Document:-
A/CN.4/2984

Summary record of the 2984th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
2008, **vol. I**

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

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

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

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

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

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

The meeting rose at 1 p.m.

2984th MEETING

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

Chairperson: Mr. Edmundo VARGAS CARREÑO

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

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

[Agenda item 9]

PRELIMINARY REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRPERSON invited the Commission to continue its consideration of the preliminary report of the Special Rapporteur on immunity of State officials from foreign criminal jurisdiction (A/CN.4/601).

2. Ms. ESCARAMEIA congratulated the Special Rapporteur on his report—the fruit of enormous research—and the Secretariat on its memorandum (A/CN.4/596)—a substantial work of reference of such substance as to merit publication. Although she felt somewhat overwhelmed by the enormous volume of material and by other members' profound knowledge of the topic, she nonetheless hoped that her comments would provide useful guidance for the Special Rapporteur in his future work. She would divide her presentation into three parts, dealing respectively with areas of agreement, hypotheses she believed to have been made too readily in the report and which possibly required further consideration, and aspects that had been overlooked.

3. She agreed, first, on the importance of having a definition of "immunity from criminal jurisdiction", in particular so as to establish to what acts in the criminal procedure immunity applied—an issue raised in the case

concerning *Certain Questions of Mutual Assistance in Criminal Matters*. Secondly, she agreed that immunities did not prevent the applicability, but merely the enforcement of existing law.

4. Thirdly, she agreed that the foundations of immunity were a combination of the theory of representation and the functional theory, and that some entities, such as Heads of State, performed a largely representative or even purely symbolic function. Thus the question of immunities was closely bound up with the theory of representation. However, in the case of other high-ranking State officials, a combination of the theory of representation and the theory of function might be involved—a point to which she would revert later, since it could have been developed more thoroughly in the report.

5. Fourthly, she agreed that the starting point for the study should not be immunity *ratione personae* and *ratione materiae*, but instead the distinction between acts performed by State officials in their personal and in their official capacities. That was an important point which, although alluded to in the report, was not clearly spelled out.

6. Fifthly, as Mr. Petrič and other speakers had observed, it was important to study the question of immunity as applicable to the pretrial phase, since so many problems relating to immunity arose at that stage.

7. Lastly, at least in the initial stages of the study, it seemed advisable not to consider the questions of recognition and of the immunity of members of the families of State officials. She would very much like to see an article drafted excluding immunity for family members—possibly with the exception of consorts of monarchs, since they too embodied the State—and another excluding immunity for officials of non-recognized States or Governments. Perhaps such matters could be taken up at a later stage.

8. Turning to hypotheses that had been made too readily, she had two basic points. First, the Special Rapporteur tended to assume that the immunities of just three categories of official would be covered by the topic. Yet, the title implied that the immunities of persons other than Heads of State, Heads of Government and Ministers for Foreign Affairs would be covered. If the Commission had had in mind that very limited category of officials, it would perhaps have referred in the title to "State representatives", rather than to "State officials". Like some other speakers, she was in favour of a broader definition of persons to be covered by the topic, namely all incumbent and former State officials, a possibility referred to in paragraph 106 of the report.

9. That pointed to a problem implicit in the functional theory approach. If that approach was adopted as the basis for granting immunity, it would be virtually impossible to identify any State official who did not enjoy immunity. Almost anyone who performed any State function whatsoever would be entitled to claim immunity, including civil servants and teachers in the State education system. In a globalized world, all members of Governments and core technical personnel had to travel abroad constantly to perform State functions. Accordingly, the concept of immunity should be restricted so as to cover only persons who performed essential State functions or functions that could not be performed in the absence of such immunity. Several States currently adopted an approach along those lines, a case in point being Spain, where a number of high-ranking Rwandan military and other officials had been brought to trial because the Spanish courts had found that they did not have immunity.

10. In her view, the true basis for immunity was representation. Only those who embodied the State truly had grounds for claiming immunity. Heads of State and possibly Heads of Government fell into that category, whereas Ministers for Foreign Affairs enjoyed immunity more as a consequence of the fact that the diplomats with whom they liaised enjoyed it. If the Commission went beyond those categories, the functional theory would come into play, and it would need to be considered what threshold should be placed on it.

11. With regard to the second hypothesis with which she took issue, the Special Rapporteur assumed that there were no exceptions to immunities in the case of crimes under international law. She endorsed Mr. Dugard's comment to the effect that the gravity of the crimes varied greatly and that the Commission must look carefully at the different categories concerned. The Special Rapporteur had made it clear that the matter would be taken up in the second part of his preliminary report, to be issued at the next session, but he had also said that the remainder of the report would deal with procedural matters, including the question of waiver of immunities. She had understood that it would deal with them along the lines set out in the Secretariat memorandum. However, she was concerned that if exceptions to immunities were included in that category, they would acquire a procedural dimension, when in fact they were substantive matters, since the commission of such crimes precluded immunity. She requested clarification as to how such exceptions would be qualified.

12. She believed that there should be no immunity in cases of the most serious crimes of concern to the international community as a whole, for several reasons: the *jus cogens* nature of the norms concerned, to which Judge Al-Khasawneh had referred in the *Arrest Warrant* case; the need to protect the fundamental interests of the international community as a whole (as referred to in the literature by Professor Bianchi *et al.*); or because they were not functions of the State (as in the *Pinochet* case). Furthermore, although the judgment of the ICJ in the *Arrest Warrant* case had frequently been invoked, the Commission should also take into account rulings made in other cases, such as the *Pinochet* case and certain cases of the Spanish Audiencia Nacional.[238] Of particular note, however, was the judgement on the request of the Republic of Croatia for review of the Decision of Trial Chamber II of 18 July 1997 of the International Tribunal for the Former Yugoslavia in the *Prosecutor* v. *Blaškić* case, referred to in footnote 148 of the Secretariat memorandum, since it gave a different ruling on the matter. According to

[238] *Juzgado Central de Instruccion No. 4,* Audiencia Nacional, *Sumario 3/2.008--D* (arrest warrant against 40 Rwandan citizens, some of whom were current or former State officials, for crimes against humanity).

paragraph 41 of that judgement, persons responsible for war crimes, crimes against humanity and genocide could not invoke immunity from national or international jurisdiction, even if they had perpetrated such crimes while acting in their official capacity. So, although that judgement was fairly categorical on the matter, there were still diverging views among the different courts.

13. Mr. Dugard had also raised an important point concerning a situation that would increasingly arise as a result of the application of the principle of complementarity under the Rome Statute of the International Criminal Court. As States incorporated the Statute in their national legislation, they would have to surrender persons for trial in the International Criminal Court for very serious crimes, with no scope for immunity. Since it was likely that those States would not wish to create disparities between their domestic and international courts on the question of immunity, that problem was likely to come to a head.

