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Summary record of the 3088th meeting

Topic:
Immunity of State officials from foreign criminal jurisdiction

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3088th MEETING

Friday, 13 May 2011, at 10 a.m.

Chairperson: Mr. Maurice KAMTO

Present: Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escobar Hernández, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Ms. Jacobsson, Mr. Kolodkin, Mr. McRae, Mr. Melescanu, Mr. Niehaus, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

Immunity of State officials from foreign criminal jurisdiction (*continued*) (A/CN.4/638, sect. F, A/CN.4/646)

[Agenda item 8]

SECOND REPORT OF THE SPECIAL RAPPORTEUR⁸² (*continued*)

1. The CHAIRPERSON invited the Commission to continue its consideration of the second report on immunity of State officials from foreign criminal jurisdiction (A/CN.4/631).

2. Mr. CAFLISCH said that many comments had already been made and he would therefore confine himself to five remarks. First, the status of the individual as a subject of international law had made great strides since the Second World War, and for that reason individuals today had rights which they could assert at the international level, but they also bore international obligations. Those obligations applied to all individuals, even those who served the State and who acted, or claimed to act, on its behalf. The fact that such an individual could incur criminal responsibility at the international level for certain types of acts did not mean that the State could elude its responsibility for the illegal act perpetrated by the individual. It could not be said that, insofar as responsibility was incumbent on the State, the agent did not bear any responsibility and thus could take shelter behind the protective shield of criminal immunity. The opposite was not true either: if an official was criminally responsible for his act at the international level, that did not mean that the State on whose behalf he claimed to be acting was not. In other words, the international responsibility of a State did not replace the international criminal responsibility of the individual, and the international criminal responsibility of the individual did not exclude the international responsibility of the State. Thus, the two types of responsibility were not mutually exclusive when a State official committed a particularly serious criminal act: the two responsibilities—that of the State and that of the individual—were superimposed.

3. Secondly, the rules relating to jurisdiction should not be confused with those on immunity. The absence of immunity in a given case did not mean that an individual

could be freely prosecuted: the conditions of domestic law and international law with regard to jurisdiction must be met. Otherwise, the court hearing the case would not have jurisdiction, and the question of immunity in the case of international crimes would not arise, even after the advent of universal jurisdiction. Following the line of reasoning of the Institute of International Law in article 3, paragraph (b), of the resolution adopted on 26 August 2005 on universal criminal jurisdiction with regard to the crime of genocide, crimes against humanity and war crimes,⁸³ the exercise of that jurisdiction “requires the presence of the alleged offender in the territory of the prosecuting State”.⁸⁴ Clearly, that condition prevented the immunity of a State official accused of an international crime from leading to multiple, uncontrolled or abusive prosecution.

4. Thirdly, the past 20 years had seen the emergence of international criminal jurisdictions. The international community had been very dedicated to that idea, and it was worth asking whether it really would have been if there was a risk that the counterargument of immunity might be raised at any time.

5. His fourth remark related to the case concerning *Al-Adsani v. the United Kingdom*, which was referred to in the Special Rapporteur’s report and during the debate. Having taken part in that procedure as a judge, he said that in its judgment, the European Court of Human Rights had found that the prohibition of torture set out in article 3 of the European Convention on Human Rights had the character of a *jus cogens* norm. Access to domestic courts, which was guaranteed under article 6 of the Convention, thus also had that character, because at issue was a complaint of a violation of a rule of *jus cogens* on the basis of article 6, which guaranteed access to the courts. Clearly, the Court would have ruled out the criminal immunity of the State in question and its leaders, except that the case concerned a civil claim, and not criminal charges. The majority had then argued that in international law, the exception to immunity was valid solely for criminal matters and not in cases in which “only” civil claims were involved. As he saw it, the majority view had been mistaken, since such a distinction had never been made in practice. In any event, if the Commission’s assumption had been at issue, namely that of a criminal act based on the prohibition of torture, he was convinced that the European Court would not have hesitated to rule out the immunity of the official. Consequently, the *Al-Adsani v. the United Kingdom* case did not substantiate the argument of a continuation of immunity; indeed, it was just the opposite.

6. Mr. Dugard had said that the Commission must choose between a solution that was no longer entirely accepted and one that was not yet entirely accepted. In his own view, that stage had already been reached, or had been more or less, and in contemporary international law, an official who argued that he was acting on behalf of his State and who committed an act contrary to the most elementary precepts of humanity could no longer take refuge in immunity. In any event, even if the law had not yet progressed to that stage, the Commission

⁸² Reproduced in *Yearbook ... 2010*, vol. II (Part One), document A/CN.4/631.

⁸³ Institute of International Law, *Yearbook*, vol. 71 (2005), Session of Krakow (2005), Part II, Seventeenth Commission, p. 297.

⁸⁴ *Ibid.*, p. 299.

would be duty-bound to develop it in that direction. That said, although he did not agree entirely with the Special Rapporteur, he recognized the great quality of his work and agreed that the report was stimulating, interesting, well documented and well structured.

7. Mr. VALENCIA-OSPINA said that the report contained much with which one could agree as well as disagree. In particular, with reference to the Special Rapporteur's conclusions concerning exceptions, he agreed with the conclusion in paragraph 90 regarding the lack of uniformity and the impossibility of identifying a dominant trend towards the emergence of exceptions to the general customary rule of State immunity. He also agreed that, as indicated in paragraphs 91 and 92, the desirability *de lege ferenda* of exceptions to the customary principle should be examined, to which the separate question of displacement by *jus cogens* should be added. The drafting of articles in that area would fall completely within the Commission's mandate of both codification and progressive development. Concerning the suggestion in paragraph 93 to consider elaborating a treaty mechanism, such work might well prove superfluous due to the abolition of the immunity of high officials pursuant to article 27, paragraph 1, of the Rome Statute of the International Criminal Court.

8. On the substance, he directed his remarks to three general points of principle that the area of work was intended to address: the rationales for State immunity; the distinction between "private acts" and "official acts"; and the rationales for exceptions to State immunity for grave international crimes. The basic element that must be borne in mind when considering the question of State immunity was that the legal and practical interests of the State were engaged, not those of the individual. Although the interests of the State might well be practically indistinguishable from those of a particular leader, political grouping or Government, from the legal point of view the interests of an individual official were distinct from those of the State, notwithstanding Louis XIV's famous pronouncement "*L'État, c'est moi*". As was generally acknowledged, that distinction was fundamental when addressing the nuanced problem of State immunity.

9. The core rationale of State immunity was to protect State interests. The practical function of government was protected by ensuring that senior officials could generally travel or otherwise perform their official duties without fear of criminal proceedings instituted by other States. Furthermore, the prohibition on States adjudicating the responsibility of other States derived from the basic principle of State equality. The rationale for that ban was no doubt closely linked to the right of States to impartial judicial or arbitral proceedings to adjudicate their legal rights and duties. In that connection, it must be admitted that a clear doctrine concerning judicial integrity or a "right" to a fair trial for a party had not yet emerged in international jurisprudence. That was unsurprising, given that such a procedural right did not exist in the Statutes of the International Court of Justice, the European Court of Human Rights, the Dispute Settlement Body of the World Trade Organization, the International Centre for Settlement of Investment Disputes or the International Tribunal for the Law of the Sea. However, the ICJ had had occasion to refer to the duty to preserve judicial integrity towards the

parties in its judgment of 2 December 1963 in the *Northern Cameroons* case, and thus State immunity was designed to protect two material interests: the functional capacity of the Government of the State, and the legal interest of the State in impartial judicial proceedings concerning its international responsibilities. In that respect, although the Special Rapporteur acknowledged, in paragraphs 36 and 37, the functional rationale for immunity *ratione personae*, he did not provide an equally clear rationale for immunity *ratione materiae*. Rather, he primarily addressed, in paragraphs 22 to 34, the scope of such immunity and devoted much attention to the distinction between "official" and "private" acts. Nor, it must be recognized, did the jurisprudence provide much assistance in determining the rationale for that type of immunity. It was merely assumed that the principle existed in positive law but that it did not extend to "private" acts. Significant in that regard was the contrast between the rationales for *ratione personae* and *ratione materiae* immunity in the 2002 judgment of the ICJ in the *Arrest Warrant* case.

