exclure du projet les crimes internationaux commis par des forces armées étrangères qui se trouvent sur le territoire de l'Etat.

Mr *Ronzitti* was puzzled by the language of sub-paragraph c). In agreement with Mr Kohen, he underlined that it was very strange that the draft Resolution did not admit immunity in the case of crimes committed in the forum State because of the existence of bilateral treaties exempting foreign forces. He suggested the deletion of sub-paragraph c).

M. *Momtaz* fait part de ses préoccupations en ce qui concerne les alinéas b) et c). Comme M. Kohen, il suggère également de supprimer l'alinéa b). Il lui semble qu'il faut interpréter l'alinéa c) de manière positive. Il suggère de rédiger celui-ci comme suit : « [...] sont sans préjudice des dispositions prévues par les conventions internationales portant sur le statut des forces étrangères sur le territoire d'un autre Etat en vue d'assurer la répression des crimes internationaux commis sur le territoire de cet Etat ».

M. *Remiro Brotons* est d'accord avec M. Kohen sur la suppression de l'alinéa b).

Mrs *Xue* drew the attention of her confrères and consœurs to several questions. As regards sub-paragraph a), she wondered to what extent the Third Commission really meant to exclude rules of State responsibility. She pointed to the fact that the Commission was not clear on this point. As regards sub-paragraph b) she said that the element of non-retroactivity might be misleading. As regards sub-paragraph c), she wondered why the Commission neglected peacekeeping operations and why there was more focus on bilateral relations than on multilateral relations. She insisted that it was important to clarify the policy direction of paragraph 3.

M. *Bennouna* rappelle qu'il faut être prudent avec les dispositions finales dans un texte. Il note que ce genre de dispositions porte atteinte dans certains cas à l'intégrité du texte. Il souligne que nul au sein de la communauté internationale ne comprendrait que le statut des forces armées conventionnelles soit exclu du projet de Résolution. En tout état de cause, il estime que l'Institut doit éviter que le discrédit soit jeté sur le projet dans son ensemble. Il est en faveur de la suppression de l'alinéa c). Il fait part de ses doutes sur l'amendement proposé par M. Momtaz. Il exprime son accord avec M. Kohen qui suggère de supprimer l'alinéa b), ainsi que quelques réticences sur l'alinéa a) considérant qu'il va de soi que la responsabilité internationale n'est pas concernée relatif à l'immunité de juridiction devant des tribunaux nationaux. Il indique que la suppression du paragraphe 3 serait bénéfique.

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M. *Abi-Saab* rappelle que tous les Etats ont en vertu de l'article 1<sup>er</sup> commun aux conventions de Genève une obligation de respecter et de faire respecter le droit humanitaire, ainsi qu'une obligation de poursuivre ou d'extrader ceux qui violent ses dispositions. Il estime que l'alinéa c) va à l'encontre de l'article 1<sup>er</sup>. C'est une raison supplémentaire de supprimer l'alinéa c). Il exprime son soutien à M. Bennouna.

Mr *Simma* noted that sub-paragraph c) was complicated. He underlined that the idea behind the Status of Forces Agreements (SOFA), was that if the territorial State did not have jurisdiction to punish crimes committed by members of foreign armed forces, it was up to the forum State to see that crimes committed by its armed forces were duly punished. He considered that this was without prejudice to the situation in which the stationing state lived up its obligations and punished the crimes committed by its armed forces. He voiced his agreement with Mr *Abi-Saab* and proposed that sub-paragraph c) should be supplemented by incorporating the idea of complementarity. He stated that sub-paragraph b) did not make any sense and shared the concern of Mr *Kohen*. He added that the draft Resolution did not give any indication on what was meant by "progressive development". It was clear to him that sub-paragraph b) should be deleted. As regards sub-paragraph a), he pointed to Article 48 of the Articles on State Responsibility. He suggested that sub-paragraph a) be redrafted.

Mr *Feliciano* observed that if the phrase « without prejudice to the application of » was included, it would clarify sub-paragraph a) and alleviate the concerns of Mrs *Xue*.

M. *Lalive* souscrit aux observations critiques de MM. Bennouna et *Simma*. Comme M. *Kohen*, il estime que l'alinéa b) implique une interprétation *a contrario*. Il note que l'alinéa a) pourrait entrer en conflit avec les paragraphes 1 et 2. Il suggère la suppression du paragraphe 3 dans son ensemble.

Mr *Ronzitti* declared that sub-paragraph c) had nothing to do with criminal jurisdiction. He considered that the *raison d'être* of sub-paragraph c) in the context of paragraph 1 was to prevent civil proceedings against the foreign state's stationing forces in the forum state. He reiterated that sub-paragraph c) should be deleted in order not to undermine paragraph 1.

M. *Salmon* se rallie à la position de M. Bennouna. Il précise qu'il est inutile de conserver l'alinéa b). Il exprime son désaccord sur la formule proposée par M. *Momtaz* car l'alinéa c) a trait à la responsabilité civile et non à la responsabilité pénale.



Mr *Lee* agreed with Mr *Simma* as regards sub-paragraph a). He suggested including « if applicable » at the end of the sentence.

Mr *von Hoffmann* agreed that sub-paragraph b) might not always make sense. However, he suggested keeping the text of sub-paragraph b) because compliance with these new rules restricting immunity would depend to a certain extent on the exclusion of the crimes committed in the past.

The *Rapporteur* commented that it was clear that the provision in Article IV (3) was not satisfactory and that consideration needed to be given either to its deletion or amendment, but that for the time being she would only go so far as to indicate that in the final version, it would not be as it currently stood.

The *President* clarified the decision that suggestions must be made in writing; that once these were submitted, the Secretariat would prepare the text and distribute it to the Commission and to the Members having made the proposal. The Commission would look into the suggestions and it would be up to the author of the suggestion to table it formally as an amendment if the Commission did not take it up.

Avant de suspendre les travaux, le *Secrétaire général* annonce que le groupe de travail portant sur la piraterie qui est placé sous la direction de M. Treves, a pour membres Mme Bastid-Burdeau, ainsi que Messrs Cafilisch, Caminos, Kirsch et Mensah.

La séance est levée à 17 h 10.

**Huitième séance plénière**                      Mardi 8 septembre 2009 (après-midi)

La séance est ouverte à 16 h 10 sous la présidence de Mme *Lamm*, deuxième Vice-présidente, qui signale qu'un nouveau projet de résolution a été élaboré. Il se lit comme suit :

DRAFT RESOLUTION 3

*The Institute of International Law,*

*Mindful* that the Institute has addressed the jurisdictional immunities of States in the 1891 Hamburg Resolution on the Jurisdiction of courts in proceedings against foreign States, sovereigns and heads of State, the 1954 Aix-en-Provence Resolution on Immunity of foreign States from jurisdiction and measures of execution, the 1991 Basle Resolution on the Contemporary problems concerning immunity of States in relation to questions of jurisdiction and enforcement and in the Vancouver 2001 Resolution on Immunities from jurisdiction and execution of Heads of

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State and of Government in International Law ;

*Conscious* that under conventional and customary international law and practice of States, a State has an obligation to protect the human rights of all persons within its jurisdiction ;

*Conscious* of the underlying conflict between immunity from jurisdiction of States and their agents and claims arising from international crimes ;

*Desirous* of making progress towards a resolution of that conflict ;

*Recognizing* that the removal of immunity from proceedings in national courts is one way by which effective reparation for the commission of international crimes may be made ;

*Conscious* of the fact that the present Resolution reflects both international law as it stands and future trends and developments ;

*Adopts* the following Resolution :

#### **Article I: Definitions**

1. For the purposes of the present Resolution « International crimes » means crimes recognised under international law as particularly grave, such as genocide, crimes against humanity, torture and war crimes, as reflected in relevant conventions and the statutes and jurisprudence of international courts and tribunals.

2. For the purposes of the present Resolution « jurisdiction » means the criminal, civil and administrative jurisdiction of the national courts of one State as they relate to the immunities of another State and its agents conferred by treaties or customary international law.

« an »

#### **Article II: Principles**

1. Immunities are provided to enable an orderly exercise of jurisdiction in disputes concerning States in accordance with international law, to respect the independence and equality of States and to ensure the effective performance of the functions of persons who act on behalf of States.

2. Pursuant to international conventions and customary international law, States have an obligation to prevent and suppress international crimes. When a State fails in that obligation, other States may act in the interest of the international community to remedy this default in accordance with international law.

**Article III: Immunity of persons who act on behalf of a State**

A. Personal Immunity

1. The following persons enjoy personal immunity from jurisdiction as conferred by international conventions or customary international law as follows :

- i) The serving Head of State and the serving Head of Government throughout the period of their office wherever they may be;
- ii) Foreign ministers and other members of the government of a State when on an official mission and present in a receiving State, or in transit in a third State ;
- iii) Members of special missions within the meaning of the Convention of 1969 on Special Missions, and members of permanent missions to international organizations (and delegations to conferences of international organizations) when present in the receiving State, or in transit in a third State ;
- iv) Serving members of the diplomatic and consular mission when present in a receiving State, or in transit in a third State ;
- v) All other persons acting on behalf of the State who enjoy personal immunity under international conventions or customary international law.

2. When the post or the mission of a person enjoying personal immunity has come to an end such personal immunity ceases.

B. Functional Immunity

Although functional immunity from jurisdiction continues to subsist for acts considered to be acts in the performance of a function of the State, no immunity applies with regard to international crimes.

C. The above provisions are without prejudice to :

- a) the responsibility of the persons referred to in A and B above under international law;
- b) the attribution to the State of the acts of any such person constituting international crimes.

**Article IV: Immunity of the State**

1. A State enjoys no immunity from civil jurisdiction before the national courts of another State in a proceeding in respect of international crimes caused by an act or omission of the State, if the act or omission occurred in whole or in part in the territory of that other State.

2. A State enjoys immunity from the civil jurisdiction of the national courts of another State, which has jurisdiction under

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international law over international crimes, unless it is established that it has not performed its obligations to make effective reparation in accordance with the applicable international conventions or customary international law.

3. The above provisions are not retrospective in so far as they do not reflect the state of the law in existence at the time of the commission of the international crime.

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The *President* requested Lady Fox to introduce the text of revised draft Resolution 3 so that a discussion on its provisions could follow.

The *Rapporteur* thanked the President and explained that the new draft Resolution – only in English for the time being (the French text will come later) – took into account all the proposals and suggestions put forward by the Members during the previous discussions. Those suggestions read as follows<sup>8</sup> :

*SUGGESTION 1 présentée par M. Skubiszewski*

#### **Article II : Principes Règles générales**

1. Conformément au droit international conventionnel et coutumier, un Etat a l'obligation d'assurer la protection des droits de l'homme à toute personne relevant de sa juridiction. Lorsque cet Etat manque à cette obligation, les autres Etats peuvent agir ~~dans l'intérêt de la communauté internationale~~ et conformément à la présente Résolution afin de remédier à ce manquement.

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#### **Article II : Principles General rules**

1. Pursuant to international conventions and customary international law, a State has an obligation to afford protection of human rights to all persons within its jurisdiction. When it fails in that obligation, other States may act in the interest of the international community to seek to remedy its default in accordance with the present resolution.

*SUGGESTION 2 présentée par M. Pellet*

#### **Article II : Principes**

1. ~~Conformément au droit international conventionnel et coutumier, un Etat a l'obligation d'assurer la protection des droits de l'homme à toute personne relevant de sa juridiction.~~ Lorsque cet Etat manque à cette

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<sup>8</sup> Au sein des suggestions les textes barrés sont des propositions de suppression et les textes en gras sont des propositions d'ajouts.

~~obligation à son obligation de prévenir et de réprimer les crimes internationaux~~, les autres Etats ~~peuvent~~ **doivent** agir dans l'intérêt de la communauté internationale ~~et conformément à la présente Résolution~~ afin de remédier à ce manquement.

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### Article II: Principles

1. ~~Pursuant to international conventions and customary international law, a State has an obligation to afford protection of human rights to all persons within its jurisdiction. When it fails in that obligation to discharge its obligation to prevent and suppress international crimes, other States may~~ **must** act in the interest of the international community to seek to remedy its default ~~in accordance with the present resolution.~~

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*SUGGESTION 3 presented by Mr Momtaz*

M. Momtaz wishes to replace the terms « violations graves » with the terms « infractions graves » throughout the French version of the draft Resolution in order better to reflect the English concept of « grave breaches ».

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M. Momtaz souhaite remplacer, dans tout le texte du projet de résolution, l'expression « violations graves » par celle de « infractions graves », en traduction de la notion anglaise de « grave breaches ».

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*SUGGESTION n° 4 présentée par MM. Kirsch, Meron, Tomuschat*

### Article I : Définitions

1. Pour les besoins de la présente résolution, « crimes internationaux » s'entend des crimes reconnus comme particulièrement graves par le droit international, tels que le génocide, les crimes contre l'humanité ou les crimes de guerre, ainsi qu'il ressort des passages pertinents des traités internationaux, ainsi que des statuts des juridictions pénales internationales et de leur jurisprudence.

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### Article I: Definitions

1. For the purposes of the present Resolution « International crimes » means crimes recognised under international law as particularly grave, such as genocide, crimes against humanity and war crimes, as reflected in

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relevant conventions and the statutes and jurisprudence of international criminal courts and tribunals.

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*SUGGESTION 5 presented by Mr Feliciano*

**Article II: Principles**

**Option A**

1. Under conventional and customary international law, a State has an obligation to protect the human rights of all persons within its jurisdiction. [.....]

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**Article II: Principles**

**Option B**

1. Under conventional and customary international law, a State has an obligation to protect the human rights of all persons within its jurisdiction. When it fails in that obligation, other States may act, on behalf and with the authorization of the international community, to seek to remedy that default **in good faith** in accordance with the **requirements of international law**.

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*SUGGESTION 6 presented by Mr Skubiszewski*

1. During the discussion it was pointed out that the express indication, in the first Draft, of what constituted the *lex lata* and the *lex ferenda* was relevant and helpful. I agree. For that reason, in view of the fourth preambular paragraph of draft Resolution 2, I suggest that whenever the Resolution states the « trends and developments » (in contradistinction to law), it should use language to emphasise this in order to avoid any confusion between the law as it is and the law as it should be. In this respect, for instance, Article IV, paragraph 3, subparagraph b, seems not to be quite clear.

2. Article II, paragraph 3 : could not something more specific be said on, first, the meaning of the “balance” and, second, on how that « balance » could be achieved ?

*SUGGESTION 7 submitted by Mr Tomuschat*

### **Article II**

1. Pursuant to international conventions and customary law, [a/every] State has an obligation to prevent and suppress international crimes perpetrated within its jurisdiction, and to make adequate reparation.

i) In discharging this obligation, States enjoy a [wide/certain] measure of discretion.

ii) The organs of the international community, both at regional and universal levels, are also called upon to take adequate punitive and remedial measures within the framework of their [powers/jurisdiction].

iii) In accordance with international law, other States may also be called upon to take appropriate measures. To the extent that legal actions before their courts are envisaged, the following articles shall apply.