14. On the issues that, in her view, had been somewhat overlooked in the report, she believed that more emphasis should have been placed on the time dimension, which permeated the whole topic and required further study. For instance, could a State official be tried for acts committed prior to his or her taking office? To what extent could officials be held responsible for acts committed during their term of office once they no longer held office?

15. In conclusion, she said that what the Commission decided on the topic was of great importance, given its evolving nature. The decision in the *Arrest Warrant* case had put a brake on parallel developments in many national courts. Several national legislations that allowed fairly broad scope for universal jurisdiction dealt with the question of immunities simply by reference to "international law". Unfortunately, which norms of international law were applicable was rarely specified. For example, the Spanish Organic Law of the Judicial Branch[239]—one of the most progressive in that field—recognized jurisdiction except in situations where there was immunity from jurisdiction as established by the norms of public international law. Accordingly, the Audiencia Nacional had declined jurisdiction over Paul Kagame, the Head of State and Commander of Armed Forces of Rwanda, on the ground that he had immunity under international law. The Commission's decisions were thus influential, and the establishment of clear rules would have an important impact.

16. Mr. McRAE congratulated the Special Rapporteur on the thorough analysis contained in his preliminary report, which evidenced comprehensive research on a difficult topic. The careful treatment of sources, of the relationship between immunity, and jurisdiction and of the nature of immunity provided an excellent basis for the Commission's work, and the conclusions set out in paragraph 102 were warranted. The Secretariat was also to be congratulated on its detailed and comprehensive memorandum on the subject.

17. The Commission needed to reflect further on some important questions arising from the report, the first of which concerned the nature of the exercise. Should the Commission be trying to identify the state of customary international law and codify it, perhaps with some marginal progressive development on the side, or to engage more boldly in progressive development, in order to adapt the immunity of State officials to contemporary society? The Special Rapporteur seemed to favour the former approach, whereas some members of the Commission seemed to prefer an emphasis on the latter. He himself thought that progressive development was indicated in some areas but not in others.

18. The approach adopted would make a difference in a number of areas. First, the category of officials who were entitled to full immunity in both their personal and official capacities was difficult to determine, but, under existing law, it was probably limited to officials holding high-level functions, including at least Heads of State, Prime Ministers and Ministers for Foreign Affairs. If the rationale for immunity was that it ensured that officials could carry out the activities of State without the threat of prosecution, then that triumvirate was neither an accurate nor a sufficient list of those who in fact carried out such activities. In some countries, Heads of State now had only symbolic functions and Ministers for Foreign Affairs no longer had a monopoly over the conduct of foreign relations. Many government ministers in such fields as the environment, trade, health and defence represented their countries internationally. It would be difficult to make distinctions on the basis of the criterion that representing their country was an indispensable part of their functions; practice would vary from country to country.

19. If immunity from jurisdiction was essential for the proper discharge of the international relations functions of the State, then why should individuals who conducted a large part of the foreign relations of a State not have the same protection as the triumvirate? Recognition of the reality of the way States operated today would militate in favour of broadening the range of those entitled to the immunity held by the protected three. However, one must consider whether the Commission should really be engaged in expanding the institution of immunity, particularly the broad immunities in respect of both personal and official capacities.

20. That led to the second important question: what justified granting to any of those officials immunity from prosecution for actions performed in their personal capacity? It was true that the personal and the public were frequently indistinguishable, but there were still certain instances where the separation could be made. Could there still be any rationale for immunity from criminal jurisdiction in respect of personal violence or sexual violence? As lower-level officials who had only functional immunity were subject to such criminal prosecution, why should higher-level officials not have the same functional immunity? Would susceptibility to such prosecution seriously impede them from carrying out their State functions? Certainly, the prolongation of such immunity after the official had left office could hardly be justified.

[239] *Ley orgánica 6/1985 del Poder judicial*, 1 July 1985, *Boletin official del Estado* (BOE) No. 157, p. 20632 (www.boe.es/buscar/act.php?id=BOE-A-1985-12666).

21. Taking away the immunity of Heads of State, Prime Ministers and Ministers for Foreign Affairs in their personal capacity might be much more progressive development than States were prepared to contemplate, but if the immunity of State officials was to be brought more closely into line with contemporary expectations of behaviour, then it was a step that had to be considered. At the very least, the Commission should not expand that somewhat anachronistic list of officials who had absolute personal and official immunity so as to grant immunity to other categories of officials for acts performed in their personal capacity, unless there was a very clear basis in customary international law for doing so. If the range of officials was to be expanded, the Commission should think in terms of something less than full immunity. Mr. McRae agreed with Ms. Escarameia's remarks about the difficulties of functional immunity and the need for a definition thereof.

22. It remained to be seen how the Special Rapporteur would deal with the question of exceptions to immunity. In the discussion so far, two almost diametrically opposed positions seemed to have emerged: immunity with no exceptions and immunity that would be waived in the event of prosecution for certain international crimes. By opting for the latter position, the Commission would be distancing itself from the decision of the ICJ in the *Arrest Warrant* case. It would be an act of progressive development—and, to be frank, one as unacceptable to some States as a rule of immunity with no exceptions would be for other States.

23. In the light of those seemingly polar opposites, it was worth reflecting on the precise nature of the topic. As the Special Rapporteur had made clear, the topic dealt with the immunity of State officials from criminal jurisdiction in the domestic courts of a foreign State, not immunity from international criminal jurisdiction, or from the jurisdiction of the domestic courts of State officials' own States. Yet the various forms of immunity could not be completely divorced. The reason for claiming that prosecution for international crimes in domestic courts might be justified was that there was as yet no adequate international criminal jurisdiction. Prosecution in the domestic courts of a foreign country was what might be called a "second-best" solution. It was needed in the absence of a fully functioning international criminal jurisdiction. However, the prospect of the prosecutorial authorities of any State being able to commence proceedings for alleged international crimes against high officials of any State was hardly a reassuring thought.

24. If, then, the "first-best" option for dealing with international crimes was international criminal jurisdiction, the Special Rapporteur might perhaps like to think about ways in which exceptions to immunities, if there were to be any, could be structured to support international criminal jurisdiction. One possibility might be that if a State accepted the jurisdiction of the International Criminal Court, its officials could have complete immunity from criminal jurisdiction in foreign courts, whereas if it did not, then its officials would not be immune from such jurisdiction in the event of international crimes. Perhaps, too, there should be a stronger focus on the circumstances in which immunity from criminal jurisdiction arose. For example, if a State whose official was being prosecuted wanted to assert his or her immunity in the event of an international crime, it might have to do so in a more affirmative, direct way.