10. One possible rationale, which was not a normative one as such but rather a legal one, was attribution. Under that approach, international responsibility was posited as exclusive in nature: it could either be attributable to an individual at the level of individual criminal responsibility or it could be attributable to a State at the level of State responsibility, but not both. For example, Antonio Cassese, quoted in the footnote to paragraph 33 of the report, stated that "the reason [is] that the act is legally attributed to the State, hence any legal liability for it may only be incurred by the State".⁸⁵ The logical consequence was that a Head of State (for example) who tortured pursuant to what amounted, albeit in disguised form, to an official policy of torture could not be held individually accountable for the act. The result was that the "I was only following orders" argument, which of course was not a substantive defence for torture, was in effect a procedural defence. That line of reasoning was questionable on both legal and normative lines. With regard to the law, it seemed generally accepted that individual and State levels of responsibility not only dualistically coexisted but also overlapped to cover the same conduct, as Olivier de Frouville noted in Crawford's 2010 book on the law of international responsibility.⁸⁶ Thus, it seemed evident that there were parallel and overlapping levels of responsibility in the shared unlawfulness of the act. At the normative level, that dualistic conception had the clear advantage of avoiding the unsatisfactory outcome of individuals evading criminal responsibility by attributing their acts to the State.

11. The elimination of the principle of attribution from the law of State immunity would, however, be a clear departure from the (admittedly inconsistent) jurisprudence, which had struggled greatly with the concept. It seemed counter-intuitive to conceive that an act need not be proved attributable to the State in order to engage State immunity. He proposed to address that problem briefly in

⁸⁵ A. Cassese, "When may senior State officials be tried for international crimes? Some comments on the *Congo v. Belgium* case", *European Journal of International Law*, vol. 13, No. 4 (2002), pp. 853–875, p. 863.

⁸⁶ See D. Momtaz, G. Cahin and O. de Frouville, "Attribution of conduct to the State", in J. Crawford, A. Pellet and S. Olleson (eds.), *The Law of International Responsibility*, Oxford University Press (2010).

order to outline how that might be achieved. Before doing so, he wished to point out that his preceding remarks were intended to show that a convincing rationale for immunity *ratione materiae* was yet to be presented.

12. He would seek to demonstrate why the invocation of immunity *ratione materiae* by a former official concerning acts that were both international crimes and internationally wrongful acts was actually contrary to the State's legal interests. As State immunity essentially existed to protect State interests, it was arguable that the entire attribution issue could be usefully eliminated from the law on State immunity *ratione materiae* with respect to those unlawful acts.

13. The issue of whether a particular act of a State official generally entitled to invoke State immunity was an "official" act or a "private" act was prominent in the jurisprudence. It not only underpinned one of the arguments raised for the existence of an exception to immunity, but was also considered as a preliminary matter of attribution. In that respect, paragraph 24 of the second report was particularly apposite: "At the same time, the Special Rapporteur does not see objective grounds for drawing a distinction between the attribution of conduct for the purposes of responsibility on the one hand and for the purposes of immunity on the other." That categorical assertion notwithstanding, it might be useful to explore further whether there might be grounds for such a distinction. The problem was essentially one of metaphysical overlap between State responsibility and individual responsibility. It might be helpful to consider the problem from the perspective of litigation to better identify their differences.

14. The Commission was not concerned in the current instance with State responsibility. When a national jurisdiction sought to prosecute a State official for grave international crimes, it was seeking to adjudicate on the official's individual responsibility. In principle, the determination of an individual's international criminal responsibility by a national jurisdiction had no legal bearing on the separate question of the international responsibility of that individual's State. Of course, the court's factual and legal findings might be persuasive authority in separate litigation to determine the responsibility of that State, as illustrated in paragraphs 209, 210 and 214 to 224 of the ICJ judgment on the merits in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*. However, as a procedural matter, the State did not sustain *ipso jure* prejudice from individual criminal litigation.

15. That procedural difference was highlighted in the treatment by the ICJ of the jurisprudence of the International Tribunal for the Former Yugoslavia in paragraphs 223 and 227 of the merits judgment in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* case. The burden of proof, standard of proof and methods of proof between individual and State responsibility differed significantly and had a direct impact on the evidentiary value of the jurisprudence of the Tribunal before the Court, for example concerning the requirement of specific intent in the internationally wrongful act of genocide. Thus, that case demonstrated the litigious distinction between individual and State responsibility.

16. As indicated in article 2 (a) of the Commission's 2001 final draft on responsibility of States for internationally wrongful acts,⁸⁷ attribution was the *sine qua non* of State responsibility. Therefore, private acts did not engage State responsibility. However, attribution was substantively immaterial to individual criminal responsibility. That was an important difference when considering the scenario of a State official being convicted by a national court of a grave international crime as concerning any parallel or subsequent proceedings against that State. Put simply, a new substantive issue, namely attribution, would arise in the latter proceedings that would not have been litigated in the former. Consequently, it was arguable that there was an objective distinction between State responsibility and State immunity when the latter was pleaded in criminal proceedings that concerned individual, not State, responsibility.

17. Paradoxically, the invocation by a State official of State immunity in that context had the greater propensity to prejudice the State in proceedings concerning its own separate responsibility. That was because, attribution of conduct being material to State responsibility but not to individual responsibility, the factual and legal findings of the national court in question concerning attribution could be subsequently invoked against the State. That was a scenario in which the interests of the individual official and those of the State (which must be carefully distinguished) were in direct conflict. It was in the individual's interest to prove that his actions were attributable to the State so that he could benefit from State immunity, and it was in the State's interest to prove that his actions were not attributable to it so as to avoid international responsibility for them.

18. That distinction was important because States were not individuals but, in John Austin's definition, "independent political societ[ies]"⁸⁸ or, as James Crawford put it, independent "territorial units".⁸⁹ An individual might rule a State for decades and, in less than a month, be deposed and subjected to criminal proceedings by a successor Government. Consequently, it was necessary to acknowledge the existence of a convincing normative rationale for State immunity *ratione materiae*. He had offered one possibility, namely to protect States from being prejudiced by having their responsibility adjudicated before the jurisdiction of other States. However, he hoped that the preceding comments had shown that it was arguable that this rationale was not engaged by litigation concerning individual responsibility for grave international crimes committed by State officials. That reasoning might ultimately prove to be wrong, but it might be useful for the Commission to consider it more closely.

19. The distinction between State and individual responsibility was also pertinent for identifying the rationales for an exception to State immunity for grave

⁸⁷ General Assembly resolution 56/83 of 12 December 2001, annex. The draft articles adopted by the Commission and the commentary thereto are reproduced in *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 26 *et seq.*, paras. 76–77.

⁸⁸ J. Austin, *The Province of Jurisprudence Determined*, "Lecture VI", London, John Murray, 1832, pp. 198 *et seq.*

⁸⁹ J. R. Crawford, "The criteria for statehood in international law", *BYBIL 1976–77*, vol. 48, No. 1, pp. 93–182, at p. 111.

international crimes. As noted in paragraph 57 of the second report, “[t]he viewpoint, whereby grave crimes under international law cannot be considered as acts performed in an official capacity, and immunity *ratione materiae* does not therefore protect from foreign criminal jurisdiction exercised in connection with such crimes, has become fairly widespread”. However, it was worth examining that view in greater detail.

20. The main argument for exceptions to *ratione personae* and *ratione materiae* immunity was that the most serious international crimes should be prosecuted regardless of individual status. In that context, the “most serious international crimes” could be usefully designated, following Cherif Bassiouni,⁹⁰ as the *jus cogens* or *erga omnes* crimes of genocide, torture, aggression, piracy, slavery, war crimes and crimes against humanity. That was not only, as the second report explained in paragraph 56, because *jus cogens* was invoked as one of the principal bases for the existence of an exception to immunity itself, but also because it was the foundation for the exercise of universal jurisdiction.

21. However, the rationales for exceptions to immunity should be considered according to the type of immunity, which raised quite different issues. For immunity *ratione personae*, the argument could be made that there ought to be an exception on the ground that the need for senior State officials to operate without fear of criminal proceedings by another State against them was overridden by the gravity of those norms. In particular, the debate concerning the pre-eminence of *jus cogens* norms over procedural customary norms such as State immunity was well known. Additionally, the lack of State practice might be attributed not to widespread satisfaction with the *status quo* but rather to the fear of violating the current law.

22. On the other hand, there were compelling arguments for the recognition of an absolute right to immunity *ratione personae*. As a juridical matter, it could be argued that that would entail progressive development of international law since, as noted in paragraph 15 of the report, the existing State practice exclusively or virtually exclusively entailed criminal proceedings against former officials. Furthermore, according to paragraph 37, there was no evidence of substantial support among States or in the jurisprudence for any change to the existing consensus on immunity *ratione personae*. Paragraph 64 recalled the argument that had been made that *jus cogens* overrode only substantive norms, not procedural norms. Incidentally, he agreed with the Special Rapporteur’s comment, in paragraph 67 of his second report, that the debate concerning the dispositive effect of *jus cogens* norms impacted upon both *ratione materiae* and *ratione personae* forms of State immunity.

