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**Summary record of the 2985th meeting**

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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.*

**2985th MEETING**

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

*Chairperson:* Mr. Edmundo VARGAS CARREÑO

*Present:* Mr. Brownlie, Mr. Cafilisch, 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

\* Resumed from the 2973rd meeting.

she had been relieved to hear from the President of the International Court of Justice, when she had addressed the Commission (2982nd meeting, above), that the area of immunity from criminal jurisdiction (unlike that of immunity from civil jurisdiction) was a significantly underdeveloped area of international law.

3. She agreed that the important issues for consideration included the sources of the right to immunity, the content of the concepts of immunity and jurisdiction, criminal jurisdiction, immunity from criminal jurisdiction and the relationship between immunity and jurisdiction, as well as the typology of immunity of State officials (*ratione personae* and *ratione materiae*). When determining the scope of the topic, the Commission should also deal with issues such as whether all State officials should be covered by the future draft guidelines or articles, the extent of the immunity enjoyed and the question of waiver of immunity. As noted by the Special Rapporteur in his report, the legal source of immunity of State officials from foreign criminal jurisdiction was international law, in particular customary law. However, State practice could not be disregarded, particularly where it had achieved a certain level of international recognition by, for instance, being quoted as a legal argument in international decisions and judgements. In that connection, she was curious to know whether and to what extent State practice in regions such as Latin America had influenced the decisions of the Inter-American Court of Human Rights. She agreed with the Special Rapporteur that the question of immunity was important during the pre-trial phase and also that the study of immunity should not deal with the substance of jurisdiction. However, the issue of jurisdiction could not be entirely bypassed: as noted by Judges Higgins, Kooijmans and Buergenthal in their joint separate opinion in the *Arrest Warrant* case, immunity and jurisdiction were “inextricably linked” and the question whether there was immunity in any given instance would depend “not only upon the status of [the person concerned] but also on what type of jurisdiction, and on what basis, the ... authorities were seeking to assert it” [para. 3]. She also shared the Special Rapporteur’s view that the Commission should consider only the immunity of State officials from national criminal jurisdiction in another State and that the question of immunity of family members should not be addressed.

4. In general, the preliminary report raised two types of concern relating, on the one hand, to the Special Rapporteur’s stated or implied assumptions or purposes and, on the other, to the place of the future draft guiding principles or articles in the consistent system of law that the Commission was seeking to build. In addition, there was a policy dimension resulting from the discernible tension between “the fight against impunity” and what might be termed “the fight for immunity”. The international community seemed to have endorsed the principle that impunity was unacceptable as a legal and policy objective, but there were unfortunate signs at the same time of informal discussions between States aimed at broadening the scope of immunity.

5. The fight against impunity called for a relaxation of legal rules so that the perpetrators of heinous crimes could be brought to trial. Any widening of the circle of persons who enjoyed procedural immunity would be at odds with

that goal. In response to the counterargument that immunity did not mean that the perpetrator would escape trial since there was no immunity from legal proceedings in his or her own country or before an international court, she pointed out that in practice that system did not always work. The responsible State might well be unwilling to prosecute a Prime Minister and might even extend immunity from domestic proceedings to the suspect. The International Criminal Court might lack jurisdiction and the possibility of a referral by the Security Council might be blocked by a veto. As a result, the crime would go unpunished. If it was a grave breach committed in a foreign country and that country stated its intention to prosecute the suspect, but was unable to do so because of the lack of an extradition treaty, there would again be a situation of *de facto* impunity.

6. The wider the circle of persons enjoying immunity, the less effective the fight against immunity would be. A credibility problem would also arise: the perpetrators of “ordinary crimes” or violations of the laws of war that did not amount to grave breaches or serious violations of international law would be punished, while senior officials would escape justice (for instance, in the case of Rwanda, accused persons appearing before the International Tribunal for Rwanda were not liable to the death penalty). What could be done if the responsible State failed to prosecute one of its officials? She suggested that special attention should be given to the question of whether State responsibility could be invoked in connection with such failure to prosecute.

7. The issue of whether there was a derogation from the principle of immunity of State officials from foreign criminal jurisdiction in the case of international crimes should be addressed as well as the question of the definition of international crimes and their possible differentiation. She welcomed the Special Rapporteur’s declared intention to deal with those important aspects of the topic. While she agreed with him that the concept of “State official” did not need to be defined, she stressed that it did not follow that all State officials should enjoy immunity or that all categories of State officials should be treated equally. The crucial question was the extent to which the functional approach should be applied. The existing case law presented the Commission with a challenge. It would be regrettable if it were to build its work on the highly criticized judgment rendered by the ICJ in the *Arrest Warrant* case, but the content of the judgment as well as its implications should nonetheless be discussed. As noted by Mr. Dugard and other members, the Commission should not hesitate to distance itself from the Court’s decision in the case and should examine the dissenting opinions appended by Judge Al-Khasawneh and Judge Van den Wyngaert, which had an important bearing on the topic under consideration. A closer look should also be taken at developments since the *Arrest Warrant* case; the discussions concerning the question of immunity in the *Milošević* and *Charles Taylor* cases were of particular importance in legal terms and should not be dismissed on the ground that they had taken place in the context of international tribunals.

8. With regard to the distinction between official acts and acts committed “in a private capacity”, she agreed with Mr. Gaja that there was a need to discuss acts such

as kidnapping and murder committed by foreign secret service agents, but also illegal intelligence gathering and espionage, since such acts might be performed by State officials who were not diplomats accredited to the targeted State, so that the *persona non grata* option was not available. The issue was briefly addressed in paragraphs 155 to 165 of the Secretariat's memorandum (A/CN.4/596) and merited further, in-depth discussion. There was sometimes a clear relationship between matters pertaining to what was deemed to be an official act, on the one hand, and the non-justiciability rule and the act of State doctrine, on the other. Both concepts should be examined in terms of both scope and substance.

9. For example, in October 1981, a Soviet Whiskey-class submarine U-137 had run aground in a military protected area in Swedish territorial waters.<sup>260</sup> The case constituted not only a serious violation of Swedish sovereignty but also a major diplomatic incident. A local prosecutor had proposed prosecuting the submarine's captain since there were reasonable grounds, in his view, for suspecting espionage. The Government of Sweden was not in favour of such a move, considering it to be an international incident rather than a criminal case. The Swedish Criminal Code was nonetheless subsequently amended and now contained a provision requiring the Government or the Office of the Prosecutor-General to take decisions in certain cases authorizing prosecutors to initiate proceedings before a Swedish court. The question of how the non-justiciability rule and the acts of State doctrine functioned as parallel or additional limitations on jurisdiction required further consideration. As rightly noted by the Secretariat in its memorandum, their precise contours and status in international law were unclear. Lastly, she stressed that her comments should not be interpreted as minimizing the importance of the concept of immunity or of its function, which was to guarantee that States were able to act without unwarranted interference. On the contrary, it was because immunity was and should remain an important aspect of inter-State relations that the legal concept had to be developed and interpreted in terms of its "constant evolution" in the light of other norms deemed to be essential by the international community.

