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**Summary record of the 2986th meeting**

Topic:  
**Immunity of State officials from foreign criminal jurisdiction**

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## 2986th MEETING

Tuesday, 29 July 2008, at 10.05 a.m.

Chairperson: Mr. Edmundo VARGAS CARREÑO

Present: Mr. Brownlie, Mr. Caffisch, 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. 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. Mr. PERERA thanked the Special Rapporteur for his thorough and well-researched preliminary report (A/CN.4/601) and the Secretariat for its comprehensive memorandum (A/CN.4/596), both of which would serve as a solid basis for the Commission's work on the topic, which was one of considerable contemporary relevance.

2. In delimiting the scope of the topic, the Special Rapporteur had emphasized that it would be confined to the immunity of State officials from foreign criminal jurisdiction, and would not deal with immunity from international criminal jurisdiction, which was governed by special regimes. That distinction had to be borne in mind when addressing the more complex issues involved in the examination of the topic. Paragraphs 103 to 130 of the report concerned the core issues to be considered when defining the scope of the topic. He would confine his comments to those issues, and in particular, to the issue of persons covered.

3. As the report stated in its paragraph 111, Heads of State, Heads of Government and Ministers for Foreign Affairs constituted the "basic threesome" of State officials who enjoyed personal immunity. Under international law, those three categories of officials were granted special status by virtue of their office and functions. That special status was evidenced by the provisions of key international conventions, including the 1969 Vienna Convention, which accorded such persons, by virtue of their functions, the competence to perform all acts relating to the conclusion of a treaty. The special status of those categories of officials was also confirmed in the Convention on special missions, the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character, and the Convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents. Furthermore, the judgment of

the ICJ in the *Arrest Warrant* case had expressly found that this category of persons enjoyed immunity *ratione personae* from both the civil and criminal jurisdiction of other States.

4. While it must be acknowledged that the joint separate opinion formulated by several judges in that case had cast doubt on the proposition that Ministers for Foreign Affairs were entitled to the same immunities as Heads of State, it was nevertheless important to view that issue, as the majority opinion had done, from the perspective of the pre-eminent role played by Ministers for Foreign Affairs in contemporary international relations, as the principal intermediaries between a sovereign State and the international community of States. The centrality of their role in the conduct of international affairs on behalf of the Head of State would require that Ministers for Foreign Affairs be treated on a par with Heads of State with regard to the scope and extent of the jurisdictional immunities they enjoyed. The basic rationale underlying the granting of jurisdictional immunities to Heads of State would thus apply with equal force to Ministers for Foreign Affairs, given the representative character and functional necessity of their role.

5. It should also be recalled that, when formulating draft articles on diplomatic intercourse and immunities,<sup>268</sup> which had subsequently been adopted as the Vienna Convention on Diplomatic Relations, the Commission had been guided by the theory of functional necessity and the representative character of a head of mission.<sup>269</sup> The theory of functional necessity and their representative character must therefore be the guiding criteria in according absolute immunity to Ministers for Foreign Affairs under whose authority ambassadors and other diplomatic agents performed their duties.

6. In moving to consider categories of officials other than the well-acknowledged "threesome", the Commission was venturing into somewhat uncharted territory, which called for a cautious approach. It was presented with a situation in which important international conventions, such as the Convention on special missions and the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character, acknowledged the existence of a category of "other persons of high rank" but did not specifically define that category. Similarly, the judgment of the ICJ in the *Arrest Warrant* case confirmed the existence of such a category, but went no further.

7. Given that situation, the Special Rapporteur recommended in paragraph 130 (*e*) of the report that an attempt could be made to determine which other high-ranking officials, in addition to the threesome mentioned, enjoyed immunity *ratione personae*, while also noting that it would be possible to single out such officials from among all high-ranking officials, if the criterion or criteria justifying special status for that category of high-ranking officials could be defined.

<sup>268</sup> *Yearbook ... 1958*, vol. II, report of the Commission to the General Assembly, document A/3859, pp. 89 *et seq.*

<sup>269</sup> *Ibid.*, p. 95, paras. 2–3 of the general comments on section II of the draft articles.

8. The Commission's approach to that issue should indeed be a criteria-based rather than an enumerative approach. A listing of officials on the basis of their functions or representative character would essentially be determined by the constitutional and other internal arrangements of each State and would thus vary from one State to the next. Consequently, it would be far more productive for the Commission to embark on a process of identifying and defining applicable criteria to be applied in granting jurisdictional immunities to high-ranking officials, while taking due account of the principles of functional necessity and representative character. That process of identifying specific elements would serve as a useful pointer to the other categories of persons who might be covered.

9. In efforts to identify such criteria, pride of place must be given to the notion that the official's representation of the State in international relations must be an indispensable part of his or her functions. It was interesting to note the reference in paragraph 120 of the report to the pleadings of counsel for France in the case concerning *Certain Questions of Mutual Assistance in Criminal Matters*, in which emphasis had been placed on the representation of the State in international relations being an indispensable and inherent aspect of the functions of officials seeking to enjoy immunity. Mr. Caffisch, too, had stressed that a very high degree of involvement of such officials in the conduct of foreign affairs should be required, in order to avoid too liberal an expansion of the scope of immunity. Those were the primary criteria that should be identified and defined in such a process.

10. The report had cited contemporary social and political changes as objective reasons for the gradual expansion of the categories of officials who enjoyed immunity from jurisdiction. It was from that perspective that the role and function of such officials as trade ministers or defence ministers had to be seen. On the basis of the aforementioned criteria for granting immunity, the representative character and the functions of a trade minister in the context of global trade negotiations in the era of WTO, or those of a defence minister in the context of stationing troops on foreign soil or other activities relating to military alliances, would appear to justify placing those ministers in the category of "other high-ranking officials". It should also be recognized that, in the modern world, States' foreign and defence policies were inextricably linked and not easily separated. As had been noted by Mr. McRae, those developments reflected the reality of how contemporary international relations were conducted, and should be taken into account.

11. That being said, a balance must be struck between the need to expand—albeit cautiously—the categories of officials to be granted jurisdictional immunities *ratione personae* in the light of modern realities, on the one hand, and the risk of too liberal an expansion of such categories, on the other, hence the need for the careful identification and definition of applicable criteria.

12. Seen in that light, the question posed by the Special Rapporteur in paragraph 121 of the report, namely whether the importance of the functions performed by high-ranking officials in ensuring the State's sovereignty

was further criterion for including such officials among those enjoying immunity *ratione personae*, became extremely relevant.

13. The effective conduct of a State's foreign relations was inherent in the preservation of its sovereignty. Together they constituted an integral whole that should be considered as such when establishing the criteria for granting jurisdictional immunities to State officials; the two should not be treated as discrete criteria.

14. The question of possible exceptions to jurisdictional immunity in the case of international crimes was a difficult and complex issue on which the legal literature appeared to be sharply divided. Although the Special Rapporteur had announced that the issue would be dealt with in his second report, it nevertheless had an unseen presence, hovering over the Commission's debate like some ghost at the banquet. At a previous meeting, Mr. Brownlie had raised some very pertinent issues concerning the scope and extent of exceptions to jurisdictional immunity on the basis of such crimes, and had cautioned against too liberal an approach in extending the boundaries of such exceptions, which could lead to the total disappearance of the whole notion of jurisdictional immunities (2984th meeting above, para. 47).

15. A whole range of complex issues would arise in considering an exception in the case of international crimes, issues which would require the Commission's very careful consideration. Those included such questions as the precise scope of crimes that would constitute such an exception; whether they would consist exclusively of what had come to be generally regarded as "core crimes" under international law, namely genocide, crimes against humanity and war crimes, or whether they would also cover what were referred to as "other crimes of international concern", the precise parameters of which were unclear; the problem of identifying possible *jus cogens* norms establishing such crimes; whether such an exception would also apply to incumbent officials or only to officials whose term of office had expired; and the question of the impact of current developments in the field of international criminal jurisdiction, which, however, constituted a distinct category that fell outside the scope of the current topic. The Secretariat's memorandum, particularly in its paragraphs 193 to 212, provided extremely useful material for the Commission's future consideration of those difficult issues.

16. While there was certainly a tension between contending principles in dealing with an exception to immunity from criminal jurisdiction in respect of international crimes, he would hesitate to approach the issue from the somewhat restrictive standpoint of declaring oneself to be categorically either for or against immunity or impunity. However difficult the task might be, the Commission must aim to strike a delicate balance between the possible recognition of carefully defined exceptions, on the one hand, and preserving the essence of jurisdictional immunities essential for the conduct of international relations, on the other. The Commission would await with interest the Special Rapporteur's treatment of that issue in his second report.