23. On the policy issues, it was arguable that the prejudice sustained by a State suddenly deprived of one of its three senior officials could be immense and, in certain circumstances, irreversible, for example a Minister for Foreign Affairs subjected to criminal proceedings during

important negotiations, or a Head of State or Government in a post-civil war State whose stability depended upon the individual’s leadership. The perspective of, for example, dispute settlement negotiations with an enemy State being disrupted or of civil war emerging from the fall of a Government must be recognized as vital interests of the State. With respect to immunity *ratione personae*, he would not necessarily adopt the prevailing orthodoxy wholesale without examining in detail the competing rationales for derogating from such immunity. It could be that there existed a nuanced solution that reconciled those normative and practical conflicts. For example, it might be possible to prescribe a partial exception to immunity *ratione personae* to allow for State officials to be subjected to proceedings for grave international crimes where the State would not suffer serious and irreparable harm as a consequence.

24. In closing, he wished to address two specific points. The first point was that, regardless of the changes that might be made to immunity *ratione personae*, or lack thereof, uniformity should be ensured between immunity *ratione personae* in general and immunity *ratione personae* from subpoena orders. If a high official broadly had the former, then he should also have the latter. In the *Prosecutor v. Blaškić* case, the Appeals Chamber of the International Tribunal for the Former Yugoslavia had found, regarding a subpoena order addressed to a Head of State, that high officials were mere agents of a State and their official action could only be attributed to the State, that they could not be the subject of sanctions or penalties for conduct that was not private but undertaken on behalf of a State (para. 38 of the decision), and that, in other words, State officials could not suffer the consequences of wrongful acts which were not attributable to them personally but to the State on whose behalf they acted. As pointed out in the footnote to paragraph 51 of the second report, the Appeals Chamber had noted that exercises of judicial authority of the Tribunal followed similar rules to those of a national court. That position was grounded in both the general immunity *ratione personae* of high officials and the immunity *ratione materiae* of other State officials. The purpose behind the immunity *ratione personae* of the so-called “troika” was both a respect for the principle of sovereign equality—of *par in parem non habet imperium*—and the acknowledgment that any gaps in the immunity of the troika might result in *de facto* subjugation of the official’s home State by preventing the high officials from performing their duties.

25. The same concerns were present in the case of a subpoena to produce evidence or give oral testimony. If a high official could be forced to produce documents, those documents would presumably be State documents which were properly under the control of the sovereign State. With regard to oral testimony, it was a fundamental principle of sovereignty that the Head of State and other officials of the executive branch must be able to communicate freely with subordinates in order to effectively coordinate government affairs. Members of the troika in particular must be able to communicate with their counterparts in other States in order to conduct foreign affairs. While it was possible that one’s own judicial branch—as a coequal branch of government—might be able to subpoena an official of the executive branch, that power could not lie in the hands of the judicial officers

⁹⁰ C. Bassiouni, “International crimes: *Jus cogens* and *obligatio erga omnes*”, *Law and Contemporary Problems*, vol. 59, No. 4 (Autumn 1996), pp. 63–74.

of a foreign State. Moreover, the power to subpoena presupposed a power to enforce the subpoena by means of contempt proceedings. Insofar as the latter power was incident to the former, the former was in violation of immunity *ratione personae*. As pointed out by the Special Rapporteur in paragraph 41 of the second report, no criminal procedures could be initiated against a foreign official that would hamper the exercise of the functions of that official by imposing obligations upon him. It should also be noted that even though the immunity applied to actions that had occurred during the official's service, that immunity was not extinguished upon the official's leaving office. If the official could expect to be called to testify upon stepping down, that would no doubt interfere with his ability to conduct State affairs while in office. Little must be added in order to explain why immunity *ratione materiae* likewise protected other State officials from the subpoena power of foreign courts. As noted by the Special Rapporteur in paragraph 48 of the report, in the case concerning *Certain Questions of Mutual Assistance in Criminal Matters*, it had been held that an official who had immunity *ratione materiae* must also have immunity from being summoned to give testimony concerning acts performed by him within the scope of his duties as a State official. The power to subpoena implied a power to sanction, and any cases in which immunity *ratione materiae* applied to other criminal proceedings logically must also apply to subpoena and contempt proceedings.

26. Finally, it appeared that immunity *ratione personae* might apply to high officials beyond the troika. That privilege must extend to other high officials who travelled and conducted foreign affairs in ways comparable to that of a Minister for Foreign Affairs. A minister of defence, for instance, should certainly fall under such a category because, as noted by the Bow Street Court in the *General Shaul Mofaz* judgment, it was a fact that many States maintained troops overseas, and there were many United Nations missions to visit in which military issues played a prominent role. Furthermore, as cited in the last footnote to paragraph 15 of the second report, the French prosecutor had been of the opinion that former United States Secretary of Defense Donald Rumsfeld was immune because he had performed duties that had overlapped with those of a Minister for Foreign Affairs. The precise scope of such immunity deserved continued investigation by the Commission. While it could not be extended to every minor official who travelled abroad, it must be able to cover those whose essential business was to travel and conduct the international affairs of their State.

27. Sir Michael WOOD expressed appreciation to the Special Rapporteur for the high quality of his second report, despite a few omissions, particularly with regard to case law, as the Special Rapporteur himself had noted. He looked forward to his third report on procedural matters, which were a vital part of the topic. The Commission would then have a complete picture of the Special Rapporteur's views on the topic.

28. He also thanked the Secretariat for its excellent 2008 memorandum.⁹¹ Both the preliminary report of the Special

Rapporteur⁹² and the memorandum were valuable sources of information. Perhaps it would be possible to update the memorandum, such as by way of an addendum.

29. He did not agree with most of the criticisms of the second report made during the debate. It was perfectly natural that there were differences of opinion among the members of the Commission, but it hardly assisted the debate to speak, in Manichean terms, of good and evil, responsibility or impunity. Moreover, it was unfair to equate support for immunity with support for impunity or to imply that those supporting *lex lata* were somehow living in the past. As pointed out by Mr. Dugard, the members of the Commission were lawyers, not activists for a particular cause.

30. For the most part, he agreed with the thoughtful comments made the day before by Mr. McRae and Mr. Vasciannie. They, together with Mr. Petrič and Mr. Valencia-Ospina, had indicated agreement with much of what was in the report and had then addressed certain specific points. It went without saying that the subject warranted additional, in-depth study. For example, it might be useful to have a further analysis of past Commission work of relevance to the topic, and other studies on exceptions to immunity, focusing on the practice of States and the decisions of their courts. Such studies should distinguish clearly between *lex lata* and proposals *de lege ferenda*, a distinction highlighted so well by Mr. Vasciannie at the previous meeting. The views of campaigning organizations, private institutions and writers were of course of interest, but needed to be viewed for what they were.

31. The topic under consideration was, unfortunately, one of the areas of international law in which there was a certain amount of wishful thinking. For those who engaged in it, minority judges were right, whatever the court's decision had actually been. In that connection, he fully shared Mr. Pellet's view on the reasoning of the minority in the *Al-Adsani v. the United Kingdom* case. Some would say that the lower court had been right in the *Jones v. Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya* case, notwithstanding that it had been overruled by the House of Lords.

32. If the Commission were to choose the option *de lege ferenda*, as Mr. Dugard urged, it must focus, if its work was to be of value, on the practical aspects of the matter, in view of the importance of immunities for relations between States, as already pointed out by Mr. McRae, Mr. Valencia-Ospina and Mr. Vasciannie. Any exception to the customary immunities brought with it the potential for abuse and the potential for serious disruption of international relations, by encouraging "lawfare".

33. The Commission must examine the available materials carefully and critically, as the Special Rapporteur had done in his reports. *Dicta* from case law should not be taken out of context. The *Pinochet* case, for example, was not authority for any general propositions about international law. It concerned the interpretation and application of a specific treaty, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

⁹¹ A/CN.4/596 and Corr.1 (mimeographed; available from the Commission's website, documents of the sixtieth session).

⁹² *Yearbook ... 2008*, vol. II (Part One), document A/CN.4/601.

to which Chile and the United Kingdom, as well as Spain, were parties, and it turned on the effect of the Convention on the immunities of a former Head of State.