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*SUGGESTION 8 présentée par M. Ranjeva*

### **Article III**

A.

i) Supprimer « en fonction ».

ii) Nouvelle rédaction :

« Les ministres des affaires étrangères et lorsqu'ils sont en mission officielle et présents sur le territoire de l'Etat d'accueil, ou en transit dans un Etat tiers, les autres membres du gouvernement d'un Etat » ;

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*SUGGESTION 9 presented by Mr Cançado Trindade*

### **Statement by Mr Cançado Trindade**

Having had the occasion to read carefully draft Resolution 2, I will submit proposals to Articles I and II, in a constructive way, so as to ameliorate the drafting of **Definitions** and **Principles**. As to Article I (1), I believe the Definition should bring together the operation of both national and international courts. As to these latter, I have in mind the case-law, already referred to, not only of the International Court of Justice, of the European Court of Human Rights, and of contemporary international criminal tribunals, but also of the Inter-American Court of Human Rights. I have in mind a series of decisions of this latter, in a cycle of massacre cases, such as its Judgments in the cases of *Barrios Altos* (2001), *Plan de Sánchez* (2004), *Mapiripán* (2005), *Moiwana Community* (2005), *Pueblo*

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*Bello (2006), Ituango (2006)*. In those cases, as well as in that of *Myrna Mack Chang (2003)*, the Court was faced with State-planned and State-perpetrated crimes, engaging aggravated State responsibility, and removing any bar to jurisdiction, either at national or international level.

In the light of this consideration, I propose an amendment to Article I (1), with an addition, so as to read: «For the purposes of the present Resolution ‘International crimes’ means crimes recognized by the international community, **and set forth in international conventions and instruments and in international case-law**, as particularly grave, such as genocide, crimes against humanity, torture, grave breaches of the 1949 Geneva Conventions for the protection of war victims, and other serious violations of international humanitarian law committed in international or non-international armed conflicts ».

My second proposal is in the form of an amendment to Article II (1) of the draft, so as to bring together International Human Rights Law and general International Law, and thus to enhance the formulation of the principle. Article II (1) would then read, with two additions, as follows :

« 1. Pursuant to international conventions and customary international law, a State has an obligation to afford **effective** protection of human rights to all persons within its jurisdiction. When it fails in that obligation, other States may, **parallel to inter-State complaints under [certain] human rights conventions**, act in the interest of the international community to seek to remedy its default in accordance with the present resolution. »

These are the two suggestions that I see it fit to submit to the consideration of the plenary of the Institut, of the 3<sup>rd</sup> Commission and of the Rapporteur, so as to improve the draft. My intention is to foster an approximation between International Human Rights Law and International Criminal Law, and to bring into the picture general International Law. It is further my intention to bring necessarily together national and international tribunals.

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*SUGGESTION 10 presented by Mr Pinto*

**Suggestion for Article II:**

1. Delete paragraph 1. The first sentence is unnecessary. States do not need to be reminded of their obligations to persons on their territory, and the effect of reminding them is obscure. In any case, it is not only the protection of human rights, for which they are responsible.



The second sentence, to the extent that it permits unauthorized, unspecified, unilateral action to remedy an alleged default on the part of the State, it opens the door to intervention in the affairs of the allegedly defaulting State that is the preserve of the Security Council alone acting under Chapter VII of the Charter.

2. Paragraphs 2 and 3 should be merged in the Preamble.
3. Delete Article II (Principles).

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*SUGGESTION 11 présentée par M. Remiro Brotons*

**A l'article III paragraphe A. lettre 2 :**

Supprimer :

« Néanmoins, l'immunité de juridiction fonctionnelle subsiste, sauf en ce qui concerne les actes »

pour affirmer :

« Les actes constitutifs de crimes internationaux, tels que définis par la présente Résolution ne peuvent en aucun cas être considérés comme des actes ..... ».

Justification :

L'immunité fonctionnelle subsiste en tout autre cas, mais le titre de la résolution nous permet de présenter la juridiction sur les crimes en termes plus affirmatifs.

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*SUGGESTION 12 présentée par M. Ranjeva*

**Article I**

Nouvelle proposition pour le paragraphe 2

« 2. L'immunité de juridiction prend fin avec la cessation de la fonction ou de la mission de la personne en bénéficiant.

2bis L'immunité de juridiction ne vise [couvre] pas les actes constitutifs de crimes internationaux tels que visés par la présente résolution [lesquels ne peuvent être, en aucun cas, rattachés aux actes relevant des fonctions d'un Etat]. »

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*SUGGESTION 13 présentée par M. Pellet*

**Article III paragraphe 2**

2. L'immunité de juridiction prend fin au terme de la fonction ou de la mission de la personne en bénéficiant en ce qui concerne les crimes internationaux au sens de la présente résolution, qui ne peuvent en aucun cas être considérés ...[reste sans changement].

[A mon sens, il conviendrait d'inverser l'ordre des paragraphes A.2 et B].

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*SUGGESTION n° 14 présentée par M. Kirsch*

**Article II : Principes**

**Paragraphe 1, second sentence, on basis of Pellet's suggestion**

« ... other States,

as well as international courts and tribunals [in the exercise of their (respective) jurisdiction] must... »

\*\*\*\*

« ... les autres Etats,

De même que les cours et tribunaux pénaux internationaux [dans l'exercice de leur compétence (respective)] doivent ... »

**Questions :**

1. La référence à l'intérêt de la communauté internationale est-elle nécessaire ?
2. Faut-il une référence au droit international en relation avec l'acte des Etats ?

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*SUGGESTION 15 presented by Mr Gaja*

**Suggestion for Article III:**

Replace the second sentence of section A (2) and section B with the following text :

« No immunity from jurisdiction other than personal immunity applies with regard to international crimes ».

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*SUGGESTION 16 présentée par M. Pellet*

**Article IV paragraphes 1 et 2**

1/2. Un Etat ne bénéficie pas de l'immunité de juridiction civile devant les juridictions nationales d'un autre Etat pour les actes constitutifs de crimes internationaux au sens de la présente résolution, où qu'ils aient été commis.

[Donc : supprimer le paragraphe 1 et la fin du paragraphe 2].

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*SUGGESTION 17 présentée par M. Salmon*

**Article IV paragraphes 1 et 2**

Remplacer les paragraphes 1 et 2 par le paragraphe suivant :

« Sans préjudice des fondements pouvant justifier la compétence des juridictions du for, un Etat ne bénéficie pas de l'immunité de juridiction civile devant des juridictions nationales d'un autre Etat dans le cas d'une procédure relative à des crimes internationaux tels que visés par la présente résolution et résultant de l'action ou de l'omission de cet Etat. ».

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*SUGGESTION 18 submitted by Mr Müllerson*

**Article II**

Proposal to Article II

« A State enjoys no immunity from the civil jurisdiction of a national court of another State, if such a court has jurisdiction under international law, unless it is established that the State has performed its obligations to make reparation in accordance with the applicable international conventions or customary international law. »

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*SUGGESTION 19 presented by Mr Von Hoffmann*

**Suggestion for Article II (3):**

There is a conflict between protection of human rights and jurisdictional immunity of States and persons acting on their behalf. The traditional understanding has been that immunity always prevails over the protection of human rights in third countries. Today consensus has emerged (is emerging) that in case of international crimes effective international protection has to be safeguarded by access to law courts in countries not involved in those crimes.

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*SUGGESTION 20 presented by Mr Lowe*

**Article IV, 2**

I think that it would be helpful to indicate (perhaps in a commentary) whether a payment made by a State *ex gratia* and without admission of responsibility counts as a performance by the State to make reparation within the meaning of article IV.2.

My impression is that many payments made by States in the circumstances with which Article IV.2. is concerned are made *ex gratia* and without admission of responsibility.

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*SUGGESTION 21 présentée par Mr Momtaz*

**Article III, paragraphe 3, lettre c)**

Remplacer la disposition de la lettre c) du paragraphe 3 de l'article III par ce qui suit :

« sont sans préjudice des dispositions prévues par les accords internationaux portant sur le statut des forces armées étrangères sur le territoire d'un autre Etat relatives à la répression des crimes internationaux commis par les membres de ces forces sur le territoire de cet Etat. »

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*SUGGESTION 22 submitted by Mr Lee*

**1. Article II paragraph 2**

Add the following at the end of the first sentence:

...ceases « and his/her individual criminal responsibility is engaged ».

**2. Article IV**

3. (a) Add « ,if applicable » at the end of the sentence.

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Moving to Article I, the Rapporteurs expressed her special gratitude for the contribution given by Messrs Kirsch, Meron, and Tomuschat.

Mr *Gaja* raised a point of drafting. He explained that the previous version of Article I read « crimes recognised by the international community as particularly grave », and had been criticised. The new provision referred

to « crimes recognised under international law as particularly grave », but this made little sense. International crimes are either recognised or not under international law, independently of the fact of being grave. It was for this reason that Mr Gaja found the wording confusing.

M. *Bennouna* souscrit à la remarque de M. Gaja. Si, dans le contexte des conventions de Genève, parler de violations graves a un sens spécifique, il n'en va pas de même pour les crimes internationaux, leur gravité n'étant pas une condition de leur reconnaissance par le droit international. Il propose d'ajouter « as such » et de modifier la première partie de l'article de la manière suivante: « international crimes means crimes recognised as such under international law ». Alternativement, il est favorable à l'élimination de l'expression « as particularly grave ». Il indique qu'il s'agit d'ailleurs d'une question relative à la rédaction du texte et qui peut par conséquent être résolue de manière assez simple.

M. *Kirsch* tient à préciser que la référence à la notion de gravité dans cette disposition a un sens car les crimes indiqués ne sont pas les seuls reconnus par le droit international. Selon le préambule du Statut de la Cour pénale internationale, seuls certains crimes suscitent la réprobation de la communauté internationale. Ce n'est qu'à ces crimes que l'Article I entend se référer.

Mr *Roucounas* suggested to delete « as particularly grave » and « recognised », and to add « serious » crimes. The new text would read as follows : « international crimes means serious crimes under international law, such as ... ».

Mr *Abi-Saab* supported the proposal advanced by Mr Roucounas. In certain cases, the term “grave” might create confusion. He explained that a crime criminalised under international law was *per se* a very grave crime. Therefore, the risk in keeping this expression would be to introduce a quantitative measure for identifying international crimes.

Mr *Meron* admitted that a certain confusion with crimes provided under the Geneva Conventions could arise. Therefore, he proposed to change « grave » into « serious » and redraft the first part of Article I as follows: « international crimes means crimes recognised under international law as particularly serious ».

Mr *Nieto-Navia* shared the position expressed by Mr Roucounas. He considered that international crimes were grave crimes, but admittedly not all war crimes were grave breaches.

Mr *Degan* recalled that Article 19 on State Responsibility drafted by Mr Ago in 1976 provided a satisfactory definition of international crimes.

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This provision has unfortunately been replaced in 2001 by Chapter III « Serious breaches of peremptory norms under general international law ». In his view, the definition proposed in draft resolution 3 was satisfactory and he supported it without any change.

Mr *Ronzitti* considered that the difficulty with the part of Article I under discussion was due to the fact that the qualification of « grave » was attached to two different crimes. Therefore, he proposed to redraft that part in the following manner: « international crimes means serious violations recognised under international law as international crimes ».

Mr *Tyagi* discussed the reference to the 1984 Convention against torture as far as this crime was to be included in the list of international crimes recognised under international law.

M. *Kirsch* fait noter que M. Tyagi se réfère probablement à une version précédente du projet de résolution, dès lors que toute référence à la convention contre la torture a disparu de l'Article I. Quant à la formulation de cette disposition, il se dit satisfait de la proposition d'amendement avancée par MM. Roucounas et Meron.

The *Rapporteur* expressed the view that the text could be improved, but as far as substance is concerned it reflected the intention of the Commission to deal only with serious crimes. Therefore, she accepted to submit Article I, paragraph 1 to the Drafting Committee, since no substantial changes were necessary.

The *President* proposed to vote by a show of hands on the question of submitting Article I paragraph 1 to a drafting revision.

Il est procédé au vote.

Le *Secrétaire général* annonce le résultat : 48 membres sont en faveur d'un renvoi du texte de l'Article I, paragraphe 1 au comité de rédaction, aucun membre ne s'y oppose, et 3 membres s'abstiennent. En conséquence, l'Article I, paragraphe 1 du projet de résolution 3 sera soumis au comité de rédaction.

The *President* suggested to move to Article I paragraph 2 of draft resolution 3.

The *Rapporteur* explained that the provision under examination has undergone only minor changes. Essentially, the reference to « conventions » has been turned into a reference to « treaties ».

Since there were no comments on Article I, paragraph 2, the *President* proposed to vote by a show of hands on the question of adopting Article I.

Il est procédé au vote.

Le *Secrétaire général* annonce que l'assemblée adopte l'Article I du projet de résolution 3 à l'unanimité.

Mr *Roucounas* noted that the term « treaties » should be consistently used under paragraph 1 and paragraph 2 of Article I.

The *President* proposed that the question be addressed by the Drafting Committee and suggested to proceed with the examination of Article II.

The *Rapporteur* underlined the importance of this provision. The title remained unchanged. Some modifications concerned the order of paragraph 1 and paragraph 2, which had been reversed. This was due to the fact that the Commission intended to state first the principle concerning immunity. Except for the reference to « allocation » which had been changed into a reference to « orderly exercise of jurisdiction » thanks to the suggestion of Mr Feliciano, the wording of paragraph 1 had not been changed. On the contrary, paragraph 2 was a new provision largely inspired by Mr Pellet suggestions.

The *President* asked whether there were any comments on Article II, paragraph 1.

M. *Bennouna* remarque que la disposition emploie l'expression « equality of States », alors que la Charte des Nations Unies parle d' « égalité souveraine des Etats » et propose d'aligner le texte de la résolution sur celui de la Charte.

M. *Bucher* préfère le terme « allocation » qu'il propose de maintenir, à l'expression « exercice de juridiction ».

Mr *Tyagi* supported the proposal of Mr Bennouna.

Mrs *Infante-Caffi* proposed to refer to both « allocation » and « exercise of jurisdiction » in Article II paragraph 1, and supported the suggestion of amendment of Mr Bennouna.

The *Rapporteur* had no objection in restoring reference to « allocation » or to both « allocation and exercise of jurisdiction », and agreed in turning « equality of States » into « sovereign equality ».

The *President* acknowledging the absence of further remarks, proposed to proceed with the adoption of Article II by a show of hands.

Mr *Kohen* suggère de voter d'abord l'Article II paragraphe 1 dans son ensemble et par la suite les deux amendements proposés.

The *President* was in favour of proceeding directly with the vote of the whole revised text of Article II, paragraph 1.

Mr *Conforti* read the revised text of Article II, paragraph 1: « Immunities

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are provided to enable an orderly allocation and exercise of jurisdiction in disputes concerning States in accordance with international law, to respect the sovereign equality of States and to ensure the effective performance of the functions of persons who act on behalf of States. »

The *President* asked the plenary to vote the adoption of Article II, paragraph 1.

Mr *Tomuschat* proposed to submit to the drafting committee the question of the placement of the expression « in accordance with international law », since the placement could be improved.

Il est procédé au vote

Le *Secrétaire général* annonce le résultat: 48 membres sont en faveur de l'adoption de l'Article II, paragraphe 1, 2 membres s'y opposent, et 5 membres s'abstiennent. En conséquence, l'Article II, paragraphe 1 du projet de résolution 3 est adopté.

The *President* opened the discussion on Article II (2) of the draft Resolution.

Mr *Degan* noted that the first sentence stated that « Pursuant to international conventions and customary international law... » and observed that many international crimes were first laid down in treaties and later became part of customary international law. For this reason, he underlined the appropriateness of referring to treaties in Article I (2).