17. Lastly, on the issue of exclusions from the scope of the topic, he shared the doubts expressed by the Special Rapporteur and several previous speakers as to the advisability of including within the current topic the questions of recognition and of immunity of members of the families of high-ranking officials. From an international law perspective, the immunity of a State official from criminal jurisdiction was based on the well-established principle of the sovereign equality of States. Although the maxim *par in parem non habet imperium* implied that one Head of State or his or her representative entered the territory of another on the implicit understanding that he or she would not be subject to its jurisdiction, that maxim could hardly be said to apply to an unrecognized entity. On the question of family members, he agreed with the view that the basis of the granting of immunity in such cases was essentially international comity rather than international law, and that there was no settled practice in that regard. Consequently, he favoured the exclusion of those issues from the scope of the topic.

18. Mr. VÁZQUEZ-BERMÚDEZ thanked the Special Rapporteur for his excellent preliminary report, and also the Secretariat for the very useful memorandum it had prepared. As had been noted by the President of the International Court of Justice, Judge Rosalyn Higgins, in her recent address to the Commission, the immunity of State officials from foreign criminal jurisdiction was a topic that was not well developed. The Commission's work in that area would therefore make a particularly significant contribution to the progressive development of international law and its codification.

19. It had been amply recognized in the literature, the case law of national courts and by the ICJ itself, that the immunity of State officials from foreign criminal jurisdiction had as its source international law, especially customary international law, and concerned the legal rights and obligations of States. The right to immunity and the corresponding obligation to respect that right by abstaining from exercising jurisdiction over beneficiaries of immunity were derived from international law. The immunity of State officials from criminal jurisdiction was therefore a legal issue that had important implications for the stability and predictability of inter-State relations and was based on the principle of the sovereign equality of States. Since the Vienna Convention on Diplomatic Relations, the Vienna Convention on Consular Relations and the Convention on special missions provided adequate rules concerning the immunity of the respective categories of public officials from criminal jurisdiction, it was not necessary to include those categories in the scope of the current topic.

20. In speaking of immunity from foreign criminal jurisdiction, it would be necessary to define the nature of the concepts of "immunity" and "foreign criminal jurisdiction". It should be stressed that immunity was procedural in nature and did not affect the substantive criminal law of the State in question, neither exonerating its beneficiaries from individual criminal responsibility nor excluding them from the jurisdiction of their State of origin. The State of origin also had the authority to waive the immunity of its public officials. As had been indicated by the Special Rapporteur, the current topic was limited to the

immunity of State officials from the criminal jurisdiction of the courts of other States, but not from the criminal jurisdiction of international courts.

21. The Special Rapporteur had questioned to what extent the distinction drawn in case law and in the literature between immunity *ratione personae* and immunity *ratione materiae* was necessary for the legal regulation of the subject of immunity of State officials from foreign criminal jurisdiction, since the ICJ had not used that categorization in the *Arrest Warrant* case, nor had it been used in the aforementioned conventions on diplomatic relations, consular relations and special missions, or in the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character. The Special Rapporteur had noted that the International Law Institute, too, had not used those concepts in its resolution on the topic.<sup>270</sup>

22. In his view, it was essential to provide a rationale for the immunity of State officials from foreign criminal jurisdiction, since that would have an impact on which public officials would enjoy such immunity. Delimiting its scope was also important, as it would determine whether immunity would be absolute or cover only acts performed in an official capacity. Despite the various reasons cited as justification for granting absolute or personal immunity, which did not distinguish between acts performed in an official capacity and those performed in a private capacity, and which was enjoyed, *inter alia*, by the trio of high-ranking State officials, it was the "functional necessity" theory that appeared to provide the most up-to-date rationale for immunity. Indeed, in the *Arrest Warrant* case, the ICJ had found that immunity should be granted to Ministers for Foreign Affairs in order to ensure the effective performance of their representative functions, as well as to Heads of State and Heads of Government. According to the judgment of 14 February 2002 issued in the *Arrest Warrant* case,

[t]he Court further observes that a Minister for Foreign Affairs, responsible for the conduct of his or her State's relations with all other States, occupies a position such that, like the Head of State or the Head of Government, he or she is recognized under international law as representative of the State solely by virtue of his or her office. [para. 53]

23. Moreover, as indicated by the Special Rapporteur, acts performed by a public official in the exercise of his or her official functions were attributable to the State, and such officials enjoyed immunity from jurisdiction for those acts. At first sight, that would seem to cover all State officials, but that concept needed to be developed further, as did the determination of the exceptions thereto. In the case of such functional immunity, public officials bore individual criminal responsibility, in particular for crimes under international law, without prejudice to the responsibility of the State for internationally wrongful acts.

24. Attention had also been drawn to the importance of efforts to combat impunity, and in that context reference had been made to possible exceptions to immunity from criminal jurisdiction *ratione personae* in the case of crimes under international law. The Special Rapporteur,

<sup>270</sup> Institute of International Law, *Yearbook*, vol. 69 (2000–2001), Session of Vancouver (2001), pp. 743 *et seq.* (see footnote 224 above).

in delimiting the topic, indicated that it referred to the immunity of State officials only from foreign criminal jurisdiction, and not from international criminal jurisdiction, in conformity with the instruments of international law on the basis of which that jurisdiction was exercised. As had rightly been noted by Mr. McRae, the reason why the prosecution of international crimes in national courts, as exceptions to immunity, was seen as desirable was that there was as yet no fully functioning international criminal jurisdiction; however, the prospect of the prosecutorial authorities of any country of the world being able to commence criminal proceedings against the high-ranking officials of any State for alleged international crimes was hardly a reassuring thought. Indeed, as he had already indicated, the immunity of State officials from criminal jurisdiction was an important legal question for the stability and predictability of inter-State relations and was based on the principles of the sovereign equality of States. Consequently, a proper balance must be struck between the stability of inter-State relations and the paramount need to put an end to impunity.

25. The need to do away with impunity for the most serious offences of concern to the international community as a whole had prompted that community to respond by setting up courts, such as the International Criminal Court, before which immunity could not be invoked. Continuing to strengthen and to ensure the universality of international criminal jurisdiction would seem to be more important in combating impunity than promoting the prosecution of such crimes in national courts. He eagerly awaited the Special Rapporteur's next report, since it would address, *inter alia*, exceptions to immunity from foreign criminal jurisdiction. Lastly, the Commission should also seize the opportunity to deal with the question of the immunity of the members of the families of persons who enjoyed immunity.

26. Mr. WISNUMURTI commended the Special Rapporteur's comprehensive and thorough preliminary report and the Secretariat's excellent memorandum on the topic. His comments would attempt to address aspects of the report on which the Special Rapporteur had requested members' views. With regard to the relevant sources of the topic, which were comprehensively presented in the report, he endorsed the Special Rapporteur's conclusion that the primary source of the immunity of State officials from foreign criminal jurisdiction was international law and, in particular, customary international law. He also agreed that immunity concerned inter-State relations and had its roots in State sovereignty.

27. Before consideration could be given to the term "immunity", it was necessary to specify what was meant by "jurisdiction". In paragraph 45, the Special Rapporteur had indicated that a distinction should be drawn between legislative, executive and judicial jurisdiction. Legislative jurisdiction concerned the promulgation of laws and regulations, while executive and judicial jurisdiction involved the application and enforcement of the law. He could agree with the Special Rapporteur's suggestion in paragraph 47 that, for the purposes of drafting articles on jurisdictional immunities, the Commission should consider only the executive and judicial aspects of jurisdiction, since the invocation of immunity from foreign jurisdiction was

basically relevant only to the implementation and enforcement of the laws of the State having jurisdiction. He also agreed that the concept of jurisdiction should cover the whole spectrum of procedural actions, since in criminal proceedings, unlike the case with civil executive jurisdiction and civil procedure, the issue of immunity could arise as early as in the pretrial phase. Such considerations were important for determining the extent of immunity.

28. Although, as noted in paragraph 56, there were no definitions of the concept of immunity in universal international agreements, the immunity of State officials from foreign criminal jurisdiction was a rule of international or at least customary international law. Such immunity could be seen at once as a right of the person with immunity not to have the State's jurisdiction exercised over him, and as a duty of the State having jurisdiction not to exercise it. In that connection, he agreed with the Special Rapporteur's suggestion, stated in paragraph 63, that the Commission should consider the advisability of formulating draft articles on the topic, including a provision that defined the term "immunity". Since the issue of jurisdiction was closely linked to immunity, it too should be addressed in the draft articles.

