

## Chapter VII

### IMMUNITY OF STATE OFFICIALS FROM FOREIGN CRIMINAL JURISDICTION

#### A. Introduction

68. The Commission, at its fifty-ninth session (2007), decided to include the topic “Immunity of State officials from foreign criminal jurisdiction” in its programme of work and appointed Mr. Roman A. Kolodkin as Special Rapporteur.<sup>724</sup> At the same session, the Commission requested the Secretariat to prepare a background study on the topic, which was made available to the Commission at its sixtieth session (2008).<sup>725</sup>

69. The Special Rapporteur submitted three reports. The Commission received and considered the preliminary report at its sixtieth session (2008) and the second and third reports at its sixty-third session (2011).<sup>726</sup> The Commission was unable to consider the topic at its sixty-first (2009) and sixty-second (2010) sessions.<sup>727</sup>

70. The Commission, at its sixty-fourth session (2012), appointed Ms. Concepción Escobar Hernández as Special Rapporteur to replace Mr. Kolodkin, who was no longer a member of the Commission.<sup>728</sup> The Commission received and considered the preliminary report of the Special Rapporteur at the same session (2012), her second report during the sixty-fifth session (2013), her third report during the sixty-sixth session (2014), her fourth report during the sixty-seventh session (2015) and her fifth report, in a partial debate, during the sixty-eighth session (2016).<sup>729</sup> On the basis of the draft articles proposed by the Special Rapporteur in her second, third and fourth reports, the Commission has thus far provisionally adopted six draft

articles and commentaries thereto. Draft article 2 on the use of terms is still being developed.<sup>730</sup>

#### B. Consideration of the topic at the present session

71. The Commission had before it the fifth report of the Special Rapporteur, analysing the question of limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction (A/CN.4/701), which it had begun to debate at its sixty-eighth session. The report addressed, in particular, the prior consideration by the Commission of the question of limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction, offered an analysis of relevant practice, addressed some methodological and conceptual questions related to limitations and exceptions, and considered instances in which the immunity of State officials from foreign criminal jurisdiction would not apply. The Special Rapporteur drew the conclusion that it had not been possible to determine, on the basis of practice, the existence of a customary rule that allowed for the application of limitations or exceptions in respect of immunity *ratione personae*, or to identify a trend in favour of such a rule. On the other hand, she came to the conclusion that limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction did apply to State officials in the context of immunity *ratione materiae*. As a consequence of the analysis, the report contained a proposal for draft article 7 on crimes in respect of which immunity did not apply.<sup>731</sup>

<sup>724</sup> At its 2940th meeting, on 20 July 2007 (see *Yearbook ... 2007*, vol. II (Part Two), para. 376). The General Assembly, in paragraph 7 of its resolution 62/66 of 6 December 2007, took note of the decision of the Commission to include the topic in its programme of work. The topic had been included in the long-term programme of work of the Commission during its fifty-eighth session (2006), on the basis of the proposal contained in annex I of the report of the Commission (*Yearbook ... 2006*, vol. II (Part Two), para. 257 and pp. 191–200).

<sup>725</sup> *Yearbook ... 2007*, vol. II (Part Two), para. 386. For the memorandum prepared by the Secretariat on the topic, see document A/CN.4/596 and Corr.1 (available from the Commission’s website, documents of the sixtieth session).

<sup>726</sup> *Yearbook ... 2008*, vol. II (Part One), document A/CN.4/601 (preliminary report); *Yearbook ... 2010*, vol. II (Part One), document A/CN.4/631 (second report); and *Yearbook ... 2011*, vol. II (Part One), document A/CN.4/646 (third report).

<sup>727</sup> See *Yearbook ... 2009*, vol. II (Part Two), para. 207; and *Yearbook ... 2010*, vol. II (Part Two), para. 343.

<sup>728</sup> *Yearbook ... 2012*, vol. II (Part Two), para. 266.

<sup>729</sup> *Ibid.*, vol. II (Part One), document A/CN.4/654 (preliminary report); *Yearbook ... 2013*, vol. II (Part One), document A/CN.4/661 (second report); *Yearbook ... 2014*, vol. II (Part One), document A/CN.4/673 (third report); *Yearbook ... 2015*, vol. II (Part One), document A/CN.4/686 (fourth report); and *Yearbook ... 2016*, vol. II (Part One), document A/CN.4/701 (fifth report).

<sup>730</sup> At its 3174th meeting, on 7 June 2013, the Commission received the report of the Drafting Committee and provisionally adopted draft articles 1, 3 and 4 and, at its 3193rd to 3196th meetings, on 6 and 7 August 2013, it adopted the commentaries thereto (see *Yearbook ... 2013*, vol. II (Part Two), paras. 48–49). At its 3231st meeting, on 25 July 2014, the Commission received the report of the Drafting Committee and provisionally adopted draft articles 2 (e) and 5 and, at its 3240th to 3242nd meetings, on 6 and 7 August 2014, it adopted the commentaries thereto (see *Yearbook ... 2014*, vol. II (Part Two), paras. 131–132). At its 3329th meeting, on 27 July 2016, the Commission provisionally adopted draft articles 2 (f) and 6, provisionally adopted by the Drafting Committee and taken note of by the Commission at its sixty-seventh session, and at its 3345th and 3346th meetings, on 11 August 2016, the Commission adopted the commentaries thereto (see *Yearbook ... 2016*, vol. II (Part Two), paras. 194–195 and 249–250; see also *Yearbook ... 2015*, vol. II (Part Two), para. 176).

<sup>731</sup> The text of draft article 7, as proposed by the Special Rapporteur in her fifth report, reads as follows:

“Crimes in respect of which immunity does not apply

“1. Immunity shall not apply in relation to the following crimes:

“(a) genocide, crimes against humanity, war crimes, torture and enforced disappearances;

“(b) crimes of corruption;

“(c) crimes that cause harm to persons, including death and serious injury, or to property, when such crimes are committed in the

(Continued on next page.)

72. At its sixty-eighth session, given that the report had not been available in all languages, the Commission underlined that the debate on the report would continue in order to be finalized at the present session. Accordingly, the Commission continued its debate on the fifth report at its 3360th to 3365th meetings, on 18, 19, 23, 24, 26 and 30 May 2017, respectively.

73. Following its debate on the report, the Commission, at its 3365th meeting, on 30 May 2017, decided to refer draft article 7, as contained in the Special Rapporteur's fifth report, to the Drafting Committee, taking into account the debate in the Commission.

74. At its 3378th meeting, on 20 July 2017, the Commission considered the report of the Drafting Committee and provisionally adopted draft article 7 (see section C.1 below). Provisional adoption was by recorded vote, with 21 votes in favour, 8 votes against and 1 abstention. The members present voted as follows:

Mr. Carlos J. Argüello Gomez	Yes
Mr. Yacouba Cissé	Yes
Ms. Concepción Escobar Hernández	Yes
Ms. Patrícia Galvão Teles	Yes
Mr. Juan Manuel Gómez Robledo	Yes
Mr. Hussein A. Hassouna	Yes
Mr. Mahmoud D. Hmoud	Yes
Mr. Huikang Huang	No
Mr. Charles Chernor Jalloh	Yes
Mr. Roman A. Kolodkin	No
Mr. Ahmed Laraba	No
Ms. Marja Lehto	Yes
Mr. Shinya Murase	Yes
Mr. Sean D. Murphy	No
Mr. Hong Thao Nguyen	Yes
Mr. Georg Nolte	No
Ms. Nilüfer Oral	Yes
Mr. Hassan Ouazzani Chahdi	Yes
Mr. Ki Gab Park	Yes

Mr. Chris Maina Peter	Yes
Mr. Ernest Petrič	No
Mr. Aniruddha Rajput	No
Mr. August Reinisch	Yes
Mr. Juan José Ruda Santolaria	Yes
Mr. Gilberto Vergne Saboia	Yes
Mr. Pavel Šturma	Abstain
Mr. Dire D. Tladi	Yes
Mr. Eduardo Valencia-Ospina	Yes
Mr. Marcelo Vázquez-Bermúdez	Yes
Sir Michael Wood	No

75. Explanations of vote before the voting were made by Mr. Roman A. Kolodkin, Mr. Sean D. Murphy, Sir Michael Wood, Mr. Huikang Huang, Mr. Aniruddha Rajput, Mr. Ernest Petrič, Mr. Juan Manuel Gómez Robledo, Mr. Juan José Ruda Santolaria and Mr. Georg Nolte. Explanations of vote after the voting were made by Mr. Dire D. Tladi, Mr. Pavel Šturma, Mr. Mahmoud D. Hmoud, Mr. Charles Chernor Jalloh, Mr. Shinya Murase, Mr. Yacouba Cissé, Mr. Hussein A. Hassouna, Mr. Hassan Ouazzani Chahdi, Mr. Ki Gab Park, Ms. Concepción Escobar Hernández and Mr. Hong Thao Nguyen. Those explanations of vote were recorded in the summary record of the 3378th meeting.

76. At its 3387th to 3389th meetings, on 3 and 4 August 2017, the Commission adopted the commentary to the draft article provisionally adopted at the present session (see section C.2 below).

77. Informal consultations on immunity of State officials from foreign criminal jurisdiction, conducted by the Special Rapporteur, were held on 18 July 2017. The informal consultations were open-ended and their aim was to exchange views and share ideas on the procedural aspects of immunity of State officials from foreign criminal jurisdiction, which will be the subject under consideration in the sixth report of the Special Rapporteur, to be submitted in 2018. The consultations were based on an informal concept paper on procedural provisions and safeguards prepared by the Special Rapporteur. At the 3378th meeting, on 20 July 2017, the Special Rapporteur reported to the Commission on the development of the informal consultations.

#### 1. INTRODUCTION BY THE SPECIAL RAPPOREUR OF THE FIFTH REPORT

(Footnote 731 continued.)

territory of the forum State and the State official is present in said territory at the time that such crimes are committed.

"2. Paragraph 1 shall not apply to persons who enjoy immunity *ratione personae* during their term of office.

"3. Paragraphs 1 and 2 are without prejudice to:

"(a) any provision of a treaty that is binding on the forum State and the State of the official, under which immunity would not be applicable;

"(b) the obligation to cooperate with an international tribunal which, in each case, requires compliance by the forum State."

78. The Special Rapporteur recalled that the fifth report, on limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction, dealt with an issue that had been the subject of recurrent debate over the years in the Commission and in the Sixth Committee, eliciting diverse, and often opposing, views. There was a general desire to proceed cautiously and prudently, given the sensitivity of the subject and its importance for States.

The report itself had been introduced at the sixty-eighth session of the Commission<sup>732</sup> and had been the subject of a partial debate.<sup>733</sup> The Special Rapporteur noted that, due to the change in composition of the Commission, and in the light of the comments and observations on the report at the sixty-eighth session of the Commission and in the Sixth Committee at the seventy-first session of the General Assembly, she considered it appropriate at the current session to make additional introductory remarks on the report. Accordingly, the Special Rapporteur gave a brief overview of the previous debates on the fifth report in the Commission and the Sixth Committee.

79. Commenting on the fifth report itself, she noted that it followed a methodology similar to that of previous reports, examining State practice, international jurisprudence and the prior work of the Commission and analysing domestic legislation. The report had also taken into account the information received from Governments in response to questions posed by the Commission and oral statements by States in the Sixth Committee. The Special Rapporteur underlined that the fifth report, like the previous reports, had to be read and understood together with the prior reports on the topic.

80. Building on her presentation at the previous session, which she considered to be an integral part of the prior reports considered by the Commission, the Special Rapporteur highlighted a number of ideas central to the report. First, she noted that the phrase “limitations and exceptions” echoed the different arguments put forward in practice for the non-application of immunity. The Special Rapporteur stressed that the distinction between limitations and exceptions, despite its theoretical and normative value for the systemic interpretation of the immunity regime, had no practical significance, as “limitations” or “exceptions” led to the same consequence, namely the non-application of the legal regime of the immunity of State officials from foreign criminal jurisdiction in a particular case.