M. *Bennouna* propose d'amender la deuxième ligne du paragraphe et suggère que l'expression « obligation to prevent and suppress » soit remplacée par « obligation to prevent and punish » qui lui semble être l'expression consacrée. Il ajoute que « prevent and suppress » lui semble redondant car « prevent » comprend déjà l'idée de suppression. Il suggère aussi d'amender la dernière ligne pour ajouter « in accordance with this Resolution and international law ». Enfin, il propose de supprimer l'idée que les Etats peuvent agir dans l'intérêt de la communauté internationale, car il trouve difficile d'apprécier ce qui est dans l'intérêt de la communauté internationale et de déterminer qui peut légitimement agir à ce titre.

Mr *Tomuschat* drew attention to Article 38 of the Statute of the International Court of Justice which spoke of conventions, custom and general principles of law as sources of international law. He noted that the words « to prevent and suppress » were also used in the Genocide Convention which underlined their appropriateness in the Resolution.

He had serious misgivings, however, as to the second sentence of



paragraph 2. In his view, it distorted the picture of the situation facing countries which have experienced international crimes on a massive scale. In such situations, it was impossible to punish everyone suspected of committing such crimes. The developing doctrine of transitional justice, which foresaw a role for amnesties, had to be considered. He illustrated his point by the example of South Africa, where a truth commission had been used as way to deal with the crimes committed while avoiding prosecution in return for perpetrators' full disclosure. The draft provision ignored the issue of amnesty and other alternative measures. He felt that it did not reflect the law as it stood and encouraged vigilantism on the part of third States, when sovereign States should be able to decide how to best deal with the situation in the aftermath of regime change.

Mr *Bucher* made two observations. In regard to the first sentence, he noted that the provision had nothing to do with the subject of the Resolution since it did not deal with immunity, but rather the responsibility of States. He observed that while comparable wording could be found in the Institute's Resolution on universal criminal jurisdiction with regard to the crime of genocide, crimes against humanity and war crimes, adopted in Krakow (2005), in that Resolution, the words were used in the preamble, whereas in this draft Resolution, they were in the text of the Resolution. While he was not opposed to this, he thought that the Institute should be aware of this shift.

Secondly, in the second sentence, he expressed concern that in a number of cases, a State may or may not act in the interest of the international community, but do so under its own law. He questioned the meaning of the phrase «in accordance with international law». Several interpretations were possible, including that a State could remedy such a default under its own law. He was mindful, in particular, of remedies that were provided in many judgments in which satisfaction was given to victims.

Mr *Mensah* shared the concern expressed by Mr Bennouna in regard to the second sentence. While he would not deny that States sometimes acted in the interest of the international community, they also acted in their own interest or in the interest of persons within their jurisdiction. If the term «interest of the international community» was retained in this location, it would need some clarification. He suggested that it could be deleted from the Resolution. He further noted that sometimes it was not necessary for a State to act in accordance with international law because it acts in accordance with its national law.

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Mr *Ronzitti* stated with regard to the first sentence of paragraph 2 that there was an inconsistency in the draft Resolution with regard to the use of the words « treaties » and « conventions » and suggested that the Resolution be consistent to avoid any risk of misinterpretation.

With regard to the second sentence, he understood the preoccupation of the other speakers. He noted that while the sentence was based on the Articles on State Responsibility prepared by the International Law Commission and Article 1 common to the Geneva Conventions of 1949 that obliged States to « respect and ensure respect » for the rules of international humanitarian law, the sentence as presently drafted was too vague. It gave no indication of what States could actually do. He observed that States could exercise criminal jurisdiction and that the provision seemed to assume that universal jurisdiction was lawful. He suggested that the provision should further substantiate what it meant by « remedy the default ».

Le *Secrétaire général* propose que les questions de terminologie soient renvoyées au comité de rédaction. Il suggère également que l'on vote sur le maintien de la seconde phrase.

The *Rapporteur* supported the Secretary General's proposal to vote on the paragraph. She noted that a great many points that had been raised had already been set out in the written proposals before the Commission and that all had been seriously considered. It would be helpful to know if the members wished to retain the provision or not. She further stated that the words « prevent and suppress » were established terminology but that other words could be used.

M. *Kamto* demande que l'on clarifie l'amendement avant de procéder au vote. Il ajoute que, selon lui, cela n'a pas de sens de voter sur la suppression de la seconde phrase sans se prononcer sur la première phrase dès lors que celle-ci perd tout son sens si celle-là disparaît.

Le *Secrétaire général* souligne qu'il vaut mieux voter d'abord sur le maintien de la seconde phrase et ensuite sur l'opportunité de la première.

The *President* proceeded to call on members to vote on the deletion of the second sentence of paragraph 2. The first sentence would be reviewed by the drafting committee.

Il est procédé au vote.

Le *Secrétaire général* annonce que la suppression de la seconde phrase recueille 32 voix pour, 18 voix contre et 7 abstentions. La proposition de supprimer la seconde phrase est adoptée.

Mr *Meron* commented on the first sentence of paragraph 2 since the drafting committee in terms would look into the usage of the words « suppress » and « punish ». He drew attention to the fact that both terms were used in the Geneva Conventions of 1949. The word « suppress » was used in regard of all the violations of obligations contained in the Geneva Conventions, while in regard to grave breaches, the language used was closer to « punish » since it spoke of the duty of each State « to enact any legislation necessary to provide effective penal sanctions ». For this reason, he was of the view that it was more logical for the committee to consider Mr Bennouna's suggestion.

M. *Bucher* rappelle que l'expression « suppression of international crimes » a été utilisée dans la Résolution de Cracovie relative à la compétence universelle et qu'il faut la conserver. L'expression « suppression of international crimes » est d'autant plus indiquée qu'elle comprend également la suppression d'un crime en train d'être commis.

Mme *Bastid-Burdeau* rappelle que l'article II est une disposition consacrée aux principes. Le deuxième paragraphe n'est pas centré sur les immunités mais sur le rôle des Etats et sur les réponses qui peuvent être apportées aux crimes. Il est opportun d'indiquer que la réponse aux crimes n'est pas nécessairement judiciaire et peut, par exemple, consister en la constitution d'une commission de réconciliation. En ce sens, l'objectif est d'éviter que les victimes n'aient aucun recours ; c'est là-dessus qu'il faut mettre l'accent. En conséquence, elle propose de renverser l'ordre de la phrase et de la reformuler comme suit : « Immunities should not constitute an obstacle to the appropriate remedies that victims of the crimes addressed by this Resolution are entitled to expect ».

M. *Conforti* souligne que, selon lui, il y a un équilibre entre le premier et le second paragraphe qu'il faut préserver. Le premier concerne les immunités alors que le second met l'accent sur l'obligation de prévenir et punir les crimes internationaux. Ces deux exigences vont de pair. Il admet néanmoins qu'on peut supprimer la deuxième phrase du second paragraphe sans remettre en cause cet équilibre.

The *Rapporteur* supported the suggestion of Mr Conforti. She thought it best not to get into greater detail, but rather to vote on that sentence in paragraph 2.

Mr *Tyagi* suggested that the absence of the word « punish » in the sentence might be misinterpreted. Since the message of the provision was to communicate the idea that serious crimes should be prevented, suppressed and punished, he proposed that all three terms be used.

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Le *Secrétaire général* répète que, selon lui, les questions de terminologie relèvent du comité de rédaction. Il y a deux questions qui se posent et auxquelles il faut répondre maintenant: celle du maintien de la première phrase, et celle de l'amendement proposé par Mme Bastid-Burdeau.

M. *Salmon* indique être d'accord avec l'amendement proposé par Mme Bastid-Burdeau mais propose d'ajouter l'expression « éviter l'impunité ».

Mr *Dugard* questioned whether new suggestions that had not been made in writing to the Commission could be considered at this stage of proceedings.

The *President* noted that there had indeed been several occasions in which submissions could have been made and that some 22 proposals had been considered by the Commission.

M. *Bennouna* propose que l'on soumette au vote le maintien de la première phrase et l'amendement formulé par Mme Bastid-Burdeau. Il indique aussi que, selon lui, personne ne peut être empêché de formuler de nouvelles propositions tant que le vote n'a pas eu lieu. Il dit enfin soutenir la proposition d'amendement de Mme Bastid-Burdeau.

Le *Président* demande à Mme Bastid-Burdeau de mettre sa proposition d'amendement par écrit.

Mr *Dugard* requested a ruling on the question of whether members could make submissions on new issues that had not been submitted in written form.

Mrs *Bastid-Burdeau* noted that in the morning it had been said that a new text would be circulated and that members who were not members of the Commission could make amendments.

Le *Secrétaire général* rappelle que, selon le règlement, une proposition d'amendement doit être formulée par écrit. Il indique toutefois que le sens de la proposition de Mme Bastid-Burdeau est suffisamment clair et que l'on peut dès lors la soumettre au vote. Il appartiendra, le cas échéant, au comité de rédaction de revenir sur la formulation.

M. *Bucher* ne partage pas l'avis du Secrétaire général selon lequel la substance de la proposition de Mme Bastid-Burdeau est claire et demande que cette dernière relise sa proposition.

M. *Salmon* exprime sa perplexité sur la façon dont l'Institut procède à cet égard. Il avait précédemment été dit que seules des suggestions étaient attendues. Etant donné que l'on vient seulement de disposer de la dernière version du projet de résolution, tout membre doit pouvoir formuler des amendements. Ceux-ci doivent être distribués à tous les

autres membres pour qu'ils puissent en prendre connaissance. Ce n'est qu'ainsi que l'on peut espérer aboutir à l'adoption de la résolution.

Mr *Tomuschat* stated that he had formulated an amendment in a printed form and supported the view that it had been said that formal amendments could be tabled.

In response to a request by Mr *Ress*, the *President* read out the proposed amendment, which stated : « Immunities should not constitute an obstacle to the appropriate remedies which the victims of the crimes addressed by this resolution are entitled to expect ».

Le *Secrétaire général* souligne que la manière la plus claire de procéder est de voter en premier lieu sur le maintien de la première phrase avant de voter sur la proposition d'amendement de Mme *Bastid-Burdeau*.

Il est procédé au vote sur le maintien de la première phrase.

Le *Secrétaire général* indique que le maintien de la première phrase recueille 47 voix pour et 7 abstentions. Il n'y a aucune voix contre. La première phrase est maintenue.

Il est procédé au vote sur l'amendement formulé par Mme *Bastid-Burdeau*.

Le *Secrétaire général* indique que l'amendement formulé par Mme *Bastid-Burdeau* recueille 40 voix pour, 2 voix contre et 11 abstentions et est, par conséquent, adopté.

Mr *Roucounas* underlined that members had voted on the understanding that the drafting committee would look at the text and amend some words.

The *President* confirmed that that was what the drafting committee would do.

Mr *Tomuschat* noted that while the first sentence dealt with punishment, the second sentence referred to reparation. He suggested that if reference was made in the first sentence not just to suppressing international crimes, but also to making reparation, this would improve the link between the two sentences.

The *President* proceeded to move the discussion to Article III of the draft Resolution.

The *Rapporteur* outlined that this Article set out five classes of persons who enjoyed personal immunity. The important change in this draft was in respect of foreign ministers, who were now placed in sub-paragraph (ii) without brackets. She was aware that some members would prefer to

place foreign ministers in sub-paragraph (i) so that such person would enjoy « class 1 » immunity, while other members believed that foreign ministers enjoyed the same immunity as other members of the government of a State when on an official mission and present in a third State, or in transit in a third State. The intention of the Commission was to state the law as it stood; it was not the intention to make new law as regards personal immunity. If members believed this was a wrong reflection of the law, they should vote to move foreign ministers to sub-paragraph (i).

Mr *Dinstein* expressed the view that serving foreign ministers should be placed in sub-paragraph (i). Since the Commission wished to preserve the existing law, it would be wrong to refer to Foreign Ministers in sub-paragraph (ii) since the International Court of Justice in the *Arrest Warrant* case clearly placed serving Foreign Ministers in sub-paragraph (i). If the Institute wished to place them in sub-paragraph (ii), this would be *de lege ferenda*.

M. *Bennouna* partage l'opinion de M. *Dinstein*. Selon lui, le ministre des affaires étrangères doit figurer dans le paragraphe i) conformément à la jurisprudence de la Cour internationale de Justice.

Mr *Gaja* pointed out what appeared to be a lack of logic in the way the paragraph was drafted. The first sentence stated that « The following persons enjoy personal immunity from jurisdiction as conferred by international conventions or customary international law as follows : » and sub-paragraph (v) referred to « All other persons acting on behalf of the State who enjoy personal immunity under international conventions or customary international law ». He suggested that the fifth sub-paragraph should be deleted and instead the first sentence should say that « persons enjoying personal immunity *include* » and then list the four categories. This would ensure that those not mentioned in the four categories would still be covered.

Mr *Hafner* expressed sympathy for retaining sub-paragraph (v). He noted that what was missing was a reference to the Secretary General and other high-ranking officials of the United Nations, who also enjoyed immunity.

M. *Ranjeva* souligne que si l'on fait figurer le ministre des affaires étrangères dans le paragraphe i), il faut adapter la formule. Il appelle aussi l'Institut à ne pas ignorer la situation des juges internationaux sur laquelle il a déjà attiré l'attention précédemment.

M. *Momtaz* rappelle que l'article III concerne uniquement l'immunité des personnes agissant au nom de l'Etat et qu'il n'y a donc pas de raison d'y faire figurer le Secrétaire général des Nations Unies et les hauts

fonctionnaires des organisations internationales qui bénéficient d'une immunité, ceux-ci n'agissant pas au nom d'un Etat.

M. *Salmon* partage l'avis de M. *Momtaz* en ce que l'on ne se préoccupe ici que des personnes agissant au nom de l'Etat. Il indique par ailleurs que le paragraphe v) doit être maintenu car il existe toute une série de conventions particulières qui accordent une immunité à d'autres personnes que celles qui sont visées dans les paragraphes i)-iv).

M. *Mahiou* exprime son accord avec MM. *Momtaz* et *Salmon*.

Mr *Dinstein* stated that the title had not yet been adopted and that Mr *Salmon* was right to caution that by not adopting the title certain problems were created. The title was about « States and their agents ». This excluded all those working for international organisations. He proposed that if the members felt it necessary, a « without prejudice » clause could be added making it clear that the Resolution did not apply to those working for international organisations.

The *Rapporteur* supported Mr *Dinstein's* proposal, which would go to the drafting committee. She suggested that members vote on the whole of Article III (A)(i)-(v), and then vote on moving the foreign ministers to sub-paragraph (i).

M. *Kirsch* souligne que le problème discuté ici constitue une question de fond et non une question de terminologie ; on ne peut dès lors pas le renvoyer au comité de rédaction sans en discuter ici.

Mr *Tyagi* drew attention to Mr *Gaja's* suggestion for amendment of the Article.

M. *Salmon* s'oppose à ce que le ministre des affaires étrangères figure dans le paragraphe i). Il exprime à cet égard son désaccord sur la proposition de M. *Dinstein* qui, selon lui, repose sur une lecture erronée de la décision de la Cour internationale de Justice dans l'affaire *Yerodia*. Il propose que ce point soit soumis au vote. Il réitère par ailleurs la nécessité de maintenir le paragraphe v) compte tenu des conventions particulières qui stipulent que certaines catégories d'agents de l'Etat – qui ne sont pas mentionnés dans les paragraphes i)-iv) du texte de la Résolution en projet – jouissent d'une immunité lorsqu'ils sont en mission.

M. *Gaja* précise que sa proposition d'utiliser le mot « include » dans le premier paragraphe permet de sous-entendre qu'il y a d'autres catégories de bénéficiaires que celles qui seraient énumérées dans la Résolution, ce qui rend le paragraphe v) superflu.

