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Held at the Palais des Nations, Geneva, on Friday, 26 May 2017, at 10 a.m.

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Present:

Chairman:	Mr. Nolte
Members:	Mr. Argüello Gómez
	Mr. Cissé
	Ms. Escobar Hernández
	Ms. Galvão Teles
	Mr. Gómez-Robledo
	Mr. Grossman Guiloff
	Mr. Hassouna
	Mr. Hmoud
	Mr. Huang
	Mr. Jalloh
	Mr. Laraba
	Ms. Lehto
	Mr. Murase
	Mr. Murphy
	Mr. Nguyen
	Ms. Oral
	Mr. Ouazzani Chahdi
	Mr. Park
	Mr. Peter
	Mr. Rajput
	Mr. Reinisch
	Mr. Ruda Santolaria
	Mr. Saboia
	Mr. Šturma
	Mr. Tladi
	Mr. Valencia-Ospina
	Mr. Vázquez-Bermúdez
	Sir Michael Wood

Secretariat:

Mr. Llewellyn	Secretary to the Commission

The meeting was called to order at 10 a.m.

Immunity of State officials from foreign criminal jurisdiction (agenda item 2) (*continued*) (A/CN.4/701)

Ms. Oral said that she appreciated the methodology, detail and comprehensiveness of the fifth report on the topic. She noted that debates during the current session had focused on three main issues: first, the nature of the Commission's work; second, whether the Special Rapporteur had demonstrated the existence of a rule of customary international law supporting any exceptions to immunity *ratione materiae* from foreign criminal jurisdiction; and third the arguments for and against the Commission's endorsement of such an exception.

On the first issue, the question had been raised as to whether draft article 7 constituted existing law or new law. In that regard, she agreed with Mr. Jalloh that it had not been the practice of the Commission to characterize its work as falling into either the codification or the progressive development of international law. Nonetheless, the Commission must, of course, undertake its mandate cautiously and conscientiously.

On the second issue, it was clear from the review of national legislation and judicial practice contained in the report that the law was settled with regard to the immunity *ratione personae* of Heads of State and some other high-ranking officials, but not settled in respect of their immunity *ratione materiae* from foreign criminal jurisdiction. It was indeed questionable whether there was adequate support for concluding that customary law permitted any exceptions to immunity *ratione materiae* from foreign criminal jurisdiction. Although a number of national criminal and civil cases would seem to point to a trend in that direction, there was no standard for actually determining what constituted a trend in that area of legal practice. The judgments of international courts also failed to provide any clear guidance on the matter. The case concerning the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* had dealt with the extension of immunity *ratione personae*, not functional immunity, to a minister for foreign affairs. The cases concerning *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)* and *Jurisdictional Immunities of State (Germany v. Italy: Greece intervening)* had dealt with the immunity of States, not the immunity *ratione materiae* of individuals. Indeed, in the latter case, the International Court of Justice had stated that the question of whether and, if so to what extent, immunity might apply in criminal proceedings against a State official was not in issue. Since the decisions of the European Court of Human Rights cited in the report had dealt mostly with civil damages, they too failed to shed any light on the legal status of immunity *ratione materiae* in relation to foreign criminal jurisdiction.

On the third issue, while the principle of sovereign equality and non-interference in internal affairs, together with the need to ensure the stability of international relations, were policy arguments in favour of immunity, they had to be weighed against the international interest in ensuring accountability and preventing impunity for the most serious international crimes. In that respect, she shared Mr. Jalloh's view with regard to the impact of atrocity crimes on peace and security. Indeed, the 124 States parties to the Rome Statute of the International Criminal Court had explicitly recognized in the preamble thereto that grave crimes threatened the peace, security and well-being of the world. Although sovereign equality was an important principle that had been acknowledged in the Charter of the United Nations and many other instruments, she, like Mr. Hmoud, believed that the protection of fundamental human rights was an equally important tool for preserving peace and avoiding war and that justice was not incompatible with respect for the obligations arising from international law.

On the question of procedure, although she concurred with Mr. Huang that substantive justice should not be at the expense of procedural justice, she feared that immunity had been elevated to a higher legal status in the hierarchy of legal norms than it merited. Procedural justice was associated with fundamental rules of justice which were non-derogable, whereas article 27 of the Rome Statute demonstrated the derogable nature of immunity. Even if immunity did not apply to certain crimes, that should not deprive the offender of procedural justice, which meant putting in place adequate procedural safeguards to ensure that prosecutions were based on proper evidence. At the same time, a

strengthening of substantive justice through accountability and the prevention of impunity might provide a compelling reason for lifting or recognizing an exception to a derogable procedural rule such as immunity *ratione materiae* when *jus cogens* rules had been violated. Another reason for permitting a limited exception to immunity *ratione materiae* was that such immunity was perpetual, unlike immunity *ratione personae* which was restricted to a person's term of office.

In paragraph 57 of his second report (A/CN.4/631), the previous Special Rapporteur had noted that the viewpoint that grave crimes under international law could not be considered as acts performed in an official capacity, and not therefore subject to immunity *ratione materiae* from foreign criminal jurisdiction, had become "fairly widespread". That opinion was supported by paragraph 155 of the judgment of the International Criminal Tribunal for the Former Yugoslavia in the case *Prosecutor v. Anto Furundžija*, by the findings of the Supreme Court of the United States and the Court of Appeals for the Fourth District in the case concerning *Samantar v. Yousuf*, those of a United States district court in *Xuncax v. Gramajo* and by paragraph 212 of the judgment of the European Court of Human Rights in *Jones and Others v. the United Kingdom*. She therefore considered that the development of an exception to immunity *ratione materiae* in criminal cases for the most serious international crimes or violations of *jus cogens* rules was merited, especially as delegates to the Sixth Committee had supported that approach. On the other hand, the concern that an exception to immunity *ratione materiae* could be abused must be addressed by devising rules of procedure to preclude that danger.