81. Second, the report addressed limitations and exceptions within the specific framework of immunity and within the context of the international legal system as a whole. In that regard, the Special Rapporteur underscored: (a) the interrelationship between immunity and jurisdiction, even though the two were different concepts; (b) the procedural nature of immunity; (c) the distinction between immunity of State officials and State immunity; and (d) the distinction between immunity from foreign criminal jurisdiction and immunity before international criminal courts and tribunals. The report further examined immunity from the point of view of international law as a normative system, in which immunity sought to guarantee respect for the sovereign equality of States but had to be balanced against other important values of the international legal system.

82. Third, the report focused on the practice of States, which constituted the cornerstone of the Commission’s work. The report examined to what extent practice revealed the existence of customary norms that could be

codified, following the basic methodology in the Commission’s work on the identification of customary international law. It also analysed whether there existed a trend towards progressive development of norms relating to immunity. Going beyond international jurisprudence and treaties, the report studied domestic legislation and decisions of domestic courts. The report also analysed the issues from a systemic perspective, thereby considering the regime of immunity in relation to other aspects of the contemporary international legal system, understood as a whole.

83. On those bases, the report concluded that it had not been possible to determine the existence of a customary rule that allowed for the application of limitations or exceptions in respect of immunity *ratione personae*, or to identify a trend in favour of such a rule. On the other hand, the report concluded that limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction were extant in the context of immunity *ratione materiae*. Although varied, the practice showed a clear trend towards considering the commission of international crimes as a bar to the application of immunity *ratione materiae* of State officials from foreign criminal jurisdiction, for the reason that such crimes did not constitute official acts, that the crimes concerned were grave or that they undermined the values and principles recognized by the international community as a whole.

84. Finally, the Special Rapporteur noted that the Commission should approach the topic of immunity from foreign criminal jurisdiction, and in particular the question of limitations and exceptions, from the perspectives of both codification and the progressive development of international law. The challenge for the Commission was to decide whether to support a developing trend in the field of immunity, or whether to halt such development.

85. The Special Rapporteur also made specific comments on the proposed draft article 7. The three paragraphs of the draft article sought to address, in an integral fashion, all the elements that defined the regime of limitations and exceptions to immunity.

86. Paragraph 1 identified crimes to which immunity would not apply. Following the model of the United Nations Convention on Jurisdictional Immunities of States and Their Property, the expression “does not apply” was used to capture both limitations and exceptions. The paragraph identified situations in which immunity did not apply by reference to the crimes over which jurisdiction was sought, namely in case of (a) international crimes; (b) crimes of corruption; and (c) the so-called “territorial tort” exception.

87. Paragraph 2 defined the scope of limitations and exceptions. It specified that the limitations and exceptions in paragraph 1 did not apply to the persons who enjoyed immunity *ratione personae*, namely Heads of State, Heads of Government and Ministers for Foreign Affairs. It emphasized, however, that the enjoyment of immunity *ratione personae* was time-bound, which meant that the limitations and exceptions to immunity would apply to the troika once they had left office.

<sup>732</sup> Yearbook ... 2016, vol. II (Part Two), paras. 196–208.

<sup>733</sup> Ibid., paras. 209–246.

88. Paragraph 3 contained a without-prejudice provision in respect of situations covered by special regimes. The first subparagraph related to instances in which immunity of officials was not applicable due to the existence of treaty relations between the States concerned. The second subparagraph covered cases in which immunity might be affected by a general obligation to cooperate with an international criminal court. Both of those situations stemmed from examples in practice.

89. With regard to the future work of the Commission on the topic, the Special Rapporteur indicated her intention to conduct informal consultations on various procedural matters relating to the topic during the present session of the Commission. It was hoped that such consultations would further inform the content of her sixth report, to be submitted during the seventieth session of the Commission.

## 2. SUMMARY OF THE DEBATE

90. The debate at the present session was a continuation of the discussion on the fifth report, which had commenced at the sixty-eighth session of the Commission. The summary below should be read in combination with the summary of the topic in the report of the Commission on the work of its sixty-eighth session.

### (a) *General comments*

91. Members commended the Special Rapporteur for her rich and well-documented fifth report, which offered a thoughtful analysis of State practice as reflected in treaties and domestic legislation, as well as in international and domestic case law. Members also recalled, with appreciation, the work by the former Special Rapporteur, as well as the study by the Secretariat. Members acknowledged the complex and contentious nature of the topic, in particular the question of limitations and exceptions. The comments made focused generally on methodological and conceptual issues raised in the fifth report, including on the methodology and treatment of State practice, the mandate of the Commission in the progressive development of international law and its codification, the regime of immunity in the international legal system as a whole, and the interrelationship between the question of limitations and exceptions and procedural aspects.

### *Methodology and treatment of State practice*

92. Several members expressed their appreciation for the detailed and comprehensive analysis of State practice contained in the fifth report. Some members noted their support for the methodology of the Special Rapporteur and maintained that the report provided a firm foundation for the proposed draft article.

93. Other members stated that, while the discussion of practice was extensive, it remained unclear how it related to the specific limitations and exceptions contained in draft article 7. Some members also questioned whether the report, while not finding coherent practice against the non-applicability of immunity, contained sufficient evidence to support the limitations and exceptions to immunity that it proposed. It was noted that many of the

examples cited in the report related to State immunity or immunity in civil proceedings, rather than criminal prosecutions. In the view of some members, the report selectively discussed cases that supported the establishment of limitations and exceptions to immunities, while ignoring evidence indicating the opposite. It was noted that the examples in the report were taken from different contexts and time periods and did not demonstrate a linear development towards restrictions on immunity.

94. Members disagreed on the extent and the relevance of treaty practice with regard to limitations and exceptions to immunity. Some members asserted that treaty practice did not establish a trend towards restricting the immunity of foreign State officials. In their view, few treaties provided for limitations and exceptions, and any practice in regard to those treaties could not be counted towards the existence of a customary rule. It was pointed out that many treaties, including treaties relating to diplomatic and consular relations, as well as those relating to international crimes, did not provide for limitations or exceptions. Moreover, a number of members noted that treaties providing for individual responsibility in the case of international crimes, even where they denied immunity before international courts, did not affect the immunity of foreign officials before domestic courts.

95. Other members asserted that treaty practice had marked a deliberate move towards limitations and exceptions to the immunity of State officials. Some members placed that development within the context of the work of the Commission on individual criminal responsibility, noting that relevant instruments, such as the Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal,<sup>734</sup> as well as the work on the draft Code of Crimes against the Peace and Security of Mankind and international criminal jurisdiction, rejected immunity for international crimes. Such members maintained that the present draft articles should follow the example of the Rome Statute of the International Criminal Court (Rome Statute), which in article 27 declares the irrelevance of official capacity. Reference was also made to the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol), as adopted by the African Union. Furthermore, some members noted that the proliferation of treaties containing a “prosecute or extradite” provision had a bearing on the scope of immunity of State officials. They suggested that the obligation to prosecute international crimes implied a limitation on the scope of immunity of State officials.

96. With regard to domestic legislation, some members noted that there were few examples of domestic laws recognizing limitations and exceptions to immunity of foreign officials, even in cases of international crimes. A few members noted that domestic legislation implementing the Rome Statute typically only dealt with institutional issues or with questions of extradition, rather than immunity. It was highlighted that the few countries whose legislation had contained broader exception clauses had recently revised their laws on immunity of State officials to restrict the scope of the limitations and exceptions.

<sup>734</sup> *Yearbook ... 1950*, vol. II, document A/1316, p. 374.

97. Other members maintained that domestic laws reflected the trend indicated by the Special Rapporteur. The view was expressed that even if domestic legislation often focused on State immunity, at least it demonstrated a trend towards the restriction of immunity. Some members noted that the domestic implementation of the Rome Statute had a direct effect on the regime of immunity in domestic courts.

98. Several members criticized the small number of domestic cases examined in the fifth report. It was noted that many of the cases had been overturned or did not relate to immunity of State officials from foreign criminal jurisdiction, but to State immunity or immunity in civil proceedings. Some members asserted that the report should have examined the reasons why immunity had been declined or upheld in particular cases; should have analysed cases in which prosecutors had decided not to prosecute due to the immunity of the official involved; and should have considered cases in which States had unsuccessfully invoked immunity.

99. A number of members maintained that the small sample of domestic cases analysed in the report did not affect its substantive analysis. The Special Rapporteur was encouraged to further consider regional practice, including, for example, case law from Asia and the jurisprudence of the Inter-American Court of Human Rights.

100. Several members stressed that the trend in international jurisprudence ran counter to the conclusions drawn in the fifth report. It was emphasized that international and regional courts had repeatedly upheld immunity, even in cases involving international crimes or violations of peremptory norms of international law (*jus cogens*). International jurisprudence had underlined that immunity, which was procedural in nature, was not affected by the gravity of an act. A number of members also emphasized the difference between international and domestic courts. They maintained that the lack of immunity before international criminal tribunals did not entail the non-application of immunity in domestic courts. It was pointed out that international tribunals had only recognized the denial of immunity by domestic courts in cases that related to cooperation with such tribunals.

101. Other members asserted that the analysis of international jurisprudence by the Special Rapporteur supported her approach to limitations and exceptions to immunity. Several members noted that many of the international decisions upholding immunity did not relate to individual criminal responsibility, but dealt with immunity in civil proceedings, State immunity, officials enjoying immunity *ratione personae*, or questions of State responsibility. Some members also pointed out that international courts and tribunals had made the application of immunity conditional on the availability of alternative redress; if no such redress was available, immunity could not be upheld. Reference was made to individual and dissenting opinions that emphasized that the requirements of sovereignty should not override the need for accountability, but that a balance should be struck.

### *Progressive development of international law and its codification*

102. In the view of some members, the report could have indicated more clearly whether it sought to determine the scope of existing international law (*lex lata*), whether it followed an emerging trend towards desirable norms (*lex ferenda*) or whether it aimed to set out “new law”. It was noted that the Commission’s dual mandate of codification and progressive development required it to closely follow established practice or to openly assert the progressive nature of its work, respectively. Several members urged the Commission to focus on existing law, rather than to engage in progressive development. It was noted that the Commission was not drafting a new treaty, the rules of which would ultimately be subject to the approval of States, but that it aimed to produce a set of guidelines on current practice, for use by non-specialists involved in domestic prosecutions.

103. In that regard, a number of members criticized the fifth report for the manner in which it asserted the existence of customary international law with regard to limitations and exceptions, without establishing a solid foundation for that in practice. In the view of several members, the report did not sufficiently highlight the serious disagreements within the Commission and within the Sixth Committee over the substantive and procedural aspects of that issue. It was suggested that, due to such differences, the Commission ought to proceed cautiously.

104. Other members stated that the Commission’s work on the question of limitations and exceptions should reflect both codification and progressive development. It was asserted that the fifth report accurately captured the current state of international law on immunity of foreign officials. Such members noted that the lingering uncertainty over the scope of immunity ought to encourage the Commission to provide guidelines on the issue, irrespective of the views of States. The Commission was urged not to forget its commitment to the progressive development of international law, as it had displayed in various earlier instruments. For some of those members, the possibility of developing draft articles to form the basis of a treaty on the subject could not be discounted at this stage.

105. Some members questioned whether State practice supported an alleged trend towards limitations and exceptions to immunity of State officials as proposed. Those members maintained that no such trend existed or, if a trend could be discerned, that it pointed in the opposite direction. It was recalled that several States had recently restricted the scope of limitations and exceptions to immunity in their domestic legislation, and international and regional courts had typically upheld the immunity of State officials from foreign criminal jurisdiction in recent cases.

106. Other members asserted that, even if not all aspects of the report found a firm basis in customary international law, a trend towards limitations and exceptions to immunity *ratione materiae* did exist. A number of members claimed that developments in the field of State immunity, international criminal law and international human rights

law supported such a trend. Moreover, it was asserted that courts and tribunals increasingly refused to apply immunity, either because the alleged acts violated peremptory norms of international law (*jus cogens*) or because they considered that such acts could not be performed in an official capacity. Further, certain States had expressed their support for restricting the scope of immunity of foreign officials. Some members maintained that the Commission ought to bolster such a trend, in order to fight impunity and lift impediments to the prosecution of international crimes.