29. Another important point made by the Special Rapporteur was that immunity from criminal jurisdiction was, by nature, a procedural issue, and did not address the merits of the case in question. Immunity from criminal jurisdiction related only to the jurisdiction of judicial and administrative authorities, and did not place the person enjoying it outside the reach of the legislative jurisdiction of the State.

30. Other limitations on State jurisdiction, referred to by the Special Rapporteur in paragraphs 71 to 77, were the "non-justiciability" and "act of State" doctrines. According to the "non-justiciability" doctrine, a court might refuse to pronounce upon the validity of a law of a foreign State applying to matters within its own territory on the ground that to do so would amount to an assertion of jurisdiction over the internal affairs of that State; consequently, the court would not consider the merits of the case. According to the "act of State" doctrine, which related to the act of a foreign State against the right to property of that State, the court considered the merits of the question whether the act of the foreign State was valid. Despite the fact that the "non-justiciability" and "act of State" doctrines were primarily used in the courts of common law systems, those limitations should also be included within the scope of the Commission's study.

31. With regard to the scope of the topic, the Special Rapporteur referred to three parameters: that it concerned, first, only immunity of State officials from foreign criminal jurisdiction and not from international criminal jurisdiction or from national civil or national administrative jurisdiction; second, immunity on the basis of international law; and third, immunity of the officials of one State from the jurisdiction of another State. The Special Rapporteur favoured excluding immunity from *international* criminal jurisdiction from the scope of the topic, stating that such immunity differed fundamentally from immunity from *national* criminal jurisdiction, a difference traceable to their respective origins. At the heart of

the issue of immunity from international criminal jurisdiction was the question of exceptions thereto in cases involving grave crimes such as genocide, war crimes and crimes against humanity. That politically sensitive issue had the potential to disrupt the stability of inter-State relations, which was the very foundation of immunity.

32. Furthermore, there seemed to be no consistency in the decisions rendered by either the international or national courts on the question of whether immunity *ratione materiae* was applicable in respect of international crimes. In the *Arrest Warrant* case, the ICJ had held that immunity from criminal jurisdiction of an incumbent Minister for Foreign Affairs was not subject to any exception in the event of crimes under international law, whereas the Appeals Chamber of the International Tribunal for the Former Yugoslavia in the *Prosecutor v. Blaškić* case had found that immunity *ratione materiae* did not exist in respect of crimes under international law. As noted in paragraph 188 of the Secretariat memorandum, at the national level, even recently, domestic authorities had not been unanimous in denying immunity *ratione materiae* to State officials accused of crimes under international law.

33. Viewed from that standpoint, widening the scope of the topic to include immunity from international criminal jurisdiction might complicate the study. That being said, several members considered it necessary to address that aspect of the topic, and the Special Rapporteur had indicated that he would address it in his next report. Because of his own misgivings on the matter and consistent with his view that impunity must not be tolerated, he urged the Special Rapporteur, when addressing that issue, to proceed with the utmost caution in order to strike a balance between the conflicting needs to prevent impunity and to maintain stability in inter-State relations, having regard to the principle of the sovereign equality of all States as set forth in the Charter of the United Nations.

34. As to the question of which persons should be covered by the topic, the Special Rapporteur had suggested that it should deal with all State officials who enjoyed immunity from foreign criminal jurisdiction in respect of acts performed in their official capacity; and that it should not extend to acts performed in their private capacity, or to immunity *ratione materiae* or functional immunity. On the other hand, Heads of State, Heads of Government and Ministers for Foreign Affairs—the so-called “three-some” or “triumvirate”—would enjoy immunity *ratione personae* or personal immunity, extending to acts performed in both an official and private capacity before and while occupying their respective posts. In paragraph 119 of the report, the Special Rapporteur referred to the possibility of extending immunity *ratione personae* to other high-ranking State officials, such as ministers of defence, the rationale being that, in certain cases, a minister of defence performed acts on behalf of the State that he or she represented that were important for the maintenance of international relations and inherent in the sovereignty of that State. In his report, the Special Rapporteur had cited several cases that supported such an extension. He himself saw merit in the argument that, in contemporary international relations, diplomacy was no longer the exclusive preserve of the Minister for Foreign Affairs, and that in addition to the minister of defence, other government

ministers sometimes represented the State in performing diplomatic or negotiating functions in specialized areas, and should accordingly be granted immunity from foreign criminal jurisdiction.

35. That being the case, the Special Rapporteur should take a cautious approach to the issue of extending personal jurisdiction beyond the threesome. As was noted in paragraph 120 of his report, in order to be able to determine which other high-ranking State officials should enjoy personal immunity, it was of the utmost importance that specific criteria for that purpose should first be established, given the wide-ranging scope of immunity *ratione personae*, which extended to acts performed by State officials in their official and private capacity before and while occupying their posts.

36. There was no definition of the term “State official” in international law. Consequently, the Special Rapporteur considered it necessary to define that term for the purposes of the topic or to identify the officials covered by it. That proposal merited consideration. As to the terminology to be used, he himself favoured the term “State official”, which was more neutral than “State representative” or “State agent”.

37. On the questions of immunity of a State not recognized by the State exercising jurisdiction and of a person not recognized as the Head of State, Head of Government or Minister for Foreign Affairs, he was inclined to think that, as those questions were more closely related to the issue of the recognition of States or Governments, they did not fall directly within the Commission’s mandate on the topic, and that it would thus be unwise to include the question of non-recognition in the context of immunity in the present study. However, he would not rule out the possibility that, at a later stage in its study of the topic, the Commission might need to address that question.

38. Lastly, on the question of granting immunity to the members of the families of Heads of State or Heads of Government, the Special Rapporteur had drawn attention to the various positions taken by national courts. As noted in paragraph 114 of the Secretariat memorandum, the question of granting immunity *ratione personae* under international law to the family members and members of the entourage of Heads of State remained an area of uncertainty, and he shared the Special Rapporteur’s doubts as to whether that issue fell within the Commission’s mandate.

39. Mr. VASCIANNIE said that the Special Rapporteur’s preliminary report on immunity of State officials from foreign criminal jurisdiction was a *tour de force*, combining analytical clarity with appropriate respect for the sources of international law so as to provide the Commission with a solid foundation for its future work on an important and increasingly controversial subject. He was also grateful to the Secretariat for its substantial and thoroughly researched memorandum on the topic.

40. Owing to time constraints, he would confine himself to a statement of his views, focusing first on the summary contained in paragraph 130 of the report. With respect to subparagraph (a), he agreed that the topic embraced only immunity from national criminal jurisdiction in foreign

States and did not include immunity rules with respect to international tribunals, immunity from civil jurisdiction *simpliciter* or issues of immunity within the home State. In some instances, however, practice and principles pertaining to international tribunals, civil jurisdiction and the home State might provide useful guidance in formulating rules on immunity from foreign criminal jurisdiction. For that reason, the Special Rapporteur had been right to acknowledge that cross-fertilization might take place, though the degree of cross-fertilization acceptable on particular points would be a matter of judgement. It would therefore be important for the Special Rapporteur to continue determining the circumstances in which rules and principles from international tribunals, civil jurisdiction and home States would be applicable to the topic.

41. He further agreed with the Special Rapporteur that, for present purposes, immunity should be interpreted as immunity from criminal process and criminal procedure, including during the pretrial phase. That issue had been of relevance in the case brought before the ICJ concerning *Certain Questions of Mutual Assistance in Criminal Matters*. He was inclined to the view that immunity of process also included immunity from interim measures of protection or measures of execution, a question touched upon by the Special Rapporteur in paragraph 70 of his report. The Special Rapporteur was also correct to proceed on the basis that the immunity under consideration was immunity from executive and judicial jurisdiction.

42. In paragraph 63, the Special Rapporteur noted that the issue of jurisdiction would have to be taken up. As Mr. Brownlie had indicated, that was particularly true of the question of universal jurisdiction. As certain issues of universal jurisdiction also arose in the context of the topic of the putative obligation to extradite or prosecute (*aut dedere aut judicare*), the matter called for the Commission's systematic attention.