10. Mr. FOMBA said that the time was ripe for taking stock of current practice in the area of immunity of State officials from foreign criminal jurisdiction and for elaborating general rules on the subject. Due importance should also be attached to immunity in the interests of stable relations among States. With regard to the purpose of the preliminary report, he considered that the division of issues into two categories—preliminary issues and issues to be considered when defining the scope of the topic—was somewhat odd and artificial. However, the list of key issues to be considered when determining the scope of the topic seemed to be relevant and comprehensive. The distinction made between issues which should, in principle, be analysed and those which should probably be addressed reflected the Special Rapporteur's doubts and convictions. He welcomed the fact that both incumbent and former State officials were mentioned in paragraph 4 of the report.

11. The Special Rapporteur had rightly reviewed the history of the consideration of the question of immunity, a section of the report which was important and helpful. Moreover, referring to the resolution adopted by the Institute of International Law in 2001,<sup>261</sup> he noted that its scope *ratione materiae* included immunity from jurisdiction and immunity from enforcement and that its scope *ratione personae* was limited to incumbent or former Heads of State and Government. However, article 15 of that resolution also referred to Ministers for Foreign Affairs. He further noted that, on a substantive issue, article 13, paragraph 2, of the resolution addressed the question of immunity with respect to international crimes but referred only to the case of former Heads of State.

12. With regard to the sources of law relating to the immunity of State officials from foreign criminal jurisdiction, he noted that Mr. Verhoeren had adopted a cautious approach to the question of immunity with respect to international crimes. He further noted that, according to the Special Rapporteur, there was no universal treaty fully regulating the question of immunity and that international custom was the basic source of international law in that area, as confirmed by the ICJ and national courts and by States when they substantiated their positions before national and international courts.

13. With regard to international comity, despite the existence of abundant practice in that area, he agreed that it was preferable to adopt a legal approach to immunity because it was a right and was based on an obligation derived from international law. The position adopted by the ICJ in the *Arrest Warrant* case could be cited in support of that approach. With regard to the situation of family members, the report noted that there were more solid grounds for holding that the source of their immunity was international comity, and that was acceptable.

14. With regard to the link between universal jurisdiction and immunity from jurisdiction, the Special Rapporteur drew attention in paragraph 39 of his report to a trend towards refusing immunity to foreign officials over whom the State exercised universal criminal jurisdiction. The report further cited a Belgian law of 1993, amended in 1999, as an example of a case in which the extent of immunity had begun to be defined in international law, which was a good thing. He noted with interest that in paragraph 40 the Special Rapporteur mentioned the main factors that determined the respective roles of international law and domestic law. He also agreed with the statement in paragraph 41 that, since national courts often had difficulty in determining the content of the customary rules of international law that should be applied, the codification of international law in that regard would be most useful. Furthermore, the inventory of sources of information to be taken into account was exhaustive.

15. Turning to the relationship between immunity and jurisdiction and, more specifically, the logical and chronological link between the two concepts, he said that he agreed with the position adopted by the ICJ in its 2002 judgment in the *Arrest Warrant* case, namely

<sup>260</sup> See M. Jacobsson, "Sweden and the law of the sea", in T. Treves (ed.), *The Law of the Sea: the European Union and its Member States*, The Hague, Kluwer Law International, 1997, pp. 516–518.

<sup>261</sup> Institute of International Law, *Yearbook*, vol. 69 (2000–2001), Session of Vancouver (2001), p. 753 (see footnote 224 above).

that jurisdiction preceded immunity. With regard to the scope of immunity *ratione personae*, it was well established that criminal jurisdiction was exercised solely with regard to persons and not with regard to States. He also agreed with the Special Rapporteur that criminal prosecution included a substantial pre-trial phase and that the exercise of criminal jurisdiction might already raise the question of immunity at that stage. That aspect was therefore important and should be taken into consideration. The Special Rapporteur further considered that it would be interesting to examine practice with respect to immunity from foreign civil jurisdiction. While the “different nature” criterion would seem at first glance to constitute a fatal impediment in that regard, he believed that such an approach might nonetheless prove useful. With regard to the concept of immunity, although different interpretations might exist, the basic idea was that it constituted a legal concept that could be expressed in terms of corresponding rights and obligations. He agreed with the Special Rapporteur that it was a derogation from State jurisdiction and an essential aspect of the sovereign equality of States. The Special Rapporteur asked whether an attempt should be made to define the concept of immunity and “immunity from criminal jurisdiction” in the context of the study. Mr. Fomba supported such an approach and considered that the Commission would be derelict in its duty if it failed to do so.

16. With regard to the relationship between immunity and jurisdiction, he supported the position adopted by the ICJ in its judgment in the *Arrest Warrant* case. The Special Rapporteur’s stance in that regard was somewhat contradictory inasmuch as he seemed to say, on the one hand, that it was unnecessary to examine the question of jurisdiction as such and, in particular, the question of extraterritorial and universal jurisdiction, and, on the other hand, that the question should be studied in the context of the scope of immunity in order to determine, for instance, whether there were exceptions to the rule of immunity. Personally, he held that there were exceptions. If there were not, it would mean that the Special Rapporteur accepted the hypothesis of “absolute immunity”. The procedural nature of immunity was crystal clear. However, the Special Rapporteur was being appropriately circumspect when he asked whether it would not be more accurate to speak of “immunity from certain measures of criminal procedure” rather than “immunity of State officials from criminal jurisdiction”, and also when he added that the latter question could not be answered until the question of the extent of immunity had been considered. In paragraph 70, the Special Rapporteur rightly held that the question of immunity from interim measures of protection or measures of execution should not be addressed at that stage. It should be noted, however, that the Institute of International Law dealt with both immunity from jurisdiction and immunity from execution in its 2001 resolution, as reflected in the title.

17. With regard to the distinction between immunity *ratione personae* and immunity *ratione materiae*, he noted that the two concepts overlapped. Immunity *ratione personae* was based on the idea that the beneficiary was invested with sovereignty and was identified with and personified the State; it was thus the source of the absolute immunity of Heads of State. Immunity *ratione*

*materiae* was clearly enjoyed by State officials regardless of the level of their post by virtue of the fact that they were performing official functions. He agreed with the Special Rapporteur that certain State officials (Heads of State, Heads of Government, Ministers for Foreign Affairs and other high-ranking officials) enjoyed both types of immunity and that all State officials enjoyed immunity *ratione materiae*. In paragraph 83 of his report, the Special Rapporteur raised the question whether and to what extent the distinction between the two was necessary for the purpose of determining the legal regime governing immunity. He did not answer the question directly but seemed to be inclined to argue against making the distinction, noting that the ICJ had used no such categorization in its judgment in the *Arrest Warrant* case and that the same was true of existing conventions. His personal view was that the distinction was helpful and indeed indispensable.