Le *Président* propose qu'il soit procédé à deux votes, l'un sur l'inclusion

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de la catégorie du ministre des affaires étrangères dans le paragraphe i) et l'autre sur le maintien du paragraphe v).

Mr *Hafner* stated that with regard to the point about the high officials of international organisations, he had misread the term « of States and their agents » in relation to immunities. With regard to sub-paragraph (iv), he hoped that the Commission had checked this in order to ensure that members of diplomatic missions did not include administrative and technical personnel, who did not enjoy immunity.

Mr *Tomuschat* noted with regard to Mr Salmon's point about sub-paragraph (v) that all other immunities were in fact functional immunities and that there was not a long list of persons enjoying full personal immunities.

M. *Bucher* rappelle qu'il avait proposé de supprimer la distinction entre immunité personnelle et immunité fonctionnelle car l'immunité personnelle est nécessairement fonctionnelle. Il regrette que cela n'ait pas été pris en compte.

Mr *Dinstein* first suggested as a point of order that the members should vote on each one of the sub-paragraphs separately and independently of each other. With regard to the position of Foreign Ministers, the vote on this could be postponed until the text of the *Arrest Warrant* case could be presented before the Institute. With respect to sub-paragraph (iv), he pointed out that in the 1961 Vienna Convention on Diplomatic Relations, personal immunity only attached to diplomatic agents and not to all those on mission. Under the 1963 Vienna Convention on Consular Relations, no consular agent enjoyed personal immunity; they only enjoyed immunity as regards acts performed in the exercise of consular functions. In the practice of States, many consular officers enjoyed diplomatic immunity in light of bilateral arrangement or as a result of Governments conferring upon them the rank of ambassadors. But, *qua* consular officers, they were not entitled to personal immunity.

M. *Kamto* partage la lecture que M. Dinstein fait de la décision de la Cour internationale de Justice dans l'affaire *Yerodia* s'agissant du ministre des affaires étrangères. Selon M. Kamto, cela ne résout cependant pas le problème car la position de la Cour sur ce point n'est pas justifiée. Il pense toutefois qu'il serait inopportun pour l'Institut de prendre une position différente de celle défendue par la Cour.

M. *Ranjeva* partage l'avis de M. Bennouna concernant la catégorie « ministre des affaires étrangères ». Il souligne que, selon la Cour internationale de Justice, le ministre des affaires étrangères jouit d'un statut différent de celui des autres ministres. Il rappelle également la



proposition d'amendement qu'il a précédemment formulée et selon laquelle le paragraphe ii) devrait commencer par énoncer une question de principe concernant le ministre des affaires étrangères, avant de décrire les circonstances dans lesquelles les autres ministres jouissent de l'immunité.

Mr *Meron* stated that he was very reluctant and opposed to voting on Article III at this point in view of the discussion. He believed that Mr *Dinstein* had made a reasonable suggestion to postpone the vote until the texts of the *Arrest Warrant* case and the Vienna Convention on Diplomatic Missions could be checked.

The *President* responded that the vote would be taken at a later session and requested that all new amendments be submitted in written for M. She confirmed that the *Arrest Warrant* case and the relevant Vienna Conventions would be checked.

La séance est levée à 18 h 35.

#### **Dixième séance plénière**

Mardi 8 septembre 2009 (matin)

La séance est ouverte à 9 h 50 sous la présidence de M. *Roucounas*, premier Vice-président.

Le *Secrétaire général* souhaite la bienvenue à M. *Kateka*, élu membre associé de l'Institut à la session de Naples.

The *President* gave the floor to the Rapporteur so that she might continue the discussion on the Third Commission's third draft Resolution.

The *Rapporteur* made two introductory remarks. First, she requested that in the discussion Members respect the structure of the draft Resolution and consequently bear in mind that omitting one part of the draft Resolution might lead to the text as a whole falling apart. Her second, more important comment, which she had discussed with four Commission Members, though not with Mr *Kooijmans*, was a proposal that whilst Article III's title should be kept, Article III (A) should be deleted. Consequently Article III (A)(2) would become article III (A)(1).

The Rapporteur indicated that the then current Article III (A)(1) should be removed because it was never the Commission's remit to explain the substance of diplomatic immunity, nor indeed other types of immunity. With regard to the wording of the current Article III (A)(2) a slight change should be made in that it should in her view now read: « When the post or the mission of any person who enjoys personal immunity in accordance with international law has come to an end such personal

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immunity ceases ». She called for a vote on that proposal, which she personally considered uncontroversial.

The *President* put to the Members the proposal that the title to Article III be maintained ; that the entire paragraph 1 be deleted ; that paragraph 2 becomes paragraph 1 and that the wording of the new paragraph 1 become : « When the post or the mission of any person who enjoys personal immunity in accordance with international law has come to an end such personal immunity ceases ». Whether the term to be used was « in accordance with international law » or alternatively “under international law” was merely a drafting matter. The Members proceeded to vote.

Le *Secrétaire général* annonce le résultat du vote : l’amendement est adopté par 32 voix pour, 1 contre et 4 abstentions.

The *Rapporteur* recalled that Article III (B) to which they now turned, related to functional immunity and read out the provision as contained in draft Resolution 3. She indicated that the essence of the provision was straightforward; namely, that anyone who enjoyed functional immunity continued to enjoy it except in respect of international crimes. Certainly this was very widely accepted with regard to criminal jurisdiction.

The *President* opened the floor to discussion.

Mr *Abi-Saab* stated that he still did not understand the subtle difference between Article III (A)(2) and Article III (B): the immunity of a person who had personal immunity only ceased when the post or mission terminated, but this would mean that while that person had the immunity he or she was immune from criminalisation and that was the difference between III (A)(2) and III (B). Was it the case that, if someone who had personal immunity committed an international crime whilst they had the immunity, would they benefit from immunity from criminalisation, with the consequence that they could only be pursued after the immunity ceased ? If this were the case, there was a difference between the two paragraphs. If that was not the case, Mr *Abi-Saab* still could not see the difference between the two articles.

M. *Salmon* estime que lorsqu’il y a une immunité personnelle elle est en général totale. C’est ce que qu’entendait signifier auparavant le précédent paragraphe en donnant une liste de tous ceux qui ont une immunité personnelle totale. Même si l’acte est ou non en rapport avec leurs fonctions, ses bénéficiaires sont couverts par une immunité totale. Lorsque leurs fonctions cessent, ils ne conservent plus que l’immunité pour les faits de leur fonction. Ceux qui ne bénéficient pas d’une immunité totale mais simplement d’une immunité fonctionnelle, tels le fonctionnaire international ou certains membres du personnel consulaire

ou diplomatique, conservent également leur immunité mais, et c'est ce que dit la présente disposition, l'immunité fonctionnelle ne couvre pas les crimes internationaux.

Mr *Tomuschat* stated that everyone agreed that there was no immunity before international criminal tribunals but that this was not stated explicitly in the draft Resolution. The article under consideration applied to State tribunals only. He believed that everyone agreed that even a president in office did not enjoy immunity before an international tribunal. He asked whether it should be stated so explicitly in order to avoid misleading inferences. Moreover, given the adoption of the amendment, paragraph B should become simply paragraph 2 and paragraph C should become paragraph 3.

The *President* thanked Mr Tomuschat and pointed out that he too had noted that such a change to the numbering should occur but that this was for the Drafting Committee.

The *Rapporteur* took the floor to indicate briefly that now that the draft Resolution made no mention of personal immunity, if it worked before international tribunals that was fine, since the draft Resolution stated nothing about it. Moreover, the Resolution was clear that it did not relate to international tribunals.

Mr *Gaja* said that he found the text very complicated. This was because it stated that there was functional immunity and then that it did not apply. He would prefer a simpler approach, which he had already suggested, but on which he had not yet submitted an amendment; namely that the provision read: «No immunity from jurisdiction other than personal immunity applies with regard to international crimes». There was no need to introduce the concept of functional immunity.

Mr *Mensah* suggested that the deletion of paragraph 1 necessarily entailed the deletion of a substantial part of B because in the previous version there was a large section on personal immunity. The reasons given by the Rapporteur for deletion were valid. When it came to paragraph B and in particular the reference to «functional immunity from jurisdiction continues to subsist», this was a product of the previous version. It was because the previous version dealt with personal immunity, that when the term of office has come to an end, personal immunity no longer subsisted whilst functional immunity continued. Since the draft Resolution no longer dealt with personal immunity, it was sufficient to stipulate that «no functional immunity applies in respect of international crimes». That would also deal with the very pertinent question raised by Mr *Abi-Saab*. It appeared to Mr *Mensah* that the

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Members were trying to give a different treatment to the two. This was not the case. All that was being said was that whilst a person was in office he had personal immunity, that this ceased when he left office, but that functional immunity applied. Nonetheless functional immunity did not apply in respect of international crimes. Therefore all that needed to be said in the draft Resolution was that when the term of office ceased there was no personal immunity and no functional immunity applied with regard to international crimes. The paragraphs required no more.

The *President* reiterated that what Mr Mensah sought was a statement that « no functional immunity applies in regard to international crimes »; in other words, that he was proposing the same amendment as Mr Gaja.

The *Rapporteur* stated that the Commission considered Mr Gaja's proposal and tried to incorporate it into paragraph B, but having the statement that personal immunity had come to an end, there was an attempt to state in parallel that functional immunity continued. If it was felt that this was not necessary, then Messrs Mensah's and Gaja's amendment would be acceptable.

Mr *Dinstein* was going to propose what had just been suggested by Mr Mensah. He explained that there was a dual regime of immunities, one subset was *persona* and the other functional. This duality brought into relief the fact that personal immunity from jurisdiction did not mean impunity. At the end of his or her term of office, an official entitled to personal immunity was subject to prosecution, save as regards acts performed in the exercise of his or her functions. But functional immunity was restricted to acts performed in a specific function. The function of a diplomat was not the same as that of a consul, nor indeed of a Head of State, to cite but three examples. In any event, all that needed to be said here was that functional immunity did not apply to the perpetration of international crimes.

M. *Torres-Bernárdez* se dit d'accord avec les propositions de MM. Gaja, Mensah et Dinstein concernant la reformulation du paragraphe.

Mr *Pocar* stated that he needed a clarification as to the consequence of reducing paragraph B to merely its last clause. If this were done, this meant that a person enjoying functional immunity would not enjoy it during his or her term in office. Consequently a person enjoying functional immunity alone, could be criminalised during their term in office. He asked whether this was correct.

The *Rapporteur* answered Mr Pocar's question in the affirmative. Functional officers committing a crime during their time in office lost that immunity. Whether something could be done about it on the other

hand related to immunity from enforcement which was not the object of the current draft Resolution. This was her personal view as she had not consulted Commission members on this point. It might be that they preferred a narrower reading of the provision, so that an office holder might continue to benefit from the immunity during their time in office.

Mr *Dinstein* realized that he may have been too brief in his earlier comment. In light of Mr *Pocar's* question, he would like to add that functional immunity related to the performance of specific functions assigned by a State to a given office-holder. The spectrum of these functions depended on the particular office. Yet, the rule in modern international law was simple : whatever the range of functions assigned to an office-holder by his or her State, they never included the commission of international crimes. Thus, the person concerned could not argue that his or her functional immunity covered the perpetration of international crimes. This construct was accepted by the House of Lords in the third *Pinochet* case (and Mr *Dinstein* was happy to note that he was cited in that Judgment).

M. *Kamto* dit avoir entendu le Rapporteur soutenir que le but est d'éviter que les personnes qui commettent par exemple la torture, soient couvertes par l'immunité. Le problème est qu'il existe des situations où les personnes bénéficiaires de l'immunité personnelle ne sont jamais poursuivies. Si l'idée est d'éviter que les auteurs de crimes internationaux puissent échapper à la justice, il faudrait envisager l'hypothèse où, lorsque les faits sont manifestement établis, même les bénéficiaires de l'immunité personnelle peuvent faire l'objet de poursuites.

Mr *Tomuschat* raised the question of the Tehran case in which the Iranian revolutionary authorities alleged that grave crimes had been committed within the US embassy. He asked what the relationship was between on the one hand diplomatic immunity and on the other hand the allegation that grave crimes had been committed. He saw a real difficulty in that light-handed allegations could be made and this could lead to grave violations of diplomatic immunity. Mr *Tomuschat* stated that he was raising the question without providing an answer.

Mr *Gaja* made two points. To reply to Mr *Tomuschat* he stated that the diplomatic agents in question enjoyed personal immunity so that such allegations would not work. Secondly, that his or Mr *Mensah's* amendment could constitute paragraph 1 rather than paragraph 2 and what was now paragraph 1 could become paragraph 2. He was not insisting on such an inversion but logically it seemed to be more coherent, since it was better to state first that the relevant immunity for

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the purpose of the draft Resolution was personal immunity, and then to state when it ceased.

The *President* asked Mr Gaja to repeat his proposal.

Mr *Gaja* stated that either his text or that of Mr Mensah, which used the word « functional », might better appear as followed: « 1. No immunity from jurisdiction other than personal immunity applies with regard to international crimes. » Then paragraph 1 would become paragraph 2.

The *President* reiterated Mr Gaja's proposal and asked Mr Mensah whether he supported it.

Mr *Mensah* said that he indeed supported that proposal.

M. *Salmon* indique que l'ordre ancien était meilleur. Il est mieux d'avoir le paragraphe 2 d'abord et ensuite le texte de M. Mensah ou celui de M. Gaja. Il faut d'abord dire qu'il existe une immunité personnelle absolue et que lorsqu'elle cesse il n'y a plus que l'immunité fonctionnelle, tout en précisant que commettre des crimes ne relève pas des fonctions de son bénéficiaire.

Mr *Abi-Saab* expressed his concern that immunity from jurisdiction might be understood as immunity from criminalisation. He indicated that a crime remained a crime wherever and whenever committed. He observed that it was only in the case of personal immunity that a person would not be pursued for a crime whilst the immunity lasted.

Sir *Ian Brownlie* stated that there was a need for another logical framework. He clarified that jurisdiction was the first question to be dealt with. If there was no jurisdiction then the question of immunity would not arise. While noting that jurisdictional immunity was not a question of substantive law, he explained that personal immunity was not confusing because it was a jurisdictional immunity based on status. He stressed that personal immunity had the appearance of a substantive immunity but it was not. It was conditional on having the status. He remarked that when personal immunity terminated one was left with the issue of legality. Sir *Ian* considered that the issue of legality could take the form of international crimes but it might also take other forms. He regretted that the Institut always focused on international crimes. He underlined that functional immunity was not a term of art and concluded that when there was jurisdiction, immunity ceased to exist because the status ended and the individual concerned was left to face the music: that music was the question of legality.

The *President* invited other comments from the floor. As none were forthcoming he called a vote on the amendment submitted by Mr Gaja

and supported by Mr Mensah. The amendment read as follows: « No immunity from jurisdiction other than personal immunity applies with regard to international crimes ».

Le *Secrétaire général* annonce le résultat du vote. L'amendement est adopté par 37 voix pour, aucune contre, et 6 abstentions.

The *President* suggested that the order between paragraphs 1 and 2 was to be submitted to the drafting committee if Messrs Gaja and Salmon agreed. There being no objections from the Members, it was so decided.

The President invited Members to consider draft Article III (C) and read out the provision.