43. With regard to subparagraph (b) of the summary, he was of the opinion that the topic should cover all State officials, in one way or another. With respect to subparagraph (c), it therefore followed that it would be necessary to identify the persons enjoying immunity and therefore to define the concept of "State official". As for subparagraph (d), the authoritative statements made during the Commission's deliberations showed that the Special Rapporteur would need to give further consideration to the extent of the circle of high-ranking officials who enjoyed personal immunity by virtue of their posts. At least two points were debatable in that connection: first, whether Heads of Government and/or Ministers for Foreign Affairs should have personal immunity; and, secondly, whether other officials such as ministers of defence, or Vice-Presidents responsible for foreign affairs, should be assimilated in that category.

44. He was of the view that, notwithstanding the apparent lack of practice in that area, the majority approach in the *Arrest Warrant* case could be accepted by the Commission as *lex lata*. In the first place, while he would not support uncritical acceptance of decisions, even those of the ICJ, considerable weight should be attached to a pronouncement by the Court that a rule of international law was "firmly established". Although Judges Higgins, Kooijmans

and Buergenthal, in their much-cited joint separate opinion had expressly departed from the Court's conclusion that the beneficiaries of personal immunity went beyond Heads of State, they were, together with Judge Al-Khasawneh and Judge *ad hoc* Van den Wyngaert, who had expressed dissenting opinions, in the minority.

45. Secondly, the decision in that case was fairly recent, and it was hard to argue with force, as some had tried to do, that subsequent developments in the law were of sufficient significance to warrant a shift from the majority perspective of the Court. He noted in passing that the notion of complementarity in the context of the Rome Statute of the International Criminal Court did not necessarily imply that leaders must be subject to the criminal jurisdiction of a foreign State; it could, however, be construed as referring to the home State's right to try its own nationals and as giving it the option of trying its leaders or surrendering them to that Court. Hence the notion of complementarity in the context of the Rome Statute did not necessarily lead to the conclusion that leaders were subject to criminal jurisdiction in jurisdictions other than that of the home State.

46. The third reason why the Commission should support the majority view in the *Arrest Warrant* case was that the Court's conclusion that personal immunity was to be granted to Heads of Government, Ministers for Foreign Affairs and certain other officials was not arbitrary. The minority view in that case built on the proposition that the entitlement to personal immunity for the Head of State derived from the idea that he or she personified the State. However, the notion of personification was simply a metaphor; in the context of foreign relations, the Head of Government, the Minister for Foreign Affairs and other high-ranking officials with foreign affairs-related duties might also be regarded as embodiments of the State in much the same way as was the Head of State. Some people liked to refer to the works of Shakespeare; in *Hamlet*, the eponymous protagonist had, as Prince, been as much the representative of the State of Denmark as his father had been before him.

47. There remained the important issue of practice. In the *Arrest Warrant* case, Judge Al-Khasawneh had referred to the "total absence of precedents" regarding the personal immunity of Ministers for Foreign Affairs. That point had also been taken up by some members of the Commission. In his view, that issue turned in part on the identification of the relevant items of practice. While national legislation would provide some guidance, it might nevertheless be open to divergent interpretations.

48. In paragraph 127 of the Secretariat memorandum, it was noted that "[t]he national laws that explicitly contemplate the immunity of the head of State generally do not contain a similar provision applying to the head of government or minister for foreign affairs" (A/CN.4/596). Although that could be taken as evidence that personal immunity was limited to Heads of State, it was not in any way conclusive. For one thing, the memorandum cited only State immunity acts of Australia and the United Kingdom in support of what was characterized as the general position. More legislation needed to be examined in order to justify the drawing of such a general conclusion. For another, even if most States' legislation

expressly limited personal immunity to Heads of State, that would not be conclusive because other forms of State practice would need to be considered.

49. More importantly, in assessing the personal immunity question, it had to be asked why the positive State practice was so scarce. Some States might simply not have passed legislation on immunity for Heads of Government, Ministers for Foreign Affairs or others because they had taken it for granted that a customary law rule of restraint already existed. Some States might have assumed the existence of a rule of immunity for Heads of Government, Ministers for Foreign Affairs and others and have left it for their courts to affirm that rule through judicial decisions. States might also have taken it for granted that the absence of convictions in that area was itself strong evidence in favour of personal immunity for Heads of Government, Ministers for Foreign Affairs and other high-ranking officials. Accordingly, the majority approach in the *Arrest Warrant* case could be accepted as a statement of the *lex lata*.

50. While noting the Special Rapporteur's suggestion in paragraph 130 (*e*) that an attempt should be made to determine which other high-ranking officials in addition to the "threesome" should have personal immunity, he considered that the point at issue was in fact whether any others should be added and, if so, which ones. In that connection, he was inclined to support the position taken by Mr. Perera.

51. With reference to subparagraph (*f*), he shared the Special Rapporteur's view that the questions of recognition and of the immunity of family members of high-ranking officials could be omitted from the topic.

52. Lastly, on the question of international crimes and, in particular, whether and to what extent immunity should shield perpetrators of international crimes from the jurisdiction of national courts, the Special Rapporteur had announced his intention of dealing with those matters in due course. Meanwhile, Mr. Dugard and others had brought some important considerations to the fore.

53. On the one hand, there was a strong case for ensuring that government leaders could not act with impunity, especially in respect of heinous crimes recognized as such by the international community. For those purposes, government leaders would include Heads of Government, Ministers for Foreign Affairs, other high-ranking officials and even Heads of State, where they exercised executive functions. That approach would promote the recognition of core community values, for example in the area of human rights, and would provide practical means of implementing those values through local courts. If that line were taken, implicitly or explicitly, concepts such as sovereignty and non-interference, together with their subspecies acts of State, non-justiciability and the political question doctrine, should not serve as a shield for grave wrongdoing.

54. On the other hand, the waiver of high-ranking officials' immunity from criminal jurisdiction could be problematic. First, there was the issue of equality, to which Mr. Brownlie had drawn attention. If foreign courts were

given broad jurisdiction over international crimes, with no scope for immunity, the system could easily become one in which judges in more powerful countries could bring political leaders from weaker countries to trial, while in practice there would be no reciprocity. If that were to happen partly as a result of the approach taken by the Commission, a charge of double standards would be levelled in predictable directions.

55. Moreover, a scheme in which foreign high-ranking officials could be tried in domestic courts would undermine the stability of the international system. Reprisal prosecutions would be possible in some instances, and there could be an escalation of tension between States, particularly when proceedings against foreign leaders were perceived to be motivated primarily by political considerations.

56. Other objections might also be briefly anticipated. Some States might recall the language of Article 2, paragraph 7, of the Charter of the United Nations and suggest that, in most instances, trials in a foreign country for crimes committed in the home State appeared to conflict with the idea of the "reserved domain" of States. Others might suggest that the trial by the strong of the weak reflected neocolonial tendencies, or at least a peculiar kind of victors' justice. The fact that in some countries courts had jurisdiction regardless of how the accused had come within its jurisdiction might kindle fears that attempts might be made to secure the extraordinary rendition of high-ranking officials. In short, the removal of immunity *ratione personae* was susceptible to significant abuse.

57. The Special Rapporteur would therefore face a difficult challenge. His own view was that personal immunity for Heads of State, Heads of Government, Ministers for Foreign Affairs and a defined category of other high-ranking officials should be favoured. Leaders who committed international crimes should be subject to international tribunals, such as the International Criminal Court, and to the courts of their home jurisdiction.

58. Mr. NOLTE said that the Special Rapporteur's preliminary report combined a mastery of detail with a methodical approach, providing clear definitions and raising pertinent questions, thereby already indicating the direction the Commission's work should take. Together with the Secretariat's very thorough memorandum, it constituted an excellent basis for the Commission's discussions.

59. Beginning with a few general observations, he said that a number of speakers had launched what he was tempted to term a pre-emptive strike, by calling the judgment of the ICJ in the *Arrest Warrant* case "a disaster", or by suggesting ways in which the Special Rapporteur should take into account modern trends in human rights law and the goal of combating impunity. Some speakers had asserted that the Special Rapporteur was playing Hamlet without the Prince, and had called for a more open attitude to the "really important issues". However, he himself considered that it was not fruitful to preface the discussion with such statements, because they tended to narrow the debate prematurely and to oversimplify it. In consideration of the topic, due heed would have to be

paid to some of the most important principles of international law and contemporary international policy. He assumed that it was because of the importance of the topic that the Special Rapporteur had started with an analysis of the legal basis for immunity and had not yet tackled the issue of possible exceptions. In view of its great significance, members must be prepared to consider all the relevant aspects of the topic. Such an open-minded approach called, first, for an analysis and description of the primary purposes of immunity, since that offered the sole basis for assessing countervailing trends and balancing competing goals in order to determine the degree and scope of possible exceptions.