25. Those were simply some suggestions as to how the Special Rapporteur might steer a course between the two poles of immunity without exceptions and exceptions in the case of international crimes, neither of which positions was likely in absolute form to find ready and universal acceptance by States. That brought him back to the basic question of whether the Commission was involved in progressive development, or simply trying to codify the existing customary international law.

26. Mr. MELESCANU thanked the Special Rapporteur for his excellent preliminary report on a topic whose inclusion on the Commission's programme of work he had personally supported. He likewise commended the Secretariat's memorandum, which constituted an excellent compendium of information on a subject that was both of practical importance and of great intellectual and theoretical interest.

27. Although the Special Rapporteur considered that his report fell into two parts, he personally was of the opinion that it comprised three separate sections. The purpose of the initial section was to trace the history of the study by the Commission and the Institute of International Law of the question of the immunity of State officials from foreign criminal jurisdiction, with a view to elucidating it further against the backdrop of the development of public international law. He concurred with Mr. McRae that the Commission must not place too much emphasis on codifying customary law, but should incline more towards the progressive development of international law on the topic. Although all members agreed with that approach in principle, when it came to putting it into practice, it was unfortunately proving very difficult to reach consensus on what actually constituted progressive development and what direction it should take.

28. He was of the view that the Commission should take a bold and innovative tack on the institution of immunity. Such a course of action would not be easy, however, because there was a general inclination to draw parallels and to use notions and rules from the realm of diplomatic and consular immunities, an institution that had been recognized by the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations. There were a number of dangers inherent in that approach. First, that institution was well established in customary law and exhaustively codified in those Conventions. Secondly, parallels could not really be drawn, since diplomatic immunity and the immunity of State officials were not entirely comparable.

29. The first part of the report, above all paragraphs 1 to 26, was drafted in an extremely intelligent manner. However, while it offered the Special Rapporteur a balanced and objective basis for enlarging upon the subject, it contained an awkward contradiction, encapsulated in the words, "[e]very State has the right to exercise jurisdiction over its territory and over all persons and things therein, subject to the immunities recognized by

international law" (drawn from article 2 of the draft Declaration on the Rights and Duties of States, adopted by the Commission at its first session in 1949)[240] and "[t]he fact that a person acted as Head of State or as responsible government official does not relieve him of responsibility for committing any of the offences defined in this Code" (drawn from article 3 of the draft code of offences against the peace and security of mankind of 1954).[241] Those two quotations, which were to be found in paragraphs 7 and 9 of the report, also set some parameters for the Commission's activities.

30. The second part of the report contained in paragraphs 27 to 102, on preliminary issues, provided a detailed presentation of the sources of law on immunity, in other words international treaties, international custom—which the Special Rapporteur rightly considered to be the basic source of general international law and of the rules on immunity in particular—and international comity, an interesting subject, but one that, in his own view, should not be codified by the Commission. He endorsed the view of the Special Rapporteur and Ms. Escarameia regarding the importance of other sources such as State practice, decisions of international criminal tribunals and the material of the Commission and the Institute of International Law. It would be vital to define the term "jurisdiction" and, in doing so, to stress that the Commission was concerned solely with immunity from criminal jurisdiction, the procedural nature of such immunity and the difference between immunity *ratione personae* and immunity *ratione materiae*, even though it was perhaps premature to tackle that rather sensitive matter.

31. The most significant issue was the scope of the topic, on which he wished to make a few preliminary comments. First, it must be noted that the immunity of State officials from foreign criminal jurisdiction was an institution recognized by public international law, even though it had been codified principally with diplomatic and consular officials in mind. The modern foundations of that institution had been laid by Vattel in the eighteenth century, with his functional necessity theory that a diplomatic representative could not freely exercise his functions unless he was protected by such immunity.[242] That rationale applied increasingly in the contemporary world to the activities of Heads of State and Heads of Government. To judge by what was happening in Europe at least, their frequent forays into *ad hoc* diplomacy suggested that they should have the same protection as that enjoyed by professional diplomats. The functional necessity principle therefore seemed to be the fundamental objective criterion on which further consideration of the topic could be based.

32. The term "State officials" covered two categories of persons. The first category, diplomatic and consular officials, was fairly well-defined by very clear rules of customary international law and the provisions of the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations. While the Commission could draw upon that source, it would be advisable to leave aside that category, which might give rise to difficulties. In any case, States had means for dealing with a diplomat who overstepped the mark by declaring him or her *persona non grata* or by refusing their accreditation.

33. The second well-established category was that of Heads of State, Heads of Government and Ministers for Foreign Affairs. It was clear, *inter alia* from article 7 of the 1969 Vienna Convention, that this trio of high-ranking State officials did not have to produce full powers in order to enter into a commitment on behalf of their country. Furthermore, many countries, including his own, had adopted domestic legislation on that matter and, to the best of his knowledge, virtually all such legislation clearly specified that the Head of State, the Head of Government and the Minister for Foreign Affairs did not need to be given full powers in order to sign international treaties or to enter into a commitment on behalf of their country.

34. Accordingly, it would be safer to leave that category aside and to deal with a third, "open" category in which other types of official could be included, beginning with ministers of defence. However, the first difficulty lay in the fact that the responsibilities of a first deputy prime minister or of deputy ministers and secretaries of State were not identical in all States. The only solution would be to employ the functional necessity principle. If clear criteria could be found for applying it to members of the Government, it would then be possible to determine the scope of the term "State official".

35. The second difficulty was that of deciding whether only members of the executive branch could be described as State officials; almost all speakers had referred to the possibility of widening the scope to take in other ministers, such as the First Deputy Prime Minister of the Russian Federation, who also had wide powers. Furthermore, in many conventions the term "State" covered the executive, the legislature and the judiciary. Should functional immunity be extended to, for instance, the Presidents of Parliaments? In Portugal and in Romania, for example, the President of the Parliament and of the Senate respectively acted as substitute for the President of the Republic, i.e. the Head of State. Should Supreme Court judges likewise benefit from immunity from foreign criminal jurisdiction? All those questions required careful examination.

36. A third point requiring clarification was that of the relationship between central government and other branches of government. While it was quite acceptable that members of the executive above a certain level, or who held certain powers, should have immunity, what was the position with regard to federations, or countries such as Romania, where the presidents of regions were more powerful than ministers? What was the position with regard to members of local government?

37. In his view, Heads of State, Heads of Government and Ministers for Foreign Affairs should have immunity from foreign criminal jurisdiction, provided that the State

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[240] *Yearbook ... 1949*, p. 287; the draft was also annexed to General Assembly resolution 375 (IV) of 6 December 1949.

[241] *Yearbook ... 1954*, vol. II, p. 152.

