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Summary record of the 3328th meeting

Topic:
Immunity of State officials from foreign criminal jurisdiction

Extract from the Yearbook of the International Law Commission:-
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complemented that description with specific examples of cases concerning bilateral and multilateral treaties, involving both newly independent and other States. The analysis could have concluded with the formulation of a new guideline on those different cases.

66. With regard to the practice of international organizations, the analysis presented in chapter III of the fourth report was informative and relevant, since it complemented the analogous section in the third report. However, once again, that analysis should have been reflected in a concrete proposal or draft guideline; it was important that the practice of States and that of international organizations be clearly differentiated and not included in the same guidelines. Concerning the role of the United Nations Secretariat with respect to the provisional application of treaties, specifically within the context of its registration functions and the depositary functions of the Secretary-General, he agreed that the 1946 regulations on registration[450] should be revised and brought into line with the current state of practice.

67. Regarding the practice of regional international organizations, he confirmed that the member States of the Economic Community of West African States had increasingly resorted to the inclusion of a clause on provisional application in their treaties, although such practice was somewhat inconsistent. Furthermore, the main item on the agenda of a forum held by the African Union Commission on International Law in Cairo the previous year had been "The challenges of ratification and implementation of treaties in Africa", which was closely related to provisional application of treaties. It would have also been useful to include in the fourth report information on the practice of the members of the African Union, the continent's main regional organization.

68. Draft guideline 10 seemed to have been inspired by article 27 of the 1969 Vienna Convention; however, it did not address cases in which the treaty being provisionally applied made explicit reference to the internal laws of States. The draft guideline should therefore be revised so as to indicate that a State could not invoke the provisions of its internal law as justification for non-compliance with its obligations under the provisional application of a treaty, unless the treaty itself expressly allowed a party to do so. Reference could also be made to the concern expressed by many States that such provisional application must be subject to their constitutional requirements. He would welcome an explanation from the Special Rapporteur of the general context of that draft guideline and its relation to the other proposed guidelines.

69. As to future work on the topic, the Special Rapporteur merely referred to his intention to deal with some pending topics not dealt with in the present report; a more detailed road map would have been welcome, as would an explanation of the nature, scope and formulation of the proposed model clauses.

70. In conclusion, he recommended that the proposed draft guideline be referred to the Drafting Committee. He hoped that the Special Rapporteur would complement that draft guideline with other, related guidelines.

[450] General Assembly resolution 97 (I) of 14 December 1946.

71. Mr. FORTEAU said that it would actually be very easy to find out about State practice with regard to provisional application of treaties, as information was made available online by treaty depositaries. As noted in the fourth report, concerning the United Nations, for instance, from 1946 to 2015, 1,349 provisional application actions had been registered; much could no doubt be learned from examining those applications.

The meeting rose at 5.10 p.m.

3328th MEETING

Tuesday, 26 July 2016, at 10 a.m.

Chairperson: Mr. Pedro COMISSÁRIO AFONSO

Later: Mr. Georg NOLTE (Vice-Chairperson)

Present: Mr. Caflisch, Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gómez Robledo, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Kolodkin, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

Immunity of State officials from foreign criminal jurisdiction[451] (A/CN.4/689, Part II, sect. F,[452] A/CN.4/701[453])

[Agenda item 3]

FIFTH REPORT OF THE SPECIAL RAPPORTEUR

1. The CHAIRPERSON invited the Special Rapporteur to introduce her fifth report on immunity of State officials from foreign criminal jurisdiction (A/CN.4/701).

2. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that her fifth report was devoted to a study of limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction, an issue that had given rise to recurrent debates in the Commission and in the Sixth Committee, in the course of which over the years diverse

[451] At its sixty-fifth session (2013), the Commission provisionally adopted draft articles 1, 3 and 4 and the commentaries thereto (*Yearbook … 2013*, vol. II (Part Two), pp. 39 *et seq.*, para. 49). At its sixty-sixth session (2014), the Commission provisionally adopted draft article 2 (*e*) and draft article 5 and the commentaries thereto (*Yearbook … 2014*, vol. II (Part Two), pp. 143 *et seq.*, para. 132). At its sixty-seventh session (2015), the Commission took note of draft article 2 (*f*) and of draft article 6, as provisionally adopted by the Drafting Committee (*Yearbook … 2015*, vol. II (Part Two), p. 71, para. 176 and footnote 385.

[452] Available from the Commission's website, documents of the sixty-eighth session.