She supported draft article 7 (1) (i), although she wondered why other serious international crimes had been omitted. Since the crimes mentioned were not defined in the draft articles, she wished to know if reference would be made to a specific source, such as existing conventions. Corruption was an extremely serious crime but, as it stood, subparagraph (ii) was too broadly drafted. She could accept subparagraph (iii), despite the fact that it was based on civil law. The need for draft article 7 (2) was questionable, since its subject matter was covered in the draft articles which had already been provisionally adopted. In principle, she could agree with the proposal that a general "without prejudice" clause should be drafted for the draft articles as a whole. In conclusion, she recommended the referral of draft article 7 to the Drafting Committee.

Mr. Grossman Guiloff said that the topic was of central importance because the determination of limitations and exceptions to immunity might help to achieve the vital balance between the rules on immunity from foreign criminal jurisdiction, which recognized the sovereign equality of States, and the principles of international criminal law and international humanitarian law, which gave rise to a common interest in rejecting impunity.

The decisions of international bodies had a bearing on the development of thinking on the topic. In the *Arrest Warrant* case, the International Court of Justice had set forth clear criteria for distinguishing between immunity and impunity. To that end, it had established that the immunity of a minister for foreign affairs was procedural in nature, applied solely to his or her term in office and was restricted to acts *juri imperii*. In addition, Judges Higgins, Kooijmans and Buergenthal had been of the opinion that serious international crimes could not be regarded as official acts. The practice of treaty monitoring bodies was also of relevance. For example, the Committee against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment had adopted a decision confirming that a State party had an obligation to prosecute or extradite a former Head of State who had been charged with the offence of torture (CAT/C/36/D/181/2001). In the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, the International Court of Justice had in turn stressed that the prohibition of torture had become a peremptory norm and that alleged perpetrators should not go unpunished. It had thereby upheld the findings of the British House of Lords in the *Pinochet No. 3* case that General Pinochet did not enjoy immunity *ratione materiae* for torture or conspiracy to torture, findings which had marked a turning point in legal theory. However, in examining the precedent established by the International Court of Justice in the case concerning *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, the Special Rapporteur had rightly distinguished between its character *obiter dictum* and its application

to the topic under consideration, since the case concerned State immunity and not individual criminal immunity.

In the section of the report on the study of practice, the Special Rapporteur should not only have given greater attention to the rejection of immunity for war crimes, she should also have included an analysis of regional rules regarding immunity, since they were a source of useful material. In proceedings before the Inter-American Court of Human Rights in the cases of *Velásquez Rodríguez*, *Barrios Altos*, *La Cantuta*, *Gelman*, *Gomes Lund*, *Almonacid-Arellano*, *the Mapiripán Massacre* and *Goiburu et al.*, the effective protection of human rights had been given priority in proceedings concerning extradition for serious violations of those rights. Similarly, consideration should be given to the decisions of the Supreme Court of Chile in *Fujimori* and of the Supreme Court of Argentina in the *Arancibia Clavel* and *Priebke* cases, which had concerned foreign citizens whose extradition had been requested for murder or torture. All those cases were indicative of a development of customary law regarding immunity and the passive nationality principle in the inter-American human rights system. The Commission should also examine the contribution of United Nations treaty monitoring bodies to the development of rules on immunity.

In the report, the Special Rapporteur had correctly identified the scope of the immunity *ratione personae* of certain State officials on the basis of customary law and treaty law and she had rightly noted that some State officials enjoyed *ratione materiae* for acts *juri imperii*. Although the International Criminal Tribunal for the Former Yugoslavia had maintained the doctrine that acts of State could not give rise to foreign criminal responsibility on the part of those acting on behalf of the State, the time had come to examine a departure from that rule, namely exceptions to immunity for serious breaches of international humanitarian law, including in States where the alleged crimes had not been committed. To that end, the Commission could base its work on the respective provisions on penal sanctions of the 1949 Geneva Conventions and article 87 (1) of Protocol I of 8 June 1977 additional to the Geneva Conventions. Further support for the lack of immunity for international crimes could be found in the 2009 resolution of the Institute of International Law and in the article cited in footnote 347 of the report, which suggested that the Convention against Torture might serve as a model for treaty-based exceptions to immunity. In his paper entitled "*When May Senior State Officials Be Tried for International Crimes? Some Comments on the* Congo v. Belgium *Case*", Professor Cassesse had likewise referred to various court decisions where immunity had not been an obstacle to prosecution.

The full worldwide impact of the exception to immunity *ratione materiae* established in the Convention against Torture had become clear in the reasoning of Lords Browne-Wilkinson, Saville, Millett and Phillips in the *Pinochet No. 3* case. Leaving aside purely formal legal arguments, the all-important question was whether former or serving State officials in respect of whom there was a reasonable suspicion that they had violated that ban on torture could move freely throughout 161 States under the protective mantle of immunity *ratione materiae*.

The *Velásquez Rodríguez v. Honduras* case, heard by the Inter-American Court of Human Rights, also illustrated how the interpretation of a treaty — the American Convention on Human Rights, in that instance — in strict compliance with the rules established by the Vienna Convention on the Law of Treaties could have an impact on the question of impunity and immunities. The International Court of Justice and regional courts had been unanimous in stressing that human rights treaties should be interpreted in the light of their object.

In his view, it seemed that the existence of a trend towards exceptions to immunity *ratione materiae* in the case of international crimes could not be denied.

The norms, developments and values to which the Special Rapporteur referred could not be disregarded as merely aspirational goals. A way had to be found to reconcile them with the principles of immunity that ensured the equality of States, while recognizing that, in accordance with the *erga omnes* principle, the violation of peremptory norms was a matter of concern to all.

While it was a valuable exercise for the Commission to provide as much clarity as possible in its work with a view to assisting States, it was not necessary to seek to distinguish between *lex lata* and *lex ferenda* in every single case. What was necessary was that the Commission should proceed with due caution so as to ensure that all interests were considered and respected. In that connection, he fully agreed that it was important to prevent abuse of the exercise of criminal jurisdiction for political ends; there were ample opportunities for that and other issues to be discussed within the Commission, and they would, he was sure, be duly taken into account by the Special Rapporteur.

Turning to draft article 7, he supported its referral to the Drafting Committee. In that context, he would welcome further clarification from the Special Rapporteur regarding the non-inclusion of the crime of aggression in the list of crimes in respect of which immunity did not apply. Similarly, the content of the crime of corruption should be defined more precisely. Although the territorial exception had been applied mainly in the field of civil law, he was in favour of maintaining its inclusion in the draft article, since it was supported by international practice, on the basis of territorial jurisdiction. He had been surprised by the argument that paragraph 3 should not be referred to the Drafting Committee because it might interfere with ongoing proceedings and would therefore be interested to know the basis for that argument.