[242] E. de Vattel, *The Law of Nations or the Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and of Sovereigns* (1758), English translation by C. G. Fenwick, Washington D.C., Carnegie Institution, 1916, vol. II, book IV, chap. VII, p. 371.

in question was a State Member of the United Nations or had been recognized by most members of the international community. Persons from certain entities that, for one reason or another had not been recognized by other States, and who styled themselves "prime minister" or "president", should not enjoy such immunity.

38. As for exceptions to and restrictions upon immunity, it was obvious that there were two quite different approaches to the question. While the majority favoured codification of the subject, he agreed with Mr. McRae that codification without substantial progressive development would leave the institution of immunity ill-adapted to contemporary realities. The best way forward would be to codify the institution of immunity, while allowing for numerous exceptions so as to avoid any suggestion that the Commission might be seeking to establish absolute impunity for high-ranking State officials. That was a danger that should not be underestimated.

39. The first vital restriction was temporal. If the basic principle adopted was that of functional immunity, then immunity would apply as long as the persons in question were in office. Once they had left office, it was hard to see how their immunity could be maintained. The second restriction was substantive: immunity was unacceptable in the case of such crimes as aggression, genocide, war crimes and crimes against peace and humanity.

40. Thirdly, he accepted the restriction proposed by the Special Rapporteur in paragraph 130 of his report, that State officials should be immune from the criminal but not the civil jurisdiction of another State, and that they should not be immune from the jurisdiction of international tribunals or the national jurisdiction of their own State.

41. If the Commission were to agree to an approach involving the codification and progressive development of the topic, focusing on the two questions of determining which officials should benefit from immunity and which express restrictions must be imposed, progress could undoubtedly be achieved. He therefore looked forward to the second part of the preliminary report on the topic.

42. Mr. BROWNLIE welcomed the Special Rapporteur's preliminary report and also the Secretariat's memorandum on immunity of State officials from foreign criminal jurisdiction. The standard of those preparatory materials was very high indeed.

43. One of the problems posed by the topic was that it combined an abundance of material and very diverse views, not least on policy. By way of introduction, he wished to reiterate a view he had already expressed on the policy of progressive development. As was well known, the Commission's mandate encouraged the progressive development of international law and it was not supposed simply to confine itself to ordinary processes of codification. However, a question arose as to what would be the fate of practice when a policy of progressive development was adopted. What would serve as practice? Was there a body of practice that was *lex ferenda* but nonetheless had some solidity? Many years earlier, in the context of the law of the sea, Manfred Lachs had invented the useful concept of emergent principles of general international law.[243] The question of practice was especially critical in the context of the topic under consideration, where there was a substantial polarization of opinion. If the Commission was in the business of extending immunity and wished to adopt a liberal approach to the question, it must avoid the danger of reducing the consideration of the topic to a debate about policy and morals. If that were allowed to happen, the Commission would then have the unenviable task of deciding whether simply to jettison the very extensive body of existing practice.

44. A central issue, with which the Special Rapporteur would doubtless deal in his next report, but which was already foreshadowed, was the question of the applicable law. Much of the literature was a curious mix of talk about international crimes and talk about the distinction between immunity *ratione materiae* and immunity *ratione personae*. In the *Pinochet* case, in which he had been involved, having appeared as counsel before both the panels in the case, the applicable law had been public international law in the form of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. It had had to take that precise form for a whole range of reasons, having to do not just with the crimes involved, but also with the reconciliation of the court's powers with the state of English municipal law at the time. That Convention had already been incorporated in English law, albeit only with certain future effects. However, since the standard applied was that of international law, there had been no question of asking whether torture was a State function: it clearly was not, because a State function had to be in accordance with international law.

45. That approach meant that if an international crime were involved, the test would be the standard of international law and there would be no immunity. The basic question put to the first and second panels was whether, when the international community had adopted instruments such as the Convention against Torture, it had also maintained the immunity of leading State officials, who were the very officials most likely in normal circumstances to be involved in organizing the activities that had led to crimes. That argument had weighed quite heavily with the House of Lords. It was a simple argument, which boiled down to the question whether there was any point in having such a convention when existing international law gave immunity to those who would most likely be subject to the criminal law concerned.

46. On the other side, in the first panel especially, some quite intelligent considerations had pointed in the other direction. Lord Goff of Chieveley, for instance, had reversed the question, asking whether it was being suggested that, when the Convention against Torture and similar instruments had been adopted, there had been a waiver of the immunity of Heads of State and other high-ranking State officials by implication. Would not such a waiver have been spelled out? There was something to be said for Lord Goff's view, from the standpoint of *lex lata*. Were he to speak as the devil's advocate, he personally

[243] See, *inter alia*, the *North Sea Continental Shelf* case, dissenting opinion of Judge Lachs, pp. 219 *et seq.*, in particular pp. 225–226.

would be inclined to say that it was probably not the case that in signing and ratifying the Convention, States had by inference abandoned the doctrine of immunity as it applied to leading officers of State. Although there had been merit in Lord Goff's argument, the House of Lords had nevertheless gone along with the former policy view with respect to the Convention against Torture. Interestingly, though, since the decision in the *Pinochet* case, leading municipal courts in other States had adopted a series of decisions in which the *Pinochet* reasoning had not been followed.

47. The fact of the matter was that, if the general opinion of liberal lawyers were to be adopted, it would lead to the disappearance of immunity. It would be unrealistic to expect that, given an inch, a mile would not be taken: that the circle of State officials entitled to immunity could be confined to the "trio", as Mr. Pellet had dubbed them. Some difficult dividing lines would have to be drawn. For example, the logic applied to a former Head of State in the *Pinochet* decisions, especially the second, should, in his opinion, also apply to an incumbent Head of State.

48. The Commission was wrestling with difficult policy questions. One that had been ignored in what had otherwise been a very good debate was what he called the question of equality. That question arose when international criminal justice was meted out to certain Heads of State while others, against whom there were equally good grounds for incrimination, were not put to any inconvenience. Some States that committed crimes in the course of suppressing rebellions were dealt with by the application of international criminal law, backed up by the United Nations Security Council, while others did not face those consequences. The occupation of Iraq, for example, had effectively been validated by Security Council resolutions:[244] the United Nations had gone out of its way to create a sort of political immunity in that case. Thus, if immunity were done away with, some would pay the price and others not.

49. On a less dramatic note, he did not think it was part of the Commission's remit to tackle the issue of recognition. Similarly, diplomatic and consular immunity were separate categories, and were not part of the topic under consideration. However, decisions on matters relating to diplomatic immunity that were by analogy relevant to the topic should be used as sources.

50. Lastly, attempts to try Heads of State and other senior State officials were linked with the as yet wholly unresolved issue of universal jurisdiction. Many Chileans, both pro- and anti-Pinochet, had held the view that the former Head of State should be tried not in Spain, but in Chile, something that could be considered a reasonable national interest given the nature of the case. Such issues were not on the Commission's current agenda, but stood in the background of the difficult decision on the extent to which it should uphold the immunity of senior officers of State.