Mr *Dinstein* drew the Rapporteur's attention to the fact that the draft Resolution had so far skipped an important practical issue, which was waiver of immunity. The importance of waiver was derived from the fact that it demonstrated that immunity was only from jurisdiction and not from liability. But, moreover, the capacity to waive immunity was vested in the State, inasmuch as the immunity was vested in the State and not in the individual who benefited from it. This was true even when the immunity was labelled « personal immunity », since immunity was never personal in the full sense of the word. If the State exercised its option of waiving that « personal immunity », the person concerned (regardless of his or her wishes) was subject to the exercise of the very jurisdiction that he or she was trying to avoid.

The *President* asked if Mr *Dinstein* had an amendment to submit.

Mr *Dinstein* indicated that it might be easier to add a third sub-paragraph in Article III (C) which would read as follows : « The State served by any person enjoying immunity can always waive that immunity ».

M. *Salmon* se rallie à la proposition de M. *Dinstein*. Il estime toutefois que la formule proposée doit être jointe à l'amendement de Mme Bastid-Burdeau qui se lit comme suit : « Immunities should not constitute an obstacle to the appropriate remedies which the victims of the crimes addressed by this Resolution are entitled to expect ». Il considère que l'on pourrait ajouter à la suite de cet amendement que l'Etat dispose toujours de la possibilité de lever les immunités. Il suggère que l'ajout soit renvoyé au comité de rédaction. Il observe que si la proposition de M. *Dinstein* est insérée à la suite de l'Article III (C), b) cela signifierait que si l'Etat lève l'immunité de son fonctionnaire pour un crime qu'il a commis, c'est qu'il s'en désolidarise ou qu'il estime que ce crime ne lui est pas attribuable. Cependant si c'est l'Etat qui a ordonné à un de ses fonctionnaires de commettre un crime, ce n'est pas en levant l'immunité

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qu'il supprime sa propre responsabilité. Il ne pense pas que la question de l'attribution de la responsabilité à l'Etat de crimes internationaux et celle de la levée de l'immunité soient liées. Il propose que la question de la levée de l'immunité soit soulevée dans l'Article II du projet de Résolution.

M. *Kamto* fait part de ses réserves. Il exprime ses doutes quant à la faculté de l'Etat de pouvoir lever l'immunité personnelle si l'intéressé en dispose en vertu du droit international. Selon lui, la levée de l'immunité n'est envisageable que dans l'hypothèse de l'immunité fonctionnelle. Or, il lui semble que l'Article III (C) couvre tant l'immunité personnelle que l'immunité fonctionnelle. Il considère qu'il ne serait pas souhaitable de traiter de la question de la levée de l'immunité sous le paragraphe C.

Mr *Ronzitti* stated that sub-paragraph b) was absolutely necessary in the draft Resolution.

Mr *Dinstein* recalled that there was a waiver clause in the 1961 Vienna Convention on Diplomatic Relations, and the case-law of various national courts acknowledged that personal immunity from jurisdiction was not personal in the full sense of the term. He revised his proposed amendment to read as follows : « The State whose agent benefits from personal immunity from jurisdiction can always waive that immunity ». Responding to Mr *Salmon*, he considered that his amendment was unrelated to Mrs *Bastid-Burdeau's* amendment. He noted that Mrs *Bastid-Burdeau's* amendment dealt with avenues of redress and indemnity, whilst his amendment dealt with the fact that proceedings which could be blocked by immunity were no longer blocked once the State waived immunity.

Sir *Ian Brownlie* emphasised that the core issue was the question of general legality which also included the criminal responsibility of individuals. He repeated that at that point, the question of jurisdiction made way to the question of the individual's legal liabilities. He agreed with Mr *Dinstein* that there may well be questions of waiver as well as amnesty. However, he noted that the Institut could not deal with all the incidental issues of legality. He emphasised again that the question of legality was not confined to the question of international crimes; there were other aspects and the possibility of waiver was such an aspect. He indicated that one could not expect the Rapporteur or the Institut to codify the entire context in which the substantive legal questions had to be approached.

Mr *Mensah* agreed that the issue of waiver was important and he fully supported Mr *Dinstein's* comments. He said that the right to waive immunity from jurisdiction is a fundamental aspect of international law



and that in many cases there was an obligation to waive immunity. He believed that Sir Ian Brownlie's position was also correct : the Institut could not deal with all matters. He suggested including the issue of waiver in Article III (C) through a new sub-paragraph.

Mrs *Xue* voiced her agreement with her confrères as regards the issue of waiver of immunity. She indicated that personal immunity in the case of allegations of international crimes was immunity of the State and not immunity of the person *per se*. She agreed that the State might waive immunity in certain circumstances. She also tended to agree with Mr Salmon in relation to the fact that waiver of immunity should not be dealt with in Article III (C). It should be attached to Mrs Bastid-Burdeau's amendment. Indeed, she considered that if one wanted to say in absolute terms that « immunities should not constitute an obstacle to the appropriate remedies », it should be said at the same time that a State could waive immunity under certain circumstances. Then the logic would hold. She supported Mr Salmon's proposal that the issue of waiver be covered by Article II rather than Article III of the draft Resolution.

The *Rapporteur* explained that at first she considered adding the issue of waiver of immunity in Article III (C). After having heard Mrs Xue, she came to the conclusion that waiver of immunity should be dealt with in Article II of the draft Resolution.

Mrs *Bastid-Burdeau* supported Mrs Xue's and the *Rapporteur*'s proposal to insert waiver of immunity in Article II.

The *President* stated that there was a need to decide upon two issues in respect of waiver of immunity. The first related to the language to be used with respect to waiver of immunity. The second related to the location of the provision on waiver of immunity within the draft Resolution.

Mrs *Bastid-Burdeau* clarified that she fully supported the idea of having a provision on waiver of immunity in Article II.

The *President* asked Mrs Bastid-Burdeau for the specific wording she would use for a provision on waiver. He recalled that Mr Mensah suggested inserting a new sub-paragraph in Article III (C) to the effect that « the right of a State to waive immunity ». He noted that a different wording would be needed if waiver of immunity was to be put in Article II of the draft Resolution.

M. *Salmon* se déclare prêt à rédiger un projet de texte pour le Comité de rédaction qui consisterait à rappeler qu'il appartient aux Etats de lever l'immunité de leurs agents s'ils le jugent indispensable. Il indique qu'il existe une série de dispositions dans les conventions internationales qui

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traitent de ce point. Il suggère de joindre ce projet de texte à l'amendement de Mme Bastid-Burdeau.

M. *Momtaz* attire l'attention sur la formule utilisée dans la Convention de 1946 sur les immunités et privilèges des Nations Unies.

The *President* asked the Members to vote upon the question whether a provision on waiver should be put in the Principles (Article II of the Draft Resolution).

Le *Secrétaire général* annonce le résultat du vote : 33 voix pour, 3 contre et 8 abstentions.

The *President* then proposed to proceed to a vote on keeping Article III (C), sub-paragraphs a) and b). The President accordingly proceeded to ask the Members present at the Session for a show of hands in favour of and against sub-paragraphs a) and b), as well as a show of hands of those who abstained from casting a vote for sub-paragraphs a) and b).

Le *Secrétaire général* annonce le résultat du vote. Les alinéas a) et b) ont recueilli 45 voix pour, 0 contre et 4 abstentions. L'Article III (C), alinéas b) et c) est donc adopté.

Mme *Bastid-Burdeau* demande si le résultat du vote a pour conséquence que la référence à la levée de l'immunité prendra place dans l'Article II du projet de Résolution.

Le *Président* répond par l'affirmative.

The *President* moved to article IV (1)

The *Rapporteur* noted that article IV (1) dealt with immunity of the State itself and compared it to article III which dealt with State agents. Originally article IV had referred to criminal jurisdiction but this reference had been removed and the article on State immunity now only dealt with civil jurisdiction. In respect of the latter, there were exceptions to State immunity when proceedings were made against the State before national courts. She recalled that the 1972 European Convention set out a number of exceptions, some of them in respect of commercial transactions but also, and significantly, a non contractual or delictual exception relative to personal injuries and personal loss of property. Immunity was taken away from the State in those circumstances. A similar exception could be found in common law legislation. As to the civil law system, many cases showed that the delict or tort exception applied. The draft Resolution built on that existing State practice.

The *Rapporteur* proceeded to read article IV (1). She noted the important qualification that the forum State had some assumption of jurisdiction

because the very act which constituted the international crime took place on its territory. This could be viewed as an extension of the delict exception to cover international crimes. She also noted that in the above mentioned Convention, the exception was not restricted to *de jure gestionis* acts. It was true that it was probably introduced to provide insurance for car accidents so that one could sue the State even though the diplomat was immune for the damage caused to the victims of car accidents. Whether that was *de jure gestionis* or *de jure imperii*, was not clear, but the point was that they never put it in explicitly precisely because it was so difficult to know. But there was precedent for the proposition that acts causing personal injuries but undertaken in exercise of sovereign authority were covered by this exception to immunity. It was narrowed in the draft Resolution by the jurisdictional limitation that the act had to take place within the territory of the forum State.

M. Lalive pose une question suscitée par le texte et notamment la dernière ligne : « ... if the act or omission occurred in whole or in part in the territory of that other State ». Il demande si la Commission a entendu par là exclure l'immunité sur la base des effets sur le territoire.

The *Rapporteur* replied that the provision did not apply to the wider doctrine of legal effects which had been developed in relation to commercial acts. However, this draft Resolution did not extend that far.

Mr *Dinstein* reminded the *Rapporteur* that the effects doctrine had implications for criminal law going back to the *Lotus* case. Nonetheless, he agreed with her that the Institut should avoid reference to the effects doctrine in the current context as it raised many issues which had not been addressed in the discussion. He also made what he termed two and a half purely semantic comments. First, the second line should refer to « acts of commission or omission », which would mean that in the third line – and this was his half suggestion – the text needed to include only the word « acts » since omissions would be covered. Second, since two States were involved, he thought that the phrase « State of the forum » should be used in relation to one of them. This would make it plain which State was adverted to.

The *President* reiterated Mr *Dinstein's* suggestions.

Mr *Tomuschat* stated that armed conflicts were not mentioned and that very often they occurred in the territory of another State. Armed conflict would now be covered by the paragraph and what the draft Resolution would be saying would go far beyond what the law stated as it currently stood. This was because under established international law, sovereign acts performed in the course of an armed conflict were not subject to the

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civil jurisdiction of other States. Thus the provision was in fact revolutionary. He found it convenient that in prior versions of the draft Resolution armed conflict had been excluded. In his view, and he was not speaking in the interests of his country, it was necessary to have a general vision of what the Institut wanted. If individuals had the right to pursue their claims in cases of armed conflict then there could be tens or hundreds of thousands of international claims. This should be carefully considered and not adopted incidentally as it was a very serious matter. Did the Institut really want what the text stated? He thought that the debate should focus on this matter.

Mr *Ronzitti* noted that at the previous meeting the matter of international and non international armed conflicts had been discussed at length. He was happy with the paragraph as amended by Mr Dinstein's suggestion. He noted that peace treaties or other treaties could sacrifice the position of the individual. However here one was dealing with the case of the individual and in the current case the individual could sue the State for international crimes. It should be borne in mind that one was only dealing with international crimes and not all wrongful acts.

Mr *Lee* appreciated Mr Tomuschat's point but the main point of paragraph 1 was that there was no immunity whenever the act took place on the territory of the forum State. The point was not whether one was dealing with an international or non international armed conflict.

Mr *von Hoffmann* indicated that he still felt uncomfortable with paragraph 1, which in his view mixed up two different types of criteria in allowing the rejection of immunity in the event of a territorial connection. In his view territorial connection could not be an argument in resolving the conflict between the international suppression of crimes and the equality of States, which were the principles set out in article II. From a logical viewpoint it was therefore necessary to strike it out.

Mr *Ress* questioned whether article IV (1) was *lex lata* or whether it was *de lege ferenda*. The draft Resolution now only made reference to that distinction in the preamble. He wondered whether it might not be better to readopt the terms of the former proposal that « a State should not enjoy ». It should be made clear that some States had in their case law gone in this direction but that the Institut was not confirming this as existing law.

M. *Conforti* indique que le paragraphe 1 s'inspire de l'article 12 de la convention des Nations Unies sur l'immunité juridictionnelle des Etats et leurs biens. Il considère qu'il faut se demander si cet article est *de lege lata* ou de *lege ferenda*. Il rappelle que l'article 12 ne vise pas que les

crimes internationaux mais aussi les dommages qu'un Etat peut causer sur le territoire d'un autre Etat.

Mr *Meron* drew the attention of the Members to the principle embodied in the Rome Statute of the International Criminal Court and according to which if a crime was performed on the territory of a State which was not a party to the Rome Statute, the ICC would nevertheless acquire jurisdiction. He indicated that in this case, jurisdiction would be triggered by the territoriality of the act. He acknowledged that the Rome Statute was dealing with individual responsibility and not State responsibility. He suggested adding « should enjoy » to stress that paragraph 1 reflected progressive development of international law.

Mr *Tomuschat* specified that if one read the commentary to the 2004 United Nations Convention on Jurisdictional Immunities of States and their Property, one would find that article 12 was only meant to cover insurable risks such as car accidents. He gave the example of the *Letelier v. Chile* case. Apart from this example, he reminded Members that there was no evidence of international practice according to which after a war individual claims had been brought before the civil courts of other States. There was a glaring absence of claims against some countries because of what happened in Vietnam, Algeria or Iraq. He declared that paragraph 1 was in reality a progressive development of international law. He expressed doubts as to whether the Institut wanted to take that step and was aware of all the consequences that the provision would entail. He feared that the provision could be interpreted as being of a *jus cogens* nature so that even peace treaties could not deprive individuals of claims which they might have against the State which committed an international crime through its agents. In his view, this would pose a great obstacle to the conclusion of peace treaties which sought to resolve outstanding financial issues by global settlement. He stressed that after an armed conflict the preferable method was to have a treaty which settled outstanding issues in all areas. He regretted that the Institut was introducing a second track through which individuals could, outside and beyond general peace treaties, have the right to pursue the claims they contended to have. He urged the Institut to address the topic with careful reflection.

S'exprimant à titre personnel, le *Secrétaire général* souhaite abonder dans le sens de M. Tomuschat. Il rappelle qu'il existe des conventions internationales qui prévoient des solutions de ce type. C'est le cas de nombreuses conventions sur le statut des forces en territoire étranger (par exemple, la convention OTAN). Ces règles conventionnelles reflètent-elles le droit international général ? Il en doute. Il lui semble qu'il existe

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un si grand nombre de situations différentes qu'il ne serait pas sage d'adopter une solution de ce type *de lege lata*. Il ne voit d'ailleurs pas quelle est à cet égard la base sur laquelle s'appuie le projet de Résolution. Est-ce un besoin de principes théoriques ? S'appuie-t-on sur une certaine pratique qui certes existe mais a trait à des délits et non à des crimes ? Il recommande de ne pas s'aventurer précipitamment dans la *lex ferenda* si l'Institut veut être crédible sur la *lex lata*.

Sir *Ian Brownlie* said, referring specifically to the *Letelier* case, that the Members should be careful how they deployed the various pieces of practice because many of them were based on applicable law relating to a very carefully negotiated *compromis*. He urged the Members to be careful in respect of the kind of precedent which was involved in particular cases and stressed that the fact that criminal activity was involved did not mean that one was dealing with the same form of *opinio juris* as it would be when dealing with crimes against international law. He repeated that Article IV concerned the immunity of the State in certain situations. He pointed out that using the phrase « civil jurisdiction » did not help very much because the exercise of civil jurisdiction by the courts of the State, including enforcement, involved the responsibility of the State whose courts were exercising jurisdiction including enforcement jurisdiction. All these concepts were reflected in the 2004 United Nations Convention on Jurisdictional Immunities of States and their Property, which was quite a conservative document.