18. Establishing the rationale for immunity was important since it could determine which officials enjoyed immunity and the extent of their immunity. It was a matter of ensuring the free and efficient performance of State functions, as reflected in the judgment of the ICJ in the *Arrest Warrant* case. He accepted that the two basic theories explaining the reasons for granting immunity were the “functional necessity” theory and the “representative character” theory. He also agreed that, in the final analysis, the immunity of officials from foreign jurisdiction belonged to the State itself, so that the State alone was entitled to waive such immunity. The Special Rapporteur rightly noted that the different rationales advanced for immunity were complementary and interrelated. He also agreed that diplomatic and consular immunities had the same basis as the immunity of State officials.

19. With regard to the summary in paragraph 102 of the first part of the report, Mr. Fomba broadly agreed with the conclusions set out under points (a) to (j) and had only a few brief remarks to make. The terminology used in subparagraph (c) was somewhat curious, or at least unusual, and it would have been preferable, for instance, to use the word “*compétence*”. In subparagraph (d) he agreed in particular, subject to a better understanding of the terminology, with the point made in the second sentence, namely that the question of immunity was more important in the pretrial phase. In subparagraph (e), he wondered whether the use of the term “juridical obligation of the foreign State” presupposed the treaty-based nature of the obligation. In subparagraph (f), the same problem of terminology arose but, in terms of substance, the idea contained in the second sentence was of crucial importance. The content of subparagraph (g) seemed to duplicate to some extent that of subparagraph (f).

20. With regard to the second part of the preliminary report and, in particular, the definition of the scope of the topic, the three key ideas set forth by the Special Rapporteur in paragraphs 103 to 105 were relevant and acceptable. On the question of the persons covered and the definition of the concept of “State official”, the Special Rapporteur stated in paragraph 106 that there were three possible options; like the Special Rapporteur, he preferred the third definition, which covered all incumbent and former State officials.

21. Referring to paragraph 117 of the preliminary report, he noted with interest that, aside from the “three-some”, other high-ranking officials might be taken into account, as confirmed by the ICJ in the *Arrest Warrant* case, although the Court failed to identify the officials concerned. With regard to paragraph 119, the debate regarding certain officials such as the state prosecutor or the head of national security (for example in the *Certain Questions of Mutual Assistance in Criminal Matters* case) or the ministers of defence or of foreign trade was stimulating and reflected the difficulties to be addressed in that regard. In paragraph 120, the Special Rapporteur rightly raised the question of whether and to what extent one or more criteria might be invoked in support of the definition. That was, in his view, the crucial question and answering it was not an easy task. With regard to paragraph 121, counsel for France in the *Certain Questions of Mutual Assistance in Criminal Matters* case, Mr. Pellet, had identified as a criterion for the determination and enjoyment of immunity *ratione personae* in the case of other high-ranking State officials that representation of the State in international relations should be an indispensable and primary part of their functions. A difficulty arose in that regard, however, since the process of representation of the State in international relations had, to some extent, been “decentralized”, as noted within brackets at the end of the first sentence of the paragraph. The Special Rapporteur asked at the end of the paragraph whether the importance of the functions performed by high-ranking officials for ensuring the State’s sovereignty was an additional criterion for the enjoyment of immunity *ratione personae*. In his view, it was.

22. With regard to the recognition of States, Heads of State and Heads of Government, he agreed that the substance of the question of recognition should not be considered because it did not form part of the Commission’s mandate with respect to the topic. On the other hand, the subject might be addressed solely from the standpoint of the impact of recognition or non-recognition on the question of immunity. There were two options in that regard: either to draft a provision concerning the role or rather the impact of recognition, or to draft a “without prejudice” clause along the lines of that contained in article 12 of the 2001 resolution of the Institute of International Law; he was in favour of the first option.

23. With regard to the question of family members discussed in paragraphs 125 to 129 of the report, he considered, unlike the Special Rapporteur, that the issue should be addressed. The Institute of International Law did so in article 5 of its 2001 resolution, adopting an interesting approach inasmuch as the article first stated the principle, basing immunity on comity, and then referred to the possibility of an exception based on a separate capacity. Such problems arose quite frequently in international political and diplomatic contexts and the Commission might take the opportunity to seek to clarify the rules of the game in that regard.

24. With regard to the summary of the second part of the report contained in paragraph 130, he agreed with the conclusions set out in subparagraphs (a) to (f). Two options were proposed in subparagraph (c) for the definition of “State officials”. In his view, a generic definition would

be more appropriate. With regard to subparagraph (e), the fundamental difficulty consisted in identifying one or more relevant criteria, but an attempt might be made to find the least common denominator. The question of recognition, referred to in subparagraph (f), should not be dealt with in terms of substance but solely in terms of its impact. Lastly, the immunity of family members should be discussed.

25. Mr. HMOUD said that since the report was comprehensive, there was no need to comment on expository matters, such as the background, sources of law or concepts of criminal jurisdiction and immunity. He would therefore confine his comments to matters that were not settled in international law and on which views diverged, and to questions on which the Special Rapporteur had requested guidance from the members of the Commission.

26. Immunity was indeed procedural in nature and could not offer protection against the substantive law of the State concerned, since that would infringe the State’s right to exercise jurisdiction in criminal matters. Moreover, the Special Rapporteur rightly noted that immunity was a State right with a corresponding obligation on other States to accord immunity from criminal jurisdiction. It was a matter of inter-State relations, sovereign equality and the right of a State not to be subject to the jurisdiction of another State. However, to say that a State was not subject to such jurisdiction was different from saying that a State’s official was not subject to the jurisdiction of another State. The same reasoning could not be used; otherwise, there would be blanket immunities and that could not be the starting point for a study of the topic. Furthermore, while immunity was a right, the exercise of jurisdiction was also a right. What was at issue was the balance between the two rights in inter-State relations. A third point was that, since immunity was a matter of inter-State relations, it could not be enjoyed, whatever its category, by the official in his or her own right.

27. It was important to ensure that the topic encompassed all State officials and hence to define the term, especially where the question of whether the person concerned was a State organ had a possible bearing on the granting of immunity.

28. The immunity of State officials from foreign criminal jurisdiction was based on customary international law. However, it was important to point out that the content, subject, extent and rationale of immunity were interpreted in different ways by national and international courts.