[244] See, *inter alia*, Security Council resolutions 1483 (2003) of 22 May 2003, 1546 (2004) of 8 June 2004, 1557 (2004) of 12 August 2004, 1619 (2005) of 11 August 2005, 1637 (2005) of 8 November 2005, 1723 (2006) of 28 November 2006 and 1762 (2007) of 29 June 2007.

51. Mr. PETRIČ said he was not sure it was possible to state categorically that the Commission should not deal with the problem of recognition in the specific context of the topic. It was true that to discuss the effects of recognition in general would be absurd. However, as Mr. Melescanu had said, immunity came into play when a majority of States recognized the State in question. Forty-three countries had now recognized Kosovo—not a majority of countries in the world, but a majority of European Union member States. When the President of Kosovo visited Slovenia, which had recognized that country, it had to respect his immunity. In relations between two States that had recognized each other, the immunity of State officials should be respected.

52. Mr. DUGARD noted that Mr. Brownlie had referred to the distinction between *lex lata* and *lex ferenda* and suggested that the Commission should not be unduly bold in the progressive development of the law. In the *Arrest Warrant* case, the ICJ had acknowledged that there had been no State practice. It had argued that because a function of a Minister for Foreign Affairs was to travel and to do business on behalf of a State, he or she should be granted immunity. That, the Court had said, was a rule of customary international law. It had thus seemed to dispense with the requirements of *usus* and *opinio juris*. His question to Mr. Brownlie, one with which the Special Rapporteur would also have to grapple, was what the Commission should do if it wished to expand the "trio" to include ministers of defence or other ministers. Should it argue in accordance with functional necessity, as the Court had done in the *Arrest Warrant* case, or should it say there was no *usus* on the subject and that therefore it should be left alone?

53. Mr. BROWNLIE acknowledged that it was a difficult question. In pointing out the difficulties of venturing onto the thin ice of *lex ferenda*, what he had been hinting at was that there was often half-formed practice, expositions of policy by decision makers with real responsibilities, which could be fed into the debate. Thus there was something in between full-fledged policy statements and areas in which ample State practice was available. The example used by Mr. Dugard was entirely legitimate but not very helpful, because the ICJ had the rather splendid prerogative of making judicial general international law. For example, the United Nations Convention on the Law of the Sea said virtually nothing about the principles of delimitation except that the result should be equitable. It was a series of decisions of the Court, starting essentially with the *Gulf of Maine* and *Continental Shelf* cases, that had built up a corpus of judicially created general international law that was then applied by courts of arbitration in cases of maritime delimitation. In the *Arrest Warrant* case, the Court had had to fill a gap and, being the International Court of Justice, it had had the prerogative—and indeed the duty—not only to apply the law, but also to make the law. The Commission could not generate international law, but it could make some informed choices based on informed discussions of policy. In other words, it had to look for some middle ground between purely abstract discussion of morals and policy and *lex lata*.

54. Mr. KOLODKIN (Special Rapporteur), responding to Mr. Brownlie's comments, said that while he had not been privy to the Court's discussions leading up to its

decision in the *Arrest Warrant* case, he imagined it had had good grounds for concluding that Ministers for Foreign Affairs had immunity under customary international law, or *lex lata*. His report indicated (para. 109) that in the Commission's work on the texts that had subsequently become the draft articles on special missions,[245] on representation of States in their relations with international organizations[246] and on the prevention and punishment of crimes against internationally protected persons,[247] it had discussed the question of the special status under international law of certain categories of persons: Heads of State, Heads of Government and, unless he was mistaken, Ministers for Foreign Affairs. During the discussion, both in the Commission and in the Sixth Committee, it had been recognized that this trio enjoyed special status under international law. He would imagine that that discussion had provided the Court with reasons to characterize the immunity of Ministers for Foreign Affairs as a rule of customary international law. The Court had viewed the immunity of the trio as a rule, a norm, of international law and, in all probability, had not seen any need to seek additional evidence that that was the case. It had said that what needed proving, however, was not the existence of that rule, but the existence of exceptions to that rule.

55. Mr. Dugard had described the ruling in the *General Shaul Mofaz* case adjudicated in a district court of the United Kingdom as a minor decision, not comparable to a decision of the High Court or the *Cour de cassation*. Nevertheless, in that particular case the position of States had also been expressed; the case had raised the issues of State practice and *opinio juris*, since it had concerned a minister of defence. It was not, therefore, merely a district court decision.

The obligation to extradite or prosecute (*aut dedere aut judicare*)[248] (A/CN.4/588, sect. F, A/CN.4/599,[249] A/CN.4/603[250])

[Agenda item 7]

THIRD REPORT OF THE SPECIAL RAPPORTEUR

56. The CHAIRPERSON invited the Special Rapporteur to introduce his third report on the topic of the obligation to extradite or prosecute (*aut dedere aut judicare*), which was contained in document A/CN.4/603.

57. Mr. GALICKI (Special Rapporteur), introducing his third report on the topic, said that the report continued the process, begun in his earlier reports, of addressing questions to Governments and to members of the Commission concerning the main aspects of the topic, chief among which was the question whether the obligation *aut dedere aut judicare* existed as a rule of customary international law.

58. His third report consisted of an introduction, a chapter on the follow-up to the second report, a chapter introducing three draft articles and conclusions. The chapter I on the follow-up to the second report (paras. 3–109) comprised the main subject matter for discussion, since he was firmly convinced of the need to continue studying the principal substantive problems raised in his second report.[251] Accordingly, this chapter was divided into three sections, dealing respectively with consideration of the topic at the fifty-ninth session of the Commission (paras. 7–53); comments and information received from Governments on issues of particular interest to the Commission (paras. 54–93); and the discussion on the topic held in the Sixth Committee during the sixty-second session of the General Assembly (paras. 94–109). The presentation of the matters dealt with in the second and third sections varied with the nature of the information provided by Governments.

59. Section B (paras. 54–93) concerned the comments and information received from Governments in response to questions addressed to them in his preliminary report and repeated in his second report. Governments had been requested to list international treaties by which they were bound, their domestic legal regulations and their judicial practice reflecting the application of the obligation *aut dedere aut judicare* and the principle of universal jurisdiction, together with crimes or offences to which that obligation and the principle of universal jurisdiction were applicable in their legislation and practice.