Mrs *Xue* stated that with regard to Article IV, paragraph 1 she had three concerns. First, she feared that the Institut gave the impression of endorsing US practice derived from the *Alien Tort Claims Act*. Secondly, she wondered to what extent serious crimes such as genocide, war crimes, and crimes against humanity could happen partly in another country. Finally, she wondered how the State *per se* could be tried in the forum State despite questions of jurisdiction and immunity. Beyond the debate on *lex lata* and *lex ferenda*, she raised doubts on whether international law would really move in that direction.

Mr *Yee* stressed that in identifying practice only those States involved in armed conflict should be taken into account. He understood Mr *Tomuschat*'s concerns and suggested adding at the end of paragraph 1 : « unless there is a treaty expressly dealing with this matter between the two states ». This would help to take into account peace treaties.

Mr *Lee* drew the attention of the Members to paragraph 3. He said that the scope of application of paragraph 1 was controlled by paragraph 3. He believed that paragraph 1 should be preserved and suggested adding

conditions in paragraph 3.

Mr *Picone* suggested formulating paragraph 1 as follows : « A State enjoys no immunity (or should not enjoy immunity) from jurisdiction before the national courts of another State, in a proceeding in respect of the civil effect of international crimes... ». He indicated that the phrase « civil jurisdiction » was ambiguous.

The *Rapporteur* thought that a vote was needed on Article IV, paragraph 1. With regard to armed conflicts, she stressed that all types of armed conflicts were within the scope of the draft Resolution if they took place on the territory of the forum State. She voiced her agreement with Mr Lee and said that not all armed conflicts involved international crimes. She also agreed with Mr *Picone*'s proposal of using the phrase « proceeding in respect of the civil effect of international crimes » or a similar phrasing. She reminded Members that what was Article 13 of the Draft Articles on Jurisdictional Immunities of States and their Property became Article 12 of the 2004 United Nations Convention on Jurisdictional Immunities of States and their Property. She proposed that the Session proceed first to a vote on the existing text of the draft Resolution and then to a vote on Mr *Ress*' amendment.

Sir *Ian Brownlie* emphasised that when Members casted their votes, they should bear in mind that Article IV as it stood would consist of some rather basic principles on jurisdiction. He pointed out that the *Rapporteur* did not raise the point he made on that question.

The *President* invited the Members to vote first upon the text of paragraph 1 as it was and then to proceed to a vote on Mr *Ress*' amendment which was supported by Messrs *Meron* and *Picone*.

Mr *Dinstein* said that, as a point of order, the Session should vote first the amendment submitted by Mr *Ress*. The Rules were clear on that point. On substance, he preferred the phrase « should not enjoy » as a compromise formula indicating clearly that the provision was *de lege ferenda*.

Mr *Ronzitti* stated that Mr *Picone* did not expressly support Mr *Ress*' amendment.

The *President* called a vote on Mr *Ress*' amendment which was supported by Mr *Meron* : « A State should enjoy no immunity... ».

Le *Secrétaire général* annonce le résultat du vote. L'amendement a recueilli 17 voix pour, 19 voix contre et 15 abstentions. L'amendement est donc rejeté.

The *President* called a vote on the text as it stood.

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Le *Secrétaire général* annonce le résultat du vote. Le paragraphe 1 est adopté par 22 voix pour, 9 contre et 18 abstentions.

The *Rapporteur* stated that in article IV (2), consideration was being given to a wider possibility. The State enjoyed immunity from civil jurisdiction over international crimes unless it was established that it had not performed its obligations to make reparation. So immunity was retained but it could be removed if the State had not made effective reparation. The word « effective » would cover *ex gratia* payments, so the word « reparation » was to be taken very broadly. Of course paragraph 3 would apply to this provision.

Mrs *Bastid-Burdeau* commented on the terms « which has jurisdiction under international law ». Normally the jurisdiction of domestic tribunals was decided by domestic law and not international law.

The *Rapporteur* stated that she had adopted this wording from Mr Müllerson. It was true that there were no clear jurisdictional rules under international law. She agreed that there was a question as to whether one was at the international or national level.

Mrs *Bastid-Burdeau* added that leaving aside the matter of recognition by States in respect the jurisdiction of other States, normally domestic courts had to apply their own rules relative to jurisdiction and she did not see how this could be decided by international law.

Mr *Wolfrum* stated that he understood the term « under international law » was meant as a limitation and therefore he appreciated the effort to bring this paragraph more in line with what the majority would have preferred to see in the text. He nonetheless still had a problem with that part of the sentence which read : « unless it is established that it has not performed its obligations to make effective reparation ». In his view this was too broad a competence, and would encourage forum shopping in favour of States where jurisdiction was liberal and compensation significant. His most important point related to the broad interpretation which the *Rapporteur* sought to confer on the term « reparation ». In Mr *Wolfrum*'s view it would nonetheless, still not cover for instance South Africa's Truth and Reconciliation Commission system. The result would be that South Africa had taken a certain procedure and this could be challenged before the courts of the forum State. In his view this was not an adequate solution. Finally, Mr *Wolfrum* indicted that an element was missing from the provision. The forum State should have done its own prosecuting of international crimes of its own citizens. Thus he would have liked to have seen a clean hands element introduced into the paragraph.



Mr *Tomuschat* expressed misgivings about the second sentence. There were many forms of reparations. The cases of the European Court of Human Rights provided an illustration of the wide array of the forms of reparation which existed. In many cases it was sufficient for the Court to make a statement that an obligation had been breached. In particular there was a time factor involved. If one had individual cases there was no problem, but since one now included armed conflict, it could take years before definitive settlement was reached and consequently what did the Institut's draft Resolution mean by reparation? He considered that the draft Resolution here established what he termed a basket of mysteries. It did not cover the complexity of the problems which arose after massive atrocities, in particular after dictatorship or war. After World War II it took years for matters to be settled. This paragraph needed more consideration before it could be adopted.

S'exprimant à titre personnel, le *Secrétaire général*, avoue ne pas très bien comprendre la signification du paragraphe 2. Dès lors qu'il y est fait référence à la compétence « civile », c'est manifestement la question de la responsabilité/réparation qui est principalement en cause, puisque la répression relève de la compétence « pénale ». Subordonner le bénéfice de l'immunité au paiement préalable d'une « réparation effective » revient dès lors simplement à dire qu'il n'y a pas d'immunité... Ce qui est une façon particulièrement compliquée de le dire ... et ce qui reste en soi très contestable. Doit-on en déduire que l'objectif serait seulement de permettre que soit remise en cause devant un (nouveau) juge toute réparation jugée non « effective », sans que le bénéfice de l'immunité puisse être réclamé? Une fois de plus, ce serait une manière bien compliquée de le dire, et une affirmation en son principe très contestable.

M. *Lalive* souhaite revenir sur la première partie de la phrase. Il s'interroge sur l'intervention de Mme Bastid-Burdeau selon laquelle la compétence dépend du droit national de l'Etat du for. Il lui semble que sa consœur critique la formule « which has jurisdiction under international law ». Il estime toutefois que l'un n'empêche pas l'autre. Il se demande si l'intention n'est pas de viser l'hypothèse dans laquelle un Etat prétendrait à une compétence abusive. Il invite Mme Bastid-Burdeau à clarifier son intervention.

Mr *Tyagi* suggested replacing the term « effective reparation » by « effective remedies ». He considered that it would cover all those aspects of remedies and other avenues of redress that Mr Tomuschat had in mind. Addressing Mrs Bastid-Burdeau's concerns, he also suggested amending the last line as follows : « unless it is established that it has not performed its obligations to make effective remedies in accordance with the

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applicable law ».

Mr *von Hoffmann* said that it was undisputed for private international lawyers that there was no norm of international law which conferred jurisdiction on national courts. However, he indicated that international law may have some sort of control on jurisdictional claims of national law. International law might sometimes state that the jurisdiction of a national court over cases was excessive. Therefore, he suggested amending paragraph 2 with the phrase: « which has jurisdiction in conformity with international law ».

The *President* recalled that amendments should be in written form. He gave the floor to Mrs *Bastid-Burdeau*.

Répondant à M. Lalive, Mme *Bastid-Burdeau* estime que le projet de Résolution donne au juge national des orientations pour traiter de cas d'immunité qui pourraient se présenter devant lui. Il lui semble que le juge national va d'abord se référer à son droit national qui peut éventuellement comporter des éléments de conventions internationales qui ont été incorporées dans le droit national. Elle indique toutefois que ce n'est pas au juge national d'apprécier si la compétence que lui a conféré sa propre loi est ou non contraire au droit international. Faisant référence au dernier membre de phrase du paragraphe 2, elle observe que l'immunité de juridiction est une exception qui est présentée *in limine litis* que le juge va apprécier au regard de la personne qui invoque l'immunité. Selon elle, la question de savoir si une indemnisation déjà accordée au demandeur est satisfaisante relève du fond.

M. *Kamto* soutient M. Verhoeven. Il s'interroge sur l'existence d'un principe de droit international qui donnerait compétence au juge national pour apprécier une décision. Il donne l'exemple de la compétence résiduelle de la CPI qui est accordée par une convention internationale. Il ne lui semble pas qu'un raisonnement par analogie puisse permettre l'attribution d'un tel pouvoir d'appréciation au juge national en dehors d'une règle conventionnelle.

La séance est levée à 13 h 00.

**Dixième séance plénière** Mercredi 9 septembre 2009 (après-midi)

The session began at 15 h 13 presided by Mr *Roucounas*, *first Vice-President*.

The *Rapporteur* proposed the withdrawal of Article IV, paragraph 2. If that paragraph were withdrawn, she was of the view that the whole of

Article IV should be withdrawn. She noted that there might be a technical problem in view of the fact that there had already been a vote in favour of paragraph 1 of Article IV, so there might be a need for a special vote to deal with this. She stated that she was prepared to withdraw the Article on State immunity in light of the fact that in adopting the first three Articles, the Institute had made some small incremental steps.

Mr *Degan* expressed his wish to continue the discussion on the problem of satisfaction as a modality of making effective reparation that triggers paragraph 2 of Article IV. He recalled that in the International Court of Justice's judgment in the *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (2007), the Court had held that Serbia had failed in its obligations to prevent the genocide at Srebrenica and that punishing its perpetrators constituted satisfaction in terms of its responsibility. In his view, this was completely wrong and indeed «inhuman». He was therefore not in favour of deleting Article IV since it would prevent victims of the Srebrenica massacre from obtaining reparation from Serbian authorities.

M. *Salmon* invite l'Institut à cesser la discussion sur l'article IV et à abandonner cette disposition dans sa totalité car, selon lui, l'article IV a été élaboré dans de mauvaises conditions. Il soutient à cet égard la proposition du Rapporteur. Il indique enfin qu'il est possible d'insérer la remarque de M. *Degan* dans l'article III.

Mr *Dinstein* supported the comment made by Mr *Salmon*. Regarding procedure, he was of the view that it was the privilege of the Rapporteur to withdraw a particular segment of the original Resolution, in which case the clause in question was no longer before the plenary. Of course, a Member might wish to resurrect the withdrawn provision. But to do so would require putting forward an amendment to the text.

On substance, he recalled that Article IV was originally entitled *de lege ferenda*. It was somewhat odd that a consensus had been reached on the *de lege lata* provisions, whereas disagreement continued as regards the *lex ferenda* clause. In his opinion, if any part of Article IV were retained, this might endanger the adoption of the Resolution as a whole. It would be better, therefore, to delete the controversial text.

Mr *Ronzitti* stated that while he understood that it was the Rapporteur's privilege to delete Article IV, paragraph 1 had already been adopted. In his view, this paragraph should be retained since it had been discussed and adopted and was very important.

The *President* explained that the Rapporteur had withdrawn paragraph 2, and that Mr *Salmon* had proposed the withdrawal of Article IV as a whole.

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He stated that the withdrawal of paragraph 2 was a fact because the Rapporteur had withdrawn it. However, since paragraph 1 had been adopted in the morning session, he opened the discussion as to whether the whole of Article IV could and should be deleted as had been proposed.

Mr *Ress* was of the same opinion as Mr *Dinstein*. If the paragraph was no longer before the plenary by reason of its withdrawal by the Rapporteur, then it was no longer subject to a vote. He was not fully sure, however, whether the Rapporteur could withdraw part of the Resolution that had already been voted on. He would support the withdrawal of the first paragraph of Article IV, because, as underlined by Mr *Dinstein*, this was *de lege ferenda*. Since the Institute would only partly deal with the issue, he saw little point in continuing with the endeavour and therefore supported the Rapporteur's proposal to delete Article IV as a whole. This, in his view, would make the Resolution more powerful and attract more votes in the plenary.

M. *Momtaz* déclare être favorable à la proposition de Lady Fox de supprimer l'article IV dans sa totalité pour les raisons indiquées par M. *Salmon*. Il estime que la préoccupation formulée par M. *Degan* ne fait pas obstacle à la suppression de l'article IV. M. *Degan* se fonde, selon lui, sur une lecture erronée de l'arrêt de 2007 de la Cour internationale de Justice dans l'affaire du génocide. Selon M. *Momtaz*, la Cour a établi une distinction claire entre l'obligation de prévenir et l'obligation de poursuivre et a jugé que la Serbie n'a pas d'obligation de poursuivre s'agissant des personnes ne se trouvant pas sur son territoire.

Mr *Bernhardt* was in total disagreement with the statement that if the Rapporteur withdrew a provision, it was no longer before the plenary. He underlined that the Resolution was a proposal of the Third Commission and it must be discussed in the plenary. On the merits, he could agree with the proposal, but it was extremely important to clarify the procedural question.

Mr *Conforti* did not wish to persuade the Assembly to go in one direction or the other, however, in his view it was a pity that, should the proposal of the Rapporteur be accepted, there would be no provision in the Resolution dealing with State immunity. He also noted that the remaining parts of the Resolution would have to be redrafted, since there were references throughout to State immunity.

Mr *Pocar* agreed with Mr *Bernhardt* that it was necessary to clarify the procedural issue. He saw problems if only paragraph 1 of the Article were retained, as it might give the impression that outside the scope of paragraph 1, States would enjoy immunity. On the other hand, he saw a problem in removing the entire article on State immunity. For one thing,

the title of the Resolution would have to change since it would only be dealing with State agents' immunity. He stated that if paragraph 2 had to be removed, then paragraph 1 should also be deleted, and Article IV should be replaced with a provision saying that the question of State immunity was reserved to show clearly that the Institute was not dealing with this subject. While he regretted that the Resolution would not be dealing with this topic, if there was no majority, he would prefer to delete the Article as a whole rather than just keep paragraph 1.

Mr *Lee* noted that Article IV was the contribution that the Institute had made to the development of international law. He pointed out that there had already been a vote on paragraph 1. The application of paragraphs 1 and 2 were restricted by paragraph 3, so the value of Article IV was restricted. He wondered whether Mr *Ress* would be prepared to return to his proposal to clarify that this provision was dealing with future developments and not *lex lata* and asked members to reconsider the proposal for its deletion in this light.