#### *International law as a system*

107. It was emphasized by some members that the draft articles ought to strike a balance between, on the one hand, the sovereign equality of States and the need for stability in international relations and, on the other hand, the interest of the international community as a whole in preventing and punishing the most serious crimes under international law.

108. Other members expressed concern that the limitations and exceptions to immunity proposed by the Special Rapporteur could foster abuse, for example by enabling politically motivated trials of State officials in foreign jurisdictions. This could weaken stability in international relations and run counter to the cause of fighting impunity and promoting human rights. It was emphasized that, as a fundamental principle of international law, the courts of one State should not sit in judgment over the acts of another State.

109. Several members noted that the system of immunity could not and should not stand in the way of the protection of the fundamental interests of the international community. It was emphasized that the protection of human rights and the fight against impunity were not peripheral to the sovereignty of States, but had to be reconciled with it. In the view of such members, perpetrators of international crimes ought not to be allowed to hide behind the cloak of sovereignty to shield themselves from prosecution, as their acts caused severe instability in the countries and regions in which they were perpetrated, eventually affecting the international community as a whole. The point was made that the rules on immunity should not be considered in isolation, but in the light of other norms of the international legal system.

#### *Procedural aspects of immunity*

110. Some members noted that the question of limitations and exceptions was closely related to that of procedural aspects of immunity, including procedural safeguards and guarantees. Several members expressed regret that the Special Rapporteur had not submitted a sixth report on that issue at the present session. A number of members suggested that the Commission ought to postpone its work on limitations and exceptions until after the Special Rapporteur had expounded her views on procedural aspects in her sixth report, so that the two issues could be considered in conjunction.

111. It was noted that procedural safeguards could help to strike the necessary balance between respect for

the sovereign equality of States and the need to fight impunity. Several members referred to the work of the previous Special Rapporteur on the topic, who had dealt with various procedural issues relating to timing, invocation, burden of proof and the waiver of immunity. With regard to waiver, some members proposed the establishment of a procedure whereby immunity had to be explicitly invoked by the State of the official; or the establishment of a treaty-based duty to “waive or prosecute”, according to which States would have to choose whether to waive immunity in a foreign court or to prosecute the case themselves.

112. Emphasizing the procedural nature of immunity, a number of members noted that, when successfully invoked through diplomatic channels or in courts, immunity suspended the jurisdiction of foreign courts, but did not affect the criminal responsibility of the alleged offenders. Given its preliminary nature, courts had to consider the question of immunity before proceeding to the merits. It was stated that, for this reason, the gravity of an alleged act could have no bearing on the application of immunity or on its sovereign or official nature. Such members maintained that this did not leave an accountability gap, since, for example, a State, by invoking the immunity of its official and recognizing his or her acts as its own, would trigger its own responsibility and could be sued itself at the national or international level.

113. Other members maintained that, while a discussion of procedural aspects was very important for the topic as a whole, the Commission first had to identify the substantive features of limitations and exceptions to immunity. It was pointed out that procedural aspects were relevant to the draft articles as a whole and could only be considered after all substantive elements had been discussed. Several members wished not to pre-empt the Commission’s debate on the topic of the sixth report and urged the Commission not to delay its consideration of the limitations and exceptions to immunity.

114. A number of members asserted that there was a strong link between immunity and impunity for international crimes. It was pointed out that, if no alternative forum or jurisdiction for prosecution of international crimes was available, the procedural barrier of immunity in domestic courts would entail substantive effects. Some members emphasized that substantive justice should not be the victim of procedural justice, particularly in the case of violations of peremptory norms of international law (*jus cogens*). Such members cautioned that an exclusively procedural approach to immunity would have a negative impact on the development of individual responsibility in international law.

115. It was noted that the International Criminal Court, the most obvious forum for the prosecution of State officials, did not have the capacity or the resources to prosecute all alleged perpetrators of international crimes. As the Court operated on the basis of complementarity, those members maintained that domestic courts should remain the principal forums for combating impunity. It was also noted that the responsibility of a State for an act did not negate the individual responsibility of an official and should not stand in the way of individual prosecutions.

(b) *Specific comments on draft article 7*

116. Some members questioned why the proposed title of draft article 7 referred to situations “in respect of which immunity does not apply”, when the report discussed “limitations and exceptions” to immunity. It was suggested that the uncertainty over the meaning and scope of the phrase “limitations and exceptions” demonstrated that draft article 7 did not reflect settled international law.

117. A number of members considered that the distinction between limitations and exceptions was useful and should be maintained. It helped to distinguish situations in which immunity was not at issue, because the relevant conduct could not be considered as an official act or as performed in an official capacity, from cases in which immunity was excluded on the basis of exceptional circumstances.

118. Other members supported the wording proposed by the Special Rapporteur. It was pointed out that the work on the topic so far had proceeded on the assumption that immunity applied and that draft article 7 should thus deal with its “non-application”. Some members noted that a distinction might provide theoretical clarity, but that it had no basis in the practice of States.

119. Some members reiterated their general reservations regarding draft article 7, as proposed. It was suggested that one way forward would be to reformulate the draft article on the basis of an obligation to waive immunity or prosecute core international crimes, which would entail a duty of a State either to waive the immunity of its officials before the courts of a foreign State, or to undertake to fulfil its obligation to prosecute its own officials.

120. A number of members questioned whether the list of crimes included in paragraph 1 was exhaustive or merely illustrative. A suggestion was made to include a general reference to the most serious crimes under international law, rather than including a list of crimes. Some members noted that the paragraph should leave open the possibility of the emergence of new crimes to which immunity would not apply. Other members questioned the basis in customary international law for the crimes listed by the Special Rapporteur, as well as the grounds for including some crimes and not others conceivably within the same genre. It was also suggested that the draft article, or the commentary thereto, should provide appropriate definitions of the crimes listed.

121. With regard to subparagraph (a), several members expressed their support for the inclusion of the core crimes of genocide, crimes against humanity and war crimes. Some members noted that torture and enforced disappearance, both listed by the Special Rapporteur, fell within the scope of crimes against humanity. Suggestions were made to add the crimes of slavery, apartheid, terrorism and crimes against global cultural heritage.

122. Members further debated whether the crime of aggression should be included in the draft article. Those arguing in favour of inclusion pointed to the prominence of the crime of aggression under the Nürnberg Principles and its pending activation in the Rome Statute. It was also

noted that the implementing legislation of some States provided for domestic prosecution of the crime. Other members agreed with the Special Rapporteur that the crime of aggression should be excluded, for the reasons outlined in the fifth report. It was maintained that prosecution by another State of a State official for the crime of aggression would affect the sovereign equality of States, an issue that would not arise in the case of prosecution before an international court.

123. Commenting on subparagraph (b), a number of members questioned whether State practice supported the inclusion of corruption as a limitation or exception to immunity. It was also noted that the text proposed by the Special Rapporteur left the definition and scope of corruption rather vague. Some members maintained that corruption could not be performed in an official capacity, as it was always done with an eye to private gain. In that regard, it was noted that immunity for corruption had already been excluded on the basis of draft article 6. It was suggested that the subparagraph could be removed and that a reference to corruption could be included in the commentaries.

124. Other members supported the inclusion of the crime of corruption in the text of the draft article, noting that the international community had to cooperate to prevent and punish the crime. It was pointed out that domestic courts had often rejected claims of immunity in corruption cases, that many States legislated to prevent and punish corruption, and that corruption had been the subject of various international and regional conventions.

125. Some members emphasized that corruption seriously affected the functioning of public institutions and the rule of law and could significantly impact the socio-economic situation of domestic populations. It was suggested that the draft article should focus on “grand” or large-scale corruption. A suggestion was made that the subparagraph could indicate what should happen to the proceeds of the crime of corruption when officials were prosecuted in foreign jurisdictions. It was pointed out that that was a matter of the political will of the States involved, but that ordinarily the funds would have to be returned to the country from which they had been taken.

126. Some members noted that the territorial tort exception, on which subparagraph (c) was modelled, was well established in civil proceedings but not in the criminal sphere. It was pointed out that the authorities cited by the Special Rapporteur mostly referred to civil cases and that the report insufficiently examined its applicability in criminal law. Several members mentioned that the concept remained controversial in international law and that the report left a number of issues open, for example its application to military activities and other public acts. In that regard, it was suggested that the subparagraph be formulated more narrowly. Several members referred to the definition proposed by the previous Special Rapporteur on the topic. It was also suggested that the scope of the subparagraph be restricted to specific acts contrary to State sovereignty, such as espionage, political assassination and sabotage.

127. Members generally agreed with the substance of paragraph 2, noting that it reflected existing practice. Members recommended that the commentaries should

specify that only the troika of Heads of State, Heads of Government and Ministers for Foreign Affairs could enjoy immunity *ratione personae*. It was emphasized that, in line with international jurisprudence, immunity *ratione personae* was without prejudice to the criminal responsibility of those enjoying it. A suggestion was made to indicate that immunity *ratione personae* did not apply before international courts.

128. Some members suggested that paragraph 2 was superfluous and could be deleted. They proposed to specify in paragraph 1 that the limitations and exceptions listed in the draft article only applied to immunity *ratione materiae*. Other members preferred to retain the paragraph to highlight the difference between immunity *ratione personae* and immunity *ratione materiae*. A suggestion was made to align the temporal scope of the application of immunity *ratione personae* and immunity *ratione materiae* with draft articles 4 and 6. Moreover, the view was expressed that immunity *ratione personae* should be restricted, as it could lead to impunity in cases of lifetime rulers.

129. Several members accepted the inclusion of the without-prejudice clause in paragraph 3. It was noted that, contrary to subparagraph (a), the clause should also apply to treaties under which immunity was applicable. With regard to subparagraph (b), some members considered the reference to an “international tribunal” too vague and suggested that the draft article specify whether that referred to international criminal courts and tribunals, or to any international tribunal. The view was expressed that the paragraph remained prejudicial and should be deleted, as it could potentially affect matters subject to ongoing judicial proceedings.

### (c) Future work

130. Many members expressed their anticipation of the sixth report, which would deal with procedural aspects of immunity. It was suggested that the Special Rapporteur should discuss the relationship between immunity and statutes of limitation for crimes to which no limitations or exceptions applied. Some members noted that the Commission should revisit some of the texts provisionally adopted, for example the definition of “immunity from jurisdiction”, in order to determine whether it included questions of inviolability.

## 3. CONCLUDING REMARKS OF THE SPECIAL RAPPORTEUR

131. In her summary of the debate, the Special Rapporteur expressed her satisfaction with the wide-ranging and interesting discussion that the fifth report had evoked. Responding to some of the criticism on the structure and content of the report, the Special Rapporteur emphasized that all sections of the report were equally relevant to its conclusions. She also noted that it was the substance of the arguments advanced that mattered, not whether she had followed the approach of the previous Special Rapporteur.

132. With regard to the analysis of practice in the fifth report, the Special Rapporteur recalled the various views expressed. She emphasized that the jurisprudence of

international courts did not unequivocally exclude the application of limitations and exceptions to immunity *ratione materiae*, as those decisions primarily dealt with State immunity or immunity *ratione personae*. She also stressed the importance of national jurisprudence, which, although it might have been limited and not sufficiently homogeneous, was at the heart of the project. She thanked members for suggesting the addition of international, regional and domestic case law.

133. The Special Rapporteur stated that the report’s analysis of domestic legislation helped differentiate immunity of State officials from State immunity; highlighted the relative nature of State immunity; and illustrated the use of the “territorial tort exception”. She also noted that domestic legislation implementing the Rome Statute could shine a light on the question of immunity of State officials, particularly when it went beyond the requirements of the Rome Statute. The Special Rapporteur noted that other forms of State practice, such as decisions by prosecutors or diplomatic *démarches*, were typically not available in the public domain and could thus not be considered as relevant practice.

134. The Special Rapporteur acknowledged the disagreement between members over a possible customary rule or emerging trend towards limitations and exceptions to immunity of State officials. She maintained that the Commission ought to focus on identifying the relevant rules *lex lata* and *lex ferenda* relating to immunity. She did not support the view that the Commission was engaged in crafting “new law” on the issue, as suggested by some members. In that regard, the Special Rapporteur noted that the draft articles, like other projects of the Commission, contained elements of both codification and progressive development and that they should be assessed in that light.