34. The Commission must bear in mind a number of important distinctions and precisions. First, immunity from civil jurisdiction and immunity from criminal jurisdiction raised fundamentally different issues. The distinction was neither arbitrary nor artificial; indeed, it was inherent in the topic. The Commission was concerned only with immunity from criminal jurisdiction. Secondly, it needed to distinguish clearly between immunity before international criminal courts and immunity from national criminal jurisdiction. There again, the Commission was concerned only with the latter; the former was usually governed by treaties or by Security Council resolutions. Thirdly, references to “international crimes”, “crimes under international law”, “grave crimes under international law” or crimes that were breaches of *ius cogens* were not particularly helpful, unless the terms were defined.

35. He had several brief comments on three important points arising from the work of the Special Rapporteur and the Secretariat memorandum. First, the Commission should not lose sight of the law on special missions, both the conventional law and especially the customary international law in that field, on which there were a number of interesting domestic court judgments. The law on special missions was of great practical importance in connection with the immunity of State officials, since it was apt to protect at least high-level visitors on official business in a foreign State.

36. Secondly, there seemed to be widespread, although not unanimous, agreement among States and courts on the immunity *ratione personae* of the troika. The judgment in the *Arrest Warrant* case had been strongly criticized by some, but in practice it was accepted as reflecting the current state of the law. In that connection, he drew attention to article 21, paragraph 2, of the 1969 Convention on special missions, which referred to the immunities accorded by international law to the troika as well as “other persons of high rank”. The main question was how to determine what categories of persons were entitled to immunity *ratione personae* in addition to the troika. To do so, it was necessary to consider the rationale of the immunity. It seemed to him, and that was borne out by a number of court decisions, that immunity should at least extend to those members of a Government for whom travel overseas was central to their functions and important if the State was to be represented *vis-à-vis* other States by persons of its choice. In today’s world, a State could not be represented internationally by persons of its choice unless a wider group than the troika was free to travel. He was thinking, for example, of ministers of overseas trade and defence, as well as deputy ministers in the fields concerned.

37. His third point concerned the scope of immunity *ratione materiae* (functional immunity), which seemed to be the most difficult issue under the topic. Which officials, and former officials, had such immunity, and what was its scope? It included those who had been entitled to immunity *ratione personae* once they left

office, as well as those who had been entitled to immunity *ratione materiae*. Functional immunity did not include private acts and omissions. It covered acts performed in their official capacity that were attributable to the State, whether or not they were *intra vires* or lawful under the internal law of the State. At the previous meeting, Mr. Gaja had mentioned an example in which the State concerned had apparently not claimed immunity in respect of the actions of its officials, but that was presumably because it had not wished to acknowledge those actions as its own. That example illustrated the close connection between attribution for the purposes of State responsibility and for the purposes of immunity.

38. Before concluding, he wished to clarify a matter raised earlier in the debate concerning a strange BBC report about the immunity of the Libyan leader and members of his family. Under United Kingdom immigration law, persons entitled to immunity were normally exempt from immigration control upon entering the country. Pursuant to the State Immunity Act of 1978, however, that exemption could be removed. On 26 February 2011, it had been decided to lift the exemption from immigration control that had been conferred upon Mr. Al-Qadhafi and members of his family. Clearly, that had nothing to do with immunity from criminal jurisdiction.

39. With regard to the future work of the Commission on the topic, he agreed with Mr. McRae that the creation of a working group would be premature. Time was needed for reflection. A working group at the current session would simply repeat and entrench the different points of view. It was important to avoid pre-empting decisions which it would be more appropriate for the Commission to take in its new composition at the start of the next quinquennium. The right course would be to see what States had to say on the topic in the Sixth Committee in the autumn, in the light of both the Special Rapporteur’s reports and the current debate. It went without saying that the Commission would be interested in what others had to say, be they NGOs, practitioners or academics. The Commission’s report would fully reflect the debate, thanks to the efforts of the Rapporteur of the Commission and the excellent work of its secretariat. Perhaps some way should be found of putting the summary records of the Commission’s work on its website in time for the debate.

40. Mr. WISNUMURTI expressed appreciation to the Special Rapporteur for his second report, which focused on a number of specific questions, including the important issue of exceptions to the rule on immunity. He shared the view expressed several days earlier by Mr. Dugard that the members of the Commission were independent lawyers who must decide for each topic the best way to proceed in order to produce results. Accordingly, it was essential to bear in mind that the product that the Commission decided to present to the Member States of the United Nations, whether as draft articles or in another form, must be practical for its users and really serve the interests of the international community. That remark applied to the topic under consideration. The Commission should keep all options addressed in the second report open and hold an in-depth debate in order to reach a common ground.

41. The report contained a vast amount of information on State practice, judicial decisions and *opinio juris* on various aspects of the topic, including the scope of immunity *ratione materiae* and of immunity *ratione personae*, relations between immunity and universal jurisdiction and between immunity and the principle of *aut dedere aut judicare*, and exceptions to the rule on immunity, to which the Special Rapporteur had devoted a large part of his report, thereby directing the Commission's attention from the outset to a particular point of view. He hoped that the Special Rapporteur would keep an open mind for different standpoints expressed by members of the Commission.

42. He was in agreement with many of the Special Rapporteur's arguments, which were carefully summarized in paragraph 94 of the second report, and he wished to make a few comments on some of the issues discussed.

43. First, he agreed that the immunity of a State official from foreign criminal jurisdiction in respect of acts performed in an official capacity was the general rule and that its absence in a particular case was the exception to that rule, as noted in paragraph 94 (a). He also endorsed the conclusion in paragraph 94 (b) that State officials enjoyed immunity *ratione materiae* from foreign criminal jurisdiction in respect of acts performed in an official capacity, since those acts were acts of the State which they served itself. That immunity emanated from the sovereignty of the State, which had the right to invoke or to revoke it before the criminal jurisdiction of another State. During the debate, the principle of sovereignty had evolved and continued to do so. Indeed, it had been shaped by State practice and by new values and principles focusing on the need to protect human rights and humanitarian law. The Commission must take that development into consideration in its debates.

44. In his report, the Special Rapporteur had further elaborated the issues of immunity *ratione materiae* and immunity *ratione personae*, which had been discussed in his preliminary report, but the major portion of his report focused on the exception to immunity, which would ultimately affect the scope of immunity. In that connection, he had taken note of the point made by the Special Rapporteur in paragraph 18 of the report that in cases in which former State officials were subjected to or were to be subjected to foreign criminal jurisdiction for acts performed in an official capacity when they had been in office, it was the absence of immunity that had to be proven, and not the existence of immunity. From that flowed the Special Rapporteur's opinion that immunity was a rule existing in general customary international law, while the existence of exceptions had to be proven. That approach was a good starting point for considering the essence of exception to the rule on immunity.

45. After carefully reviewing State practice, judicial decisions and *opinio juris* to determine whether exceptions to the rule on immunity were grounded in customary international law, the Special Rapporteur concluded, in paragraph 94 (n) and (o), that the rationales for exceptions to the immunity of State officials from foreign criminal jurisdiction were not convincing, and he rejected the notion that exceptions to immunity were an emerging

norm of international law. As he saw it, the Special Rapporteur's conclusions were a bit too categorical. The review of State practice, case law and *opinio juris* was a good starting point, but the Commission should bear in mind that its collective responsibility was to go beyond those conclusions. It should overcome its conceptual and ideological differences, especially those concerning the scope and extent of immunity *ratione materiae* and immunity *ratione personae*, in order to strike a balance between immunity flowing from State sovereignty, on the one hand, and the need to prevent impunity, on the other.

46. The Commission agreed that State officials performing acts in an official capacity enjoyed immunity *ratione materiae* from foreign criminal jurisdiction. That immunity extended to acts performed by State officials in their official capacity during the time they held office and also to acts of former officials performed when they had been in office, but it did not extend to acts performed by officials before taking office. However, he did not agree with the view expressed by the Special Rapporteur in paragraph 94 (f) of the report that immunity *ratione materiae* extended to *ultra vires* acts of officials and to their illegal acts. It should be understood that, as immunity emanated from the sovereignty of the State that the official served, the moment an official committed acts that fell outside his mandate, the immunity must cease to exist. He also had doubts regarding the Special Rapporteur's argument in paragraph 94 (e) that an official performing an act of a commercial nature enjoyed immunity from foreign criminal jurisdiction if that act was attributed to the State. It would be useful if the Special Rapporteur could clarify what he meant by "act of a commercial nature".