60. The discussion thus far had not concentrated sufficiently on the basic reasons for granting State officials immunity from foreign criminal jurisdiction in the first place. Those reasons were often stated in rather abstract terms and they sounded either somewhat old-fashioned: sovereign equality, *par in parem non habet imperium*, representation of the State, stability and predictability of inter-State relations; or else rather technocratic, for example, the necessity of immunity for the performance of State functions. When formulated in those terms, those reasons might sound rather weak, especially when set against reasons embodying such substantive values as human rights and the need to combat impunity. At the current stage it was, however, vital to clarify the substantive values underlying the abstract and apparently technocratic terms by which immunity was usually justified. Mr. Vasciannie had taken a few steps in that direction, and Mr. Brownlie had reminded the Commission that sovereign equality was designed to ensure that strong States did not treat weak ones unfairly. He would add that the stability of inter-State relations was not just important in securing technical cooperation between Governments, but was also essential for securing the human rights of individuals and, in some situations, for ensuring that force was not used within and between States. The rules on immunity therefore protected not only the “egoistical” sovereign interest of a particular State, but also the very community values that were safeguarded by human rights and by the principle that there should be no impunity for international crimes. The Special Rapporteur had alluded to those interests, in paragraph 96 of his report, but they deserved more emphasis as collective goods.

61. Turning to the distinction between national and international criminal jurisdiction, he agreed with the stress placed on that distinction in paragraph 44 of the report. Since the jurisdiction of international criminal tribunals derived from agreements between the States concerned, there could be no justification for immunity from that jurisdiction. That also meant, however, that developments in the field of international jurisdiction could not be used as an argument in support of restricting immunity before national courts. For example, the judgment of the International Tribunal for the Former Yugoslavia in the *Prosecutor v. Blaškić* case could not be regarded as a precedent for purely national criminal jurisdiction. If any conclusions were to be drawn from the existence of international criminal jurisdiction, they should go in the direction of confirming the immunity of State officials from another State’s criminal jurisdiction, the reason being that the growth and entrenchment of international criminal

jurisdiction would make it unnecessary for third States to assume criminal jurisdiction over State officials in order to combat impunity.

62. His last general point was that modern developments must be taken into account in a comprehensive rather than a selective manner. He had therefore been rather concerned at the assertions of some members that the judgment of the ICJ in the *Arrest Warrant* case had “interrupted” a trend towards the recognition of a new exception to immunity in cases involving international crimes or grave human rights violations. He had the impression that this assertion owed more to a particular interpretation of the significance of the decisions in the *Pinochet* case than to what they actually stood for if analysed critically. Even if they constituted a new trend, history did not always go in a straight line, but took twists and turns. Why should the judgment of the ICJ not be the expression of another equally legitimate and even more recent countervailing trend, stemming from the experience of different jurisdictions since the *Pinochet* case? Perhaps those jurisdictions had weighed the pros and cons of according such an exception and had concluded, explicitly or implicitly, that the time was not ripe for allowing a new exception, or that countervailing reasons prevailed. The general trend of national and international case law since the *Pinochet* case should not be played down, but rather it should be taken seriously, for it might be based on valid considerations. Excessive importance should not be attached to exceptions to that general trend, or to certain individual dissenting voices, merely because they happened to coincide with a widespread moral and political perception.

63. Turning to more specific points, he agreed with the view expressed by the Special Rapporteur in paragraph 83 of the report that, while it might be appropriate to distinguish between immunity *ratione personae* and immunity *ratione materiae* for analytical purposes, it was questionable whether that distinction was necessary for the legal regulation of the subject of immunity. He took that comment to mean that, as practising lawyers, the members of the Commission should not lose sight of the common purpose underlying those two seemingly different forms of immunity. That common purpose was the protection of State officials’ functions, irrespective of whether they were limited or whether they extended to the representation of the State at the international plane—in other words what the Special Rapporteur called the “mixed functional/representative rationale” of immunity *ratione materiae*. But, naturally, a State alone could not define which of its officials had a wide representative role; such a definition must depend on a shared understanding on the part of the international community, an understanding that was not frozen in time but would evolve in parallel with changes in the external and representative functions of certain officials. He therefore saw no contradiction in the fact that there might be a tendency simultaneously to expand both the immunity of certain State officials and exceptions thereto, since the two tendencies were not mutually exclusive. In theory, in the *Arrest Warrant* case, the ICJ could have found that Ministers for Foreign Affairs in principle enjoyed immunity *ratione personae*, except in cases of prosecution for genocide. The reason why the Court had not followed that line of reasoning might have had to do with the inherent persuasiveness of the analogy of Head

of State with Minister for Foreign Affairs in terms of their representative function, as compared to the much more difficult task of establishing an exception for international crimes. That, however, was a question that the Commission should examine at subsequent sessions.

64. He concurred with the Special Rapporteur that, in principle, all State officials should be considered within the context of the topic, but that must not be taken to imply that all persons regarded as officials by a particular State must be recognized as State officials for purposes of enjoying immunity from criminal jurisdiction. There were two ways of narrowing down the definition of the category in question. The first would be to consider only those persons who exercised powers intrinsic to the State, thereby excluding the vast majority of State officials whose work could be performed equally well by the private sector, or who did not have the instruments of State power at their disposal. That category would include most officials working in the sectors of education, health, inland transport, telecommunications, water, gas and electricity. Since the Court of Justice of the European Communities had developed a similarly narrow concept of “public service” in the admittedly different context of the right to freedom of movement within the European Union, in considering what the term “State official” essentially meant, the Special Rapporteur could perhaps draw some inspiration from that case law, as it reflected the functional approach which formed the basis of the law of immunity. That would make it possible to narrow down somewhat the wider notion of “State official”, which the Special Rapporteur had drawn from article 4, paragraph 2, of the draft articles on responsibility of States for internationally wrongful acts,<sup>271</sup> without detriment to the basic principle of the protection of the function.

65. A second way of narrowing down the concept of State officials entitled in principle to immunity could be to identify certain groups of officials who would form an exception because in State practice they were not generally considered to benefit from immunity. For example, soldiers who were prisoners of war did not usually benefit from immunity if they were charged with war crimes. Perhaps, however, that exception was limited to certain crimes and did not affect the principle whereby soldiers, as public officials, normally enjoyed immunity, in which case it should be dealt with in the context of possible substantive exceptions to immunity.

66. As for the group of persons enjoying immunity *ratione personae* because they were considered to represent the State as such, he agreed with the Special Rapporteur that it should comprise the trio of Head of State, Head of Government and Minister for Foreign Affairs, whose immunity was recognized in customary international law. The Commission should not address the question of whether other State officials, such as ministers of defence, enjoyed the same immunity. However, while the Commission should not encourage an extension of that category, neither should it exclude possible developments, or insights derived from specific cases. In his opinion, in the *Arrest Warrant* case the ICJ had plausibly recognized

that the rationale for immunity *ratione personae* applied equally well to Ministers for Foreign Affairs. That principle had not been explicitly recognized hitherto, nor, however, had it been explicitly challenged. On the other hand, it would be going too far to interpret paragraph 51 of the judgment in that case as recognizing that immunity *ratione personae* covered more than the trio. The decisions in the *General Shaul Mofaz* and *Bo Xilai* cases, concerning the Israeli Defence Minister and the Minister of Commerce of the People’s Republic of China respectively, might quite legitimately have had a different outcome in other national jurisdictions. In any case, the deciding factor must be, not the importance that the State ascribed to the post of the official concerned, but rather the international community’s recognition of, and mutual assumptions regarding, the importance of a particular post for the exercise of public functions and in particular for the representation of the State as a whole.

67. He concurred with the Special Rapporteur that the issue of recognition was part of the wider topic of the effects of recognition in general, and should be alluded to only by way of a “without prejudice” clause. In his opinion, however, it would seem to follow from the general principles of *bona fides* and legitimate expectations that if a State recognized an entity as a State and that entity met the usual criteria for statehood, the recognizing State must accord immunity to the officials of that entity.

68. He had no firm preferences on how to deal with the issue of family members of persons enjoying immunity *ratione personae*. He suspected that the matter was inextricably bound up with the topic under consideration and unconnected with any other topic, in which case the Commission should try to tackle it. The Special Rapporteur had already mapped out a good approach in that regard in paragraphs 125 to 129 of his report.