Mr *Mensah* stated that in his view, the procedural point was clear. Since the Rapporteur had withdrawn paragraph 2, this was no longer before the plenary. The consequence was that paragraph 1 would stand on its own, which would create a problem. He was unaware of any rule as to how to deal with the fact that paragraph 1 had already been voted on. If this was a procedural problem, he thought that it could be decided on by the Assembly. He moved that the Assembly reconsider its decision on paragraph 1 so that the whole Article could be deleted.

The *President* noted that Mr *Pocar* had made a useful suggestion to put something in Article IV to say that the Institute would not be dealing with State immunity and invited colleagues to comment on this.

M. *Torrez-Bernárdez* estime que le Rapporteur ne peut unilatéralement retirer la disposition dont il est question ici parce qu'il s'agit d'un texte adopté par la commission. Il indique également que, sur le fond, les différents paragraphes de la disposition sont autonomes ; la suppression du second paragraphe n'emporte dès lors pas automatiquement la disparition des autres paragraphes.

Mr *Treves* stated that the Institut was in an embarrassing situation. That morning, there were almost the same number of votes for keeping the paragraph as it stood and for couching it in the « should » mode, which suggested that it did not constitute existing law. This meant that the majority of members wished to say something positive, yet now the Institute was in the situation where the whole Article could disappear. Underlining this paradox, he wondered whether the Assembly could

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reconsider the drafting and use the « should » mode rather than delete the Article altogether.

Mr *von Hoffman* was disappointed with the proposal to withdraw the Article which covered issues that were important. He noted that the Institut had engaged in this topic for years, and that the disappearance of the Article would be a non-result. He wondered whether the Institut could find a formula to reach a consensus on paragraph 1, perhaps along the lines suggested by Mr Treves, but he also thought it fair to cover the issue in paragraph 2, that is, the immunity of jurisdiction in cases of international crimes which were dealt with by a court with no territorial connection. In his view, the fact that the Institute had discussed the issue but could not reach agreement was important information for the general public.

Mr *Meron* congratulated the Rapporteur for her proposal to delete either paragraph 2 or Article IV as a whole. He agreed with Mr Pocar that it would be a pity not to have something on the issue, but that it would be worse to deal with State immunity in a way that was not comprehensive or compelling. The discussion of the morning had shown that members were deeply divided on paragraph 1. He would have been prepared to vote for paragraph 1 in the « should » mode, but was not prepared to support the paragraph in its present form for the reason that he was not sure that it was really a reflection of present international law. While he supported pushing international law in a progressive direction, the word « should » must still be used when the law was not yet established. The subject of State immunity in relation to international crimes deserved further understanding and he would be happy to see another report in the future. He noted that deleting the Article would necessitate modifying the title and entail consequential amendments and changes to the draft Resolution. In conclusion, he supported the proposal of the Rapporteur, which would mean that the Resolution as it remained would be more coherent and would deal with one major subject.

M. *Morin* demande au Secrétaire général si c'est au rapporteur ou à la commission que revient le droit de retirer la disposition. Sur le fond, il indique regretter l'abandon de tout l'article IV car il estime que cette disposition constitue l'apport principal de la résolution. Plutôt que de supprimer le paragraphe 2, il suggère que l'on formule celui-ci au conditionnel pour clairement montrer que c'est de la *lex ferenda*.

Le *Secrétaire général* indique que, à sa connaissance, ni le statut ni le règlement ne contiennent quelque stipulation à cet égard. Il lui semble toutefois que, selon les principes généraux, la commission agit toujours par l'intermédiaire de son rapporteur et est représentée par celui-ci en

séance plénière, qu'il ait ou non consulté les membres de celle-ci. Le Secrétaire général n'est pas opposé à ce que ce point de procédure soit soumis au vote si on le croit utile. Sur le fond, le Secrétaire général indique ne pas très bien comprendre le sens du paragraphe IV.3. Le formuler en termes de *lex ferenda* n'y changerait rien. Il souligne enfin qu'il serait étrange que la résolution ignore la question des immunités de l'Etat. Il suggère en conséquence de conserver le paragraphe 1 et de reformuler le paragraphe 2 pour indiquer que l'Etat devrait renoncer à son immunité s'il refuse d'accepter les procédures – judiciaires ou diplomatiques – permettant de statuer sur les réparations.

M. *Fadlallah* trouve regrettable que l'article IV soit supprimé, car, comme d'autres membres, il estime qu'il s'agit de l'apport principal de cette résolution. Il souligne aussi l'amendement de Mme Bastid-Burdeau adopté hier à l'unanimité visait précisément l'un des recours dont il est question au paragraphe 1<sup>er</sup>. Il serait en conséquence illogique de le supprimer.

M. *Kamto* pense que les incertitudes procédurales concernant le retrait de la disposition par le Rapporteur ont été clarifiées par le Secrétaire général. Sur le fond, il indique qu'une résolution de l'Institut ignorant la question de l'immunité de l'Etat n'aurait pas de sens. Il reconnaît toutefois que si l'Institut veut proposer un développement progressif du droit international, il ne doit le faire que si la résolution recueille une large majorité. Il soutient enfin la proposition de conserver le paragraphe 1<sup>er</sup> et de reformuler le paragraphe 2 en le mettant le conditionnel. Il propose cependant de compléter le paragraphe 2 en ajoutant « sans préjudice de ses obligations de réparation conformément au droit international conventionnel et coutumier ».

Mr *Ronzitti* did not understand why members should reconsider the proposal to use the « should » form in paragraph 1 since this had been controversial and the paragraph as written had gathered 22 votes.

Mr *Mensah* noted that paragraph 2 had been withdrawn. In his view, it was not fair on those members who had voted against using the « should » form in paragraph 1 to return to that proposal since the decision on this language had already been taken. It was not possible to go back to a vote on a new amendment to paragraph 1.

The *President* proposed that the Assembly suspend the discussion on this item and that the Third Commission convene in order to come up with a new text for Article IV, if any, which could then be presented to the plenary. In the meantime, the plenary could deal with other business.

The plenary agreed to this proposal.

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La séance est suspendue à 16 h00 et reprend à 17 h 15.

The *President* invited the Rapporteur to comment on Amendment 1 to the draft Resolution presented by the Commission.

The *Rapporteur* stated that the Third Commission had met and had considered two proposals. First, Mrs Bastid-Burdeau's proposal to add another sentence to Article II (2) had been incorporated as a third paragraph to Article II, which read : « States may waive immunity where international crimes are allegedly committed by agents of the State ».

With regard to Article IV, which had been subject to considerable discussion, the Commission proposed to delete the Article completely and replace it with one provision, which read : « The above provisions are without prejudice to the issue of whether and when a State enjoys immunity from civil jurisdiction before the national courts of another State in a proceeding in respect of international crimes caused by an act or omission of the State ». The Article would retain its title in order to clearly show that no decision on the immunity of the State had been taken.

Mr *Pocar* stated that the new paragraph 3 to Article II on waiving immunity reflected the suggestion made earlier that morning. He was in agreement with it since it reflected existing law. However, he wondered whether the Institute should not go further and actually encourage States to waive immunity where international crimes had been committed. This might give more weight to the principle.

Mr *Ress* responded to Mr *Pocar*'s intervention by explaining that the Commission had considered the same wording and that there had been a discussion as to whether there was an important difference between « may » and « should consider ». He did not oppose the proposal, but he did not think that there was much import in the change of wording.

Mme *Bastid-Burdeau* exprime son soutien à la formulation proposée par M. *Pocar* et l'estime d'autant plus souhaitable que la rédaction actuelle fait double emploi avec ce qui est dit dans le préambule. Plutôt que de le répéter, il serait plus logique que le paragraphe 3 soit conçu comme y donnant suite.

The *President* noted that the Rapporteur had accepted to write « States should consider waiving... » instead of « States may waive... ».

Mr *Degan* supported Article II, paragraph 3 as proposed, but did not see any serious reason for the modification in wording. With regard to Article IV, he expressed his dissatisfaction with the proposal to delete it because he believed that this might be discouraging for victims of international crimes to seek reparation from civil courts. In this regard, he noted that



victims of the terrible international crimes that had occurred in the Balkan region were trying to obtain reparation in the courts of Serbia and Croatia and that the omission of the immunity of the State in the Resolution was regrettable.

Mr *Kazazi* welcomed the proposal of the Commission to replace Article IV with a new text. He suggested, however, that the text should be revised to a negative formulation, i.e. « when a State does not enjoy civil jurisdiction », which would align more closely with the state of the law.

Mr *Conforti* expressed the view that it seemed strange to have an Article IV which was entitled « Immunity of the State » only to have a saving clause, which did not deal with the issue. He would support deleting the Article altogether. If this were not accepted, then he suggested inserting the saving clause in Article III (C) when it said that “The above provisions are without prejudice to : ».

Mr *von Hoffmann* was of the mind that since there were divided opinions on Article IV, it was better to say something than to say nothing. This would make it clear that there was a difference of opinion which in itself was an interesting statement about the state of the law. However, it would be necessary to remove from the preamble the reference to « future trends and developments » since there were no longer any future trends and developments in the Resolution.

The *President* said that the preamble would be considered at a later stage, but that the suggestion would be taken note of.

Mr *Ronzitti* thanked the Rapporteur for the new efforts on the draft Resolution. However, he found it difficult to understand why there was only now a saving clause in the Article and requested clarification. With regard to the first line referring to the « issue of whether and when », he noted that the word « when » was redundant because it was included in the word « whether ».

Mr *Bernhardt* supported the new proposal for Article IV since the discussion had shown that no agreement was possible. He pointed out that the title of the Resolution would have to be changed to refer only to « State agents ».

The *President* responded that the title would be considered later in the discussion.

Mr *Ress* noted that by including a saving clause, the Institute had indicated that there was an issue. He submitted that there was in fact a difference between the words « whether » and « when », the former being a general acceptance of such jurisdiction and the latter referring to the

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conditions that had been spelt out in the former draft Resolution. In his view, that was covered by the word « issue ». He was happy that the Institute addressed the issue at all and therefore supported the proposal of the Commission.

Mr *Degan* suggested that it might be best to mention in the preamble that the Resolution did not deal with the immunity of States, which was open to future progressive development. In his view, this was preferable than to have a separate Article with a title on State immunity.

Mrs *Xue* said that as a member of the Third Commission, she felt obliged to give some substantive thoughts on the new draft. She recalled that the Commission had had lengthy discussion on all the comments and concerns raised. From a personal perspective, she wished to draw attention to the Articles on State Responsibility, in which the International Law Commission had referred to « serious breaches of international obligations », for which States were liable to provide reparation and satisfaction, which would include the punishment of alleged criminals. Although Article IV had been excluded, this did not therefore mean that States were not responsible for serious breaches of international obligations, i.e. international crimes. She also pointed to Article III (C)(b) of the Resolution which stated that the provisions of the Resolution were without prejudice to the attribution to the State of the acts of any such person constituting international crimes. She underlined that international crimes were committed by persons. Therefore, the Resolution did not neglect crimes committed by States.

The *President* thanked Mrs *Xue* for her clarifications.

M. *Salmon* rappelle que le paragraphe du préambule « recognizing that the removal of immunity from proceedings in national courts is one way by which effective reparation for the Commission of international crimes may be made » s'applique tant à l'immunité des agents qu'à l'immunité de l'Etat.

The *President* proceeded to the vote on the first proposal under Amendment 1 on Article II, paragraph 3, with the modification of the words « should consider waiving » instead of « may waive ». There were 34 votes in favour; none against; and 2 abstentions. The proposal was adopted.

With regard to the second proposal under Amendment 1 on Article IV, the *President* asked Mr *Kazazi* whether he insisted on his proposed change of wording « when a State does not enjoy ».

Mr *Kazazi* indicated that he did not insist on his proposal.

Mr *Tyagi* pointed out that Mr Conforti had made a suggestion to move this text into Article III (C)(c).

The *President*, after conferring with Mr Conforti, stated that this suggestion was not insisted on. He proceeded to call on members to vote on the Amendment 1 on Article IV presented by the Commission. There were 26 votes in favour; 6 against; and six abstentions. The proposal was adopted.

The *President* then moved the discussion to the title and the preamble and invited the *Rapporteur* for comment.

The *Rapporteur* drew attention to paragraph 1 of the preamble, which had not been subject to any comment. Paragraph 2 was new, but consisted of a statement that had previously been in the Article on Principles, and merely stated the law. The third and fourth paragraphs had been in all the draft Resolutions. The fifth paragraph was new, and was important now that all reference to reparation in a substantive article had been removed. She noted that it would be appropriate to delete the sixth paragraph in view of the fact that the Resolution merely stated the law as it was, and did not contain new trends and developments.

Mr *Degan* indicated that he would abstain from the entire Resolution.

Mrs *Infante Caffi* suggested removing the words “and the practice of States” in the second paragraph since this was too wide.

The *President* stated that each paragraph would be taken in turn, beginning with the first paragraph.

The first paragraph was accepted.

The *President* called on members to comment on the suggestion of Mrs Infante Caffi to delete the reference to the practice of States in the second paragraph.

Mr *Dinstein* noted that the words «the practice of States» were redundant since the general practice of States was included in the reference to customary international law.

Mr *Tyagi* suggested that the paragraph could be simplified to read: «*Conscious* that a State has an obligation... ».

The *President* noted the proposal of Mr Tyagi to delete the reference to international law.

Mr *Bernhardt* supported the deletion of the reference to «practice of States».

The *President* called on members to vote on the deletion on the words «and the practice of States». The proposal was accepted.

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Mr *Pocar* noted that conventions usually referred to the obligation to « ensure and protect » rather than just « protect ».

The *President* called on members to vote on the third paragraph. It was accepted.

The *President* called on members to vote on the fourth paragraph. It was accepted.

The *President* called on members to vote on the fifth paragraph. It was accepted.

The *President* called on members to vote on the seventh paragraph. It was accepted.

The *President* called on members to vote on the preamble in its entirety. It was unanimously adopted.

The *President* then moved the discussion to the title of the Resolution and invited the *Rapporteur* to comment.

The *Rapporteur* was aware that the Resolution now dealt mainly with the jurisdiction of State agents, however she submitted that it was not entirely accurate to only refer to this in the title since the article on Principles and on the addition on waiver of immunity did deal with State immunity. Therefore, while she recognised that Article IV was emasculated, the Institute had said something about States and therefore the title should remain.

The *President* asked members whether they accepted the *Rapporteur's* proposal. It was accepted. He proceeded to the vote on the entire Resolution.

Le *Secrétaire général* souligne que le comité de rédaction devrait revoir le texte avant le vote par appel nominal. Il ajoute qu'on pourrait également envisager la suppression des titres intermédiaires dans la résolution.

Le *Président* indique que le vote par appel nominal aura lieu le lendemain.

Le *Secrétaire général* présente l'agenda provisoire des travaux du lendemain.

Mr *Ress* indicated that he would prefer to vote immediately on the Resolution.

Mr *Pocar* stated that he was not prepared to vote at this stage, since the text must go to the drafting committee in order to produce a clean text.

Mr *Ress* said that he would withdraw his proposal if there were objections.

M. *Salmon* partage l'avis de M. *Pocar*. Ce n'est qu'après la distribution du texte final que l'on peut procéder au vote. Il souligne toutefois qu'il est déjà arrivé que l'Institut procède à un vote indicatif avant que le texte final soit disponible.

Le *Président* indique que si l'on vote maintenant, il ne pourrait s'agir que d'un vote indicatif.

Le *Secrétaire général* propose qu'il soit procédé au vote indicatif immédiatement.