47. He fully agreed that immunity *ratione personae* applied to highest-ranking officials, namely the President, the Prime Minister and the Minister for Foreign Affairs, but did not believe that it should also apply to other senior officials. The Special Rapporteur was of the view that immunity *ratione personae* was absolute and that it extended to illegal acts committed both in an official and in a private capacity, including prior to taking office. Personally, he had stressed the need to achieve a balance between the principle of immunity, which emanated from national sovereignty, and the prevention of impunity. To do so, the Commission should explore the possibility of subjecting immunity *ratione personae* to certain limitations that reflected the need for justice and accountability in today's world. It should examine the feasibility, from a legal and political perspective, of elaborating norms on those possible limitations as part of the progressive development of international law, norms that provided that immunity *ratione personae* should not extend to crimes which violated peremptory norms of international law, including crimes of genocide, crimes against humanity, war crimes and crimes of aggression committed by high officials in their official or private capacity. It was, however, imperative that immunity *ratione personae* should cease to exist only after the high officials were no longer in office. In that connection, the Commission should always bear in mind the importance of maintaining stability in international relations. Given the highly sensitive nature of the issues involved, the Commission must proceed with extreme caution.

48. The proposal to establish a working group was interesting, but not opportune at the current time. The Commission should hold more discussions in plenary before establishing a working group, in order to be able to provide it with guidelines for its work.

49. Ms. ESCOBAR HERNÁNDEZ acknowledged the coherence and thoroughness of the Special Rapporteur's reports, but did not necessarily agree with their arguments. The debate had highlighted the sensitivities and different approaches of the members of the Commission with regard to the topic, which was not surprising, given the important questions that it raised, including State sovereignty and its scope; the procedural and/or substantive nature of immunity; its absolute or limited nature; the definition of the concept of "official act"; the designation of the high State officials to which immunity applied; the link between international responsibility and impunity; and the distinction between immunity and impunity.

50. The importance of the topic stemmed not only from the essential questions of international law that it raised, but also from two other aspects which needed to be taken into consideration: it was of great interest to States, and it permitted an in-depth analysis of the two pillars of the Commission's mandate, namely codification and the progressive development of international law. In sum, the Commission should have a dual perspective and should take both *lex lata* and *lex ferenda* into account.

51. Given the interest of the topic for the Sixth Committee and for many States, she agreed with other members of the Commission that it might be useful to establish a working group to elaborate a method for examining the question that might also serve as a basis for the Commission's future work in its new composition. Although the Commission had a heavy workload, the topics whose consideration must be completed during the current quinquennium should move forward at a proper pace. In view of the importance of the topic, its examination should not be delayed. Moreover, the establishment of a working group would not be prejudicial to the independence of the new Commission to be elected in autumn 2011; on the contrary, the new Commission could only benefit from a more precise focus for considering the topic.

52. A good approach to the topic would not be possible without taking into account the *de facto*—and, at times, other—relationship that existed between the concepts of immunity and impunity. That question must constitute a vital aspect of the Commission's work, for two reasons: first, because the analysis of that relationship contrasted two essential elements of international law, namely the need to preserve the institution of immunity as an instrument that served the protection of the functions of State in the framework of international relations (and thus served State sovereignty), and the need to preserve the essential values of the international community, and secondly, because both concepts—immunity and impunity—had to do with the question of the international responsibility of both the State and the individual, which could not be left out of an examination of immunity, because in practice it would result in the impossibility—whether temporary or not, or absolute or not—of inferring the criminal responsibility of high State officials.

53. Consequently, an analysis of the topic should be conducted in a way that did not lead to a recognition of techniques of impunity, not only for reasons of principle, but also because there had been a clear and growing trend in contemporary international law towards combating impunity as a way of protecting the fundamental values of the international community. At the international level, that development had resulted above all in a consolidation of the phenomenon of international criminal tribunals, but there was no reason why it should not also have an impact on the exercise of international criminal jurisdiction.

54. The Commission must be careful to ensure that its treatment of the topic did not result, even indirectly, in a strengthening of impunity. It needed to strike a balance between the treatment of immunity and the treatment of impunity. Although immunity could not be allowed to become a kind of impunity in disguise, the institution of immunity fulfilled a function in contemporary international law which could not be understated. The Commission could not ignore that reality. However, the preservation of the immunity of the State or of its civil servants or senior officials could only be understood from the standpoint of function, which necessarily posed the question of the purpose of recognition of immunity. That functional approach must provide important analytical elements when the time came to define not only the subjective scope of that form of immunity (which senior officials benefited from it in the interest of the State?), but also the scope of immunity *ratione personae* and immunity *ratione materiae*. The functional dimension of immunity could also have consequences for the scope of immunity and the determination of possible exceptions to it.

55. In sum, although immunity was functional, it was clear that it should only be recognized to protect functions specific to the bearer of immunity and thus protect functions specific to the State. The consequences of that reasoning for immunity *ratione materiae* could be easily deduced: an act committed by a senior official that might be deemed an offence, in particular if it was an international crime, could hardly be covered by functional immunity, which was recognized exclusively to preserve the functions of the State, notwithstanding the fact that the act in question could be attributed to the State at the level of responsibility.

56. Secondly, it must be borne in mind that the State had an essential function which it could not abandon: it must maintain international relations. That function of the State must also be protected through immunity, including through immunity from criminal jurisdiction. Accordingly, it was clear that officials who exercised that function or who participated in the international representation of the State must be protected from any kind of coercive measure, even when they had committed certain crimes. That explained the definition of responsibility *ratione personae*, which clearly had a broader scope than responsibility *ratione materiae*. The need to protect that specific function of representation of State required a restrictive interpretation of the subjective dimension of immunity. Thus, leaving aside the immunity of diplomatic agents—including those on special mission—and that of consular officials, the number of persons who could benefit from that type of immunity must be as small as possible, and must basically

be limited to the troika: the Head of State, the Head of Government and the Minister for Foreign Affairs.

57. Thirdly, if immunity was functional, it must be limited to the period during which its beneficiary exercised the function to be protected. That applied to both immunity *ratione materiae* and immunity *ratione personae*, given that in both cases the diversity of functions to be protected made it necessary to qualify the manner in which a temporal limitation was applied.

58. The question of the relationship between responsibility and immunity called for a particular remark. The point had been raised by the Special Rapporteur in order to define the concept of “official act”. Any act performed by an official in that capacity (including *ultra vires*) was, according to the Special Rapporteur, attributable to the State and therefore constituted an “official act” and as such was covered by immunity. In that connection, she did not believe that any objection could be made to the fact that *ultra vires* acts performed by a State official were attributable to the State at the level of responsibility. To affirm the contrary would run counter to the current trend in international law. On the other hand, the idea that such *ultra vires* acts could be considered acts of the State (and therefore “official acts”) at the level of immunity was more debatable. If immunity protected a function, in principle, and except in the highly exceptional cases of immunity *ratione personae*, the only acts that would be considered official acts were those performed in the discharge of a particular function and not acts performed by State officials in the context of that function which, for example, were contrary to norms of international law designed to protect essential values of the international community.

59. In making that assertion, she was not maintaining that no relationship existed between international State responsibility and the immunity of State officials from foreign criminal jurisdiction. In fact, she went further, insofar as she believed that a relationship also existed between that immunity and the criminal responsibility, including international, of the individual. However, that relationship came into play for the very specific purpose of modulating or limiting (even temporarily) the exercise of the competence of the State or international institution in order to establish the criminal responsibility of persons who enjoyed immunity. That said, that relationship could not have any impact on the definition of the international responsibility of the State, which, as indicated in the jurisprudence and recognized, for example, in the Rome Statute of the International Criminal Court, was independent of the criminal responsibility that a physical person might incur for the same acts.

60. In sum, although it was possible to attribute certain acts to a State official, it was only relevant at the level of the international responsibility of the State, but not at the level of immunity, since the consequence of immunity was precisely to limit the effects that might derive from a separate responsibility, namely criminal responsibility, which was attributable exclusively to the individual.

61. In closing, she addressed the question of the scope of immunity, which was probably the one for which her position was furthest from the one set out by the Special

Rapporteur in his report. The Special Rapporteur had chosen an absolute approach to both immunity *ratione personae* and immunity *ratione materiae* and had concluded that it could not be deduced from doctrine, jurisprudence or practice that it was possible to formulate exceptions to the rule on immunity, apart from those which might have been established by treaty.

62. As she saw it, the absolute nature of immunity, precisely because of its functional dimension, could not be understood in identical terms depending on whether immunity *ratione personae* or immunity *ratione materiae* was at issue. Whereas in the first case, she could more readily accept the absolute nature of immunity (provided it was limited in time to the period of official functions), in the case of immunity *ratione materiae*, which was necessarily related to the type of act committed by the official who wished to benefit from it, the element of relativity seemed inevitable.