29. The Commission should not content itself with categorizing State officials and defining the types of immunity that they enjoyed. It should examine the various situations in which immunity could arise, the rights and interests involved and how they could be balanced, the possible exceptions to immunity based on a lack of right to immunity or an overwhelming right to exercise jurisdiction, the security of inter-State relations and sovereign equality.

30. While the rationales for immunity of State officials from foreign criminal jurisdiction were perhaps, as the Special Rapporteur put it, complementary and

interrelated, it was important to differentiate such rationales in order to indicate when there was immunity and its extent. National courts frequently referred to the rules of customary international law pertaining to immunity, but they seemed to have conflicting opinions on the existence of such rules and their underlying rationales for immunity.

31. Personal immunity existed under customary international law for certain categories of high-ranking officials. While the rationale for such immunity in the case of Heads of State was that they personified the State, that rationale, which had particular consequences, was not applicable to other senior officials. As stated by Judge Higgins, the rationale for the concept of the immunity available to the Head of State was clear under general international law. But was there anybody else who personified the sovereign State? Representation of the State overlapped with the concept of personification but it was not the same concept. It was necessary to determine whether the representation at issue was related to international relations or whether it constituted representation of sovereign authority. The rationale of representation in international relations was applicable, for example, to the Minister for Foreign Affairs, diplomats and consuls, but it was not applicable to other categories of senior State officials.

32. The judgment in the *Arrest Warrant* case should not be interpreted to mean that the ICJ considered that the immunity enjoyed by high-ranking State officials was equivalent to impunity. According to the Court's reasoning, immunity—in the case before it the immunity of an incumbent Minister for Foreign Affairs—was necessary for the effective performance by such ministers of their functions on behalf of the State. The Court went on to state that such immunity from jurisdiction

does not mean that they enjoy *impunity* in respect of any crimes they might have committed, irrespective of their gravity. ... Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility. Accordingly, the immunities enjoyed under international law by an incumbent or former Minister for Foreign Affairs do not represent a bar to criminal prosecution in certain circumstances. [paras. 60–61]

One such circumstance was where the person concerned was no longer in office. It was therefore the impact of the other State's exercise of jurisdiction *vis-à-vis* the high-ranking official and the effect that it had on the State's ability to conduct its sovereign affairs that was the core rationale underlying the Court's decision, which should be applied as a criterion for determining which categories of senior officials enjoyed immunity. The idea was, of course, to preserve the State's sovereign prerogative in inter-State relations, and that was where the balance should lie in deciding whether a high-ranking official enjoyed immunity from the criminal jurisdiction of another State.

33. Functional immunity, which was the immunity enjoyed by officials for acts performed in their official capacity, was a matter that the Commission should consider in depth. It should be put into perspective in order to prevent abuse. A State acting through its agent enjoyed immunities, but there were certain acts that clearly fell outside the scope of State functions. The commission of

acts constituting crimes under international law was attributable to the individual as the only person who could be held criminally responsible. Although such acts could be attributed to both the individual and the State, criminal responsibility lay with the individual, even though the State could be held responsible for an internationally wrongful act. Thus, if functional immunity was not restricted in the case of certain international crimes, impunity would ensue, a situation which, according to the ICJ in the *Arrest Warrant* case, was unacceptable. There had been instances in which States had claimed responsibility for certain acts before national courts in order to exonerate an individual from criminal responsibility for acts constituting war crimes.

34. A rationale could be invoked for the immunity from foreign criminal jurisdiction of an official of one State who had broken the law of another State in the course of performing his or her functions, and the former State might have an interest in upholding the official's immunity from the latter State's jurisdiction. However, there was a point where a balance must be struck between the various interests and rights involved, and there were also cases where no rule of international law indicated that a State enjoyed immunity for an act committed outside the scope of its functions.

35. The Commission should determine precisely which crimes could not be treated as acts attributable to the State. In the same context, it should consider whether functional immunity existed indefinitely for certain crimes. If the ICJ had not ruled out the possibility of exercising jurisdiction over high-ranking officials after they had left office, there was no reason why that possibility should be ruled out in the case of other categories of officials when they left office. The Court had not recognized any exception to that possibility for acts performed in an official capacity. Furthermore, if immunity was procedural in nature, in other words if the official concerned would continue to be criminally responsible under the relevant law, it followed that limits should be applicable to functional immunity. If such immunity was absolute, it would be substantive and not procedural.

36. The Special Rapporteur had indicated that he would take up the issue of international crimes in his next report, and he mentioned in paragraph 63 and in the footnote to paragraph 80 of his preliminary report that the question of the extent of immunity and possible exceptions thereto would be addressed. Crimes of concern to the international community as a whole challenged the principle of immunity in current inter-State relations. The establishment of international criminal tribunals, such as the International Criminal Court, showed that the international community was determined to fight impunity. While international jurisdiction might be a means of addressing impediments to the exercise of jurisdiction by domestic courts in cases involving international crimes, certain issues that might have a bearing on international jurisdiction needed to be addressed in the context of the Commission's study. How would the principle of immunity be dealt with where a treaty conferred jurisdiction on national courts over certain international crimes even if they were committed by third State nationals or officials? A conflict would arise in

such circumstances between a treaty-based right and duty and customary law immunity.

37. The issue of recognition should be dealt with, if only in the form of a “no prejudice” clause. It was a relevant matter inasmuch as current practice differed from State to State. Some States refused to accord immunity on the premise that they did not recognize the other State or the status of the official concerned. If immunity was a right under international law, it should be granted to the official of any State that was recognized as such under international law. The key condition for recognition was how the State concerned was treated under international law and not whether the national authorities of another State recognized it. The status of an official was a matter to be decided by the State entitled to immunity pursuant to its domestic law and it was not a matter of discretion for the authorities of the State exercising jurisdiction.

38. With regard to family members, although there was extensive practice, it differed from State to State. It would be useful, however, to provide guidance on whether immunity stemmed from customary international law or from international comity.

#### **Organization of the work of the session (continued)\***

[Agenda item 1]

39. The CHAIRPERSON suspended the meeting so that the Commission could proceed with the official closure of the International Law Seminar.

*The meeting was suspended at 11.15 a.m. and resumed at 11.45 a.m.*

#### **Cooperation with other bodies (continued)\*\***

[Agenda item 12]

STATEMENT BY REPRESENTATIVES OF THE COUNCIL OF EUROPE

40. The CHAIRPERSON welcomed, on behalf of the Commission, the representatives of the Council of Europe Committee of Legal Advisers on Public International Law (CAHDI), Mr. Lezertua, Director of Legal Advice and Public International Law (Jurisconsult), Sir Michael Wood, Chairperson of CAHDI, and Ms. Albina Ovcearenco, Administrator, CAHDI Public International Law and Anti-Terrorism Division.