60. In its report on the work of its fifty-ninth session, the Commission had asked Governments for specific additional information on (*a*) whether the State had authority under its domestic law to extradite persons in cases not covered by a treaty or to extradite persons of its own nationality; (*b*) whether the State had authority to assert jurisdiction over crimes occurring in other States that did not involve one of its nationals; and (*c*) whether the State considered the obligation to extradite or prosecute as an obligation under customary international law, and, if so, to what extent.[252]

61. Regrettably, only 20 Governments had submitted written comments and information[253] in response to the questions formulated in his previous reports and those put by the Commission. Not included in his current report were additional comments and information received since its finalization, including a second set of comments from the Government of Chile and comments from the Governments of Guatemala, Mauritius, the Netherlands and the Russian Federation, all of which were to be found in document A/CN.4/599. While he would take those comments and information into consideration in his next report, he would not rule out the possibility

[245] *Yearbook ... 1967*, vol. II (document A/6709/Rev.1 and Rev.1/Corr.1), p. 347 (see footnote 226 above).

[246] *Yearbook ... 1971*, vol. II (Part One) (document A/8410/Rev.1), p. 284 (see footnote 228 above).

[247] *Yearbook ... 1972*, vol. II (A/8710/Rev.1), p. 312 (see footnote 229 above).

[248] For the history of the Commission's work on the topic, see *Yearbook … 2006*, vol. II (Part Two), chap. XI, p. 172. The first two reports of the Special Rapporteur were reproduced, respectively, in *Yearbook … 2006*, vol. II (Part One), document A/CN.4/571, and *Yearbook … 2007*, vol. II (Part One), document A/CN.4/585.

[249] Reproduced in *Yearbook … 2008*, vol. II (Part One).

[250] *Idem*.

[251] For the Commission's consideration of the second report, see *Yearbook … 2007*, vol. II (Part Two), chap. IX, paras. 347–368.

[252] *Ibid.*, chap. III, paras. 31–33.

[253] *Yearbook … 2007*, vol. II (Part One), document A/CN.4/579.

of considering them during the current debate. Even so, the total volume of comments and information received was still insufficient to enable the Commission to reach any clear and compelling conclusions. Consequently, in his view, it should renew its request to Governments to respond to the questions contained in his preliminary and second reports, and also to any further questions that the Commission might wish to formulate at the current session.

62. A different method of presentation had been adopted in section C (paras. 94–109), which followed the layout used in paragraphs 161 to 173 of the topical summary of the discussion held in the Sixth Committee during the sixty-second session of the General Assembly on the report of the Commission on the work of its fifty-ninth session (A/CN.4/588, section F). The consideration of that discussion under eight subheadings allowed for a clearer presentation of the views of Governments.

63. The following chapter II (paras. 110–125) was devoted to the continuation of the main task of the codification process in respect of the topic, namely the formulation of draft rules on the obligation to extradite or prosecute (*aut dedere aut judicare*). That process had been initiated at the previous session, when he had proposed a draft article 1 on the scope of application of the draft articles. That draft article 1, which was reproduced in paragraph 20 of the third report, had generally been well received by members of the Commission and delegates in the Sixth Committee, notwithstanding certain suggestions for its improvement, which were set out in paragraphs 52 and 108 of the report.

64. In the light of opinions expressed in the Commission and in the Sixth Committee, he was prepared to delete the adjective "alternative", qualifying "obligation", from the proposed text of draft article 1, even though, as was explained in the footnote to paragraph 49 of the report, that adjective had been used in an authoritative doctrinal description of the obligation to extradite or prosecute.

65. Another aspect of draft article 1 that had stimulated some discussion had been the enumeration of the phases of "establishment, content, operation and effects" involved in the formulation and application of the obligation to extradite or prosecute. He was prepared to engage in further discussion concerning either the total elimination of that enumeration or its replacement with different wording, such as "formulation and application".

66. Lastly, the phrase "persons under their jurisdiction" had also met with some criticism. Proposals had been made to replace that phrase with another, such as "persons present in the territory of the custodial State" or "persons under the control of the custodial State". Although there seemed to be a need to discuss the matter further, he personally favoured his original formulation.

67. Taking into account the comments of members of the Commission and delegates in the Sixth Committee, and the views of Governments, he wished to keep the discussion open at the current stage and to propose an alternative version of draft article 1, which was to be found in paragraph 116 of the report, and read:

Article 1. Scope of application

The present draft articles shall apply to the establishment, content, operation and effects of the legal obligation of States to extradite or prosecute persons [under their jurisdiction] [present in the territory of the custodial State] [under the control of custodial State].

68. It could be seen that he was proposing to replace the controversial term "alternative", qualifying "obligation", with the word "legal", in order to stress the need for the obligation to extradite or prosecute to have a legal basis, rather than treating it as a moral or a political obligation. A further reason for that change was that, while the view that the obligation was essential to the suppression of criminality or to the limitation of power-based diplomacy was justified to some extent, it might also tend to emphasize the moral or political dimension of the obligation to the detriment of its legal force.

69. He had some doubts about the suggestions to delete the list of the various phases (establishment, content, operation and effects) in which the obligation to extradite or prosecute might arise. While it would certainly be possible to replace them with a shorter description, such as "formulation and application", that might lead to difficulties when the Commission came to formulate more detailed draft rules applicable to those phases. That issue should to be resolved by the Commission as soon as possible, since it was a precondition for further progress in systematizing the draft rules.

70. Draft article 2 was necessary in order to avoid misunderstandings and unnecessary repetition when formulating the draft rules. Although, in his second report, he had made some suggestions concerning terms that might require more detailed definition, there had been little by way of a response to his requests for suggestions regarding the terms to be defined. However, there had been no outright opposition to the article *per se*; on the contrary, members had favoured its inclusion.

71. In his second report, he had proposed the terms "extradition", "prosecution", "jurisdiction" and "persons" as candidates for definition. It would perhaps also be useful to include detailed definitions of the terms "crimes" and "offences" as they related to the scope of application of the draft articles. He remained convinced of the need to keep draft article 2 open until the end of the codification exercise, in order to allow for the gradual addition of definitions and descriptions as and when the need arose.

72. In the meantime, he proposed that an embryonic draft article 2, as contained in paragraph 121 of the report, should be worded in the following manner:

Article 2. Use of terms

1. For the purposes of the present draft articles:

(*a*) "extradition" means [...];

(*b*) "prosecution" means [...];

(*c*) "jurisdiction" means [...];

(*d*) "persons under jurisdiction" means [...];

2. The provisions of paragraph 1 regarding the use of terms in the present draft articles are without prejudice to the use of those terms or to the meanings which may be given to them [in other international instruments or] in the internal law of any State.