135. The Special Rapporteur reiterated her position that the distinction between limitations and exceptions, as set out in the report, helped to illuminate the concept of immunity of State officials and its role within the international legal system. In her view, that approach was not incompatible with the pragmatic formulation of draft article 7, which focused on the situation in which immunity “does not apply”; rather, that formulation avoided a number of controversies relating to the distinction between limitations and exceptions and found its basis in practice.

136. The Special Rapporteur agreed with members that a discussion of the procedural aspects of immunity was of vital importance to the project. She noted, however, that procedural issues went beyond questions of limitations and exceptions, affected the draft articles as a whole and should be dealt with after the Commission had considered the issue of limitations and exceptions to immunity. She pointed out that the previous Special Rapporteur had taken a similar approach and reiterated her offer to hold informal consultations on that matter, in preparation for the submission of the sixth report.

137. Turning to specific comments on the draft article proposed in the fifth report, the Special Rapporteur noted that many members were in favour of retaining paragraph 1, although various suggestions for revision of its



content had been made. With regard to subparagraph (a), the Special Rapporteur expressed her readiness to include the crime of apartheid, but continued to have reservations regarding the inclusion of other transnational crimes, as the latter were treaty-based and did not derive from custom. Moreover, the Special Rapporteur maintained her hesitancy regarding the inclusion of the crime of aggression, as it risked increased politicization of the entire project. For a similar reason, she preferred to maintain a list of specific crimes, rather than including an open, general reference to international crimes. Definitions of the specific crimes could be provided in the commentaries, possibly by reference to existing treaties.

138. The Special Rapporteur noted that the inclusion of corruption in subparagraph (b) remained controversial. She acknowledged that the provision should principally apply to matters of “grand corruption”, a term that was to be further specified in the commentaries. She emphasized that, since corruption was always committed for private gain, it could not be considered as an act performed in an official capacity, to which immunity *ratione materiae* would apply. With regard to the “territorial tort exception”, as contained in subparagraph (c), the Special Rapporteur maintained that its application was not restricted to the sphere of civil jurisdiction. In its current form, it aimed at addressing major offences, such as sabotage and espionage.

139. The Special Rapporteur also noted the general agreement on paragraph 2, which highlighted that limitations and exceptions did not apply in case of immunity *ratione personae*, a well-established position in practice and doctrine. In her view, the explicit reference to immunity *ratione personae* provided a balance between the principle of sovereign equality and the need to fight impunity, which might be undone were the paragraph deleted. She also expressed her preference for retaining the without-prejudice clauses in paragraph 3, which would facilitate the resolution of any normative conflict between the draft articles and existing international instruments, in particular those relating to international criminal courts and tribunals.

### C. Text of the draft articles on immunity of State officials from foreign criminal jurisdiction provisionally adopted so far by the Commission

#### 1. TEXT OF THE DRAFT ARTICLES

140. The text of the draft articles provisionally adopted so far by the Commission is reproduced below.

#### IMMUNITY OF STATE OFFICIALS FROM FOREIGN CRIMINAL JURISDICTION

##### PART ONE

##### INTRODUCTION

###### Article 1. Scope of the present draft articles

1. The present draft articles apply to the immunity of State officials from the criminal jurisdiction of another State.

2. The present draft articles are without prejudice to the immunity from criminal jurisdiction enjoyed under special rules of international law, in particular by persons connected with diplomatic missions, consular posts, special missions, international organizations and military forces of a State.

#### Article 2. Definitions

For the purposes of the present draft articles:

...

(e) “State official” means any individual who represents the State or who exercises State functions;

(f) an “act performed in an official capacity” means any act performed by a State official in the exercise of State authority.

##### PART TWO

#### IMMUNITY *RATIONE PERSONAE*\*

##### Article 3. Persons enjoying immunity *ratione personae*

Heads of State, Heads of Government and Ministers for Foreign Affairs enjoy immunity *ratione personae* from the exercise of foreign criminal jurisdiction.

##### Article 4. Scope of immunity *ratione personae*

1. Heads of State, Heads of Government and Ministers for Foreign Affairs enjoy immunity *ratione personae* only during their term of office.

2. Such immunity *ratione personae* covers all acts performed, whether in a private or official capacity, by Heads of State, Heads of Government and Ministers for Foreign Affairs during or prior to their term of office.

3. The cessation of immunity *ratione personae* is without prejudice to the application of the rules of international law concerning immunity *ratione materiae*.

##### PART THREE

#### IMMUNITY *RATIONE MATERIAE*\*

##### Article 5. Persons enjoying immunity *ratione materiae*

State officials acting as such enjoy immunity *ratione materiae* from the exercise of foreign criminal jurisdiction.

##### Article 6. Scope of immunity *ratione materiae*

1. State officials enjoy immunity *ratione materiae* only with respect to acts performed in an official capacity.

2. Immunity *ratione materiae* with respect to acts performed in an official capacity continues to subsist after the individuals concerned have ceased to be State officials.

3. Individuals who enjoyed immunity *ratione personae* in accordance with draft article 4, whose term of office has come to an end, continue to enjoy immunity with respect to acts performed in an official capacity during such term of office.

##### Article 7. Crimes under international law in respect of which immunity *ratione materiae* shall not apply

1. Immunity *ratione materiae* from the exercise of foreign criminal jurisdiction shall not apply in respect of the following crimes under international law:

- (a) crime of genocide;
- (b) crimes against humanity;
- (c) war crimes;
- (d) crime of apartheid;
- (e) torture;
- (f) enforced disappearance.

\* The Commission will consider the procedural provisions and safeguards applicable to the present draft articles at its seventieth session.

2. For the purposes of the present draft article, the crimes under international law mentioned above are to be understood according to their definition in the treaties enumerated in the annex to the present draft articles.

#### ANNEX

##### LIST OF TREATIES REFERRED TO IN DRAFT ARTICLE 7, PARAGRAPH 2

###### Crime of genocide

Rome Statute of the International Criminal Court, 17 July 1998, article 6;

Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, article II.

###### Crimes against humanity

Rome Statute of the International Criminal Court, 17 July 1998, article 7.

###### War crimes

Rome Statute of the International Criminal Court, 17 July 1998, article 8, paragraph 2.

###### Crime of apartheid

International Convention on the Suppression and Punishment of the Crime of Apartheid, 30 November 1973, article II.

###### Torture

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, article 1, paragraph 1.

###### Enforced disappearance

International Convention for the Protection of All Persons from Enforced Disappearance, 20 December 2006, article 2.

2. TEXT OF THE DRAFT ARTICLE, WITH COMMENTARY THERETO, PROVISIONALLY ADOPTED BY THE COMMISSION AT ITS SIXTY-NINTH SESSION

141. The text of the draft article, and the commentary thereto, provisionally adopted by the Commission at its sixty-ninth session is reproduced below.

##### IMMUNITY OF STATE OFFICIALS FROM FOREIGN CRIMINAL JURISDICTION

#### PART TWO

##### IMMUNITY *RATIONE PERSONAE*\*

...

#### PART THREE

##### IMMUNITY *RATIONE MATERIAE*\*

...

\* The Commission will consider the procedural provisions and safeguards applicable to the present draft articles at its seventieth session.

##### Article 7. Crimes under international law in respect of which immunity *ratione materiae* shall not apply

1. Immunity *ratione materiae* from the exercise of foreign criminal jurisdiction shall not apply in respect of the following crimes under international law:

- (a) crime of genocide;
- (b) crimes against humanity;
- (c) war crimes;
- (d) crime of apartheid;
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Rome Statute of the International Criminal Court, 17 July 1998, article 7.

###### War crimes

Rome Statute of the International Criminal Court, 17 July 1998, article 8, paragraph 2.

###### Crime of apartheid

International Convention on the Suppression and Punishment of the Crime of Apartheid, 30 November 1973, article II.

###### Torture

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, article 1, paragraph 1.

###### Enforced disappearance

International Convention for the Protection of All Persons from Enforced Disappearance, 20 December 2006, article 2.

## Commentary

(1) Draft article 7 lists crimes under international law in respect of which immunity from foreign criminal jurisdiction *ratione materiae* shall not apply under the present draft articles. The draft article contains two paragraphs, one that lists the crimes (para. 1) and one that identifies the definition of those crimes (para. 2).

(2) As draft article 7 refers solely to immunity from jurisdiction *ratione materiae*, it is included in part three of the draft articles and does not apply in respect of immunity from jurisdiction *ratione personae*, which is regulated in part two of the draft articles.

(3) This does not mean, however, that the State officials listed in draft article 3 (Heads of State, Heads of Government and Ministers for Foreign Affairs) will always be exempt from the application of draft article 7. On the contrary, it should be borne in mind that, as the Commission has indicated, Heads of State, Heads of Government and Ministers for Foreign Affairs “enjoy immunity *ratione personae* only during their term of office”<sup>735</sup> and the cessation of such immunity “is without prejudice to the application of the rules of international law concerning immunity *ratione materiae*”.<sup>736</sup> In addition, draft article 6, on immunity *ratione materiae*, provides that “[i]ndividuals who enjoyed immunity *ratione personae* ..., whose term of office has come to an end, continue to enjoy immunity with respect to acts performed in an official capacity during such term of office”.<sup>737</sup> Accordingly, as this residual immunity is immunity *ratione materiae*, draft article 7 will be applicable to the immunity from jurisdiction enjoyed by a former Head of State, a former Head of Government or a former Minister for Foreign Affairs for acts performed in an official capacity during their term of office. Therefore, such immunity will not apply to these former officials in connection with the crimes under international law listed in paragraph 1 of draft article 7.

(4) Paragraph 1 of draft article 7 lists the crimes which, if committed, would prevent the application of such immunity from criminal jurisdiction to a foreign official, even if those crimes had been committed by the official acting in an official capacity during his or her term of office. Thus, draft article 7 complements the normative elements of immunity from foreign criminal jurisdiction *ratione materiae* as defined in draft articles 5 and 6.

(5) The Commission, by a recorded vote, decided to include this draft article for the following reasons. First, it considered that there has been a discernible trend towards limiting the applicability of immunity from jurisdiction *ratione materiae* in respect of certain types of behaviour

that constitute crimes under international law. This trend is reflected in judicial decisions taken by national courts which, even though they do not all follow the same line of reasoning, have not recognized immunity from jurisdiction *ratione materiae* in relation to certain international crimes.<sup>738</sup> In rare cases, this trend has also been reflected in the adoption of national legislation that provides for