Mr. Cissé said that he wished to thank the Special Rapporteur for her detailed and well-researched report, which, though a little long, was highly readable in its treatment of a complex and politically sensitive topic.

The law of immunities in relation to the criminal responsibility of State officials was quite settled, as could be seen from the consistent case law, both national and international, which had contributed significantly to the crystallization of customary international law applicable to the regime of immunity of State officials from foreign criminal jurisdiction. The major principles of international law concerning, in particular, the distinction between immunity *ratione personae* and immunity *ratione materiae*, along with their respective legal implications, were largely not questioned. Indeed, that regime had not undergone any major changes, even though dissenting opinions were at times voiced by judges and writers against the mechanical application of that distinction in the context of serious international crimes, such as crimes against humanity, war crimes and genocide. Support also existed among some jurists for the inclusion of other crimes, such as torture, aggression, enforced disappearance and corruption among the most serious international crimes for which immunity could not be granted.

The question before the Commission was whether State practice, as described and analysed by the Special Rapporteur in her fifth report, met the criteria of generality, consistency and uniformity needed to attain the status of a customary rule applicable *erga omnes*. Paragraph 42 of the report concluded that immunity of the State or of its officials from jurisdiction was not explicitly regulated in most States and that the response to immunity had been left to the courts. In the light of that conclusion, there could be no doubt that a customary rule did not exist, inasmuch as it was recognized that at the domestic level there was too great a variability in practice, both legislative and judicial. Accordingly, in the absence of established State practice and, therefore, of the possibility of codification, the Commission should engage in progressive development and in its work take into account the emerging, new challenges faced by the international community, including transnational crimes, such as crimes against humanity and war crimes, that were often perpetrated with the blessing and complicity of certain high-ranking State officials who were always quick to invoke immunity in order to protect themselves from prosecution. Immunity could not and must not be accorded as if it were a carte blanche for such persons.

If the goal was to combat impunity and arbitrariness, care should be taken not to extend the exception to immunity *ratione personae* beyond the troika, namely the Head of State, the Head of Government and the minister for foreign affairs, to other State officials. He was in favour of providing protection for the troika, but only in the form of immunity *ratione personae* and for the sole purpose of preventing anarchy in inter-State relations and diplomatic incidents. Immunity did not mean impunity, since even those who enjoyed immunity *ratione personae* could be tried by foreign courts once they had left office.

It was important to recall that the question of substantive immunity, examined in the present report, went hand in hand with that of procedural immunity, which would be the subject of a future report. In any event, jurisdictional immunity only acquired meaning and scope when the scope of the applicable law was clearly defined. The question that arose was whether the applicable law in relation to immunity from foreign criminal jurisdiction was a matter of *lex lata* and/or *lex ferenda*. What balance did the report strike between the two? The answers to those questions were to be found in draft article 7 (1) and (2).

Paragraph 1 of draft article 7 stated that immunity did not apply in relation to genocide, crimes against humanity, war crimes, torture and enforced disappearances. It would be appropriate to indicate that the immunity referred to in the paragraph was immunity *ratione materiae*. He, like several other members, was of the view that the crime of aggression should be added to the list. He would also add to the list of crimes the destruction of world cultural heritage and terrorism, as long as senior State officials were directly or indirectly implicated in those crimes.

Paragraph 2 of draft article 7 stated that paragraph 1 did not apply to persons who enjoyed immunity *ratione personae* during their term of office. In his view, that paragraph did not create new law, nor seek to do so. In fact, it merely faithfully reflected customary international law, under which persons enjoying immunity *ratione personae* enjoyed absolute immunity, even in relation to war crimes and crimes against humanity.

The debates within the Commission on the immunity of State officials from foreign criminal jurisdiction had highlighted the serious nature and importance of the issue for the proper functioning of inter-State relations. The challenge facing the Commission was to find an acceptable balance between conservative and progressive trends in international law regarding jurisdictional immunity and the international criminal responsibility of State officials. Draft article 7 seemed to have reconciled those two trends, inasmuch as elements of *lex lata* were to be found in paragraph 2 and elements of *lex ferenda* in paragraph 1. To his mind, codification and progressive development of international law could not or should not be seen as two opposing, completely separate functions. Technically, there was nothing wrong with having, in a single multilateral instrument, both codification and *lex ferenda* provisions; the United Nations Convention on the Law of the Sea provided a good example in that regard.

The expression “corruption-related crimes” in paragraph 1 (ii) did not seem appropriate because it gave the impression that corruption itself was not a criminal offence. That wording could cause confusion because no definition was given of what constituted corruption-related crimes; for example, money-laundering could be considered a crime related to corruption. The phrase should therefore be reworded to read: “crimes of corruption and related offences” [*crimes de corruption et autres infractions connexes ou infractions assimilées*].

Unlike some members of the Commission, he considered that crimes of corruption should be mentioned in draft article 7. Such crimes, which deprived States of much needed essential resources, were sufficiently serious to be raised to the rank of crimes in relation to which immunity could not apply. If it was accepted that corruption did not constitute an official act performed by a State official, then there could be no obstacle to its being considered an exception to immunity *ratione materiae* applicable to the high-ranking officials of the foreign State once they had left office. It was part of the Commission’s mandate to progressively develop international law and it would be right for it to propose a text to the international community which made corruption a crime for which no immunity could be granted.

He was not in favour of the proposal of some speakers to refer to the crime of corruption in the commentary to draft article 7, rather than in the body of the text. Such an approach could be seen as downplaying the serious scourge that was corruption. A large majority of States had adopted laws on corruption and established administrative and judicial institutions to prevent the crime and punish its perpetrators. At the regional and subregional level in Africa, for example, legal instruments had been adopted to address the matter. At the multilateral level, treaty provisions had been adopted and implemented to combat corruption, notably the United Nations Convention against Corruption.

In his view, the Commission needed to engage in progressive development, while striking a balance, admittedly a delicate one, between the principle of the sovereign equality of States and the imperative of combating impunity. In doing so, it would have made the wise, progressive and unambiguous choice to stand on the side of the rule of law, national and international, and justice rather than on the side of impunity.