41. Mr. LEZERTUA (Director of Legal Advice and Public International Law, CAHDI) said that, following the Slovak Chairpersonship of the Committee of Ministers of the Council of Europe from November 2007 to May 2008, Sweden had taken over and would assume the Chairpersonship for six months. Spain was then in line and would take over the Chairpersonship in November 2008. Sweden had announced its priorities for the Council of Europe, which were, of course, closely related to the Council’s main objectives, namely the protection of human rights, democracy and the rule of law.

42. During the Swedish Chairpersonship, the question of the rule of law would certainly be given high priority. At the 118th session of the Committee of Ministers on 7 May 2008, the Rapporteur Group on Legal Co-operation (GR-J) of the Committee of Ministers had been requested to examine how full use could be made of the Council of Europe’s potential in promoting the rule of law. The Rapporteur Group had already emphasized the close link between human rights, democracy and the rule of law. It was a complex issue, but a strategy for promoting the link as a key concept would have to be developed. The Rapporteur Group would contact other international actors with a view to building cooperation. Its report would be submitted in November 2008 when Sweden would hand over the Chairpersonship of the Committee of Ministers to Spain.

43. Another priority area was promotion of democracy. Support would be provided for the preparation of the Council of Europe Forum for the Future of Democracy to be held in Madrid from 15 to 17 October 2008 under the auspices of the Ministry of Public Administration of Spain. The proposed main theme was “e-Governance”. Furthermore, the Swedish Chairpersonship would give priority to the promotion of relations between the Council of Europe and the European Union as well as other international organizations.

44. There had recently been a marked development in relations with the European Union. On 23 October 2007, a quadripartite meeting had been held between the Council of Europe and the European Union, the first since the signing of the Memorandum of Understanding of 23 May 2007 between the two organizations. The outcome of the meeting reflected a joint determination to increase cooperation on topics of shared interest, especially in the area of human rights. Possible synergies between the Council’s activities and those of the European Union Agency for Fundamental Rights had been discussed. As a result, the Council and the Agency had signed a cooperation agreement on 18 June 2008<sup>262</sup> aimed at promoting complementarity and avoiding wasteful duplication of activities relating to the safeguarding of human rights in Europe. The question of the accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms was also regularly discussed with the European Union, since it would greatly enhance consistency in that area of cooperation.

45. The following quadripartite meeting, held on 10 March 2008, had focused on the electoral assistance provided to States, the role of the media in the electoral process and the situation in the Western Balkans. The next quadripartite meeting would be held in autumn 2008. With the same aim of strengthening cooperation between the Council of Europe and the European Union, a cooperation agreement had been signed on 28 November 2007 between the Parliamentary Assembly of the Council of Europe and the European Parliament. It provided for meetings and joint hearings as well as regular contacts between rapporteurs.

\* Resumed from the 2979th meeting.

\*\* Resumed from the 2982nd meeting.

<sup>262</sup> *Official Journal of the European Union*, 15 July 2008, L. 186, p. 7.



46. Lastly, with regard to cooperation with the United Nations, the Council of Europe had aligned itself with the Organization in accelerating the process of abolition of the death penalty, as advocated in General Assembly resolution 62/149 of 18 December 2007. The abolition of capital punishment had long been a Council of Europe priority, as attested by the adoption of Protocol No. 6 to the Convention of 4 November 1950 for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty, and Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty in all circumstances. He also noted that a draft United Nations General Assembly resolution on cooperation between the Council of Europe and the United Nations was currently being negotiated. It was expected that the draft resolution would be discussed at the sixty-third session of the General Assembly, scheduled to open on 16 September 2008.

47. With regard to recent legal developments in the Council of Europe, three Council conventions had entered into force in 2008 and two new conventions drafted by the Council had been opened for signature. On 1 January 2008, the European Convention for the protection of the Audiovisual Heritage had entered into force with five ratifications and 14 signatures. The twentieth century had been the first century of the cinema and, with the emergence of television, audiovisual output had grown apace. Unfortunately, a large proportion of the resultant audiovisual heritage had already been lost because of lack of awareness of its museographic interest. Today, multimedia products also formed part of the audiovisual heritage, a huge reserve calling for protection and conservation. On 1 February 2008, the Council of Europe Convention on Action against Trafficking in Human Beings had entered into force with 10 ratifications. Since then, it had secured 17 ratifications and 38 signatures. The Convention was based on the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime. The Council of Europe had considered it necessary to draft a specific instrument on trafficking because it acted within a more limited regional context. The Council of Europe Convention on Action against Trafficking in Human Beings also contained more specific and more demanding provisions, going beyond the minimum norms laid down in the universal instruments. For instance, it provided for an independent monitoring mechanism, the Group of Experts on Action against Trafficking in Human Beings (GRETA). The rules of procedure for the election of members of GRETA had been adopted by the Committee of Ministers on 11 June 2008. Pursuant to article 37, paragraph 2, of the Convention, the first meeting of the Committee of the Parties was to be held by 1 February 2009, thus within one year of the entry into force of the Convention, in order to elect the members of GRETA. A question that was currently being discussed was whether the Committee of the Parties should fill all GRETA seats at the first election or whether it would be preferable to review the situation one year after the election in the light of the state of ratifications. States planning to ratify the Convention after the first meeting of the Committee of the Parties pointed

out that they would then have an opportunity to participate rapidly in the GRETA electoral process.

48. On 1 May 2008, the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on Financing of Terrorism had entered into force after the deposit of the sixth instrument of ratification. There were now seven ratifications and 29 signatures. The Convention reflected recent developments in the area, particularly the views of the Financial Action Task Force concerning action against the financing of terrorism.

49. The three aforementioned instruments had been opened for signature at the Warsaw Summit in 2005. They were of considerable importance for the activities of the Council of Europe and the achievement of its goals, and were drafted in a spirit of geographical openness, since accession was open to non-member States of the Council, an essential prerequisite for more vigorous action against international networks of organized crime.

50. The Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse had been adopted and opened for signature at the twenty-eighth Conference of European Ministers of Justice, held in Lanzarote, Spain, on 25 and 26 October 2007. The Convention, which now had 27 signatures, was the first to criminalize sexual abuse; it provided for the prosecution of perpetrators of crimes involving the sexual exploitation of children, while giving priority to the best interests of the child. To ensure its effective implementation, the Convention provided for international cooperation on criminal matters, on the prevention of sexual exploitation and abuse, and on assistance to and protection of victims. More recently, on 7 May 2008, the Committee of Ministers of the Council of Europe had adopted the revised European Convention on the adoption of children, which updated the 1967 European Convention on the adoption of children. The purpose of the revised Convention, which would be opened for signature in November 2008, was to improve national adoption procedures. It supplemented, at the European level, existing international norms such as the 1993 Convention on Protection of Children and Cooperation in respect of Intercountry Adoption.