<sup>738</sup> See the following cases, which are presented in support of such a trend: *Regina v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 3)*, House of Lords, United Kingdom, 24 March 1999, [1999] UKHL 17, [2000] 1 AC 147; *Re Pinochet*, Belgium, Court of First Instance of Brussels, judgment of 6 November 1998, ILR, vol. 119, p. 349; *In re Hussein*, Germany, Higher Regional Court of Cologne, judgment of 16 May 2000, 2 Zs 1330/99, para. 11 (makes this assertion in relation to the hypothesis that the then President Hussein had ceased to hold office); *Bouterse*, Netherlands, Amsterdam Court of Appeal, judgment of 20 November 2000, *Netherlands Yearbook of International Law*, vol. 32 (2001), pp. 266 *et seq.* (although the Supreme Court subsequently quashed the verdict, it did not do so in relation to immunity but because of the violation of the principle of non-retroactivity and the limited scope of universal jurisdiction; see judgment of 18 September 2001, ILDC 80 (NL 2001)); *Re Sharon and Yaron*, Belgium, Court of Cassation, judgment of 12 February 2003, ILR, vol. 127, p. 123 (although the Court granted immunity *ratione personae* to Ariel Sharon, it tried Amos Yaron, who, at the time the acts were committed, was head of the Israeli armed forces that took part in the Sabra and Shatila massacres); *H. v. Public Prosecutor*, Netherlands, Supreme Court, judgment of 8 July 2008, ILDC 1071 (NL 2008), para. 7.2; *Lozano v. Italy*, Italy, Court of Cassation, judgment of 24 July 2008, ILDC 1085 (IT 2008), para. 6; *A. v. Office of the Public Prosecutor of the Confederation*, Switzerland, Federal Criminal Court, judgment of 25 July 2012, BB.2011.140; *FF v. Director of Public Prosecutions* (Prince Nasser case), High Court of Justice, Queen's Bench Division, Divisional Court, judgment of 7 October 2014 [2014] EWHC 3419 (Admin.) (the significance of this ruling lies in the fact that it was issued as a “consent order”, that is to say, based on an agreement reached between the plaintiffs and the Director of Public Prosecutions, in which the latter agrees that the charges of torture against Prince Nasser are not covered by immunity *ratione materiae*). In a civil proceeding, the Italian Supreme Court has also asserted that State officials who have committed international crimes do not enjoy immunity *ratione materiae* from criminal jurisdiction (*Ferrini v. Federal Republic of Germany*, Court of Cassation, judgment of 11 March 2004, ILR, vol. 128, p. 674). In *Jones*, although the House of Lords recognized immunity from civil jurisdiction, it reiterated that immunity from criminal jurisdiction is not applicable in the case of torture (*Jones v. Kingdom of Saudi Arabia*, House of Lords, judgment of 14 June 2006, [2006] UKHL 26, [2007] 1 AC). Lastly, it should be noted that the Federal High Court of Ethiopia, albeit in the context of a case pursued against an Ethiopian national, affirmed the existence of a rule of international law preventing the application of immunity to a former Head of State accused of international crimes (*Special Prosecutor v. Hailemariam*, Federal High Court, judgment of 9 October 1995, ILDC 555 (ET 1995)). National courts have in some cases tried officials of another State for international crimes without expressly ruling on immunity. This occurred, for example, in the *Barbie* case before the French courts: *Fédération Nationale des Déportés et Internés Résistants et Patriotes and others v. Barbie*, France, Court of Cassation, judgments of 6 October 1983, 26 January 1984 and 20 December 1985, ILR, vol. 78, p. 125; *Fédération Nationale des Déportés et Internés Résistants et Patriotes and others v. Barbie*, Rhone Court of Assizes, judgment of 4 July 1987, ILR, vol. 78, p. 148; and Court of Cassation, judgment of 3 June 1988, ILR, vol. 100, p. 330. Meanwhile, the National High Court of Spain has tried various foreign officials for international crimes without deeming it necessary to rule on immunity, in the *Pinochet*, *Scilingo*, *Cavallo*, *Guatemala*, *Rwanda* and *Tibet* cases. In the *Rwanda* case, however, the National High Court ruled against the prosecution of President Kagame on the grounds that he enjoyed immunity. Similarly, in the *Tibet* case, the National High Court ruled against the prosecution of the then President Hu Jintao; however, following the end of the latter's term as President of China, the Central Court of Investigation No. 2 of the National High Court allowed his prosecution by order of 9 October 2013, claiming that he no longer enjoyed “diplomatic immunity”.

<sup>735</sup> Draft article 4, paragraph 1. See para. (2) of the commentary to draft article 4 provisionally adopted by the Commission at its sixty-fifth session, *Yearbook ... 2013*, vol. II (Part Two), p. 48.

<sup>736</sup> Draft article 4, paragraph 3. See para. (7) of the commentary to draft article 4, *ibid.*, p. 50.

<sup>737</sup> Draft article 6, paragraph 3. See paras. (9) to (15) of the commentary to draft article 6 provisionally adopted by the Commission at its sixty-eighth session, *Yearbook ... 2016*, vol. II (Part Two), pp. 217–218. See also para. (4) of the commentary to draft article 5 provisionally adopted by the Commission at its sixty-sixth session, *Yearbook ... 2014*, vol. II (Part Two), p. 146.

exceptions to immunity *ratione materiae* in relation to the commission of international crimes.<sup>739</sup> This trend has

<sup>739</sup> In support of this position, attention has been drawn to Organic Act No. 16/2015 of 27 October, on the privileges and immunities of foreign States, international organizations with headquarters or offices in Spain and international conferences and meetings held in Spain, which establishes a separate regime of immunity for Heads of State, Heads of Government and Ministers for Foreign Affairs, according to which, in respect of “acts performed in the exercise of official functions [by the officials in question] during a term in office, genocide, forced disappearance, war crimes and crimes against humanity shall be excluded from immunity” (art. 23, para. 1, *in fine*). Also of interest is Act No. 24488 of Argentina, on foreign State immunity, article 3 of which was excluded by Decree No. 849/95 promulgating the Act, with the result that the Argentine courts may not decline to hear a claim against a State for violation of international human rights law. Meanwhile, from a far more limited perspective, the United States Foreign Sovereign Immunities Act, as amended by the Torture Victim Protection Act, establishes a “terrorism exception to the jurisdictional immunity of a foreign State” (sect. 1605A), which makes it possible to exclude the application of immunity for certain types of acts such as torture or extrajudicial executions, provided that they were carried out by officials of a State previously designated by the competent authorities of the United States as a “State sponsor of terrorism”. A similar exception is contained in the State Immunity Act of Canada. Lastly, it should be borne in mind that some limitations or exceptions to immunity in relation to international crimes are contained in national legislation concerning such crimes, either in separate laws (see the Repression of Serious Violations of International Humanitarian Law Act of Belgium, as amended in 2003; the 2003 International Crimes Act of the Netherlands; or the Criminal Code of the Republic of the Niger, as amended in 2003) or in legislation implementing the Rome Statute of the International Criminal Court. For implementing legislation that establishes a general exception to immunity, see Burkina Faso, Act No. 50 of 2009 on the determination of competence and procedures for application of the Rome Statute of the International Criminal Court by the jurisdictions of Burkina Faso, arts. 7 and 15.1 (according to which the Burkina Faso courts may exercise jurisdiction with respect to persons who have committed a crime that falls within the competence of the Court, even in cases where it was committed abroad, provided that the suspect is in their territory. Moreover, official status shall not be grounds for exception or reduction of responsibility); Comoros, Act No. 11-022 of 13 December 2011 concerning the application of the Rome Statute, art. 7.2 (“the immunities or special rules of procedure accompanying the official status of a person by virtue of the law or of international law shall not prevent national courts from exercising their competence with regard to that person in relation to the offences specified in this Act”); Ireland, International Criminal Court Act 2006, art. 61.1 (“In accordance with Article 27, any diplomatic immunity or State immunity attaching to a person by reason of a connection with a State party to the Statute is not a bar to proceedings under this Act in relation to the person”); Mauritius, International Criminal Court Act 2001, art. 4; South Africa, Implementation of the Rome Statute of the International Criminal Court Act (No. 27 of 18 July 2002), arts. 4 (2) (a) (i) and 4 (3) (c) (stating that South African courts are competent to prosecute crimes of genocide, crimes against humanity and war crimes when the alleged perpetrator is in South Africa and that any official status claimed by the accused is irrelevant). For implementing legislation that establishes procedures for consultation or limitations only in relation to the duty to cooperate with the International Criminal Court, see: Argentina, Act No. 26200 implementing the Rome Statute of the International Criminal Court, adopted by Act No. 25390 and ratified on 16 January 2001, arts. 40 and 41; Australia, International Criminal Court Act 2002 (No. 41 of 2002), art. 12.4; Austria, Federal Act No. 135 of 13 August 2002 on cooperation with the International Criminal Court, arts. 9.1 and 9.3; Canada, 1999 Extradition Act, art. 18; France, Code of Criminal Procedure (under Act No. 2002-268 of 26 February 2002), art. 627.8; Germany, Courts Constitution Act, arts. 20.1 and 21; Iceland, 2003 International Criminal Court Act, art. 20.1; Ireland, International Criminal Court Act 2006 (No. 30), art. 6.1; Kenya, International Crimes Act, 2008 (No. 16 of 2008), art. 27; Liechtenstein, Act of 20 October 2004 on cooperation with the International Criminal Court and other international tribunals, art. 10.1 (b) and (c); Malta, Extradition Act, art. 26S.1; Norway, Act No. 65 of 15 June 2001 concerning implementation of the Rome Statute of the International Criminal Court of 17 July 1998 in Norwegian law, art. 2; New Zealand, International Crimes and International Criminal Court Act 2000, art. 31.1; United Kingdom, International Criminal Court Act 2001, art. 23.1; Samoa, International Criminal

also been highlighted in the literature, and has been reflected to some extent in proceedings before international tribunals.<sup>740</sup>

(6) Second, the Commission also took into account the fact that the draft articles on immunity of State officials from foreign criminal jurisdiction are intended to apply within an international legal order whose unity and systemic nature cannot be ignored. Therefore, the Commission should not overlook other existing standards or clash with the legal principles enshrined in such important sectors of contemporary international law as international humanitarian law, international human rights law and international criminal law. In this context, the consideration of crimes to which immunity from foreign criminal jurisdiction does not apply must be careful and balanced, taking into account the need to preserve respect for the principle of the sovereign equality of States, to ensure the implementation of the principles of accountability and individual criminal responsibility and to end impunity for the most serious international crimes, which is one of the primary objectives of the international community. Striking this balance will ensure that immunity fulfils the purpose for which it was established (to protect the sovereign equality and legitimate interests of States) and that it is not turned into a procedural mechanism to block all attempts to establish the criminal responsibility of certain individuals (State officials) arising from the commission of the most serious crimes under international law.

(7) In the light of the above two reasons, the Commission considers that it must pursue its mandate of promoting the progressive development and codification of international law by applying both the deductive method and the inductive method. It is on this premise that the Commission has included in draft article 7 a list of crimes to which immunity *ratione materiae* shall not apply for the following reasons: (a) they are crimes which in practice tend to be considered as crimes not covered by immunity *ratione materiae* from foreign criminal jurisdiction; and (b) they are crimes under international law that have been identified as the most serious crimes of concern to the international community, and there are international, treaty-based and customary norms relating to their prohibition, including an obligation to take steps to prevent and punish them.

Court Act 2007 (No. 26 of 2007), arts. 32.1 and 41; Switzerland, Act on Cooperation with the International Criminal Court, art. 6; and Uganda, International Criminal Court Act 2006 (No. 18 of 2006), art. 25.1 (a) and (b). Denmark is a special case: its International Criminal Court Act of 16 May 2001, art. 2, attributes the settlement of questions on immunity to the executive branch without defining a specific system for consultations.

<sup>740</sup> The existence of a trend towards limiting immunity for international crimes was noted by Judges Higgins, Kooijmans and Buergerthal in their joint separate opinion in *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, I.C.J. Reports 2002, p. 3, at p. 88, para. 85. For its part, the European Court of Human Rights, in *Jones and Others v. the United Kingdom*, expressly recognized that there appeared to be “some emerging support in favour of a special rule or exception in public international law in cases concerning civil claims for torture”, and that, “in light of the developments currently underway in this area of public international law, this is a matter which needs to be kept under review by Contracting States” (*Jones and Others v. the United Kingdom*, Applications Nos. 34356/06 and 40528/06, judgment of 2 June 2014, ECHR 2014, paras. 213 and 215).