In the light of the foregoing, he recommended the referral of the draft article to the Drafting Committee.

Mr. Jalloh asked Mr. Cissé how he envisaged ensuring that, when individuals were prosecuted in foreign national courts for corruption, which constituted one of the classic economic crimes, illicitly acquired assets could be recovered by the victim State. He raised that question because an immunity exception had been proposed for economic crimes of that nature, and asset forfeiture was sometimes ordered in respect of individuals convicted of such offences. And, in some cases, where such offences were prosecuted in the national courts of third States, the proceeds of the crime belonged to the sovereign people of the victim State whose wealth had been taken and stashed in distant foreign jurisdictions that might have no legal claims or proper basis to retain such wealth.

Mr. Cissé said that it was a question of political will on the part of the international community and relevant actors. Under the United Nations Convention against Corruption, for example, when foreign financial institutions were unable to clearly identify the economic beneficiaries of funds deposited in an account, such funds could be recovered by the State from which they originated.

Mr. Huang said that the observations that he would make on the Special Rapporteur's fifth report were further to the preliminary comments he had made at the previous session. The topic under consideration was an important and sensitive one, and the report had given rise to great interest and heated debate. It was now time for the Commission to decide whether to refer draft article 7 to the Drafting Committee. In that regard, he wished to set out four lines of reasoning why in his view the draft article should not be referred to the Committee for the time being.

Before doing so, he wished to comment on two matters. First, he wished to commend Mr. Murphy on his detailed and well-researched statement, in which he had put forward many convincing arguments for not supporting draft article 7. Second, he had been shocked at the previous meeting when he had heard a statement by a colleague, in which the latter, among other things, attacked African leaders as a whole and the basic political systems of African countries. While Commission members could agree or disagree with one another in debates, they should not violate basic principles of international law by, for example, interfering in the internal affairs of States under cover of combating impunity.

His first line of reasoning concerned the importance of decision-making by consensus. As there was no consensus among Commission members, he could not support the referral of draft article 7 to the Drafting Committee at the current stage. It was extremely important for the Commission to adhere to the spirit of consensus at the beginning of a new quinquennium. Since its establishment nearly 70 years previously, the Commission had, as a matter of principle and as a key rule of procedure, operated on the basis of consensus when dealing with substantive issues. It should continue to uphold that valuable tradition. The referral of draft articles to the Drafting Committee was vital to the work of the Commission, since the Drafting Committee not only provided guidance regarding the direction of the Commission's work, but also laid the foundations for the widest possible acceptance of the outcome of the Commission's work by the international community. Therefore, when referring draft articles to the Drafting Committee, the Commission should not rush into a making a final decision when there were still significant differences of opinion among its members. The desirability of ensuring the widest possible consensus should always be kept in mind. For controversial issues, consultations should be conducted with a view to reaching a consensus. If agreement could not be reached, it was best to postpone decision-making until a suitable solution had been found.

With regard to draft article 7, divergent views had been expressed both in the Commission and in the Sixth Committee. Fundamental and significant differences of views continued to exist among Commission members. Since the Commission was unable to

agree on whether to refer the draft article to the Drafting Committee, further deliberations and consultations were needed, and every effort should be made to reach a consensus. Although some Commission members might suggest that the referral of the draft article should be put to a vote, it seemed to him that such a course of action would not be conducive to narrowing the differences of opinion in the Commission. Instead, those differences would be exposed to the Sixth Committee and to the general public. It was questionable whether that was desirable.

His second line of reasoning concerned respect for the different views and positions of Member States. As a number of Member States had strongly objected to the expansion of exceptions to immunity of State officials, he did not support the referral of draft article 7 to the Drafting Committee. International law was created essentially on the basis of consensus among States. Indeed, one of the basic features of the international law-making process was the fact that international treaties and customs were brought into existence by the very States that would be bound by them. Therefore, the progressive development of international law and its codification were inevitably diplomatic and pragmatic in nature, rather than academic and dogmatic. That fact should never be ignored by the Commission if it hoped to achieve its objectives.

The Commission's object was to promote the progressive development of international law and its codification, principally by preparing draft articles on subjects which had not yet been regulated by international law or with regard to which the law had not yet been sufficiently developed in the practice of States, and by undertaking the more precise formulation and systematization of rules of international law in fields where there had already been extensive State practice, precedent and doctrine. States played an essential role at every stage of that process. Although the Commission was technically independent, its work should always be carried out in close cooperation with the political authorities of States and under the political guidance and supervision of the General Assembly. For that reason, the Commission should respect the views and positions expressed and upheld by Member States in the Sixth Committee.

In the Sixth Committee, delegations had observed that the topic involved fundamental principles of real practical significance for States and that the Commission should proceed cautiously and accurately. In fact, a number of States had consistently and repeatedly expressed their concerns about the proposition that serious international crimes constituted an exception to the immunity of State officials from foreign criminal jurisdiction. They pointed out that customary international law did not support such an exception and that there was a lack of political will to develop one. Many States agreed with the conclusion reached in 2010 in the second report of the former Special Rapporteur, Mr. Kolodkin, that there was in contemporary international law no customary norm or trend toward the establishment of such a norm and that further restrictions on immunity, even *de lege ferenda*, were not desirable, since they could impair the stability of international relations. That conclusion had been based on an in-depth analysis of relevant existing norms of international law and State practice and had laid a solid foundation for the Commission's consideration of exceptions to immunity. The Commission should take into account the concerns and different views expressed by Member States. Unless there had been major breakthroughs in international practice since 2010, it was imperative to adhere to the principle of immunity of State officials from foreign criminal jurisdiction. Exceptions to that principle must be supported by sufficient State practice and should not be expanded at will.