M. *Salmon* indique que l'on a renvoyé un très grand nombre de problèmes au comité de rédaction.

Mr *Gaja* noted that it was unusual to move to a formal vote without distributing a text. He suggested that a general vote be taken by a show of hands and that an a vote by roll call be postponed to the time when the text was ready.

Il est procédé à un vote indicatif sur l'ensemble de la résolution.

Le *Secrétaire général* annonce que la résolution recueille 31 voix pour, aucune voix contre, et 5 abstentions. La résolution est adoptée à titre indicatif.

La séance est levée à 18 h 12.

**Douzième séance plénière**                      Jeudi 10 septembre 2009 (après-midi)

La séance est ouverte à 15 h 45 sous la présidence de M. *Conforti*, Président de l'Institut.

**Resolution**

*The Institute of International Law,*

*Mindful* that the Institute has addressed jurisdictional immunities of States in the 1891 Hamburg Resolution on the Jurisdiction of courts in proceedings against foreign States, sovereigns and heads of State, the 1954 Aix-en-Provence Resolution on Immunity of foreign States from jurisdiction and measures of execution, the 1991 Basle Resolution on the contemporary problems concerning immunity of States in relation to questions of jurisdiction and enforcement and in the 2001 Vancouver Resolution on Immunities from jurisdiction and execution of heads of State and of Government in international law ;

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*Conscious* that under conventional and customary international law a State has an obligation to respect and to ensure the human rights of all persons within its jurisdiction ;

*Considering* the underlying conflict between immunity from jurisdiction of States and their agents and claims arising from international crimes ;

*Desirous* of making progress towards a resolution of that conflict ;

*Recognizing* that the removal of immunity from proceedings in national courts is one way by which effective reparation for the commission of international crimes may be achieved ;

*Adopts* the following Resolution :

#### **Article I : Definitions**

1. For the purposes of this Resolution « international crimes » means serious crimes under international law such as genocide, crimes against humanity, torture and war crimes, as reflected in relevant treaties and the statutes and jurisprudence of international courts and tribunals.
2. For the purposes of this Resolution « jurisdiction » means the criminal, civil and administrative jurisdiction of national courts of one State as it relates to the immunity of another State or its agents conferred by treaties or customary international law.

#### **Article II : Principles**

1. Immunities are conferred to ensure an orderly allocation and exercise of jurisdiction in accordance with international law in proceedings concerning States, to respect the sovereign equality of States and to permit the effective performance of the functions of persons who act on behalf of States.
2. Pursuant to treaties and customary international law, States have an obligation to prevent and suppress international crimes. Immunities should not constitute an obstacle to the appropriate reparation to which victims of crimes addressed by this Resolution are entitled.
3. States should consider waiving immunity where international crimes are allegedly committed by their agents.

#### **Article III : Immunity of persons who act on behalf of a State**

1. No immunity from jurisdiction other than personal immunity in accordance with international law applies with regard to international crimes.

2. When the position or mission of any person enjoying personal immunity has come to an end, such personal immunity ceases.
3. The above provisions are without prejudice to :
  - (a) the responsibility under international law of a person referred to in the preceding paragraphs ;
  - (b) the attribution to a State of the act of any such person constituting an international crime.

#### **Article IV : Immunity of States**

The above provisions are without prejudice to the issue whether and when a State enjoys immunity from jurisdiction before the national courts of another State in civil proceedings relating to an international crime committed by an agent of the former State.

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#### **Résolution**

*L'Institut de droit international,*

*Rappelant* que l'Institut s'est prononcé sur les immunités de juridiction des Etats dans la résolution de Hambourg de 1891 sur la compétence des tribunaux dans les procès contre les Etats, souverains ou chefs d'Etat étrangers, dans la résolution d'Aix-en-Provence de 1954 sur l'immunité de juridiction et d'exécution forcée des Etats étrangers, dans la résolution de Bâle de 1991 sur les aspects récents de l'immunité de juridiction et d'exécution des Etats, et dans la résolution de Vancouver de 2001 sur les immunités de juridiction et d'exécution du chef d'Etat et de gouvernement en droit international ;

*Conscient* que, selon le droit international conventionnel et coutumier, un Etat est obligé de respecter et de garantir les droits de l'homme de toutes les personnes relevant de sa juridiction ;

*Considérant* le conflit latent entre les immunités de juridiction des Etats ou de leurs agents et les réclamations liées aux crimes internationaux ;

*Désireux* de contribuer à la solution de ce conflit ;

*Reconnaissant* que la levée de l'immunité lors de procédures engagées devant des juridictions nationales est un moyen d'assurer aux victimes de crimes internationaux une réparation effective ;

*Adopte* la résolution suivante :

#### **Article I : Définitions**

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1. Pour les besoins de la présente résolution, l'expression « crimes internationaux » s'entend des crimes graves en droit international, tels que le génocide, les crimes contre l'humanité, la torture et les crimes de guerre, ainsi que cela ressort des traités applicables ou du statut et de la jurisprudence des juridictions internationales.

2. Pour les besoins de la présente résolution, l'expression « juridiction » s'entend de la compétence pénale, civile ou administrative des tribunaux nationaux d'un Etat en tant qu'elle se rapporte aux immunités conférées à un autre Etat ou à ses agents par le droit international conventionnel ou coutumier.

### **Article II : Principes**

1. Les immunités sont accordées en vue d'assurer conformément au droit international une répartition et un exercice ordonnés de la compétence juridictionnelle dans les litiges impliquant des Etats, de respecter l'égalité souveraine de ceux-ci, et de permettre aux personnes qui agissent en leur nom de remplir effectivement leurs fonctions.

2. Conformément au droit international conventionnel et coutumier, les Etats ont l'obligation de prévenir et de réprimer les crimes internationaux. Les immunités ne devraient pas faire obstacle à la réparation adéquate à laquelle ont droit les victimes des crimes visés par la présente résolution.

3. Les Etats devraient envisager de lever l'immunité de leurs agents lorsque ceux-ci sont soupçonnés ou accusés d'avoir commis des crimes internationaux.

### **Article III : Immunités des personnes agissant au nom d'un Etat**

1. Hors l'immunité personnelle dont un individu bénéficierait en vertu du droit international, aucune immunité n'est applicable en cas de crimes internationaux.

2. L'immunité personnelle prend fin au terme de la fonction ou de la mission de son bénéficiaire.

3. Les dispositions ci-dessus sont sans préjudice de :

(a) la responsabilité en vertu du droit international de la personne visée aux paragraphes précédents ;

(b) l'imputation à un Etat des actes de cette personne qui sont constitutifs de crimes internationaux.

### **Article IV : Immunité de l'Etat**

Dans une affaire civile mettant en cause le crime international commis par l'agent d'un Etat, les dispositions qui précèdent ne préjugent pas de



l'existence et des conditions d'application de l'immunité de juridiction dont cet Etat peut le cas échéant se prévaloir devant les tribunaux d'un autre Etat.

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Le *Président* souhaite, à titre liminaire, remercier M. Treves, sa Commission et l'ensemble des Membres pour les efforts déployés afin d'adopter la Déclaration de Naples sur la piraterie, à laquelle il tenait tout particulièrement. Il en vient ensuite au projet de résolution de la troisième Commission présenté par Lady Fox ; il procède à sa lecture, puis appelle les Membres à voter sur chacun des articles.

L'article I est adopté par 49 voix pour, aucune voix contre et 1 abstention.

L'article II est adopté par 51 voix pour, aucune voix contre et 1 abstention.

L'article III est adopté par 46 voix pour, aucune voix contre et 5 abstentions.

L'article IV est adopté par 35 voix pour, 3 voix contre et 14 abstentions.

Le préambule est adopté par 53 voix pour, aucune voix contre et aucune abstention.

Le titre est adopté par 46 voix pour, aucune voix contre et 6 abstentions.

Le *Secrétaire général* procède ensuite au vote de l'ensemble de la résolution par appel nominal.

Le résultat du vote est le suivant :

Pour : M. Vignes ; M. Abi-Saab, Mme Bastid-Burdeau, MM. Bernhardt, Cançado Trindade, Lord Collins, MM. Dinstein, El-Kosheri, Fujita, Gaja, Sir Kenneth Keith, M. Kooijmans, Mme Lamm, MM. Lee, Mahiou, McWhinney, Mensah, Meron, Momtaz, Morin, Pocar, Ranjeva, Ress, Roucounas, Rudolf, Salmon, Tomuschat, Treves, Verhoeven ; MM. Audit, Erauw, Mme Infante Caffi, MM. Kamto, Kateka, Kazazi, Kirsch, Lankosz, Mc Clean, Remiro Brotons, Schrijver, Struycken, Thürer, Wolfrum ;

Contre : aucun

Abstentions : M. Rigaux ; MM. Caminos, Conforti, Degan, Fadlallah, Gannagé, Torres Bernárdez, Yankov ; MM. Bucher, Francioni, Ronzitti, Tyagi, Mme Xue, M. Yee.

La résolution est adoptée par 43 voix pour, 0 contre et 14 abstentions.

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M. *Fadlallah* propose d'adopter par acclamation une motion de remerciement à Lady Fox pour l'ensemble de son travail et de ses efforts.

Cette motion est adoptée.

La séance est levée à 16 h 10.

### III. RESOLUTION

#### THIRD COMMISSION

*Resolution on the Immunity from Jurisdiction of the State  
and of Persons Who Act on Behalf of the State in case of International  
Crimes*

Rapporteur : Lady Fox

#### RESOLUTION

*The Institute of International Law,*

*Mindful* that the Institute has addressed jurisdictional immunities of States in the 1891 Hamburg Resolution on the jurisdiction of courts in proceedings against foreign States, sovereigns and heads of State, the 1954 Aix-en-Provence Resolution on immunity of foreign States from jurisdiction and measures of execution, the 1991 Basle Resolution on the contemporary problems concerning immunity of States in relation to questions of jurisdiction and enforcement and in the 2001 Vancouver Resolution on immunities from jurisdiction and execution of heads of State and of Government in international law ;

*Conscious* that under conventional and customary international law a State has an obligation to respect and to ensure the human rights of all persons within its jurisdiction;

*Considering* the underlying conflict between immunity from jurisdiction of States and their agents and claims arising from international crimes;

*Desirous* of making progress towards a resolution of that conflict;

*Recognizing* that the removal of immunity from proceedings in national courts is one way by which effective reparation for the commission of international crimes may be achieved;

*Adopts* the following Resolution:

**Article I: Definitions**

1. For the purposes of this Resolution “international crimes” means serious crimes under international law such as genocide, crimes against humanity, torture and war crimes, as reflected in relevant treaties and the statutes and jurisprudence of international courts and tribunals.
2. For the purposes of this Resolution “jurisdiction” means the criminal, civil and administrative jurisdiction of national courts of one State as it relates to the immunity of another State or its agents conferred by treaties or customary international law.

**Article II: Principles**

1. Immunities are conferred to ensure an orderly allocation and exercise of jurisdiction in accordance with international law in proceedings concerning States, to respect the sovereign equality of States and to permit the effective performance of the functions of persons who act on behalf of States.
2. Pursuant to treaties and customary international law, States have an obligation to prevent and suppress international crimes. Immunities should not constitute an obstacle to the appropriate reparation to which victims of crimes addressed by this Resolution are entitled.
3. States should consider waiving immunity where international crimes are allegedly committed by their agents.

**Article III: Immunity of persons who act on behalf of a State**

1. No immunity from jurisdiction other than personal immunity in accordance with international law applies with regard to international crimes.
2. When the position or mission of any person enjoying personal immunity has come to an end, such personal immunity ceases.
3. The above provisions are without prejudice to:
  - (a) the responsibility under international law of a person referred to in the preceding paragraphs;
  - (b) the attribution to a State of the act of any such person constituting an international crime.

**Article IV: Immunity of States**

The above provisions are without prejudice to the issue whether and when a State enjoys immunity from jurisdiction before the national courts of another State in civil proceedings relating to an international crime committed by an agent of the former State.

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*TROISIEME COMMISSION*

*Résolution sur l'immunité de juridiction de l'Etat  
et de ses agents en cas de crimes internationaux*

Rapporteur : Lady Fox

RESOLUTION

*L'Institut de droit international,*

*Rappelant* que l'Institut s'est prononcé sur l'immunité de juridiction ou d'exécution des Etats dans la résolution de Hambourg de 1891 sur la compétence des tribunaux dans les procès contre les Etats, souverains ou chefs d'Etat étrangers, dans la résolution d'Aix-en-Provence de 1954 sur l'immunité de juridiction et d'exécution forcée des Etats étrangers, dans la résolution de Bâle de 1991 sur les aspects récents de l'immunité de juridiction et d'exécution des Etats, et dans la résolution de Vancouver de 2001 sur les immunités de juridiction et d'exécution du chef d'Etat et de gouvernement en droit international ;

*Conscient* que, selon le droit international conventionnel et coutumier, un Etat est obligé de respecter et de garantir les droits de l'homme de toutes les personnes relevant de sa juridiction ;

*Considérant* le conflit latent entre les immunités de juridiction des Etats et de leurs agents, d'une part, et les réclamations liées à des crimes internationaux, d'autre part ;

*Désireux* de contribuer à la solution de ce conflit;

*Reconnaissant* que la levée de l'immunité lors de procédures engagées devant des juridictions nationales est un des moyens d'assurer aux victimes de crimes internationaux une réparation effective ;

*Adopte* la résolution suivante :

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### **Article I : Définitions**

1. Pour les besoins de la présente résolution, l'expression « crimes internationaux » s'entend des crimes graves en droit international tels que le génocide, les crimes contre l'humanité, la torture et les crimes de guerre, ainsi que cela ressort des traités applicables ou du statut et de la jurisprudence des juridictions internationales.
2. Pour les besoins de la présente résolution, l'expression « juridiction » s'entend de la compétence pénale, civile ou administrative des tribunaux nationaux d'un Etat en tant qu' elle se rapporte aux immunités conférées à un autre Etat ou à ses agents par le droit international conventionnel ou coutumier.

### **Article II : Principes**

1. Les immunités sont accordées en vue d'assurer conformément au droit international une répartition et un exercice ordonnés de la compétence juridictionnelle dans les litiges impliquant des Etats, de respecter l'égalité souveraine de ceux-ci, et de permettre aux personnes qui agissent en leur nom de remplir effectivement leurs fonctions.
2. Conformément au droit international conventionnel et coutumier, les Etats ont l'obligation de prévenir et de réprimer les crimes internationaux. Les immunités ne devraient pas faire obstacle à la réparation adéquate auxquelles ont droit les victimes des crimes visés par la présente résolution.
3. Les Etats devraient envisager de lever l'immunité de leurs agents lorsqu'ils sont soupçonnés ou accusés d'avoir commis des crimes internationaux.

### **Article III : Immunités des personnes agissant au nom d'un Etat**

1. Hors l'immunité personnelle dont un individu bénéficierait en vertu du droit international, aucune immunité n'est applicable en cas de crimes internationaux.
2. L'immunité personnelle prend fin au terme de la fonction ou de la mission de son bénéficiaire.
3. Les dispositions ci-dessus sont sans préjudice de :
  - (a) la responsabilité en vertu du droit international de toute personne visée aux paragraphes précédents;

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(b) l'imputation à un Etat des actes de cette personne qui sont constitutifs de crimes internationaux.

**Article IV : Immunité de l'Etat**

Dans une affaire civile mettant en cause le crime international commis par l'agent d'un Etat, les dispositions qui précèdent ne préjugent pas de l'existence et des conditions d'application de l'immunité de juridiction dont cet Etat peut le cas échéant se prévaloir devant les tribunaux d'un autre Etat.