63. Moreover, a tendency had been noted in international practice to introduce exceptions to the rule on immunity from criminal jurisdiction. Most of those examples arose in the context of international criminal jurisdiction, but some could be found in domestic jurisdictions. Be that as it may, exceptions to the general rule of immunity should be treated *de lege ferenda*.

64. Mr. NOLTE said that he would begin by addressing a number of fundamental issues raised by Mr. Dugard and other members. Mr. Dugard had been very critical of the report and had attacked its very premise, and he had urged members of the Commission to acknowledge their role as lawmakers and not to hide behind the “fig leaf” of codification.

65. He came from a country whose officials had in the past committed horrendous international crimes. Germans of his generation saw the Nuremberg trials as a decisive contribution to the development of international law and actively supported the International Criminal Court. He was deeply affected by the international crimes of the day and wanted to help ensure that they did not go unpunished. He was certain that the common goal was to eliminate impunity, and therefore the Commission should avoid framing the debate as taking place between those who were empathetic and future-oriented, on the one hand, and those who were cold-hearted, backward-looking apologists of an outdated concept of State, sovereignty and international law, on the other.

66. In his view, the real question was how the principle of immunity should be implemented and how it could be made to fit within the international legal system as it stood and was developing. It would be too simple to say that the general trend of international law was to recognize that the most serious crimes should not go unpunished and that the immunity of State officials should therefore be considerably restricted or even, as Mr. Dugard preferred, purely and simply abolished. Mr. Vasciannie had rightly pointed out that undue limitations on immunity could lead to serious friction in international relations. The world was not living in 1999 anymore, a time in which it had been assumed that prosecution of international crimes would be restricted to deposed dictators or overthrown perpetrators

of genocide. Today, efforts to prosecute also concerned more ambiguous cases, for example possible war crimes committed by the military forces of developed countries engaged in peacekeeping operations or other unclear situations in a civil war context. He had no objection to subjecting such situations to an international criminal jurisdiction, but doubted whether the international community had sufficient confidence in national criminal proceedings to accept that they should deal with such cases. If national jurisdictions were not considered to be impartial and reliable, that might lead to tensions, and restricting immunity would become counterproductive. Thus, the Commission must recognize today's realities, which must not be painted over by invoking high moral principles. It must strike a balance between different concerns, which in a sense were already reflected in the law but needed to be reassessed. That would enable the Commission to determine which course to take and to examine the different facets of the topic.

67. The Special Rapporteur's second report addressed many important issues, and many aspects of its analysis were convincing. If the Commission decided in favour of a codification exercise with the use of the traditional methods which it applied, for example, to the consideration of reservations to treaties, he would agree with the Special Rapporteur's general approach. However, he found merit in the analysis of *lex lata* put forward by Mr. Gaja and which militated against the very broad scope of functional sovereignty which the Special Rapporteur espoused, although personally he had not fully understood how that analysis fit in with the current state of customary international law. That said, he was not persuaded by the assertion by Mr. Dugard and others that the Commission would depart from its own practice if it followed the Special Rapporteur's approach, nor did he see a conflict between the Commission and the ICJ on the subject of immunity of State officials. On the other hand, the Special Rapporteur should have distinguished more clearly between the immunity of the State itself and the immunity of its officials, as well as between substantive rules and rules on jurisdiction, as proposed by Mr. Pellet. It was not sufficient to say that rules of *jus cogens* took precedence over rules of immunity. The real question was how far the rules on immunity went in the first place. One need not be "hyper-Westphalian" to find that they went further than what Mr. Pellet postulated. On the other hand, they were not as broad in their scope as the Special Rapporteur proposed.

68. The Commission was currently in a difficult situation, and three approaches were conceivable. The first was the one espoused by the Special Rapporteur, and which could be called the codification approach. That risked to expose the Commission to the criticism that it was arresting an important development in customary international law. The second approach was the one defended by Mr. Dugard, who openly called for a progressive development approach. Such an approach risked creating a rift between, on the one hand, those States that felt justified in being able to rely on *lex lata* and, on the other, certain domestic courts that took the Commission's position as an encouragement to interpret the rules of immunity ever more strictly. That might result in more domestic prosecutions and a loss of authority of

international law as a source of law. The third approach, suggested by Mr. Pellet, might be called the progressive development approach in the guise of *lex lata*, which was astute, but also problematic. Mr. Pellet's *lex lata* was not what the Commission usually referred to as *lex lata*. The Commission usually considered all State and other practice, and it did not postulate a rule as *lex lata* simply on the basis of an abstract principle. However, should the Commission decide to change its position, it would probably be difficult to maintain the consensus, which was the basis of the authority that its work enjoyed.

69. Whichever approach the Commission decided to adopt, it would be very difficult to achieve a satisfactory result. That should give cause for thought, because at issue was not only the best approach with respect to the subject of immunity of State officials, but also the need to resolve a question that was vital to the Commission and its standing. That key question risked involving the Commission in an unpleasant dispute at a time when it should be trying to analyse the different aspects of the problem and to decide how much room there was for interpretation by a traditional approach. Mr. Gaja had made a proposal to that effect. The Commission should only seek to progressively develop certain aspects of the law on a solid basis of *lex lata*. The Commission was not a lawmaker in the sense in which Frankfurter⁹³ or the American realist school had understood the term, because it did not have the unquestioned authority of a national legislature or a national judge. Of course, law and its interpretation involved choices, including of a political nature, but such choices were limited. The law was evolving constantly, but that did not justify taking shortcuts by invoking moral imperatives.

70. It would be presumptuous at the current stage for the members of the Commission to try to resolve all the preliminary questions and leave the details to the members of the Commission in the next quinquennium. It would be more useful to draw the attention of States to the debate at its current stage so that they could help the Commission take a decision on which approach to adopt: traditional codification, progressive development or progressive development in the guise of *lex lata*. Like Mr. McRae, he did not see any point in establishing a working group at the current stage.

71. Mr. PELLET said that Mr. Nolte had posed the problem well and that it was in fact necessary to strike a proper balance between *lex lata* and *lex ferenda*. However, it could not be said that they were as different as night and day: there was also dawn and dusk. In a sense, the world was witnessing the twilight of an old norm, that of immunity and impunity, in favour of a new and perhaps more respectable law which militated against immunity. Although it was not the Commission's job to legislate, it could not fail to take that development into account and could not allow itself to await further events. He was well aware that in 2012 there would be a new quinquennium with new members, but he was convinced that the Commission should offer the General Assembly a real choice of options. The debate had shown

⁹³ F. Frankfurter, "Some reflections on the reading of statutes", *Columbia Law Review*, vol. 47, No. 4 (May 1947), pp. 527-546, at p. 529.

the need for a balance. If the Commission limited itself to the introduction of the topic contained in the Special Rapporteur's report, that balance would not be ensured.

72. Mr. PETRIČ said that the image of the Commission and the message that it wished to convey were at issue. It was not the aim of the Commission to leave States "a space" which they could exploit. The Commission must reaffirm that it upheld justice and that perpetrators of grave crimes of international law must not go unpunished: that should be its message.

73. Mr. DUGARD, raising a point of order, said that the Commission could not possibly exhaust such an important topic in the following 45 minutes; sufficient time should be allowed to continue its consideration.

74. The CHAIRPERSON recalled that, as noted by the Special Rapporteur, consideration of the topic would continue in the second part of the session.

75. Mr. HASSOUNA thanked the Special Rapporteur for his report, which had given rise to a stimulating debate in the Commission. The issues raised in the report were sensitive, complex and controversial, in particular the relation between the concept of immunity and the concept of universal jurisdiction, for which no generally recognized definition existed. The topic also addressed the growing number of political trials, legal and diplomatic aspects of sovereignty, international crimes and human rights and, in a much broader sense, the general approach to international law.

76. In dealing with those interrelated issues, the Special Rapporteur had chosen a traditional, conservative approach. He had concluded that, by and large, immunity existed for State officials and was a bar to criminal proceedings, and that there were no well-established exceptions to that rule, even in the case of grave violations of human rights. However, he had wisely left the door open for alternative approaches, taking into account the views of members of the Commission who favoured a more restrictive definition of immunity and a broader scope of exceptions.