(8) However, some members disagreed with this analysis. First, they opposed draft article 7, which had been adopted by vote, stating that: (a) the Commission should not portray its work as possibly codifying customary international law when, for reasons indicated in the footnotes below, it is clear that national case law,<sup>741</sup> national statutes,<sup>742</sup> and treaty

<sup>741</sup> Those members noted that only nine cases are cited (see footnote 738 above) that purportedly expressly address the issue of immunity *ratione materiae* of a State official from foreign criminal jurisdiction under customary international law, and that most of those cases actually provide no support for the proposition that such immunity is to be denied. For example, in the United Kingdom case of *Regina v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte* (No. 3), immunity was denied only with respect to acts falling within the scope of a treaty in force that was interpreted as waiving immunity (the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment). The German case of *In re Hussein* did not concern any of the crimes listed in draft article 7, and the judgment did not assert, in relation to the hypothesis that the then President Hussein had ceased to hold office, that immunity *ratione materiae* from jurisdiction was not or should not be recognized in that instance. The *Bouterse* case was not upheld by the Netherlands Supreme Court and the reasoning of the lower court on immunity remained an untested *obiter dictum*. The Belgian decision in *Re Sharon and Yaron* was controversial and led the Parliament thereafter to alter Belgian law, resulting in the Court of Cassation affirming a lack of jurisdiction over the case. The same law was at issue in *Re Pinochet* before the Court of First Instance of Brussels. In the case of *Lozano v. Italy*, the foreign State official was accorded, not denied, immunity *ratione materiae*. The case *Special Prosecutor v. Hailemariam* concerned prosecution by Ethiopia of one of its own nationals, not of a foreign State official. Other cases cited concern situations where immunity has not been invoked, or has been waived; they provide no support for the proposition that a State official does not enjoy immunity *ratione materiae* from foreign criminal jurisdiction under customary international law if such immunity is invoked. Further, those members noted that the relevance for the topic of *civil* cases in national courts must be carefully considered; to the extent they are relevant, they tend not to support the exceptions asserted in draft article 7. For example, the case *Ferrini v. Federal Republic of Germany* (see footnote 738 above) was found by the International Court of Justice to be inconsistent with the obligations of Italy under international law. See *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, I.C.J. Reports 2012, p. 99. In the case of *Jones v. Kingdom of Saudi Arabia* (see footnote 738 above), the House of Lords recognized the immunity of the State official. By contrast, in addition to those cases indicated above, those members pointed to several cases where immunity *ratione materiae* has been invoked and accepted by national courts in criminal proceedings. See, for example, Senegal, *Hissène Habré*, Court of Appeal of Dakar, judgment of 4 July 2000, and Court of Cassation, judgment of 20 March 2001, ILR, vol. 125, pp. 571–577 (immunity accorded to former Head of State); Germany, *Jiang Zemin*, decision of the Federal Prosecutor General of 24 June 2005, 3 ARP 654/03-2 (same).

<sup>742</sup> These members noted that very few national laws address the issue of immunity *ratione materiae* of a State official from foreign criminal jurisdiction under customary international law. As acknowledged in the Special Rapporteur's fifth report on immunity of State officials from foreign criminal jurisdiction (A/CN.4/701), para. 42: "Immunity of the State or of its officials from jurisdiction is not explicitly regulated in most States. On the contrary, the response to immunity has been left to the courts." Of the few national laws that purportedly address such immunity (Burkina Faso, Comoros, Ireland, Mauritius, Niger, South Africa, Spain), none support draft article 7 as it is written. For example, the Spanish Organic Act No. 16/2015 of 27 October, art. 23, para. 1, only addresses the immunity *ratione materiae* of former Heads of State, Heads of Government and Ministers for Foreign Affairs. Statutes such as the Repression of Serious Violations of International Humanitarian Law Act, as amended in 2003, of Belgium or the 2003 International Crimes Act of the Netherlands only provide that immunity shall be denied as recognized under international law, without any further specification. Further, those members observed that national laws implementing an obligation to surrender a State official to the International Criminal Court, arising under the Rome Statute or a decision by the Security Council, are not relevant to the issue of immunity of a State official under customary international law from foreign criminal jurisdiction. Also irrelevant are national laws focused on the immunity of States, such as Act No. 24488 of Argentina, the

law<sup>743</sup> do not support the exceptions asserted in draft article 7; (b) the relevant practice shows no "trend", temporal or otherwise, in favour of exceptions to immunity *ratione materiae* from foreign criminal jurisdiction; (c) immunity is a procedural matter and, consequently, (i) it is not possible to assume that the existence of criminal responsibility for any crimes under international law committed by a State official automatically precludes immunity from foreign criminal jurisdiction; (ii) immunity does not depend on the gravity of the act in question or on the fact that such act is prohibited by a peremptory norm of international law; (iii) the issue of immunity must be considered at an early stage of the exercise of jurisdiction, before the case is considered on the merits;<sup>744</sup> (d) the lack of immunity before an international criminal court is not relevant to the issue of immunity from the jurisdiction of national courts; and (e) the establishment of a new system of exceptions to immunity, if not agreed upon by treaty, will likely harm inter-State relations and risks undermining the international community's objective of ending impunity for the most serious international crimes. Furthermore, these members took the view that the Commission, by proposing draft article 7, was conducting a "normative policy" exercise that bore no relation to either the codification or the progressive development of international law. For those members, draft article 7 is a proposal for "new law" that cannot be considered as either *lex lata* or desirable progressive development of international law. Second, those members of the Commission also stressed the difference between procedural immunity from foreign jurisdiction, on the one hand, and substantive criminal responsibility, on the other, and maintained that the recognition of exceptions to immunity was neither required nor necessarily appropriate for achieving the required balance. Rather, in the view of those members, impunity can be avoided in situations where a State official is prosecuted in his or her own State; is prosecuted in an international court; or is prosecuted in a foreign court after waiver of the immunity. Asserting exceptions to immunity that States have not accepted by treaty or through their widespread practice risks creating severe tensions, if not outright conflict, among States whenever one State exercises criminal jurisdiction over the officials of another based solely on an allegation that a heinous crime has been committed.

(9) It should be borne in mind that these members also expressed the view that no decision can be taken on the

Foreign Sovereign Immunities Act of the United States, and the State Immunity Act of Canada (further, it was noted that the Foreign Sovereign Immunities Act was not amended by the Torture Victim Protection Act, which has nothing to do with terrorism).

<sup>743</sup> These members noted that none of the global treaties addressing specific types of crimes (e.g., genocide, war crimes, apartheid, torture, enforced disappearance) contain any provision precluding immunity *ratione materiae* of State officials from foreign criminal jurisdiction, nor do any of the global treaties addressing specific types of State officials (e.g., diplomats, consular officials, officials on special mission).

<sup>744</sup> See, for example, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* (footnote 741 above), p. 137, para. 84 ("customary international law does not treat a State's entitlement to immunity as dependent upon the gravity of the act of which it is accused or the peremptory nature of the rule which it is alleged to have violated"); *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* (footnote 740 above), p. 25, para. 60 ("Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law").

issue of limitations and exceptions to immunity until the Commission has taken a position on the issue of procedural safeguards. This opinion was not, however, accepted by the majority of Commission members, who, while recognizing the importance of clearly defining procedural safeguards to prevent abuse in the exercise of foreign criminal jurisdiction over State officials, took the view that the issue of the crimes to which immunity from jurisdiction *ratione materiae* does not apply can be dealt with separately at the present stage of the Commission's work. Nevertheless, in order to reflect the great importance attached by the Commission to procedural issues in the context of the present topic, it was agreed that the current text of the draft articles should include the following footnote: "The Commission will consider the procedural provisions and safeguards applicable to the present draft articles at its seventieth session." The footnote marker was inserted after the headings of part two (Immunity *ratione personae*) and part three (Immunity *ratione materiae*) of the draft articles, since procedural provisions and safeguards may refer to both categories of immunity, and should also be considered in relation to the draft articles as a whole.

#### Paragraph 1

(10) Paragraph 1 (a)–(f) of draft article 7 lists the crimes under international law which, if allegedly committed, would prevent the application of immunity from criminal jurisdiction to a foreign official, even if the official committed those crimes while acting in an official capacity during his or her term of office. The crimes are as follows: the crime of genocide, crimes against humanity, war crimes, the crime of apartheid, torture and enforced disappearance.

(11) The chapeau of the draft article uses the phrase "shall not apply" in order to reflect the fact that in both practice and doctrine two different interpretations have been followed with regard to whether or not such crimes are to be considered "acts performed in an official capacity". One view is that the commission of such crimes can never be considered a function of the State and they therefore cannot be regarded as "acts performed in an official capacity". The contrary view holds that crimes under international law either require the presence of a State element (torture, enforced disappearance) or else must have been committed with the backing, express or implied, of the State machinery, so that there is a connection with the State, and such crimes can therefore be considered in certain cases as "acts performed in an official capacity".<sup>745</sup> Although the Commission did not find it necessary to come down in favour of one or the other of these interpretations, it noted that some national courts have not applied immunity *ratione materiae* in the exercise of their criminal jurisdiction in respect of these crimes under international law, either because they do not regard them as an act performed in an official capacity or a characteristic function of the State,<sup>746</sup> or

because they take the view that, although crimes under international law may constitute such an act or function, such crimes (by virtue of their gravity or because they contravene peremptory norms) may not give rise to recognition of the perpetrator's immunity from criminal jurisdiction.<sup>747</sup>

(12) Therefore, bearing in mind that, in practice, the same crime under international law has sometimes been interpreted as a limitation (absence of immunity) or as an exception (exclusion of existing immunity), the Commission considered it preferable to address the topic in terms of the effects resulting from each of these approaches, namely, the non-applicability to such crimes of immunity *ratione materiae* from foreign criminal jurisdiction that otherwise might be enjoyed by a State official. The Commission opted for this formulation for reasons of clarity and certainty, in order to provide a list of crimes which, even if committed by a State official, would preclude the possibility of immunity from foreign criminal jurisdiction.

(13) To that end, the Commission used the phrase "immunity ... shall not apply", following, *mutatis mutandis*, the technique once used by the Commission in relation to jurisdictional immunity of the State, when it used the phrase "proceedings in which State immunity cannot be invoked" in a similar context.<sup>748</sup> However, in draft article 7, the Commission decided not to use the phrase "cannot be invoked" in order to avoid the procedural component of that phrase, preferring instead to use the neutral phrase "shall not apply".

Court of Cologne, judgment of 16 May 2000 (footnote 738 above), para. 11 (makes this assertion in relation to the hypothesis that the then President Hussein had ceased to hold office). A similar argument has also been used in some cases when the question of immunity has been raised before the civil courts. See, for example, *Prefecture of Voïotia v. Federal Republic of Germany*, Court of First Instance of Livadeia (Greece), judgment of 30 October 1997.

<sup>747</sup> As happened, for example, in the case of *Eichmann*, Israel, Supreme Court, judgment of 29 May 1962, ILR, vol. 36, pp. 309–310. In the *Ferrini* case, the Italian courts based their ruling on both the gravity of the crimes committed and the fact that the conduct in question was contrary to *jus cogens* norms (*Ferrini v. Federal Republic of Germany*, Court of Cassation, judgment of 11 March 2004 (see footnote 738 above), p. 674). In the *Lozano* case, the Italian Court of Cassation based its denial of immunity on the violation of fundamental rights, which have the status of *jus cogens* norms and must therefore take precedence over the rules governing immunity (*Lozano v. Italy*, Italy, Court of Cassation, judgment of 24 July 2008 (see footnote 738 above), para. 6). In *A. v. Office of the Public Prosecutor of the Confederation*, the Federal Criminal Court of Switzerland based its decision on the existence of a customary prohibition of international crimes that the Swiss legislature considers to be *jus cogens*; it also pointed out the contradiction between prohibiting such conduct and continuing to recognize immunity *ratione materiae* that would prevent the launch of an investigation (*A. v. Office of the Public Prosecutor of the Confederation*, Switzerland, Federal Criminal Court, judgment of 25 July 2012 (see footnote 738 above)).

<sup>748</sup> Draft articles on jurisdictional immunities of States and their property, adopted by the Commission at its forty-third session, *Yearbook ... 1991*, vol. II (Part Two), p. 33. The Commission used the phrase cited above as the title of part III of those draft articles and reiterated a variant (the "State cannot invoke") in articles 10 to 17 in the same part. For an explanation of the reasons that led the Commission to use this phrase, see, in particular, para. (1) of the general commentary to part III (p. 33) and paras. (1) to (5) of the commentary to article 10 (pp. 33–34). The United Nations Convention on Jurisdictional Immunities of States and Their Property of 2004 likewise uses the phrase "Proceedings in which State immunity cannot be invoked" in the title of part III and the variant "the State cannot invoke" in articles 10 to 17.

<sup>745</sup> See, for example, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* (footnote 741 above), p. 125, para. 60 (discussing *acta jure imperii* in the context of State immunity).

<sup>746</sup> See, for example, the following cases: *Re Pinochet*, Belgium, Court of First Instance of Brussels, judgment of 6 November 1998 (footnote 738 above), p. 349; *In re Hussein*, Germany, Higher Regional

(14) The expression “from the exercise of foreign criminal jurisdiction” is included in the chapeau for consistency with the formulation used in draft articles 3 and 5, as provisionally adopted by the Commission.

(15) The expression “crimes under international law” refers to conduct that is criminal under international law whether or not such conduct has been criminalized under national law. The crimes listed in draft article 7 are the crimes of greatest concern to the international community as a whole; there is a broad international consensus on their definition as well as on the existence of an obligation to prevent and punish them. These crimes have been addressed in international treaties and are also prohibited by customary international law.