69. He agreed with the conclusions to chapters I to III of the report as summarized in paragraph 102 and with the conclusions to chapter IV as summarized in paragraph 130. His only suggestion would be to delete the word “primarily” in paragraph 130 (d) in order to avoid any suggestion that the Commission held that more officials than the trio already enjoyed immunity *ratione personae*.

70. Mr. BROWNLIE said that the Special Rapporteur had quite rightly reserved the question of international crimes for his next report. As a way of organizing the relevant material and evidence of the legal position, that was perfectly defensible. His own earlier statement on the topic, however, seemed to have fostered the unfortunate assumption that the rubric of international crimes concerned a set of issues substantively different from those concerning such crimes considered within the ambit of municipal jurisdictions. In the *Pinochet* case, no counsel—either for General Pinochet, the Government of Spain, the Government of Chile, Amnesty International or the other six interveners—had considered such a distinction to be of great importance. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, among others, had been regarded as evidence of the content of the applicable law, which was general international law. Another important issue considered was to

<sup>271</sup> *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 40–42, especially paragraphs (11) and (13) of the commentary, p. 42.

what extent the relevant international law had actually been incorporated in the legislation of the United Kingdom. He did not think there was a substantive difference between international crimes and other types of crimes: the fact that international tribunals were organizationally separate from municipal courts created a degree of confusion. The real issue was what kind of evidence the Convention against Torture and similar standard-setting conventions provided on the issue of immunity.

71. Mr. HMOUD said that the decision of the ICJ in the *Arrest Warrant* case was multifaceted. While the Court had stated that Ministers for Foreign Affairs enjoyed immunity from foreign jurisdiction under general international law while they were in office, it had also stressed that impunity was not to be condoned and that, once they left office, Ministers for Foreign Affairs lost their immunity. Aside from the trio who performed essential functions, there was no general immunity for State officials. The ICJ had intended for there to be some leeway for confronting impunity, as demonstrated by the fact that it had not addressed the question of functional immunity. He therefore did not think the Commission need necessarily go against the Court on the issue of immunity: some exceptions could be found within the confines of general international law.

72. On Mr. Vasciannie's remark concerning complementarity, he pointed out that article 27 of the Rome Statute of the International Criminal Court provided that the Statute applied to all persons without any distinction based on official capacity as a Head of State or Government; and article 98, paragraph 1, stipulated that the Court could not proceed in a manner that would require a State to act inconsistently with its obligations under international law.

73. Ms. JACOBSSON, responding to Mr. Nolte's remarks, said that, to the best of her recollection, only Mr. Pellet had described the decision in the *Arrest Warrant* case as disastrous. Others had viewed the case from different perspectives. She herself had simply said that the Commission should not be prevented from discussing the case. Mr. Dugard had pointed out that the Commission had already, on other occasions, taken a position that was not identical to that of the ICJ. The Commission had not only the procedural right but also the duty systematically to address the implications of important decisions such as the one in the *Arrest Warrant* case and to keep an open mind when doing so. Where its analysis would lead the Commission, she did not know: perhaps it would come to the conclusion that the *Arrest Warrant* decision had been flawed. That, however, remained to be seen.

74. Mr. PELLET said that what he had called a trend could not simply be reduced to the *Pinochet* case. That decision was not the only ruling that attested to an evolution in recent years, the *Gaddafi* [Qadhafi] case in France being another example among several. He agreed with Ms. Jacobsson that there was no reason to treat all the decisions of the ICJ with unquestioning reverence.

75. Mr. Hmoud's remark about there being leeway for interpretation of the Court's decision was not quite accurate: unfortunately, there was precious little leeway, the

decision having been very clear about the main point, namely that absolute immunity existed, at least for Heads of State, Heads of Government and Ministers for Foreign Affairs. The sole point on which there was room for interpretation was whether leaders other than that threesome could be deemed to have personal immunity.

76. The core of the debate was what the grounds for immunity were. Were they that a person represented the State—in other words, was the incarnation of the State—in which case almost any official could have immunity, an outcome that he would consider catastrophic? Or were they, as the Court had found in the unfortunate *Arrest Warrant* decision, that absolute immunity was necessary for the purposes of the international relations of the State? The question was clearly posed in the preliminary report, and the Commission would need to take a position on it, as it would have a bearing on many other aspects of the topic. Personally, he was prepared to accept only the latter grounds for immunity.

77. Last but not least, he did not wholly agree with Mr. Brownlie's remarks about crimes. International crimes differed: first there were ordinary international crimes such as piracy; then there were the most serious international crimes in respect of which impunity was intolerable, which according to the draft code of crimes against the peace and security of mankind numbered five,<sup>272</sup> although he himself had staunchly advocated limiting their number to four. Lastly, there were grave violations of obligations arising from peremptory norms of general international law. That lengthy periphrasis was simply a way of speaking about international crimes without naming them as such, derived from article 19 of the draft articles on State responsibility as adopted on first reading.<sup>273</sup> He did not think it was taboo to speak of international crimes. He had always argued that one of the consequences of grave violations of obligations arising from peremptory norms of general international law was that those who committed such violations could no longer hide behind the State: their individual responsibility came to light. That was a coherent approach to grave violations. Such violations were of concern to the international community as a whole and an affront to the conscience of humanity. According immunity in that context would be repugnant and intolerable, and if that complicated a State's international relations somewhat, that was simply too bad.

78. Mr. NOLTE, responding to Mr. Brownlie's and Mr. Hmoud's remarks, said he suspected there was less of a difference of opinion than might appear to be the case. His earlier statement had been about the competence of international criminal jurisdiction in relation to national criminal jurisdiction. The *Pinochet* decision dated back nearly 10 years; when it had been adopted, the International Criminal Court had only just been negotiated. More consideration now had to be given to coordination between the nascent global international criminal jurisdiction and national jurisdiction. He fully agreed with Ms. Jacobsson on the need for open-mindedness. No one had advocated unquestioning reverence for the *Arrest Warrant* decision, but some had adduced reasons why the decision could be seen as correct. It was true that the *Pinochet* decisions

<sup>272</sup> *Yearbook ... 1996*, vol. II (Part Two), p. 17, para. 50.

<sup>273</sup> *Yearbook ... 1980*, vol. II (Part Two), p. 30 *et seq.*, para. 34.

were not the only relevant ones; recent decisions by the House of Lords, for example, went in a direction that was diametrically opposed to that of *Pinochet*. The Commission needed to identify what was the dominant trend, and for what reasons, and what—perhaps for better reasons—was the minority trend. Lastly, he was thrilled to hear that for Mr. Pellet, the *Arrest Warrant* decision was no longer disastrous: it was now merely unfortunate.

79. Mr. PETRIČ said that much had been said both for and against the *Arrest Warrant* decision. The Special Rapporteur should continue to follow the balanced approach he had used so far, whereby he took case law into consideration. Case law, however, did not create the law, even though it had an important impact on the law, and the Commission was not obliged to be bound by it if its reasoning or its observations of State practice led it in a different direction.

80. Mr. HMOUD, clarifying his position on the *Arrest Warrant* case, said his point had been, not that there was room for interpretation, but rather that there was room to address international crimes from three different standpoints: the category of official; the time frame, i.e. the period during which the official was in the service of the State; and the distinction between personal and functional immunity.

81. Ms. XUE said that the preliminary report presented a wealth of research materials, raised pertinent issues that States frequently encountered in practice, contained clear and thought-provoking analysis and was extremely enjoyable reading. She also wished to pay tribute to the Secretariat for its helpful research paper.

82. On the general issues that the Special Rapporteur wished the Commission to consider, firstly, she agreed with his general approach. Given recent developments in international criminal law and the rising number of controversial prosecutions of foreign officials in domestic courts, the topic of immunity of officials from foreign criminal jurisdiction was of practical importance as well as theoretical relevance. The Commission's decision to take up the topic was therefore timely. The question of immunity was one of the classic areas of international law, touching on some fundamental aspects of international relations. Both in law and in practice, it presented constant concerns for States. The analysis carried out by the Commission and the Institute of International Law justified the Special Rapporteur's conclusion that immunity of State officials from foreign criminal jurisdiction was based on international law, particularly customary international law. The Commission's first task should be to codify the law so as to ascertain the extent of the immunity that State officials enjoyed in a foreign court where a criminal charge had been laid against them. That did not mean, however, that the Commission's exercise involved only codification and excluded progressive development. The question was not merely a policy issue, but also a legal matter. How far the Commission should go in developing the law largely depended on how the conflicting legal interests underlying the topic could be reconciled with a view to maintaining stable international relations. In that regard, she welcomed the cautious approach adopted by the Special Rapporteur.