77. He was personally of the view that the Commission must bear in mind two sets of considerations: on the one hand, the need to respect the sovereign equality of States and the principle of non-interference in internal affairs enshrined in the Charter of the United Nations, the aim being to ensure the stability of international relations, and, on the other hand, the requirement to protect against flagrant violations of human rights, combat impunity and prevent international crimes. In other words, the legitimate concerns of States must be reconciled with the vital interests of the international community.

78. The only way of doing so was to adopt a balanced approach, one that was based on traditional sources of international law, such as customary law, combined with contemporary developments in international law, two processes which, after all, were closely interrelated.

79. Regardless of the approach chosen, the subject of immunity was one that would continue to raise many

theoretical issues, which the Commission had already examined in great detail, but also posed a number of practical questions that likewise warranted consideration. He would confine himself to three examples. First, the question of who had the power to waive immunity was of great importance. Could a Government in exile waive the immunity of a *de facto* Government? Did it matter if a State attempting to prosecute officials of a *de facto* Government recognized the Government in exile as the *de jure* Government? Could the United Nations Security Council waive immunity for State officials and allow domestic prosecution?

80. Secondly, who determined whether an act was performed in an official or in a personal capacity, the official's State or the courts of the receiving State?

81. Thirdly, if immunity was extended to all actions taken by national courts that were mandatory, how would extradition hearings in a national court be dealt with? Since extradition was a mandatory order in some States, would not those hearings be precluded by existing immunities?

82. The Commission needed to examine all those questions. Some members had proposed the establishment of a working group to that end. That would allow the Commission to engage in an extensive debate, but it would also require the presence of the Special Rapporteur throughout the exercise, which would not be very practical. As he saw it, the Commission should continue the debate in plenary within the remaining limited time of the current session and should then submit to the General Assembly a summary of its debates on the second and third reports with a view to seeking the views and reactions of Member States to the issues raised in the Commission's report. In its new composition, the Commission could devote the time necessary to a more in-depth consideration of the topic.

83. It had been noted that the debates had revealed the existence of very different conceptual approaches among Commission members. Such cultural, legal and professional diversity was the Commission's greatest asset.

84. Mr. GALICKI said it was paradoxical that the Special Rapporteur should have derived a sole, dangerous and not very optimistic conclusion from the extensive analysis of State practice and jurisprudence on which his second report was primarily based.

85. Apart from the question of the scope of immunity of State officials from foreign criminal jurisdiction, the Commission should decide whether exceptions should be made to the rule of immunity. Only when it answered that question could it reach a consensus on the appropriateness and extent of the exercise of a codification of customary international law applicable to the various aspects of the immunity of State officials. Differences of opinion had emerged in the debates in plenary session. In any event, the Commission must support the Special Rapporteur when he wrote, in paragraph 56 of his second report, that "[t]he need for the existence of exceptions to immunity is explained, above all, by the requirements of protecting human rights from their most flagrant and large-scale violations and of combating impunity".

86. The Special Rapporteur's idea of elaborating an optional protocol or model clauses on the limitation or waiver of the immunity of State officials from foreign criminal jurisdiction was worth considering. He fully understood that the Special Rapporteur had not deemed it wise at the current stage to formulate draft articles. That would have been somewhat premature, because it would be preferable first for the Commission to arrive at a joint position on the fundamental question of whether the traditional rule still prevailed over practice, which gave growing importance to exceptions to that rule. He was fully in favour of the proposal to establish a working group to elaborate that position.

87. He expressed gratitude to the Special Rapporteur for having raised in his second report the question of the connections between the institution of the immunity of State officials from foreign criminal jurisdiction and two other important concepts of international criminal law, namely universal jurisdiction and the obligation to extradite or prosecute. He approved in particular the Special Rapporteur's remarks in paragraphs 56 and 79, which would no doubt be very helpful when the Commission continued its work on the topic of *aut dedere aut judicare*.

88. Mr. PERERA said that he agreed with the general thrust of the comments made earlier in the morning by Mr. Nolte and Sir Michael. With regard to the fundamental point of whether exceptions to the rule on immunity should be allowed, it would first be necessary to decide what crimes would justify such exceptions. Should they consist exclusively in core crimes under international law, such as acts of genocide and crimes against humanity, or, to employ the phrase used in the Rome Statute of the International Criminal Court, should they also include other "crimes of international concern"? A second important issue was whether peremptory norms of international law relating to grave human rights violations prevailed over the principle of sovereign immunity because they were a "hierarchically higher" norm, as had been argued in several opinions cited by the Special Rapporteur in his second report. The diversity of views reflected in the report was quite appreciable, and he was grateful to Mr. Caffisch for shedding light earlier in the morning on the majority opinion. Thirdly, there was the very interesting question raised by Mr. Gaja at the previous meeting with regard to international law enforcement treaties, such as the Convention for the suppression of unlawful acts against the safety of civil aviation: would functional immunity preclude the exercise of extraterritorial jurisdiction, or would such instruments require prosecution, even if a State official enjoyed such immunity? As Mr. Gaja had noted, all law enforcement treaties based on the principle of "extradite or prosecute" were silent on the issue of immunity. The question arose as to how silence was to be interpreted in the context of the underlying rationale of those instruments, namely the denial of safe haven to perpetrators of serious international crimes. On the other hand, there was good reason to ask whether silence could be interpreted so broadly. Those were complex issues, and there might be no easy answers. Nevertheless, they called for a critical analysis and a balanced approach by the Commission.

89. The Commission was thus faced with the challenge of reconciling the need to protect the sovereignty of States, which remained at the core of international

law (although that principle was currently undergoing change), the sovereign equality of States and the stability of international relations, on the one hand, with the need to protect core human rights values by making State officials accountable for any grave international crimes that they might have committed.

90. He also recalled the words of caution of Sir Ian Brownlie during the debates in the Commission on the Special Rapporteur's preliminary report, who stressed that an expansion of exceptions to the rule on immunity risked leading to the very disappearance of the institution of immunity.

91. The Commission must also be aware of the negative impact that politically motivated or "reprisal" prosecutions might have on the stability of international relations. In that connection, he referred to the observation formulated by one member of the Commission during the debate on the Special Rapporteur's preliminary report, namely that stability in inter-State relations and rules on immunity protected not only the sovereign interests of States but also the very community values that were safeguarded by human rights. Thus, the contending interests and principles need not necessarily be viewed as opposing choices.

92. Given that further analysis of those complex issues was required, he supported the proposal to establish a working group, but agreed with Mr. McRae that it would be preferable to wait until the next quinquennium to do so, because that would give the Commission the opportunity to take into consideration the views expressed by States in the Sixth Committee.

93. Mr. FOMBA said that he would make a short statement of a somewhat political nature.

94. Many speakers had rightly referred to the qualities of the Special Rapporteur's second report and to the problems which it raised at the practical and theoretical levels. The basic question which arose was the following: what was, would be or should be the state of international law with regard to the overall logical and rational interpretation and interrelationship of the concepts of sovereignty, State representation, responsibility and immunity, and what consequences could or should be deduced from the point of view of *lex lata* or *lex ferenda*? Interesting ideas and proposals had been formulated in that regard, which he could accept in full or in part, and which in any event deserved to be considered in greater depth. As for the actual approach to be adopted, the options proposed should also be examined. He was certain that the Commission would be able to find a way of making tangible, effective and judicious progress in its work on that important and sensitive topic, whether at the current or the next session.

95. Mr. KOLODKIN (Special Rapporteur) said that he intended to introduce his third report at the current session. With regard to the establishment of a working group, he thought that it would be preferable to wait until the next session, which would mark the beginning of a new quinquennium. The composition of the Commission would then be renewed, a new Special Rapporteur would be appointed for the topic and the views expressed by States in the Sixth Committee would enrich the debate.

96. The CHAIRPERSON, speaking as a member of the Committee, said that despite all its qualities, the Special Rapporteur's second report seemed intent on delivering a particular message. The Special Rapporteur had chosen a position, which he had sought to substantiate scientifically, perhaps too systematically, while ruling out anything that might contradict it or shift its emphasis. That was no doubt an excellent approach from an academic point of view, but it was perhaps less in step with the Commission's working method. He was speaking from experience, having himself dared to attempt a similar approach in his fifth report on expulsion of aliens,⁹⁴ in which he had postulated the existence of a "hard core" of human rights.

97. Such an approach lost sight of nuances. It was blind to exceptions. In the current case, it had resulted in the Special Rapporteur submitting a report in which, apart from the sole hypothesis set out in paragraph 94 (*p*), only the "theories" defended by the Special Rapporteur were summarized. The impression arose that the Special Rapporteur concluded that a rule of total or absolute immunity existed in international law, without exceptions, and was accepted in positive law.