51. The aforementioned instruments were of great importance for the Council of Europe's legal work and would contribute to the implementation of what was known as the "Warsaw Agenda". The Agenda was based on four core Council of Europe projects defined at the third Summit of Heads of State and Government of the Member States of the Council, held in Warsaw in 2005. They focused on reforming the European Court of Human Rights, action against terrorism, action against organized crime and action against racism. The question of reform of the European Court of Human Rights was always a high priority. Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention, sought to enhance the efficiency of the Court's proceedings. As in 2007, the Protocol currently had 46 ratifications and only one more was required for its entry into force. Furthermore, the Swedish Chairpersonship of the Committee of Ministers wished to give fresh impetus to the incorporation of the European Convention on Human Rights

in the domestic legislation of member States. With that end in view, it had held a colloquy entitled “Towards stronger implementation of the European Convention on Human Rights at national level” on 9 and 10 June 2008 in Stockholm, which had discussed, *inter alia*, the improvement of domestic remedies, the growing importance of the jurisprudence of the European Court of Human Rights and the implementation of the European Convention on Human Rights at the national level.

52. He noted, in connection with action against terrorism and organized crime, that the Council of Europe had pioneered action against Internet crime, specifically through the adoption of the Convention on cybercrime on 23 November 2001. On 1 and 2 April 2008, the Council had convened a conference on cooperation against cybercrime, at the close of which guidelines for cooperation between law enforcers and Internet service providers and on the status and effectiveness of cybercrime legislation had been adopted. They reflected the strategic importance of enhanced cooperation between the public and private sectors and of the promotion of international mutual legal assistance for law enforcement agencies. The Conference had also decided to maintain contacts between the Council of Europe and the G8 Subgroup on High-Tech Crime.

53. In 2008, the Committee of Experts on Terrorism (CODEXTER) had also continued to coordinate the Council of Europe’s action against cyberterrorism. In December 2007, the Council of Europe had published *Cyberterrorism—the Use of the Internet for Terrorist Purposes*,<sup>263</sup> which contained an expert report by Professor Ulrich Sieber and national reports on measures taken against cyberterrorism in 27 member States and two observer States (Mexico and the United States of America). The database on cyberterrorism and the use of the Internet for terrorist purposes had also been advertised on the CODEXTER website. The conference on cooperation against cybercrime and the meetings of CODEXTER provided a platform that would facilitate cooperation against cybercrime and, in particular, cyberterrorism. In keeping with the Council of Europe’s general stance, high priority was accorded to the protection of human rights, which should on no account be sacrificed in the context of action against terrorism and organized crime.

54. With regard to action against racism, the European Commission against Racism and Intolerance regularly drafted general policy recommendations. In 2008, it had adopted a recommendation on racial profiling, abusive police conduct, the role of the police in action against terrorism, and relations between the police and members of minority groups.

55. Although it concerned different issues from those placed on the Warsaw Agenda, it was also worth mentioning the Council of Europe’s work on the law of nationality, a topic that had also been addressed by the International Law Commission. The Commissioner for Human Rights, Thomas Hammarberg, regularly issued “viewpoints” on the current human rights situation in member States of the Council of Europe. In 2008, after assessing the situation of stateless persons in Europe, he had requested member States to take steps to eliminate statelessness in order to

facilitate conflict resolution and promote social cohesion. In that connection, the 2006 Council of Europe Convention on the avoidance of statelessness in relation to State succession, which sought to protect everyone’s right to a nationality, had been ratified by two member States (Norway and the Republic of Moldova), so that only one more ratification was required for its entry into force.

56. With regard to constitutional and electoral law, he drew attention to increased interest from the Arab world in the work of the Council of Europe’s European Commission for Democracy through Law (Venice Commission). Its interest had grown as a result of contacts between the Venice Commission and the Union of Arab Constitutional Courts and Councils. In 2007, the Committee of Ministers of the Council of Europe had invited Morocco and Algeria to become members of the Venice Commission, and on 15 May 2008 it had approved Tunisia’s application for membership. It had further granted special cooperation status to the Palestinian National Authority. The seventy-fifth plenary session of the Venice Commission had been held in June 2008. It had discussed, in particular, dual voting rights for persons belonging to national minorities and the *Guidelines on Freedom of Peaceful Assembly* of the Organization for Security and Co-operation in Europe (OSCE).<sup>264</sup> The Guidelines had been prepared by an OSCE panel of experts in consultation with the Venice Commission.

57. Lastly, several high-level conferences had been held since the last session of the International Law Commission or would be held in the near future. The European High-level Conference on the Council of Europe Disability Action Plan 2006–2015, held in Zagreb, Croatia, on 20 and 21 September 2007, had brought together more than 150 governmental and non-governmental experts. It had been a landmark event at a time when numerous European States were signing the Convention on the Rights of Persons with Disabilities. The twenty-eighth Conference of European Ministers of Justice had been held in Lanzarote, Spain, on 25 and 26 October 2007. The ministers had discussed emerging problems of access to justice for vulnerable groups (migrants, asylum seekers and children, including delinquent children). A conference of European prosecutors had been held in Saint Petersburg on 2 and 3 July 2008. The conference had discussed the role of prosecution services in the protection of human rights and the public interest outside the criminal law field and had stressed the importance of ensuring that such services respected the principles of the European Convention on Human Rights and the case law of the European Court of Human Rights. Forthcoming high-level conferences included the eighth Council of Europe Conference of Ministers responsible for Migration Affairs, which would be held on 4 and 5 September 2008 in Kyiv, Ukraine. The conference, which would seek to develop an integrated approach to questions of migration, development and social cohesion, would offer member States an opportunity for dialogue aimed at bilateral and multilateral cooperation in the area of migration.

58. Sir Michael WOOD (Chairperson of CAHDI) said that relations between the International Law Commission

<sup>263</sup> Council of Europe, Strasbourg, 2007.

<sup>264</sup> OSCE Office for Democratic Institutions and Human Rights, Warsaw, 2007.

and CAHDI had traditionally been close, both personally and in substance, which was not surprising since they were both committed to promoting the rule of public international law in international affairs.

59. CAHDI brought together the chief legal advisers to the Ministries for Foreign Affairs of its 47 member States and a number of observer States and organizations, including Canada, the Holy See, Israel, Japan, Mexico, the United States and the European Union. It covered a very broad range of issues, almost all of which were closely related to the work of the International Law Commission. Each year, at its autumn session, it examined the Commission's report, focusing on issues in respect of which the Commission had sought the views of Governments and on those submitted to the General Assembly. For the 47 member States and eight observer States, the consideration by CAHDI of the Commission's report was an important stage in forming their views on those issues.