83. While agreeing in principle with the general thrust of paragraph 102 of the report, she wished to emphasize a few points. First, in looking for evidence of customary international law, the Commission should, of course, take into account the judicial decisions of national courts. In analysing those cases, however, it should carefully ascertain to what extent those national judgements reflected generally accepted international practice and *opinio juris*. As the immunity issue had a direct bearing on international relations and sovereign rights and interests, it was essential to study the general practice of States—a point just made by Mr. Petrič.

84. Secondly, given the object and purpose of the topic, the analysis of immunity must be confined to the procedural aspects of foreign criminal jurisdiction, including measures taken in the pretrial phase. While leaving aside the substantive law of foreign States was acceptable, that did not mean that the Commission endorsed those national legislations that established unlimited universal jurisdiction. Such extraterritorial jurisdiction in criminal matters, even in the case of the most serious international crimes, was questionable under international law.

85. Thirdly, paragraph 102 (f) stated that immunity from criminal jurisdiction meant immunity only from executive and judicial jurisdiction. That statement was rather sweeping and could only be accepted in context and for the purposes of the present topic. When a person was entitled to jurisdictional immunity under international law, such immunity extended to legislative jurisdiction as well, including substantive law in criminal matters. In other words, *certain* substantive criminal law did not apply to such persons. Exemptions from the law were primarily of a substantive nature. Although that was a minor technical point not directly related to the issues under the topic, it would be better to clarify it. For that very reason, she agreed that diplomatic and consular immunities should be left aside, as they were regulated by special regimes.

86. As for the bases of immunity of State officials from criminal prosecution, she agreed with the Special Rapporteur that both immunity *ratione personae* and immunity *ratione materiae* should be considered. In practice, however, it was difficult to draw a line between the two categories. The rationale applicable to the trio also applied to other high-ranking officials. She was inclined to accept the suggestion that criteria containing both representative and functional elements should be adopted, including, *inter alia*, the official status of the person, the purpose and nature of the visit, and the legal status granted by the host country. In principle, family members could be excluded from the scope, but immediate family members accompanying the Head of State, Head of Government or Minister for Foreign Affairs during the visit should benefit from certain immunities, given their functions in the context of the mission. That, however, was an open question that merited further consideration.

87. As for the more controversial issue of whether there should be any exceptions to the rule of immunity of State officials, the primary rationale for exceptions was linked to the question of whether a foreign court could exercise criminal jurisdiction over State officials for allegedly committing serious international crimes such as torture,

crimes against humanity, war crimes and genocide. At first sight, it seemed rather difficult to reject that idea. However, it was the legal rather than the policy aspects of the matter that required deeper study. Apart from the question of equality, a point raised by Mr. Brownlie, the question of criminal justice was also relevant: in such cases, the legal standards of fair trial and due process could scarcely be guaranteed, as judicial assistance and collection of evidence were hard, if not impossible, to ensure. For the most part, such proceedings were used to serve political purposes rather than to pursue criminal justice. If exceptions were permitted, no matter how the terms were defined, the rule of immunity could easily be set aside because legal charges were likely to be brought against State officials on those grounds simply for purposes of jurisdiction. Consequently, improper legal proceedings against State officials, instead of being checked, would grow more frequent, a situation which was certainly not conducive to maintaining stable international relations. She did not agree with some of the criticisms of the judgment of the ICJ in the *Arrest Warrant* case. Most States appeared to have welcomed the decision because it clarified the rules in that area, even though some issues might have been left in abeyance. The Court had performed a useful service to the international community by directly addressing a very difficult legal issue.

88. Her second point was that immunity from foreign criminal jurisdiction did not mean impunity. The notion that certain States were entitled to act on behalf of the international community had always proved to be problematic in international relations because the basis of its legitimacy could be challenged. While serious international crimes had become the general concern of all States and the concern of the international community as a whole, legal process should be regarded as one of the means available to prevent and punish such crimes. Since the *Pinochet* case, legal practice in that field had developed further, and the Commission should look not only at what had been said, but also at what States were actually doing. In the consideration of any possible exceptions to the immunity rule, the questions of equality, due process (both substantive and procedural) and legitimacy were important and difficult issues that the Commission should not overlook.

89. One of the legal corollaries of recognition was the granting of sovereign status to the recognized State, which then enjoyed immunity from the jurisdiction of the recognizing State. In deciding whether to grant judicial immunities, national courts often had first to look at recognition issues, whether the entity in question was a sovereign State or a Government. In most cases, the matter came up only in bilateral relations, but sometimes the decisions of international organizations on recognition might be involved. Although directly linked, the question of recognition and the rules of immunity belonged to separate legal regimes under international law. The Commission should not become embroiled in a consideration of the substance of recognition, in other words of the question of whether recognition had been properly granted under international law. The approach taken by the Institute of International Law in its 2001 resolution, namely the use of a "without prejudice" clause, could be adopted.

90. Mr. SABOIA commended the quality and clarity of the Special Rapporteur's preliminary report and also expressed appreciation of the Secretariat's excellent memorandum. He proposed to focus on particular issues regarding which views had diverged or the Commission's opinion had been sought.

91. Basically he agreed with the points made in the summary of chapters I to III of the report, contained in paragraph 102. However, in subparagraph (a), besides international law, relevant national court decisions should also be mentioned as a source of immunity of State officials. The decisions of the House of Lords in the *Pinochet* case, referred to by the Special Rapporteur and dealt with in the Secretariat memorandum, were particularly important and deserved further in-depth consideration at an appropriate stage in the study. The reasons were twofold: it was an area of international law that, in her recent address to the Commission, the President of the International Court of Justice had recognized as being relatively underdeveloped; furthermore, it concerned the application of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which placed obligations on States parties concerning the exercise of jurisdiction that were relevant to the question of immunity and possible exceptions thereto. In that connection, contrary to what was stated in paragraph 63 of the report, it might be necessary to consider the issue of universal criminal jurisdiction, particularly with regard to its implications for the immunity of former office holders.

92. Turning to the summary of chapter IV of the report, contained in paragraph 130, he agreed with the points made in subparagraphs (a) and (c). However, he had doubts regarding the suggestion made in subparagraph (b) that the topic should cover all State officials. He understood that the issue at stake was functional immunity, yet, as immunity created an obstacle to the exercise of criminal jurisdiction, it should be strictly limited to cases in which the function was relevant to inter-State relations.

93. He endorsed the view set forth in subparagraph (d), that incumbent Heads of State, Heads of Government and Ministers for Foreign Affairs were recognized holders of personal immunity, because of their representative status and the essential role they played in international relations. There might be some justification for extending the category in the light of the increasingly important role played in international affairs by other high-ranking officials, such as ministers holding other portfolios and Presidents of Parliament and the Supreme Court who, in Brazil for example, sometimes deputized for the President. Nevertheless, he would prefer to retain the current category as it stood, possibly allowing for some degree of ambiguity, without embarking on the difficult exercise of defining other categories or criteria that more often than not depended on national legislation. In that connection, it might be relevant to bear in mind that, in Brazil and other countries, it was not uncommon for other high-ranking officials to travel abroad as members of missions or on official bilateral visits, usually preceded by official exchanges between the States concerned. Such officials might therefore be granted immunity on other grounds.

94. Concerning subparagraph (f), he agreed that the issue of recognition should be dealt with only insofar as it was relevant to the topic. However, it would be useful to consider the question of the immunity of family members of high-ranking officials, so as to establish the possible grounds for immunity and limits to the granting of immunity to such persons as an obligation. An analogy could be found with diplomatic immunities, which were normally granted only to immediate family members, including children up to a certain age, who resided with the diplomatic agent concerned. In other circumstances, favourable treatment was sometimes granted as a matter of courtesy and reciprocity.

95. The Special Rapporteur has asked whether, in handling the topic, the Commission should remain within the domain of *lex lata*, as expressed, for instance, in the judgment in the *Arrest Warrant* case, or should go beyond it and, recognizing the current trend and the interests of the international community in combating impunity in the case of the most serious international crimes, should try to establish a basis for exceptions to the rule of immunity. In the light of his own attachment to and previous work in the field of human rights, he was in favour of working, by way of progressive development, towards establishing exceptions to and limitations on the granting of immunity in the case of serious international crimes such as genocide, crimes against humanity and war crimes. There were legal grounds for moving in that direction, as illustrated by the material examined in paragraphs 141 to 153 of the Secretariat memorandum and the comments of Mr. Dugard, Ms. Escarameia, Ms. Jacobsson and Mr. Pellet.