73. He invited members to propose other terms which, in their opinion, should be defined in draft article 2 for the purposes of the draft articles. The bracketed text in paragraph 2 was modelled on similar articles found in international treaties, drafts of which had been elaborated by the Commission. For instance, article 2, paragraph 2, of the 1969 Vienna Convention referred only to "the internal law of any State", whereas article 2, paragraph 3, of the 2004 United Nations Convention on Jurisdictional Immunities of States and their Property referred also to "other international instruments". In his view, given the large number of international treaties relating to the obligation *aut dedere aut judicare*, draft article 2 should include in its "without prejudice" clause a reference to "other international instruments", as well as to "the internal law of any State".

74. Proposed draft article 3 dealt with treaties as a source of the obligation to extradite or prosecute. He had already proposed the drafting of such an article in his second report, and since there had been no opposition to it either in the Commission or in the Sixth Committee, he proposed that the text of draft article 3 should read:

Article 3. Treaty as a source of the obligation to extradite or prosecute

Each State is obliged either to extradite or to prosecute an alleged offender if such an obligation is provided for by a treaty to which such State is a party.

75. It was generally recognized that international treaties were a source of the obligation to extradite or prosecute. The number of international treaties containing the obligation was growing year by year. Although that in itself did not provide a sufficient basis for the codification of a generally binding customary rule, the development of international practice that it demonstrated could serve as a starting point for the formulation of an appropriate customary norm. In that connection, he drew attention to a doctrinal statement, cited in paragraph 125 of the report:

If a State accedes to a large number of international treaties, all of which have a variation of the *aut dedere aut judicare* principle, there is strong evidence that it intends to be bound by this generalizable provision, and that such practice should lead to the entrenchment of this principle in customary law.[254]

76. In addition to treaties, other potential material on which proposals for the formulation of subsequent draft rules could be based was to be found in paragraph (3) of the commentary to article 9 of the 1996 draft code of Crimes against the Peace and Security of Mankind.[255] Some of those quasi-rules had already been cited in paragraph 114 of his second report,[256] and could serve as *sui generis* directives for the elaboration of additional draft articles, even though they were applicable only to limited categories of crimes.

77. The last chapter of the report was devoted to conclusions. As he had mentioned at the start of his introduction, the third report was closely related to its two predecessors, and a review of all three reports revealed a sequential presentation of problems which would continue to be considered in subsequent reports. Despite the repetition it entailed, that approach seemed well-suited to achieving a final outcome in the form of draft articles that truly reflected the existing legal realities. However, those realities were also changing, as could be seen from developments even over the relatively short period of the Commission's work on the topic, in the form of a growing number of national legal acts and judicial decisions relating to the obligation *aut dedere aut judicare* that contributed to the establishment and development of legal practice, and thereby to the acceptance of emerging customary norms. Proving the existence of a customary basis for the obligation was the main purpose of the Commission's endeavours, and the first three years of the exercise seemed to have witnessed an increasing degree of acceptance of those endeavours on the part of States.

78. One of the initial problems still unresolved was the relationship between the obligation *aut dedere aut judicare* and the principle of universal jurisdiction. Few States had replied to the questions put, *inter alia* in chapter II of the second report, and the few replies received were so diverse in content as to make it impossible to draw any firm conclusions. While the Commission should not accord undue prominence to problems connected with universal jurisdiction, neither should it underplay the importance of those problems. A compromise solution was needed, although that depended to a large extent on whether a positive reaction on the part of States to the request made by the Commission would be forthcoming.

79. Another important problem still to be resolved concerned the decision he had taken in his second report to refrain from any further examination of the so-called "triple alternative", whereby the alleged offender might also be surrendered to an international criminal tribunal.[257] Although many States had supported his decision, it might be somewhat premature to reject that alternative totally. Laws recently enacted in Argentina, Panama, Peru and Uruguay to implement the Rome Statute of the International Criminal Court also provided for the *aut dedere aut judicare* obligation in the context of the institution of surrender, thus giving the impression that the "triple alternative" was still alive and well, and that it was closely related to the obligation to extradite or prosecute.

80. In closing, he urged the members of the Commission and delegates in the Sixth Committee to reply to all the questions and problems raised in his third report, and to those in his second and preliminary reports that remained unresolved. Their replies would make it possible to continue and complete the work of formulating draft articles on the obligation to extradite or prosecute. As was pointed out in paragraph 131 of his third report, the positive effects of that work were acquiring ever-greater importance for the international community of States as it faced growing threats from national and international crime.

[254] C. Enache-Brown and A. Fried, "Universal crime, jurisdiction and duty: the obligation of *aut dedere aut judicare* in international law", *McGill Law Journal*, vol. 43 (1997–1998), pp. 613–633, at pp. 628–629.

[255] *Yearbook ... 1996*, vol. II (Part Two), p. 31.

[256] *Yearbook … 2007*, vol. II (Part One), document A/CN.4/585, p. 80.

[257] *Ibid.*, p. 79, para. 107.

81. Mr. PELLET said he had hesitated a good deal before taking the floor to discuss the Special Rapporteur's third report, and had decided to do so only in order to say a few words on the question of method. To his great disappointment, he had found very little of substance on which to reflect in the third report, which basically recapitulated the second report, which, in turn, did little more than recapitulate the preliminary report. Given such a state of affairs, he could probably limit himself to referring back to what he had said at the previous session, specifically at the Commission's 2945th meeting.[258] But that was precisely where the problem lay. Notwithstanding his personal regard for the Special Rapporteur, he found it was time to "put his foot down".

82. Admittedly, he himself was hardly well placed to give lessons on the virtues of speediness in developing a topic, but slowness was one thing and a complete standstill was quite another. And although he was willing to grant—though without much conviction—that at the previous session, which marked the beginning of the new quinquennium, the Special Rapporteur had felt the need to make a fresh start, practically *ab initio*, such an approach seemed hard to defend at the current session.

83. The Special Rapporteur complained about the insufficient number of replies from Governments to the questions that he and the Commission had put to them. There were two comments he would like to make in that regard: the first was that this reluctance or failure to reply was a fact of life, albeit an annoying one, indicating that States were perhaps not enthralled by the subject, or, more likely, tired of being constantly pestered with questionnaires to which they could not respond for lack of resources. Yet that was nothing new: States were generally disinclined to reply to the Commission's questionnaires. In any case, it was a fact of life that must be lived with, and in his view, was less disastrous than the Special Rapporteur made it out to be.

84. The topic with which the Special Rapporteur had been entrusted was not particularly difficult, as had been noted by Mr. Dugard at the previous session,[259] even though it was politically sensitive. Moreover, the conventional and judicial practice in that area was not secret; therefore, information concerning it was not particularly hard to obtain.

85. His second comment prompted by the Special Rapporteur's expectations—not to say his "wait and see" attitude—with regard to the assistance to be expected from States, was that he found that expectation to be, at root, not very healthy. He rather had the impression that the Special Rapporteur relied on the well-known principle whereby "As their leader, I follow them". In other words, it was the Special Rapporteur who should provide the impetus, not States, as the Special Rapporteur, wrongly in his own view, seemed to expect.