60. Dispute settlement had long been a focus of the work of CAHDI. In early July 2008, the Committee of Ministers of the Council of Europe had adopted two recommendations in that regard, both of which had been prepared by CAHDI. The first encouraged States to nominate and keep up-to-date lists of the arbitrators and conciliators provided for in important treaties such as the 1969 Vienna Convention and the United Nations Convention on the Law of the Sea. The second concerned acceptance of the jurisdiction of the ICJ under the "optional clause" and listed some model clauses that States might find helpful. The two recommendations might be seen as a contribution to the implementation of the 2005 World Summit Outcome document adopted by the General Assembly in its resolution 60/1. That would be particularly true if, as he hoped, the recommendations were brought to the attention of the Sixth Committee of the General Assembly and some follow-up action was taken in the United Nations.

61. Another important regular task of CAHDI was to examine reservations to and declarations on treaties, paying particular attention to treaties concerning terrorism. In doing so, it derived considerable assistance from the ongoing work of the International Law Commission, and the Commission's Special Rapporteur on the topic had recently attended a CAHDI meeting.

62. CAHDI was currently working on a report on the legal consequences of the so-called "disconnection clause" which, as the Commission was well aware, had been a contentious issue, both legally and politically, over the years. The authors of the report, which should be available at the next meeting of CAHDI, had drawn heavily on the Commission's 2006 study on the fragmentation of international law.<sup>265</sup>

63. CAHDI was closely following the development of international justice. It had organized four conferences

<sup>265</sup> "Fragmentation of international law: difficulties arising from the diversification and expansion of international law", Report of the Study Group of the International Law Commission (A/CN.4/L.682 and Corr.1 and Add.1) (mimeographed, available on the Commission's website; the final text to be published as an addendum to *Yearbook ... 2006*, vol. II (Part One)). A summary of this report was published in *Yearbook ... 2006*, vol. II (Part Two), pp. 176–184, paras. 241–251.

to promote the implementation of the Rome Statute of the International Criminal Court and regularly discussed developments in the various international criminal tribunals. A conference entitled "International courts and tribunals—the challenges ahead", to be held in London on 6 and 7 October 2008, would focus on the interface between national Governments (particularly their legal advisers) and international courts. The autumn session of CAHDI would be held immediately after the conference, and he hoped that a representative of the International Law Commission would attend, as was very often the case.

64. Recent domestic cases demonstrated the importance and topicality of the subject of State immunity. CAHDI monitored and encouraged progress towards accession to the 2004 United Nations Convention on the Jurisdictional Immunities of States and their Property, one of the Commission's most important achievements.

65. From its earliest days, the Commission had been concerned to develop ways and means of making the evidence of customary international law more readily available. As long ago as the 1960s, the Council of Europe had taken the lead by developing a model plan for such publications, which had been updated in the 1990s. Unfortunately, only a minority of States systematically published their practice. He hoped that CAHDI would continue to encourage more States to do so.

66. The Council of Europe's website on public international law (<http://www.coe.int/en/web/cahdi>) contained most CAHDI documents and some useful databases. One database, on the office of Ministry for Foreign Affairs legal adviser, described the current position in most member and observer States. It was a valuable resource, one that could perhaps also be developed within the United Nations.

67. Ms. ESCARAMEIA thanked Mr. Lezertua and Sir Michael Wood for their clear and informative statements. Noting that Mr. Lezertua had mentioned numerous contacts between Council of Europe and European Union bodies, she asked whether the same was true of the two courts, namely the European Court of Human Rights and the Court of Justice of the European Communities. It had recently been claimed that many human rights cases were now brought before the Court of Justice of the European Communities because its proceedings were more rapid and its judgements more directly applicable.

68. With regard to cybercrime, a subject that had been included in the long-term programme of work of the International Law Commission, she noted that the Council of Europe had not shown much enthusiasm in the past for a Commission study and asked how matters now stood.

69. According to Sir Michael Wood, CAHDI discussed the Commission's work at its autumn session each year. Ms. Escarameia asked whether CAHDI might envisage devoting a specific session in the future to one of the topics being dealt with by the Commission.

70. Mr. LEZERTUA (Director of Legal Advice and Public International Law, CAHDI) said that relations between the European Court of Human Rights and the Court of

Justice of the European Communities were neither structured nor systematic. There was no institutional dialogue as such, only spontaneous contacts, for instance at specific events, which enabled the two courts to exchange views. Their proceedings were totally independent.

71. It was true that human rights treaties had become sources of law for the European Communities and that in some cases the Court of Justice of the European Communities was obliged to apply the European Convention on Human Rights and other instruments, including the European Social Charter, in implementing Community law. However, the possibility of raising human rights issues before the Court of Justice was strictly limited to the fields of competence of the institutions of the European Union, so that a far wider range of cases could be brought before the European Court of Human Rights. Despite the limited jurisdiction of the Court of Justice, the two courts sometimes reached divergent conclusions, which was regrettable from the point of view of protection of human rights. They were aware of the problem, which had given rise to a sense of powerlessness, although the Council of Europe strongly believed that the only solution would be for the European Union to accede to the European Convention on Human Rights, if not to the European Social Charter. That possibility was envisaged in the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, and since the Court of Justice had issued an opinion to the effect that the European Union had no jurisdiction to ratify the Convention, everybody was awaiting the entry into force of the Treaty of Lisbon. In the Council of Europe's view, that was the only development that would enable the European Court of Human Rights to remain the ultimate authority in matters pertaining to the interpretation of the Convention.

72. What role could the International Law Commission play in practice with regard to cybercrime? The Council of Europe Convention on cybercrime was very effective and had aroused the interest of such diverse countries as Brazil, the Dominican Republic, the Republic of Korea and Mexico, which had all applied for accession. The Committee of Ministers was currently considering the possibility of inviting them to do so. The Cybercrime Convention Committee had met once and would meet again shortly. The Convention on cybercrime was of universal relevance and the Council of Europe had reservations about the possibility of drafting a new convention that improved on its content. The Council was convinced that it reflected the state of the art, and its policy was to encourage non-European States to accede to the Convention—with limited success for the time being, but the prospects were good. With regard to the outcome of the Conference on Cooperation against Cybercrime, one of the issues that the International Law Commission might consider was the responsibility of Internet service providers, which was an area in which cooperation between the public and private sectors was extremely important and in which the Council of Europe Convention had not settled all outstanding issues.

73. Sir Michael WOOD (Chairperson of CAHDI) said that CAHDI discussed specific matters on the agenda of the International Law Commission but tended to do so

when they were submitted to Governments for consideration and action. For instance, it had discussed the draft articles on jurisdictional immunities of States and their property<sup>266</sup> a year or two before their adoption by the General Assembly and the draft articles on responsibility of States for internationally wrongful acts<sup>267</sup> before the General Assembly had taken action. However, it would be useful to discuss certain matters at an earlier stage, while the drafting process was still under way in the Commission, both to draw the attention of legal advisers to particular topics and to promote useful exchanges of views. He suggested that informal contacts might take place between CAHDI and the Commission in the future to determine the most appropriate topics for discussion and that the special rapporteurs responsible for the topics might be invited every one or two years to engage in an in-depth debate.