96. Nonetheless, the role played by immunity from criminal jurisdiction of State officials, particularly high-ranking ones, in guaranteeing the stability of inter-State relations and respect for sovereignty and non-intervention could not be underestimated. As stated in the joint separate opinion of Judges Higgins, Kooijmans and Buergenthal in the *Arrest Warrant* case, it was a question of a balancing of interests: on the one hand, there was the interest of the community of mankind to prevent and stop immunity for perpetrators of grave crimes against its members; on the other hand, there was the interest of the community of States to allow them to act freely on the inter-State level without unwarranted interference. He counselled caution in seeking the right balance. It seemed unrealistic to propose exceptions to the immunity from criminal jurisdiction of foreign States enjoyed by incumbent high-ranking officials, given their special representative status and functional positions. There might, however, be grounds for exceptions in the case of former office holders and State officials of other levels whose involvement in serious international crimes and crimes subject to clauses establishing universal jurisdiction was sufficiently substantiated.

97. Mr. McRae had hinted at a possible middle way whereby the search for exceptions to immunity could be linked to the process of strengthening international criminal jurisdictions, a suggestion which, although attractive, needed to be further elaborated. Mr. Hmoud had pointed to the need to reconcile the principle of immunity with the challenge posed by the growing importance attached to international efforts to combat impunity. He shared the

concerns expressed regarding the need to make progress in reducing the scope for impunity in the case of serious crimes, while taking into account the different factors and principles at play.

98. In conclusion, he thanked the Special Rapporteur for a report that had prompted a lively debate. He hoped that the second part of the preliminary report would shed light on other aspects of the topic, including possible exceptions to immunity from foreign criminal jurisdiction.

99. Mr. DUGARD said that the debate on the topic had been fruitful and it had become clear that the principal issue at stake was the immunity of senior government officials from national criminal jurisdiction where international crimes were concerned. Although views had diverged on the *Arrest Warrant* case, there seemed to be general consensus that the judgment was not beyond criticism and might be in need of reappraisal. He looked forward to the second part of the Special Rapporteur's report for a thorough examination of judicial decisions and national legislation. All members who had spoken thus far had pointed to the need for consensus and a balanced solution to the problem.

100. Mr. BROWNLIE endorsed the general assessment of the situation given by, amongst others, Mr. Dugard and Mr. Petrič. All relevant material should be given due consideration and it was not particularly helpful to assert that some material was seriously impaired. He had not invoked the *Pinochet* case at any stage in the debate to support a particular point of view; when he had first raised the matter, he had pointed out that the other senior municipal courts had taken a different line on it. The *Pinochet* case remained important: it had been argued twice by fairly senior international lawyers, and the level of debate had therefore been high. He had been glad to see that the Secretariat memorandum had taken the decision very seriously.

101. Mr. NOLTE asked Mr. Brownlie whether, in his view, the lawyers involved in the *Pinochet* case had been aware of the extent of the legal debate it would elicit, not only in the United Kingdom, but also in other countries. Perhaps the case could be reappraised from that perspective.

102. Mr. BROWNLIE said that all the Lords of Appeal involved in the case had shown great interest in international law as a major component of the applicable law. Counsel had obviously been more concerned about the interests of their clients than about the future implications of the case. It should be borne in mind, however, that the effect of the Spanish indictment had been considerably diminished owing to the very late stage in the proceedings at which the United Kingdom had incorporated the Convention against Torture in its municipal legislation.

103. Ms. XUE said that since the Special Rapporteur would be dealing with the substance of the matter and the *Pinochet* case had given rise to so much heated debate within the Commission, members must keep in mind that it was only one domestic case. What was important was not the jurisprudence itself or the lawyers involved, but the extent to which their opinions reflected generally

accepted international practice, why their decision had prompted such debate and how it had affected subsequent State practice.

104. Mr. PELLET said that, while he basically agreed with Ms. Xue, it should also be borne in mind that the requests for extradition by France, Spain and Switzerland were part of international practice and showed that those States were not entirely convinced that General Pinochet's immunity was absolute.

105. Mr. BROWNLIE said that by and large he agreed with Ms. Xue. Nevertheless, the importance of drawing analytical material from municipal decisions should not be overlooked. In the *Pinochet* case, the Law Lords had examined an important piece of State practice, namely the Convention against Torture, and their different views on the subject provided an authoritative source of commentary.

106. The CHAIRPERSON, speaking as a member of the Commission, said that the *Pinochet* case had affected the conscience of all Chileans. There was not one single Chilean who did not have something to say on the matter. General Pinochet had seized power following a *coup d'état* during which very serious human rights violations and crimes against humanity had been committed. He had succeeded in securing immunity from prosecution for those crimes, first by amending the Constitution, then in his capacity as Commander-in-Chief of the Chilean Armed Forces, a post he had continued to hold even under a democratic Government, and latterly as a senator for life. That anomalous situation had to be seen in the context of the restoration of democracy in Chile, which would not have been possible if Chileans had not accepted, albeit reluctantly, a Constitution allowing for his continued immunity following his removal from power.

107. General Pinochet's cardinal error had been to believe that his immunity also applied at the international level: for many years he had travelled extensively, confident of his immunity from prosecution. He had visited the United Kingdom on several occasions, including as a member of a national defence commission to do business with the British arms industry. Then, suddenly one day he had been arrested in London following an extradition request from Spain, based on a Spanish judge's interpretation, not of a point of international law, but of Spanish domestic law, pursuant to which the Spanish courts had extraterritorial jurisdiction over cases of terrorism and of genocide, of which General Pinochet was accused. The charge of genocide had subsequently dropped out of the case.

108. The Divisional High Court decision that his arrest had been unlawful had been appealed against and overturned by a panel of five judges in the House of Lords, a judgement subsequently set aside on the grounds that the panel had not been properly constituted. The second hearing, conducted by a panel of seven Law Lords, had invoked an international instrument, namely the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, to which Chile, Spain and the United Kingdom were all parties, and had found it to be applicable. It had found that the acts of torture instigated by General Pinochet were not covered by his immunity *ratione materiae*.

However, views had diverged as to the date at which the Convention had become applicable in respect of each of the three States parties. There had also been considerable debate as to whether General Pinochet had been physically and mentally fit to stand trial in Spain. The final decision had rested with the United Kingdom Home Secretary, who, in the light of medical assessments, had decided that General Pinochet had been unfit to stand trial. That had been another controversial decision, because, upon his return to Chile, General Pinochet had made the blunder of standing up and walking away from his wheelchair, thereby making a mockery of the proceedings.

109. At the time of General Pinochet's release, the Home Secretary had made a very significant statement to the effect that the whole process was destined to have a great impact on international law and that thereafter no one who committed such serious crimes would be able to do so with impunity. Arguably, it was Chile, rather than Spain, the United Kingdom or any other State, that should have requested General Pinochet's extradition. For reasons with which he personally did not agree, the Government of Chile had nonetheless decided that it could not itself request General Pinochet's extradition, since it would first have needed to initiate procedures to waive his parliamentary immunity.

110. There could be no doubt that the *Pinochet* case had had far-reaching implications, not least in Chile, where the judicial system had changed radically as a result. There had been requests for General Pinochet to stand trial in Chile for a variety of crimes, including economic crimes. Furthermore, at least seven generals and many high-ranking officials had been arrested for crimes committed during the dictatorship, something which, in his view, would never have been possible but for the *Pinochet* case.

111. Mr. NOLTE said he had the impression from recent cases on State immunity examined in the House of Lords that the Law Lords were reconsidering their former position, and were now inclined to reaffirm rather than restrict immunity.

112. Mr. BROWNLIE said that the judges regarded cases involving immunity from civil jurisdiction as qualitatively different from those involving immunity from criminal jurisdiction. Moreover, recent cases, some of which concerned persons detained by the United Kingdom military authorities in Iraq, had been based on the principle of non-justiciability. Each case was decided on its individual merits and he did not consider that the judges concerned referred back to the *Pinochet* case either positively or negatively in that connection.

113. Ms. XUE said that the Commission clearly recognized the significant impact of the *Pinochet* case on international law, particularly where international efforts to combat impunity and immunity in the case of serious international crimes were concerned. Nevertheless, when considering the impact of the case, the Commission must bear in mind that immunity from the criminal jurisdiction of foreign courts was a very different matter.

*The meeting rose at 1.05 p.m.*