His third line of reasoning concerned adherence to the fundamental principles of international law. As the proposed expansion of exceptions to the immunity of State officials eroded and deviated from the fundamental principles of international law, he did not support the referral of draft article 7 to the Drafting Committee. Those principles, as reflected in the Charter of the United Nations, were the cornerstone of just and equitable international relations. As a subsidiary organ of the General Assembly, the Commission was fully committed to upholding those principles, including the principles of sovereign equality and non-intervention in the internal affairs of other States, which were both of critical importance to the stability of international relations. States enjoyed their rights on the basis of independence and on an equal footing and assumed their obligations and

responsibilities on the basis of mutual respect. They must at all times honour international obligations regarding the immunity of States, their property and officials. Violations of those obligations were not in conformity with the principle of sovereign equality and might contribute to the escalation of tensions. An example of such a violation was the exercise by a State of its national criminal jurisdiction over a foreign official without the consent of the State to which the official belonged.

It was well known that the immunity of State officials was also rooted in State immunity, which was not a privilege or a benefit that one State gave to another, but an intrinsic right based on the principle of sovereign equality. Given the lack of universal State practice and *opinio juris*, the ill-considered establishment of exceptions to immunity would put the principle of sovereign equality in jeopardy and subordinate it to other rules. The abusive exercise of universal jurisdiction in recent years had also caused concern among the international community. For example, some Western countries frequently invoked so-called universal jurisdiction in order to prosecute and even issue arrest warrants against African leaders and senior government officials, while some anti-government organizations and individuals frequently initiated abusive litigation in the courts of Western countries. The inappropriate development of exceptions to immunity would facilitate the abusive exercise of universal jurisdiction. Recently, more and more countries had announced their support for the view that the application of universal jurisdiction should respect the rules of international law that recognized immunity. Some Western countries had also started to amend their domestic legislation in order to restrict the application of universal jurisdiction and to preclude certain types of proceedings against senior foreign officials. The Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol), adopted in 2014, reflected the concerns of African States in that regard. That development reflected a trend which the Commission could not ignore in its work on the topic under consideration.

In her fifth report, however, the Special Rapporteur had considerably expanded the rules on exceptions to immunity of State officials. Draft article 7 not only listed as exceptions to immunity from foreign criminal jurisdiction the serious international crimes that were enumerated in the Rome Statute, such as genocide, crimes against humanity and war crimes, but also human rights violations, such as torture and enforced disappearance, crimes of corruption, and even crimes under ordinary law that were committed in specific circumstances with harm to persons and loss of property. Putting aside the question of whether those developments corresponded to State practice, if numerous exceptions to immunity were allowed, they would inevitably have a serious impact on the principles of sovereign equality and non-intervention in the internal affairs of other States. It seemed to him that draft article 7 had gone too far in that regard, and he therefore could not support it.

His fourth line of reasoning concerned consistency of methodology and the high standard of the Commission's work. Owing to the inconsistency in the methodology used in the report and the lack of evidence to support the proposed expansion of exceptions to immunity, he did not support the referral of draft article 7 to the Drafting Committee.

As with other topics, the consideration by the Commission of the immunity of State officials from foreign criminal jurisdiction was closely related both to the codification of existing law, *lex lata*, and to the progressive development of new law, *lex ferenda*. However, in her fifth report, the Special Rapporteur had inappropriately shifted the focus of the Commission's work on the topic to the latter, which had resulted in a loss of balance and a departure from the systematic, ordered and structured working method that the Special Rapporteur had herself proposed and that had been approved by the Commission. The Special Rapporteur had not given due attention to the basic principles of international law and customary international norms, in particular the principles of sovereign equality and non-intervention in the internal affairs of other countries, or to the decisions of the International Court of Justice and national judicial practice. She had determined to restrict the application of immunity through the expansion of exceptions to immunity, as a way of resolving the so-called issue of impunity. However, that approach was wrong. It not only represented a departure from the direction that the Commission had set for its consideration of the topic, but was also unlikely to obtain support from the majority of the members of the international community.

In addition, there was some confusion over basic concepts, such as international and domestic crimes, criminal and civil jurisdictions, universal, international and domestic jurisdictions, and third State jurisdiction, as well as State immunity, the immunity of officials and diplomatic immunity.

The Special Rapporteur had emphasized the issue of impunity many times in her report. However, as many other colleagues had correctly noted, impunity was not necessarily linked to immunity from jurisdiction. The purpose of adhering to the principle of immunity was not to absolve State officials who were suspected of having committed crimes from criminal punishment. Immunity from jurisdiction was merely a procedural rule and did not absolve State officials from their substantive responsibilities; it did not lead to the commission of international crimes, nor did it facilitate impunity. There were many causes of impunity, most of which were political in nature. Measures to eliminate impunity should start at the political and domestic levels, instead of attempting to negate, remove or restrict the long-established international law principle of the immunity of State officials from foreign criminal jurisdiction. He believed that impunity therefore should not be invoked as grounds for restricting immunity.

In conclusion, he agreed with many of the comments and suggestions made by other Commission members, in particular those made by Mr. Murphy. He fully endorsed Mr. Murphy's observation that even the existence of a "trend" had not actually been established in the report; that no consensus among States had been demonstrated; and that draft article 7 was supported neither by national case law and legislation nor by international case law and treaty practice. Thus, he did not believe that draft article 7 was ready to be submitted to the Drafting Committee at the current session.

As to the future workplan, given the differences of opinion among its members, and in a spirit of cooperation and compromise, he proposed that the Commission should work towards a comprehensive solution, which could include the following elements: deferring for the time being the final decision regarding the referral of draft article 7 to the Drafting Committee; setting up an open-ended working group to conduct informal consultations; requesting the Special Rapporteur to prepare a commentary on draft article 7 for consideration by the Commission at the following session; and considering the issue of limitations or exceptions to immunity in the context of the issue of the procedural safeguards to immunity, which would be dealt with in the Special Rapporteur's sixth report.

Lastly, he wished briefly to touch on a related topic, namely the extradition of fugitives, in order to show that efforts to combat impunity depended on judicial and law enforcement cooperation among States. In recent decades, the Chinese authorities had stepped up their efforts to secure the return of Chinese fugitives who had fled the country. Over the previous three years, thousands of Chinese fugitives, most of whom were former State officials, had been returned from more than one hundred foreign countries. In all of those cases, extradition had been secured through traditional mutual assistance rather than the exercise by a foreign State of its national criminal jurisdiction. The obstacle to the extradition of fugitives was not the failure by States to exercise their national criminal jurisdictions, but a lack of willingness on their part to offer judicial and legal assistance. In 2015, the Chinese authorities had released a list of the 100 most wanted Chinese fugitives, of whom around 60 remained in hiding in countries that were unwilling to return them to China. The key issue at stake was thus political willingness among States to cooperate and to bring fugitives to justice.