86. While there was no question that the Commission served the international community made up of States, that did not mean that it should or must wait for instructions or even guidance from them. Once a topic had been selected and placed on its agenda, it was up to the Commission, at the instance of and under the authority of the Special Rapporteur, to give form to it and to make proposals, taking the reactions of States into account, but without hanging onto their every word. That was why the Commission's work was divided into two major phases. On first reading, it made proposals, attempting to present draft articles that were relevant and coherent but without having to be overly concerned about States' positions on any given problem. In any case, such a precaution would be unnecessary, given that so many of its members were thoroughly imbued with the sensitivities of their respective States. During second reading, the Commission tried to reset its sights, taking into account the criticisms and proposals of States.

87. To return to more specific questions of method, he did not see what was to be gained from recapitulating previous reports, copying out topical summaries of the debate in the Sixth Committee or summarizing the replies of States to questions put by the Commission. That might be justifiable as a means of introducing another subject, but in itself it was not of much interest. All members had the documentation in question, and it was the Special Rapporteur's job to utilize it as support for the draft articles he proposed to the Commission.

88. True, the Commission did have three draft articles to consider; however, with all due respect, draft article 2 on definitions scarcely constituted one: it had no definitions to propose—and rightly so, it might be added, since it was doubtless better to formulate definitions as the work progressed and problems were encountered. As for draft articles 1 and 3, while they did not quite state the obvious, their consideration at the previous session had posed so few problems that there was no reason to raise them again in plenary at the current session.

89. Nevertheless, in order to avoid disappointing the Special Rapporteur unduly, he would reiterate his views in telegraphic style. With regard to draft article 1, first of all, the phrase "the establishment, content, operation and effects" could be dispensed with, since it added little to the text; secondly, he had no objection to—though he saw no advantage in—specifying that the obligation to extradite or prosecute was "legal"; and thirdly, as far as the three phrases in square brackets were concerned, he would actually prefer a fourth, at least in French, that would be borrowed from the European Convention on Human Rights. That was because it was necessary to specify that the obligation to extradite or prosecute, when it existed, applied to persons within the jurisdiction of the State in question. However, he had not ascertained whether that comment had an impact on the English version.

90. Draft article 3, for its part, was once again practically a statement of the obvious. That statement of the obvious needed to be complemented by a further reference, to some as yet unspecified customary rule. But what customary rule? *That was the question*—but the protagonist was no longer Hamlet, as at the previous meeting; instead, the Commission was waiting for Godot. It was to be hoped that, irrespective of the outcome in Beckett's masterpiece, Godot would finally arrive.

[258] *Yearbook … 2007*, vol. I, 2945th meeeting, paras. 43–56.

[259] *Ibid.*, para. 20.

91. In closing, he said that although he was not particularly enthusiastic about the prospect of adding to the already considerable number of working groups, he wondered whether, given the difficulties encountered by the Special Rapporteur, it might nonetheless be advisable to set up a working group to be chaired by the Special Rapporteur, if he so desired, or by another member of the Commission. Its purpose would be to delimit more precisely the broad outlines of the topic and identify the questions it raised, and to give a rough idea of the possible responses to those questions. If it could do that, the Commission might finally be able to stop waiting for Godot.

Expulsion of aliens (*continued*)[*]
(A/CN.4/588, sect. C, A/CN.4/594)

[Agenda item 6]

REPORT OF THE CHAIRPERSON OF THE WORKING GROUP

92. Mr. McRAE (Chairperson of the Working Group on expulsion of aliens), introducing the recommendations resulting from the Working Group's discussion, said that the Working Group on expulsion of aliens had been established by the Commission at its 2973rd plenary meeting on 6 June 2008, for the purpose of considering issues raised by the expulsion of persons of dual or multiple nationality and by denationalization in relation to expulsion. The Working Group had held one meeting on 14 July 2008, during which it had first considered whether the principle of the non-expulsion of nationals also applied to persons of dual or multiple nationality. While the view had been expressed that the issue of expulsion of nationals fell outside the scope of the topic, members of the Working Group had generally felt that as far as expulsion was concerned, no distinction should be made between the situation of nationals and that of persons with dual or multiple nationality. Having considered various ways of dealing with that situation, the Working Group had come to the conclusion that the commentary to draft article 4 (Non-expulsion by a State of its nationals) or to any other relevant provision should eventually indicate that, for the purposes of the draft articles, the principle of non-expulsion of nationals also applied to persons who had legally acquired another nationality or several nationalities.

93. The Working Group had next proceeded to consider whether the draft articles should include a provision prohibiting denationalization for the purposes of expulsion. The issue of principle was whether a State could denationalize a person for the sole purpose of expulsion. Several members of the Working Group had emphasized the difficulty of ascertaining the motivations underlying a decision of denationalization. While it had agreed that that rare situation should not be dealt with in a separate provision, the Working Group had concluded that the commentary should indicate that States should not use denationalization as a means of circumventing their obligations under draft article 4.

94. The Working Group recommended that the plenary should take note of the conclusions it had reached on those two issues and should refer them to the Drafting Committee to guide it in its further consideration of the relevant draft articles. In the course of its deliberations, the Working Group had had the full and very helpful cooperation of the Special Rapporteur on the topic of expulsion of aliens, Mr. Maurice Kamto.

95. The CHAIRPERSON said that if he heard no objection, he would take it that the Commission wished to take note of the recommendations of the Working Group on expulsion of aliens and to refer them to the Drafting Committee in order to assist it in its deliberations.

It was so decided.

The meeting rose at 12.50 p.m.

[*] Resumed from the 2973rd meeting.

2985th MEETING

Friday, 25 July 2008, at 10.05 a.m.

Chairperson: Mr. Edmundo VARGAS CARREÑO

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

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

[Agenda item 9]

PRELIMINARY REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRPERSON invited the Commission to continue its consideration of the preliminary report of the Special Rapporteur on immunity of State officials from foreign criminal jurisdiction (A/CN.4/601).

2. Ms. JACOBSSON thanked the Special Rapporteur for his thoughtful and stimulating preliminary report, which was supplemented by an excellent Secretariat memorandum. When Mr. Pellet had commented at a previous meeting that the preliminary report was perhaps "too good", he had perhaps meant that it might be difficult to criticize. She acknowledged herself the perfect clarity of the Special Rapporteur's logic and reasoning. Nevertheless, reasoning could be perfectly valid and yet founded on erroneous premises. She was unable to agree fully with some of the Special Rapporteur's underlying assumptions and was inclined to share the views expressed by Mr. Dugard, Ms. Escarameia, Mr. Pellet and other members of the Commission. The report raised a number of interesting legal and policy considerations, and