(16) The expression “crimes under international law” was used previously by the Commission in the Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal<sup>749</sup> and in the 1954 draft Code of Offences against the Peace and Security of Mankind.<sup>750</sup> In this context, the Commission took the view that the use of the expression “crimes under international law” means that “international law provides the basis for the criminal characterization” of such crimes and that “the prohibition of such types of behaviour and their punishability are a direct consequence of international law”.<sup>751</sup> What follows from this is “the autonomy of international law in the criminal characterization” of such crimes<sup>752</sup> and the fact that “the characterization, or the absence of characterization, of a particular type of behaviour as criminal under national law has no effect on the characterization of that type of behaviour as criminal under international law”.<sup>753</sup> Accordingly, the use of the expression “crimes under international law” directly links the list of crimes contained in paragraph 1 of draft article 7 to international law and ensures that the definition of such crimes is understood in accordance with international standards, and any definition established under domestic law to identify cases in which immunity does not apply is irrelevant.

<sup>749</sup> See principle I of the Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal: “Any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment” (*Yearbook ... 1950*, vol. II, document A/1316, p. 374).

<sup>750</sup> See article 1 of the draft Code of Offences against the Peace and Security of Mankind adopted in 1954: “Offences against the peace and security of mankind, as defined in this Code, are crimes under international law, for which the responsible individuals shall be punished” (*Yearbook ... 1954*, vol. II, document A/2693, para. 54, p. 151). For its part, article 1, paragraph 2, of the draft Code of Crimes against the Peace and Security of Mankind adopted by the Commission in 1996 states that “[c]rimes against the peace and security of mankind are crimes under international law and punishable as such, whether or not they are punishable under national law” (*Yearbook ... 1996*, vol. II (Part Two), p. 17).

<sup>751</sup> See para. (6) of the commentary to article 1 of the 1996 draft Code of Crimes against the Peace and Security of Mankind (*Yearbook ... 1996*, vol. II (Part Two), p. 17).

<sup>752</sup> *Ibid.*, para. (9), p. 18.

<sup>753</sup> *Ibid.*, para. (10). It should be borne in mind that the Commission, in commenting on principle I of the Nürnberg Principles, had stated that “[t]he general rule underlying Principle I is that international law may impose duties on individuals directly without any interposition of internal law” (*Yearbook ... 1950*, vol. II, document A/1316, p. 374).

(17) The category of crimes under international law includes (a) the crime of genocide, (b) crimes against humanity and (c) war crimes. The Commission included these crimes among the crimes in respect of which immunity does not apply for two basic reasons. First, these are crimes about which the international community has expressed particular concern, resulting in the adoption of treaties that are at the heart of international criminal law, international human rights law and international humanitarian law, and the international courts have emphasized not only the gravity of these crimes, but also the fact that their prohibition is customary in nature and that committing them may constitute a violation of peremptory norms of general international law (*jus cogens*). Second, these crimes arise, directly or indirectly, in the judicial practice of States in relation to cases in which the issue of immunity *ratione materiae* has been raised. Lastly, it should be noted that these three crimes are included in article 5 of the Rome Statute, where they are described as “the most serious crimes of concern to the international community as a whole”.<sup>754</sup> Some members noted, however, that the inclusion of those crimes in draft article 7 found little if any support in practice, in national and international jurisprudence or in national legislation.

(18) The Commission decided not to include the crime of aggression at this time, even though it too is included in article 5 of the Rome Statute and is characterized as a crime under the amendments adopted at the Review Conference of the Rome Statute held in Kampala in 2010.<sup>755</sup> The Commission took this decision in view of the nature of the crime of aggression, which would require national courts to determine the existence of a prior act of aggression by the foreign State, as well as the special political dimension of this type of crime,<sup>756</sup> given that it constitutes a “crime of leaders”; and also in view of the fact that the Assembly of States Parties to the Rome Statute of the International Criminal Court has not taken a decision to activate the Court’s jurisdiction over this crime. However, some members stated that the crime of aggression should have been included in paragraph 1 of draft article 7, as it is the most serious of the crimes under international law, it was previously included by the Commission itself in the 1996 draft Code of Crimes against the Peace and

<sup>754</sup> Rome Statute, art. 5, para. 1, and preamble, fourth paragraph.

<sup>755</sup> See the definition of aggression in article 8 *bis*, *Official Records of the Review Conference of the Rome Statute of the International Criminal Court, Kampala, 31 May–11 June 2010*, publication of the International Criminal Court, RC/9/11, resolution 6, “The crime of aggression” (RC/Res.6).

<sup>756</sup> In this regard, it should be borne in mind that in the commentaries to the 1996 draft Code of Crimes against the Peace and Security of Mankind, the Commission stated the following: “The aggression attributed to a State is a *sine qua non* for the responsibility of an individual for his participation in the crime of aggression. An individual cannot incur responsibility for this crime in the absence of aggression committed by a State. Thus, a court cannot determine the question of individual criminal responsibility for this crime without considering as a preliminary matter the question of aggression by a State. The determination by a national court of one State of the question of whether another State had committed aggression would be contrary to the fundamental principle of international law *par in parem imperium non habet*. Moreover, the exercise of jurisdiction by the national court of a State which entails consideration of the commission of aggression by another State would have serious implications for international relations and international peace and security” (*Yearbook ... 1996*, vol. II (Part Two), p. 30, para. (14) of the commentary to article 8).



Security of Mankind<sup>757</sup> and it is one of the crimes covered by the Rome Statute. Furthermore, a substantial number of States have included the crime of aggression within their national criminal law.<sup>758</sup> Accordingly, they expressed their opposition to the majority decision of the Commission and reserved their position on the matter.

(19) On the other hand, the Commission considered it necessary to include in paragraph 1 of draft article 7 the crimes of (d) apartheid, (e) torture and (f) enforced disappearance as separate categories of crimes under international law in respect of which immunity does not apply. Although these crimes are included in article 7 of the Rome Statute under the category of crimes against humanity,<sup>759</sup> the Commission took into account the following elements to consider them as separate crimes. First, the crimes of apartheid, torture and enforced disappearance have been the subject of international treaties that establish a special legal regime for each crime for the purposes of prevention, suppression and punishment,<sup>760</sup> which imposes specific obligations on States to take certain measures in their domestic legislation, including the obligation to define such crimes in their national criminal legislation and to take the necessary measures to ensure that their courts are competent to try such crimes.<sup>761</sup> It

<sup>757</sup> *Ibid.*, pp. 42–43, art. 16.

<sup>758</sup> The following are examples of national legislation that includes the crime of aggression: Austria, Criminal Code art. 321k, No. 60/1974 of 23 January 1974, as amended by BGBl. I No. 112/2015 of 13 August 2015; Azerbaijan, Criminal Code of 2000, arts. 100–101; Bangladesh, International Crimes (Tribunals) Act, art. 3, International Crimes (Tribunals) Act No. XIX of 1973, as amended by the International Crimes (Tribunals) (Amendment) Act No. LV of 2009 and Act No. XXI of 2012; Belarus, Criminal Code, arts. 122–123, Law No. 275-Z of 9 July 1999, as amended on 28 April 2015; Bulgaria, Criminal Code, arts. 408–409, *State Gazette*, No. 26 of 2 April 1968, as amended by *State Gazette*, No. 32 of 27 April 2010; Croatia, Criminal Code, arts. 89 and 157, *Official Gazette of the Republic of Croatia* “*Narodne novine*”, No. 125/11; Cuba, Criminal Code, arts. 114–115, Act No. 62 of 29 December 1987, as amended by Act No. 87 of 16 February 1999; Ecuador, Criminal Code, art. 88; Estonia, Criminal Code, §§ 91–92; Finland, Criminal Code of Finland, Act No. 39/1889, as amended by Act No. 1718/2015, §§ 4 (a), 4 (b) and 14 (a); Germany, Criminal Code of 13 November 1998 (BGBl); Luxembourg, Criminal Code, art. 136; Macedonia, Criminal Code, art. 415; Malta, Criminal Code § 82(C), Criminal Code of the Republic of Malta (1854, as amended in 2004); Republic of Moldova, Criminal Code of the Republic of Moldova, arts. 139–140, adopted by Law No. 985-XV on 18 April 2002, as amended in 2009; Mongolia, Criminal Code of Mongolia (2002), art. 297; Montenegro, Criminal Code, art. 442, *Official Gazette of the Republic of Montenegro*, No. 70/2003, Correction, No. 13/2004; Paraguay, Criminal Code of the Republic of Paraguay, art. 271, Act No. 1.160/97; Poland, Criminal Code, art. 17, Law of 6 June 1997; Russia, Criminal Code, Criminal Code of the Russian Federation, arts. 353–354, Federal Law No. 64-FZ of 13 June 1996 (as amended); Samoa, International Criminal Court Act 2007, as amended by the International Criminal Court Amendment Act 2014, § 7A, No. 23; Slovenia, Criminal Code of 2005, arts. 103 and 105; Tajikistan, Criminal Code of the Republic of Tajikistan, arts. 395–396; Timor-Leste, Criminal Code of the Democratic Republic of Timor-Leste, Decree Law No. 19/2009, art. 134. See, for discussion, A. Reisinger Coracini, “National legislation on individual responsibility for conduct amounting to aggression”, in R. Bellelli (ed.), *International Criminal Justice: Law and Practice from the Rome Statute to Its Review*, London and New York, Routledge, 2016.

<sup>759</sup> Rome Statute, art. 7, para. 1, subparas. (j), (f) and (i), respectively.

<sup>760</sup> See the International Convention on the Suppression and Punishment of the Crime of Apartheid, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the International Convention for the Protection of All Persons from Enforced Disappearance.

<sup>761</sup> International Convention on the Suppression and Punishment of the Crime of Apartheid, art. IV; Convention against Torture and Other

should be added that the treaties in question establish systems of international cooperation and judicial assistance between States.<sup>762</sup> Second, the Commission also noted that the crimes of apartheid, torture and enforced disappearance are subject under the Rome Statute to a specific threshold that is defined as the commission of such crimes “as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack”,<sup>763</sup> which, however, does not exist in the instruments specifically related to these crimes. Third, the Commission observed that the conventions against torture and enforced disappearance expressly establish that such acts can only be committed by State officials or at their instigation or with their support or acquiescence.<sup>764</sup> In addition, the Commission took into account the fact that, in many cases, when national courts have dealt with these crimes in relation to immunity, they have done so by treating them as separate crimes. The treatment of torture is a good example of this.<sup>765</sup> Some members noted, however, that the inclusion of those crimes in draft article 7 found little if any support in practice, in national and international jurisprudence or in national legislation.

(20) While some members of the Commission suggested that the list should include other crimes such as slavery, terrorism, human trafficking, child prostitution and child pornography, and piracy, which are also the subject of international treaties that establish special legal regimes for each crime for the purposes of prevention, suppression and punishment, the Commission decided not to include them. In doing so, it took into account the fact that these crimes either are already covered by the category of crimes against humanity or do not fully correspond to the definition of crimes under international law *stricto sensu*, being more correctly described in most cases as transnational crimes. In addition, such crimes are usually committed by non-State actors and are not reflected in national judicial practice relating to immunity from jurisdiction. In any event, the non-inclusion of other international crimes in draft article 7 should not be taken to mean that the Commission underestimates the seriousness of such crimes.

Cruel, Inhuman or Degrading Treatment or Punishment, arts. 4–6; International Convention for the Protection of All Persons from Enforced Disappearance, arts. 4, 6 and 9.

<sup>762</sup> International Convention on the Suppression and Punishment of the Crime of Apartheid, art. XI; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, arts. 6–9; International Convention for the Protection of All Persons from Enforced Disappearance, arts. 10–11 and 13–14.

<sup>763</sup> Rome Statute, art. 7, para. 1. The definition of the threshold is contained in article 7, paragraph 2 (a).

<sup>764</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 1, para. 1; International Convention for the Protection of All Persons from Enforced Disappearance, art. 2.