Mr. Tladi said that he wished to stress that article 46A *bis* of the Malabo Protocol and article 27 of the Rome Statute of the International Criminal Court were irrelevant to the debate, as those provisions were each directed at a particular institution, namely the African Court of Justice and Human Rights and the International Criminal Court, respectively. With regard to draft article 7, he wished to clarify that, while he did not agree with some aspects of the Special Rapporteur's methodology and did not support paragraph 3, he believed that paragraph 1 (i) should be referred to the Drafting Committee.

Mr. Gómez-Robledo, responding to Mr. Huang, said that "consensus" was not defined in any international instrument. The great powers had invented the concept in the 1970s to prevent the so-called automatic majorities of the Third World. It was not

mentioned in either the Charter of the United Nations or in the rules of procedure of the General Assembly. The rules of procedure of some international conferences stipulated that participants should make efforts to reach the broadest possible agreement, but, if all such efforts failed, a vote could be held. The great advances in international law, including the United Nations Convention on the Law of the Sea, the Vienna Convention on the Law of Treaties and the Rome Statute of the International Criminal Court, had been achieved through a vote, a fact that in no way undermined the authority and value of those instruments. Even the International Court of Justice regularly held votes. He was by no means suggesting that the Commission should automatically resort to voting, and he had full confidence in the Chairman's abilities to ensure that a consensus was reached by other means, but the option of holding a vote should nevertheless be available. Indeed, to grant each Commission member a vote would be the clearest possible reflection at an individual level of the principle of sovereign equality, which was important to all members. He stressed that votes should be held only as a matter of last resort.

Mr. Rajput said that the Commission had traditionally sought to build a consensus among its members, and it would be regrettable if it were regularly to resort to holding votes. The starting point of a debate could not be that there was a majority view and that there should therefore be a vote and the minority should be ignored. Every effort should first be made to understand and give due consideration to all members, whether majority or minority.

Mr. Huang said that the spirit of consensus was not only an important tradition, but was also essential to the Commission's work. He was not necessarily opposed to voting, but he believed that the Commission should first seek to build the broadest possible consensus through formal or informal consultations.

Mr. Peter said that it was important to bear in mind the status of the various international instruments that had been mentioned in the debate. The Malabo Protocol, for example, had been adopted by the African Union in 2014, but it had been signed by only 9 States and had yet to be ratified by a single State.

Mr. Murase said that he wished to recall that the Commission was a subsidiary organ of the General Assembly and thus followed the latter's rules of procedure, which allowed it to hold votes on important issues. The so-called consensus rule did not give veto power to minority groups. While the Commission should make every effort to reach a consensus before resorting to a vote, it should nevertheless have the option of doing so. He noted that, in previous decades, the Commission had often held indicative votes, and it should in his view continue that practice.

Mr. Hassouna said that, in the practice of both the General Assembly and the Commission, consensus had never been equated with unanimity. In the past, the Commission had on occasion resorted to a vote when, despite its best efforts, it had been unable to reach a consensus. Perhaps the Commission could discuss the issue in the Working Group on methods of work, which would meet during the Commission's current session.

Mr. Ruda Santolaria said that he agreed with other Commission members that the report addressed elements of both *lex lata* and *lex ferenda*. In its work on the topic, the Commission should approach the codification and progressive development of international law in an integrated manner, rather than treat them as two separate categories.

As rightly noted by the Special Rapporteur in paragraph 142 of her report, international law should be seen as a system that struck a balance between traditional, fundamental considerations, such as ensuring respect for the sovereign equality of States and the need to preserve the smooth functioning of international relations, on the one hand, and the need to give consideration to the progress made in recent decades in the areas of international human rights law, international humanitarian law and international criminal law, on the other. He was convinced that the Commission was capable of rising to the challenge of preserving and consolidating what had gone before, while at the same time addressing the complex and changing contemporary situation with a spirit of open-mindedness.

With regard to immunity for the troika, he highlighted the importance of the judgment of the International Court of Justice in the *Arrest Warrant* case, which clearly indicated that immunity *ratione personae* fully protected the members of troika against any act of authority of another State which would hinder them in the performance of their duties, with no distinction being drawn between acts performed in an official capacity and those performed in a private capacity. Such immunity lapsed when the official ceased to hold office. As indicated in paragraph 67 of the report, the judgment itself restricted the scope of the Court's consideration to the immunity from criminal jurisdiction and the inviolability of an incumbent minister for foreign affairs in the discharge of his or her functions. It was therefore not possible to apply the finding in that case to State officials who were not members of the troika.

Likewise, as noted in paragraph 85 of the report, the International Court of Justice's decision on the merits in its judgment in *Jurisdictional Immunities of the State* referred to the jurisdictional immunity of the State *stricto sensu* when the State acted *jure imperii*. In his view, it was important to distinguish between State immunity *stricto sensu* in situations involving the bringing of civil actions against a State before the courts of another State and the immunity of State officials from foreign criminal jurisdiction. With regard to the latter, a distinction should, in turn, be made between members of the troika, who enjoyed immunity *ratione personae* during their term of office, and State officials or former State officials, including former Heads of State, Heads of Government and ministers for foreign affairs, who enjoyed immunity *ratione materiae* in relation to acts performed in an official capacity. The Special Rapporteur highlighted those distinctions in her fourth report (A/CN.4/686), as well as in paragraphs 153 and 154 of her fifth report, in which she drew attention to the fact that a single act could give rise to two different types of responsibility — international, for the State, and criminal, for the individual — and to the existence of two types of immunity — of the State and of State officials, with their respective legal regimes.

In alluding in paragraph 87 of its judgment in *Jurisdictional Immunities of the State* to the *Pinochet (No. 3)* case, which had been tried in the United Kingdom, the International Court of Justice stressed that the distinction between the immunity of a State official and that of the State had been emphasized by several judges in *Pinochet*. It also mentioned that, in its judgment in *Jones v. Saudi Arabia*, the House of Lords further clarified that distinction, with Lord Bingham describing the distinction between criminal and civil proceedings as "fundamental to the decision" in *Pinochet*.