98. As he saw it, that conclusion was debatable, because it was based on an initial erroneous hypothesis, namely that the rule of immunity of State officials from foreign criminal jurisdiction was so well established in customary law that it did not need to be demonstrated and, above all, that it continued to be the cornerstone of inter-State relations. In actual fact, what the Special Rapporteur had done was to suggest that that norm was a logical rule stemming from the sovereignty, equality and independence of States and was thus, as asserted in paragraph 18 of the report, "the normal state of affairs".

99. Even assuming, for the sake of argument, that this was true, there was reason to believe that the Special Rapporteur had neglected to place such a norm in the context of contemporary international law, in which the principle of sovereignty was at odds with other fundamental principles.

100. Consequently, before examining the technical aspects of the topic, the Commission had to make a choice of legal policy in the light of the development of international law.

101. The requirement of the protection of certain essential values of the international community, in particular human rights, had transformed contemporary international law. For example, it was on behalf of elementary considerations of humanity, which had begun to emerge in its jurisprudence in the 1950s, that the ICJ, in its 1970 judgment in the *Barcelona Traction* case, had confirmed the existence of *erga omnes* obligations. The emergence in treaty law, and more specifically in article 53 of the Vienna Convention on the law of treaties (hereinafter "1969 Vienna Convention"), of the category of rules of *jus cogens* was part of that development. The question of immunity of State officials from foreign criminal jurisdiction envisaged in the context of current international law posed the problem of the relationship between immunity as a logical principle

stemming from the fundamental principle of the sovereign equality of States, on the one hand, and, on the other hand, the moral imperative of non-impunity imposed by the memory of the "millions of ... victims of unimaginable atrocities that deeply shock the conscience of humanity", to quote the formulation in the preamble to the Rome Statute of the International Criminal Court. At a legal level, that moral imperative resulted in a category of obligations owed to the international community as a whole, the regime of which was established by articles 40 *et seq.* of the Commission on responsibility of States for internationally wrongful acts.⁹⁵ The phrase "the most serious crimes of concern to the international community as a whole" referred to in the antepenultimate paragraph of the preamble to the Rome Statute of the International Criminal Court (to which, as Mr. Dugard had recalled, 114 States were parties), constituted violations of that category of obligations owed to the international community as a whole.

102. That description clearly showed that in terms of legal policy, the main question raised by the topic under consideration was the need to strike a balance between the requirement of stable relations between States and the imperative of combating impunity for "the most serious crimes". If, at the current stage, the idea was formulated that there existed a norm of immunity of State officials from foreign criminal jurisdiction, it must be concluded that this norm was at odds with another norm, the norm which required every State, and thus its officials, to respect the obligations owed to the international community as a whole. It was not a question of a rule and exceptions to the rule, because the rule was neither the immunity nor the responsibility. Whether the rule of immunity was incorporated into the principle of sovereign equality of States—which, logically speaking, was conceivable—or whether it was regarded as a rule of customary international law, it was an objective norm on the same basis as obligations owed to the international community as a whole, with the particularity that those obligations also included peremptory norms, or *jus cogens*, which was not the case with immunity.

103. The treatment of the topic thus consisted in determining in which cases immunity prevailed and in which other cases responsibility for crimes constituting violations of obligations owed to the international community as a whole must prevail.

104. Turning to technical questions to be considered in the framework of the topic and which for the most part had been dealt with by the Special Rapporteur, although sometimes in a manner on which personally he had a number of reservations, he agreed with the substance of most of the analysis and comments of the Special Rapporteur, in particular those set out in paragraphs 22 to 30 of his report, concerning the criterion of attribution of State responsibility and the use of that criterion to determine whether the State official enjoyed immunity *ratione materiae*, as well as those contained in paragraphs 57, 58, 62 and 63. He endorsed the views of those who contended that the nature of peremptory norms of international law determined the legal regime of those norms, including with regard to jurisdiction.

⁹⁵ General Assembly resolution 56/83 of 12 December 2001, annex. The draft articles adopted by the Commission and the commentary thereto are reproduced in *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 26 *et seq.*, paras. 76–77.

⁹⁴ *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/611.

105. He agreed with most of what the Special Rapporteur referred to as “statements” in paragraph 94 of the report, but he had difficulties or was in partial or total disagreement with paragraph 94 (d), which stated that “[c]lassification of the conduct of an official as official conduct does not depend on the motives of the person or the substance of the conduct”, the “determining factor” apparently being whether the official was acting in a capacity as such; with subparagraph (f), where it was stated that immunity *ratione materiae* extended to the “illegal acts” of officials; with subparagraph (g), the formulation of which gave the impression that immunity *ratione materiae* covered all acts, whatever they might be, performed by a State official while in office; with subparagraph (n), in which the Special Rapporteur made the debatable assertion that “[t]he various rationales for exceptions to the immunity of State officials from foreign criminal jurisdiction are not sufficiently convincing”; and with subparagraph (o), where it was stated that “it cannot definitively be asserted that a trend toward the establishment of such a norm exists”. The latter conclusion could only be reached because the Special Rapporteur had only put forward arguments in its support. The Special Rapporteur had postulated a theory which he seemed to want to prove at all costs, including by minimizing any arguments that might have contradicted it. That created an uncomfortable feeling about the second report.

106. The Commission would do well to re-examine five questions in detail. First, the basis of the norm of immunity: was it a logical norm inherent in the principle of the sovereign equality of States, or was it a norm of customary international law? If it was a customary norm, it would need to be set off more clearly by defining its scope. From that point of view, the ICJ had not been entirely convincing when, in the *Arrest Warrant* case, it had declared—one could almost say “proclaimed”—the “complete immunity” of a Minister for Foreign Affairs. The Special Rapporteur could also have examined, more carefully than he had, the criticism levelled against the Court in that regard.

107. Secondly, consideration should be given to the relationship between State responsibility and the waiver of the immunity of State officials from foreign criminal jurisdiction: the idea was that State responsibility, in particular for the violation of an obligation owed to the international community as a whole, entailed the waiver of the immunity of its representatives, who ultimately were the perpetrators of the violation. In that case, the State shield disappeared, and the perpetrators of the crime were left to their fate, in other words their criminal responsibility. Of course, the two types of responsibility were different, but they shared the same factual basis: the initial illegal act which incurred the criminal responsibility of the individual or the international responsibility of the State was exactly the same.

108. Thirdly, the relationship between immunity *ratione materiae* and immunity *ratione personae* needed to be examined. The two types of immunity did not operate in parallel in all cases. In some instances, immunity *ratione materiae* and immunity *ratione personae* went hand in hand. The discontinuation of immunity *ratione personae* on account of official functions ceasing to exist

posed the question of whether immunity *ratione materiae* continued to apply to a State official.

109. That should lead the Commission to address the question of immunity *ratione temporis*: did the latter cover acts performed before a State official took office or was acting in that capacity? If so, did such coverage last solely for the beneficiaries of immunity *ratione personae*, or did it also extend to persons who enjoyed immunity *ratione materiae*? Did the benefit of immunity for acts performed before taking office cease to exist with the departure from office?

110. Fourthly, it would be necessary to consider whether the question of immunity arose even in the pretrial phase of the criminal process, as asserted by the Special Rapporteur in paragraph 7 of the report, or rather in the trial phase.

111. Fifthly, there was the question of the connection between universal jurisdiction and the immunity of a State official from foreign criminal jurisdiction. Given the legitimate reactions of most States to the first laws, notably Belgian and Spanish, relating to universal jurisdiction and the amendments to them, he suggested that the Commission examine the question of the connection between jurisdiction or competence for “the most serious crimes” and the circumstances of the particular case. There might be a link of territoriality (the alleged offences took place in the forum State) or a personal link (the alleged offences concerned nationals of the forum State). That would avoid criticism relating to the imbalance of power, the result of which was that officials of weak States could be prosecuted without regard to their immunity in jurisdictions of powerful nations on the basis of allegations of international crimes committed in any country, whereas in general, the opposite was not the case. The ideal, of course, would be a perfect universality of the International Criminal Court, but for that, all States without exception would have to be parties to the Rome Statute of the International Criminal Court. History always repeated itself, and often for the worse. The absolute immunity of State officials from foreign criminal jurisdiction would inevitably create such a risk.

The meeting rose at 1.15 p.m.

3089th MEETING

Tuesday, 17 May 2011, at 10 a.m.

Chairperson: Mr. Maurice KAMTO

Present: Mr. Caffisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escobar Hernández, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Ms. Jacobsson, Mr. Kemicha, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.