<sup>765</sup> As in the case, for example, of the United Kingdom, where cases relating to immunity from jurisdiction *ratione materiae* which raised the question of the non-applicability of such immunity to acts of torture have been based on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. See *Regina v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte* (No. 3), House of Lords, United Kingdom, 24 March 1999 (footnote 738 above); and *FF v. Director of Public Prosecutions* (Prince Nasser case), High Court of Justice, Queen’s Bench Division, Divisional Court, judgment of 7 October 2014 (footnote 738 above). The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment also served as the basis of a matter related to immunity from civil jurisdiction: *Jones v. Kingdom of Saudi Arabia*, House of Lords, judgment of 14 June 2006 (footnote 738 above).



(21) Lastly, it should be noted that the Commission did not include in draft article 7, paragraph 1, the crimes of corruption or crimes affected by the so-called “territorial tort exception” proposed by the Special Rapporteur.<sup>766</sup> This does not mean, however, that the Commission considers that immunity from foreign criminal jurisdiction *ratione materiae* should apply to these two categories of crimes.

(22) With regard to corruption (understood as “grand corruption”), several members of the Commission pointed out that crimes of corruption are especially serious as they directly affect the interests and stability of the State, the well-being of its population and even its international relations. Consequently, those members were in favour of including an exception to immunity *ratione materiae*. However, other members of the Commission argued that, while the seriousness of the crime of corruption cannot be called into question, its inclusion in draft article 7 posed a problem, related essentially to the general nature of the term “corruption” and the wide range of acts that can be included in this category, as well as the fact that, in their view, treaty practice and case law do not provide sufficient grounds for including such crimes among the limitations and exceptions to immunity. Other members questioned whether corruption met the test of gravity of the other crimes listed in draft article 7. Lastly, several members of the Commission pointed out that corruption cannot under any circumstances be regarded as an act performed in an official capacity and therefore need not be included among the crimes for which immunity does not apply.

(23) Especially in view of that last argument, the Commission decided not to include crimes of corruption in draft article 7, on the grounds that they do not constitute “acts performed in an official capacity”, but are acts carried out by a State official solely for his or her own benefit.<sup>767</sup> Although some members of the Commission pointed out that the involvement of State officials in such acts cannot be ignored, because it is precisely their official status that facilitates and makes possible the crime of corruption, some members of the Commission took the view that the fact that the crime is committed by an official does not change the nature of the act, which remains an act performed for the official’s own benefit even if the official uses State facilities that might give the act a semblance of official status. Accordingly, since the normative element contained in draft article 6, paragraph 1, does not apply to the crime of corruption, several members of the Commission took the view that immunity from jurisdiction *ratione materiae* does not exist in relation to the crime of corruption and therefore the latter does not need to be included in the list of crimes for which immunity does not apply.<sup>768</sup>

(24) The Commission also considered the case of other crimes committed by a foreign official in the territory of the forum State without that State’s consent to both the official’s presence in its territory and the activity carried

out by the official that gave rise to the commission of the crime (territorial exception). This scenario differs in many respects from the crimes under international law included in paragraph 1 of draft article 7 or the crime of corruption. Although the view was expressed that immunity could exist in these circumstances and the exception should not be included in draft article 7 because there was insufficient practice to justify doing so, the Commission decided not to include it in the draft article for other reasons. The Commission considers that certain crimes,<sup>769</sup> such as murder, espionage, sabotage or kidnapping, committed in the territory of a State in the aforementioned circumstances are subject to the principle of territorial sovereignty and do not give rise to immunity from jurisdiction *ratione materiae*, and therefore there is no need to include them in the list of crimes for which this type of immunity does not apply. This is without prejudice to the immunity from criminal jurisdiction enjoyed under special rules of international law, as set forth in draft article 1, paragraph 2.

#### *Paragraph 2 and annex*

(25) Paragraph 2 of draft article 7 establishes a link between paragraph 1 of the article and the annex to the draft articles, entitled “List of treaties referred to in draft article 7, paragraph 2”. While the concept of “crimes under international law” and the concepts of “crime of genocide”, “crimes against humanity”, “war crimes”, “crime of apartheid”, “torture” and “enforced disappearance” belong to well-established categories in contemporary international law, the Commission is mindful that the fact that draft article 7 refers to “crimes” means that the principle of legal certainty characteristic of criminal law must be preserved and tools must be provided to avoid subjectivity in identifying what is meant by each of the aforementioned crimes.

(26) However, the Commission did not consider it necessary to define the crime of genocide, crimes against humanity, war crimes, the crime of apartheid, torture and enforced disappearance, as this is not part of its mandate within the framework of the present draft articles. On the contrary, the Commission found it preferable to simply identify the treaty instruments that define the aforementioned categories, for inclusion in a list that will enable legal practitioners to act with greater certainty in applying draft article 7. The outcome of this exercise is the list contained in the annex to the draft articles.

(27) As indicated in paragraph 2 of draft article 7, the linkage of each crime with the treaties listed in the annex is only for the purposes of draft article 7 on the immunity of State officials from foreign criminal jurisdiction, in order to identify the definitions of the crimes listed in paragraph 1 of the article without assuming or requiring that States must be parties to those instruments.

(28) On the other hand, it should be borne in mind that the listing of certain treaties has no effect on the customary nature of these crimes, as recognized under international law, or on the specific obligations that may arise from those treaties for States parties. Similarly, the inclusion

<sup>766</sup> See the Special Rapporteur’s fifth report on immunity of State officials from foreign criminal jurisdiction (A/CN.4/701), paras. 225–234.

<sup>767</sup> In the same vein, see paras. (3) and (5) of the commentary to draft article 2 (f), dealing with the definition of an “act performed in an official capacity”, *Yearbook ... 2016*, vol. II (Part Two), pp. 212–213.

<sup>768</sup> *Ibid.*, para. (13), p. 215.

<sup>769</sup> Referring to an exception in the context of State immunity, see *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* (footnote 741 above).

of only some of the treaties that define the crimes in question has no effect on other treaties that define or regulate the same crimes, whose definitions and legal regimes remain intact for States parties in their application of those treaties. In conclusion, the reference to a specific treaty for the definition of each of the crimes listed in paragraph 1 of draft article 7 is included for reasons of convenience and appropriateness and solely for the purposes of draft article 7, and in no way affects the other rules of customary or treaty-based international law that refer to such crimes and that contain legal regimes of general scope for each of them.

(29) The choice of treaties whose articles are included in the annex to provide a definition of the various crimes under international law was based on three fundamental criteria: (a) the desire to avoid possible confusion when several treaties use different language to define the same crime; (b) the selection of treaties that are universal in scope; and (c) the selection of treaties providing the most up-to-date definitions available.

(30) Genocide was defined for the first time in the Convention on the Prevention and Punishment of the Crime of Genocide<sup>770</sup> and its definition has remained constant in contemporary international criminal law, notably in the Statute of the International Tribunal for the Former Yugoslavia (art. 4),<sup>771</sup> the Statute of the International Criminal Tribunal for Rwanda (art. 2)<sup>772</sup> and, in particular, the Rome Statute, article 6 of which reproduces the definition contained in the Convention on the Prevention and Punishment of the Crime of Genocide. For its part, the Commission defined genocide in article 17 of the 1996 draft Code of Crimes against the Peace and Security of Mankind.<sup>773</sup> For the purposes of the present draft articles, the Commission has included in the annex both the Rome Statute (art. 6) and the Convention on the Prevention and Punishment of the Crime of Genocide (art. II), given that the wording used in the two instruments is practically identical and has the same meaning.

(31) With regard to crimes against humanity, it should be recalled that some international treaties have identified certain behaviours as “crimes against humanity”<sup>774</sup> and that international courts have ruled on the customary nature of this category of crimes. The Statute of the

International Tribunal for the Former Yugoslavia (art. 5) and the Statute of the International Criminal Tribunal for Rwanda (art. 3) have also defined this crime. The Commission itself defined this category of crimes in the 1996 draft Code of Crimes against the Peace and Security of Mankind (art. 18).<sup>775</sup> However, the Rome Statute was the first instrument to define this category of crimes separately and comprehensively. For this reason, the Commission considered that article 7 of the Rome Statute should be taken as the definition of crimes against humanity for the purposes of the present draft article. This is consistent with the decision taken earlier by the Commission on the draft articles on crimes against humanity, draft article 3 of which reproduces the definition of this category of crimes contained in article 7 of the Rome Statute.<sup>776</sup>

(32) The concept of war crimes has a long tradition that was originally associated with treaties on international humanitarian law. The Geneva Conventions for the Protection of War Victims (Geneva Conventions of 1949) and the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), define that category of crimes as “grave breaches”.<sup>777</sup> War crimes were defined in the Statute of the International Tribunal for the Former Yugoslavia (arts. 2 and 3) and the Statute of the International Criminal Tribunal for Rwanda (art. 4), as well as by the Commission itself in the 1996 draft Code of Crimes against the Peace and Security of Mankind (art. 20).<sup>778</sup> The latest definition of war crimes is contained in article 8, paragraph 2, of the Rome Statute, which draws on previous experience and refers comprehensively to war crimes committed in both international and internal armed conflicts, as well as to crimes recognized on the basis of treaties and customary law. For the purposes of the present draft article, the Commission decided to retain the definition contained in article 8, paragraph 2, of the Rome Statute, as the most up-to-date version of the definition of this category of crimes. This does not imply, however, that the importance of the Geneva Conventions of 1949 and Protocol I thereto in relation to the definition of war crimes should be overlooked.

(33) The crime of apartheid was defined for the first time in the International Convention on the Suppression and Punishment of the Crime of Apartheid of 30 November 1973, which, although it describes apartheid as a crime against humanity and a crime under international law (art. I), contains a detailed and separate definition of the crime of apartheid (art. II). For this reason, the Commission decided to retain the definition in the 1973 Convention for the purposes of the present draft article.

<sup>770</sup> Convention on the Prevention and Punishment of the Crime of Genocide, art. II.

<sup>771</sup> Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, adopted by the Security Council in its resolution 827 (1993) of 25 May 1993 and contained in the report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993) (S/25704 and Corr.1 and Add.1), annex.

<sup>772</sup> Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January 1994 and 31 December 1994, Security Council resolution 955 (1994) of 8 November 1994, annex.

<sup>773</sup> *Yearbook ... 1996*, vol. II (Part Two), p. 44.

<sup>774</sup> International Convention on the Suppression and Punishment of the Crime of Apartheid, art. I; International Convention for the Protection of All Persons from Enforced Disappearance, preamble, fifth paragraph.

<sup>775</sup> *Yearbook ... 1996*, vol. II (Part Two), p. 47.

<sup>776</sup> See *Yearbook ... 2015*, vol. II (Part Two), p. 38, article 3 and para. (8) of the commentary thereto.

<sup>777</sup> Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva Convention I), art. 50; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Geneva Convention II), art. 51; Geneva Convention relative to the Treatment of Prisoners of War (Geneva Convention III), art. 130; Geneva Convention relative to the Protection of Civilian Persons in Time of War (Geneva Convention IV), art. 147; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 85.

<sup>778</sup> *Yearbook ... 1996*, vol. II (Part Two), pp. 53–54.

(34) Torture is defined as a violation of human rights in all the relevant international instruments. Its characterization as prohibited conduct liable to criminal prosecution is found for the first time in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984, which defines it as a separate crime in article 1, paragraph 1. This definition includes, moreover, the significant requirement that an act cannot be characterized as torture unless it is carried out by or at the instigation of or with the consent of public officials, which places this crime squarely within the scope of the present draft articles. A similar definition is contained in the Inter-American Convention to Prevent and Punish Torture (arts. 2 and 3). The Commission considers that, for the purposes of the present draft article, torture is to be understood in accordance with the definition in the

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

(35) The enforced disappearance of persons was defined for the first time in the Inter-American Convention on the Forced Disappearance of Persons, of 9 June 1994 (art. II). The International Convention for the Protection of All Persons from Enforced Disappearance, of 20 December 2006, also defines this crime (art. 2). As in the case of torture, this definition requires that the act be carried out by or at the instigation of or with the consent of public officials, which places this crime squarely within the scope of the present draft articles. The Commission therefore considers that, for the purposes of the present draft article, the definition of enforced disappearance should be understood in accordance with article 2 of the 2006 Convention.