Moreover, in paragraph 91 of its judgment in *Jurisdictional Immunities of the State*, the Court emphasized that it was addressing only the immunity of the State itself from the jurisdiction of the courts of other States; the question of whether, and if so to what extent, immunity might apply in criminal proceedings against an official of the State was not in issue in the judgment. The conclusions reached by the principal judicial organ of the United Nations were therefore consistent with those presented by the Special Rapporteur in her fifth report with reference to limitations and exceptions to immunity *ratione materiae* of State officials from foreign criminal jurisdiction.

It was also important to point out that jurisdictional immunity was essentially procedural in nature. It was therefore fitting, in keeping with the arguments set forth in the case law of the International Court of Justice and that of other courts, to draw a distinction between immunity from jurisdiction and the responsibility of State officials. The distinction was clearly illustrated by the fact that members of the troika, once they had completed their term of office, no longer enjoyed immunity *ratione personae* and were subject to their immunity being restricted to acts performed in an official capacity — a point clearly described by the Special Rapporteur in paragraphs 148 and 149 of her report.

Nevertheless, as indicated in paragraphs 150 to 152 and 205 of the report, a situation could arise whereby immunity *ratione materiae* was, in practice, no longer purely procedural if no alternatives to foreign criminal jurisdiction were available and, owing to the invocation of such immunity, efforts to prosecute State officials suspected of involvement in the commission of horrendous international crimes were impeded. Should that happen, immunity would acquire a substantive scope and lead to the *de facto* impunity of the perpetrators of such crimes and the inability to combat flagrant violations of *jus*

cogens. Such a situation would distort the meaning of immunity and the obligation set forth in various treaties to punish those responsible, irrespective of their official position.

The Special Rapporteur highlighted a clear tendency, one that was reflected in resolutions of the Institute of International Law. It was significant that, in the resolution on Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law of 2001, a distinction was drawn between the treatment to be afforded to serving Heads of State and Heads of Government and that to be afforded to former Heads of State and former Heads of Government. Article 13 (2) of the resolution restricted the scope of the immunity from jurisdiction of former Heads of State to acts performed in the exercise of official functions, stipulating that they could be prosecuted and tried when the acts alleged constituted a crime under international law, or when they were performed exclusively to satisfy a personal interest or when they constituted a misappropriation of the State's assets and resources. Article 1 of the resolution on Immunity from Jurisdiction of the State and of Persons Who Act on behalf of the State in case of International Crimes of 2009 indicated that, for the purposes of the resolution, the term "international crimes" meant serious crimes under international law such as genocide, crimes against humanity, torture and war crimes, as reflected in relevant treaties and the statutes and jurisprudence of international courts and tribunals.

He agreed with what was said in paragraphs 170 to 175 of the report to the effect that the practical consequences of exceptions and limitations to immunity *ratione materiae* were similar to the non-application of such immunity. He nonetheless considered the conceptual distinction to be important.

In his view, it was possible to speak of exceptions with regard to international crimes, and he subscribed to the arguments made by the Special Rapporteur in paragraphs 124 and 125 of her fourth report, as well as to those made by the previous Special Rapporteur in paragraphs 60 and 61 of his second report (A/CN.4/631). In her fourth report, the Special Rapporteur rightly pointed out that such crimes were committed using the State apparatus, with the support of the State, and that the participation of State officials was an essential element of the definition of some forms of conduct characterized as international crimes. That was the case, for example, in article 1 (1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; article II of the Inter-American Convention on Forced Disappearance of Persons; and article 2 of the International Convention for the Protection of All Persons from Enforced Disappearance.

However, he was of the view that corruption-related crimes fell into the category of limitations on immunity *ratione materiae*. He therefore agreed with the view that corruption-related crimes should not be considered official acts, since, although they involved State officials, the purpose of such crimes was to derive a personal benefit or profit.

With regard to proposed draft article 7, he agreed with the list of international crimes set out in paragraph 1 (i), in respect of which immunity *ratione materiae* did not apply, as well as with the use of that expression. He agreed with previous speakers who had advocated the inclusion of the crime of apartheid in the list. However, he had serious doubts about the advisability of including the crime of aggression. Because of its particular characteristics, it would be better to consider the crime of aggression within the framework of the Amendments to the Rome Statute of the International Criminal Court on the crime of aggression. In that regard, what was decided at the next Assembly of States Parties to the Rome Statute, in accordance with articles 15 *bis* and 15 *ter* of that instrument, would be crucial.

He agreed with the inclusion of corruption-related crimes in paragraph 1 (ii). He was of the view that there should be a policy of zero tolerance for corruption, which, among other things, affected the poorest members of the population in particular. Noteworthy in that regard were the judgment of the Supreme Court of Chile of 11 July 2007 in the *Fujimori* case and an earlier decision handed down by courts in the United States of America in the 1960s in response to a request for the extradition of former Venezuelan president Marcos Pérez Jiménez. He could accept the scope of the "territorial tort" exception in paragraph 1 (iii), and he agreed with the content of paragraph 2. With regard to

paragraph 3, he agreed with other speakers that consideration could be given to a "without prejudice clause" applicable to all the draft articles. At the same time, he concurred with the view that the obligation to cooperate should be focused on the International Criminal Court and international tribunals established by decision of the United Nations Security Council. Lastly, he believed that, in its future work on the topic, the Commission should give careful consideration to the procedural aspects of immunity in an effort to prevent political manipulation or any abuse. On the basis of those comments, he was in favour of referring draft article 7 to the Drafting Committee.

Mr. Argüello Gómez said that there appeared to be general agreement that there was a category of crimes, classified in general terms as international crimes, which were identified as such because they had consequences that were different from those of other crimes. Draft article 7 addressed one such consequence, namely the fact that the perpetrator of an international crime was not protected by immunity from criminal jurisdiction.

In developing the topic of jurisdictional immunity, the logical sequence was first to identify the crimes that fell into the category of international crimes and thereafter to determine the manner in which jurisdiction over such crimes was to be exercised. Thus, the only matter for the Commission at the current stage was to identify the crimes in respect of which immunity did not apply. In that connection, he had heard no speaker deny that the crimes set out in draft article 7 (1) (i) were international crimes.