74. Mr. DUGARD said that national groups established under the Permanent Court of Arbitration seemed to serve two completely different purposes: one was to compile a list of competent arbitrators and the other to compile a list of candidates for election to the ICJ. Some countries included political figures in the national group in order to ensure that persons nominated for election to the ICJ were politically acceptable, but that clearly was not the purpose of national groups, which were supposed to provide competent and independent arbitrators. He wished to know whether CAHDI had examined the qualifications and competence of members of national groups.

75. Sir Michael WOOD (Chairperson of CAHDI) said that the CAHDI recommendation did not focus on the Permanent Court of Arbitration but was of a more general scope. There were some 10 or 20 important treaties that provided for States to nominate arbitrators or conciliators. Even the most efficient parties did not always do so or, if they did, they failed to keep their list up to date. For example, the United Kingdom had recently realized that it had not nominated conciliators under the 1969 Vienna Convention for the past 15 years. States should therefore be encouraged to compile a list of all treaties to which they were parties that provided for the nomination of arbitrators and to keep a note of when their term of office ended, since laxity in that regard seemed to be largely due to bureaucratic inertia. The United Nations Convention on the Law of the Sea was a very good example: the panels of arbitrators established under the Convention played a very important role, since it was compulsory to draw upon their members when establishing an arbitral tribunal. However, the existing lists were very short: of 156 States parties, only about 20 had nominated arbitrators.

76. Mr. GALICKI asked how far the work of CAHDI on the disconnection clause had progressed and what approach it had adopted. It was a subject that the Commission had considered some time ago in the context of its study on the fragmentation of international law. He was particularly interested in the matter because he was

<sup>266</sup> *Yearbook ... 1991*, vol. II (Part Two), p. 13, para. 28 (see footnote 225 above).

<sup>267</sup> See *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 26 *et seq.*, para. 76 (see footnote 12 above).

involved in negotiations on a convention containing such a clause. Noting that the Parliamentary Assembly of the Council of Europe was broadly opposed to such a clause, he asked whether the Committee of Ministers intended to follow the Parliamentary Assembly's line or whether the representatives of the States on the Committee adopted a different approach.

77. Sir Michael WOOD (Chairperson of CAHDI) said he very much hoped that CAHDI would adopt its report on the subject in October 2008 and that the Committee of Ministers would act on it. He doubted that the report would adopt a negative approach and thought that it would acknowledge the important role to be played by disconnection clauses. Nonetheless, such clauses should be used very cautiously; they should only be included in treaties where they were really necessary and should be confined to relevant provisions. Moreover, their impact should be clear to everyone, which was not the case at present. Thus, nobody really knew what impact they had on certain European Union laws. The effects should be clear and transparent for everyone and not just for European Union lawyers.

78. Mr. VASCIANNIE, referring to the fact that the Council of Europe was particularly active in promoting the abolition of the death penalty, noted that although the United Nations General Assembly adopted resolutions on the subject every year, some States were still resisting abolition. Given the experience of the Council in that area, he asked whether either of its representatives thought that the ICJ should deliver an advisory opinion on the status of the death penalty in international law.

79. Mr. LEZERTUA (Director of Legal Advice and Public International Law, CAHDI) said that the Council of Europe had succeeded in imposing a moratorium on the death penalty in all its member States so that nobody was executed in those countries, which was a major step forward. It had included such a provision in international instruments so that it would be impossible or at least very difficult to revert to the previous situation. Furthermore, the Council, in cooperation with the European Union, had proclaimed 10 October each year a "European Day against the Death Penalty". He preferred to ask Sir Michael Wood to answer the question regarding a possible advisory opinion of the ICJ.

80. Sir Michael WOOD (Chairperson of CAHDI) said that, personally speaking, he was rarely in favour of seeking an advisory opinion from the ICJ, since the procedure was, in his view, unsatisfactory and rarely produced good results. He feared that the Court might reach a conclusion similar to that on the *Legality of the Threat or Use of Nuclear Weapons*.

81. The CHAIRPERSON, speaking as a member of the Commission, noted that the question of reform of the European Court of Human Rights was again in the news and asked for more background information on Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention. With regard to Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950,

restructuring the control machinery established thereby, which enabled victims to file a complaint with the European Court without first referring the matter, as required by the Convention, to the European Commission on Human Rights, he asked Mr. Lezertua to comment on Europe's experience in that area since complainants in the inter-American system, which was strongly influenced by the European system, still had to pass through the Inter-American Commission on Human Rights to gain access to the Inter-American Court of Human Rights. He also asked him to comment on reports that, following the expansion and reform of the Council of Europe, the number of complaints filed with the European Court had increased to the point where the Court was unable to cope with them.

82. Mr. LEZERTUA (Director of Legal Advice and Public International Law, CAHDI) said that Protocol No. 11, which allowed individuals to file complaints directly with the Court, had constituted a major step forward. However, many people felt it had been a mistake, since the Commission had usually processed complaints quite speedily and had only retained those of some importance. The report of the Group of Wise Persons aimed at improving the effectiveness of the system, which had been submitted to the Committee of Ministers in 2007, proposed, *inter alia*, the creation of a chamber composed of a small number of judges who would decide on the admissibility of complaints. It had certainly proved difficult for the European Court to deal with all cases, which now numbered over 100,000, and there was a considerable legal backlog. The Court considered that Protocol No. 14, once it entered into force, would simplify matters. For instance, a single judge could declare an application inadmissible under the Protocol, compared with at least three under the existing system. Moreover, a committee of three judges, compared with seven at present, could declare an application admissible, which meant that more chambers could be set up from among the serving judges. It had been estimated, however, that the new system would enable the Court to handle only 20 to 25 per cent more cases, which was quite inadequate in view of the backlog and the exponential increase in the number of complaints filed. The report of the Group of Wise Persons contained numerous proposals to deal with the problem which the Court would consider at a later stage, since they all dealt with the situation after the entry into force of Protocol No. 14. For example, the Group proposed the establishment of a filtering mechanism which would be attached to the Court itself instead of being a separate body as in the case of the Commission. With a view to preserving the right of individuals to file complaints, a chamber of junior judges could be charged with deciding on the admissibility of applications, which would then be referred for consideration to established judges. There was also a trend towards encouraging States to assume greater responsibility for incorporating the jurisprudence of European Court of Human Rights in their legislation and disseminating relevant information.

*The meeting rose at 1 p.m.*