In his view, there was no need, in the draft article, also to address the rules of procedure for implementing exceptions or to analyse possible exceptions to the exceptions to immunity. That said, he was aware of the concerns of some Commission members that those exceptions could be used for political ends. That was precisely the balance that the Commission had to strike: to prevent impunity, while ensuring that the non-application of immunity did not become a political weapon. In that regard, there were countries where the power to prosecute was the prerogative of the executive branch and thus no criminal proceedings could be brought without a decision to that effect by the executive, which was of course a political authority. Ultimately, however, if the Commission was going to develop mechanisms to avoid the use of those exceptions for political ends, that matter should perhaps be dealt with in separate draft articles.

Regarding paragraph 1 (i) of draft article 7, consideration should be given to whether the list of international crimes was exhaustive or not. He recalled that, in its judgment in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, the International Court of Justice had found that undue use of force, in other words aggression, was prohibited by customary international law. Accordingly, he saw no reason why aggression or the unlawful use of force should not be included in the list of international crimes.

With regard to paragraph 1 (ii), corruption was a complex issue and perhaps the one that was most likely to be politically manipulated; its inclusion in draft article 7 should therefore be considered very carefully. Furthermore, the text was somewhat ambiguous; it should be made clear the reference was to large-scale corruption that affected the State official's country of origin. The fact that paragraph 1 (iii) referred to State officials who committed a crime in the territory of the forum State did not seem to be consistent with the objective of draft article 7, which was to address crimes committed outside the forum State. The issue should perhaps be dealt with in a new draft article in a different section.

In paragraph 3, only subparagraph (i) was necessary for the purposes of the draft article, unless in subparagraph (ii) the intention was to indicate that States that were not parties to the international courts or tribunals concerned should nevertheless comply with the obligation to cooperate with them. If that was its intention, he would not, in principle, support that provision. In conclusion, he was in favour of referring draft article 7 to the Drafting Committee.

Mr. Ouazzani Chahdi said that the issue addressed in the report was a delicate one that the Commission should approach with caution. Its difficulty lay in the fact that it entailed satisfying a variety of requirements, such as respecting the sovereign equality of States and the stability of international relations, protecting human rights and combating impunity, since the immunity of State officials should not be invoked to escape prosecution.

It was precisely in that regard that the question of exceptions and limitations came into play. In dealing with that topic in her fifth report, the Special Rapporteur had drawn on legal writings and case law and had conducted a study of State practice. She had also taken into account the previous work of the Commission and the views of States in the Sixth Committee. The fifth report must be seen as falling into the category of the progressive development of international law.

In section II of the report, the Special Rapporteur cited, in the context of treaty practice, the 1961 Vienna Convention on Diplomatic Relations, the 1963 Vienna Convention on Consular Relations, the 1975 Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character and the 1969 Convention on Special Missions. In paragraphs 24 and 173 of her report, she concluded that those conventions did not define exceptions applicable to residual immunity *ratione materiae* as regards criminal jurisdiction. The only limitation to immunity provided for in the 1961 Vienna Convention on Diplomatic Relations, which marked the beginning of the codification of certain aspects of diplomatic law, was a declaration of *persona non grata*. A study of those conventions showed that the subject of limitations and exceptions to immunity concerned both the codification and progressive development of international law, since not everything had been codified in Vienna in 1961.

In his view, only the Convention on Special Missions related directly to the report, since its article 21 provided that the Head of State, Head of Government, minister for foreign affairs and other persons of high rank, when they took part in a special mission of the sending State, were to enjoy in the receiving State the facilities, privileges and immunities accorded by international law. Other conventions cited by the Special Rapporteur contained provisions on immunity but not on exceptions and limitations.

As to national laws, the Special Rapporteur acknowledged in paragraph 44 of her report that attention should first be drawn to the fact that national laws regulating jurisdictional immunity were very few in number and, in addition, usually referred basically to immunities of the State. In paragraph 54 of her report, she cited the Repression of Serious Violations of International Humanitarian Law Act that had been adopted in Belgium in 1993 and amended in 1999 and again in 2003 following the *Arrest Warrant* case. However, that law concerned a special case, as did the International Crimes Act of 2003 of the Netherlands, cited in the following paragraph. It seemed difficult to draw conclusions solely on the basis of those two cases.

As far as judicial practice was concerned, the report referred essentially to the case law of foreign criminal courts. However, the Special Rapporteur also referred to international case law, given the potential influence that the latter could have at the national level. In that regard, only the *Arrest Warrant* case was of direct relevance because, as the Special Rapporteur indicated in paragraph 66 of her report, in that case the Court set out a model of immunity from foreign criminal jurisdiction of ministers for foreign affairs which had become the benchmark.

It was difficult to regard the dissenting opinions of the judges cited by the Special Rapporteur in paragraph 68 and subsequent paragraphs of her report as being on a par with the decisions of the International Court of Justice itself. However, he supported the Special Rapporteur's reasoning and conclusions with regard to *Jurisdictional Immunities of the State* in paragraph 74 and subsequent paragraphs. With regard to national judicial practice, the summary she provided in paragraph 121 of her report was also interesting.

As to section III of her report, and in particular paragraph 170 and subsequent paragraphs, which dealt with the concept of limitations and exceptions to immunity, the explanations provided by the Special Rapporteur should be developed further. Any limitations and exceptions to immunity should be clearly identified and defined in order to facilitate their utilization by States; regrettably, that had not been done in the report.

With regard to draft article 7, like other Commission members, he would like to know what criteria the Special Rapporteur had used as a basis for the list of international crimes that she proposed. He agreed with previous speakers that the list should include the crimes of aggression and apartheid. As to corruption, the commentary to that draft article should perhaps explain that it concerned large-scale corruption and provide further details.

He agreed that it was very important to specify in paragraph 2 that paragraph 1 did not apply to persons who enjoyed immunity *ratione personae* during their term of office, since immunities were accorded to such persons precisely in order to ensure the effective performance of their functions, as pointed out by the International Court of Justice in the *Arrest Warrant* case.

In conclusion, he was in favour of referring draft article 7 to the Drafting Committee.

The meeting rose at 12.55 p.m.