[453] Reproduced in *Yearbook … 2016*, vol. II (Part One).

and often opposing views had been expressed. As she had indicated at the outset, the issue could not be addressed until the normative elements of the general regime of immunities *ratione personae* and *ratione materiae* had been identified, which had been done at the previous session. The methodology followed in the present report was the same as in the previous reports.[454] While she had based the report principally on an analysis of judicial and treaty practice, as well as on the Commission's previous work, she had also added a section dedicated to an analysis of States' national legislation in order to determine the extent to which it provided for limitations or exceptions to immunity. She had also taken into consideration the information provided by States in response to the questions formulated by the Commission in 2014[455] and 2015.[456] In that regard, she noted that more than 20 written responses had been received in 2015 and 2016[457] and that most delegations that had spoken on the topic in the Sixth Committee had mentioned those questions. She had regrettably not been able to take into account the written comments submitted by the United Kingdom in 2016, as they had reached her after the fifth report had been completed. She thanked the secretariat for having circulated to Commission members all the comments received in 2016, which would allow them to be taken into account in the debate. She was also grateful to the secretariat for publishing on the Commission's website the written comments by States on the various issues under consideration and trusted that it would continue to perform that task, which helped to meet the need for transparency and openness in the Commission's work.

3. The report under consideration consisted of five chapters. The first aimed to describe the current state of the issue of limitations and exceptions to immunity within the context of the Commission's work by identifying in a systemic manner the issues raised during the debates since the inclusion of the topic on the Commission's programme of work in 2007, as well as the various views expressed by Commission members and by States in the Sixth Committee since that date. Chapters II, III and IV constituted the core of the fifth report and served as the basis on which draft article 7, entitled "Crimes in respect of which immunity does not apply", was proposed in chapter IV, while chapter V dealt with the future workplan. Lastly, the fifth report contained three annexes devoted, respectively, to draft articles 1, 2 (*e*), 3, 4 and 5, which had already been provisionally adopted by the Commission (annex I); draft articles 2 (*f*) and 6, which had been provisionally adopted by the Drafting Committee and would be considered at the current session (annex II); and draft article 7, proposed at the current session (annex III).

4. In addition, she would like to make the Commission aware of two points. First, the fifth report formed a whole with the four previous reports and should thus be read in conjunction with them. Thus, draft article 7 took on its full meaning only when read alongside the draft articles that had been provisionally adopted. Second, the English version of the report contained a number of errors and inaccuracies that might lead to a distorted interpretation of ideas and proposals put forward in the original version. For example, in draft article 7, paragraph 1 (ii), the expression "corruption-related crimes" should be replaced with "crimes of corruption". A corrigendum would be issued, which the members of the Commission might wish to take into account in the debate.

5. Turning to general remarks, she recalled first of all the purpose of the fifth report, which, though it might appear obvious, warranted a brief explanation. The aim was to try to discover whether there were situations in which the immunity of State officials from foreign criminal jurisdiction was without effect, even where such immunity was potentially applicable because all normative elements were present and, if the answer were in the affirmative, to identify those situations. That analysis was structured around two elements: the limitations and exceptions to immunity, on the one hand; and the crimes in respect of which immunity did not apply, on the other.

6. The use of the phrase "limitations and exceptions" reflected the various arguments found in practice to support the non-application of immunity. In that regard, she had taken into account in particular the fact that courts that had found that immunity was inapplicable in a given case had, in some instances, done so on the ground that a particular crime could not be considered an official act or an act ostensibly connected with official status, or simply that the act constituting the offence in question was not part of State functions. In other instances, they had denied immunity, taking the view that certain offences gave rise to exceptions to that regime because they violated *jus cogens* norms, internationally recognized human rights or, more generally, the basic legal values and principles of contemporary international law. The same diversity of approaches could be found in the views expressed by Commission members and by States in the Sixth Committee. With regard to the distinction between "limitations" and "exceptions" to immunity from jurisdiction, it should be noted that a limitation was intrinsic to the concept of immunity, or directly linked to it or to some of its normative elements. On the other hand, an exception was extrinsic to immunity and its normative elements, but nevertheless belonged to the international legal system and should for that reason be taken into account in the determination of the applicability of immunity in a specific case. That distinction was theoretical in nature, but also normative, as it had major consequences in terms of the systemic interpretation of immunity, which was why it had been included in the fifth report. However, it had no practical impact in terms of possible effects on immunity, and it could thus be said that, ultimately, whether a given situation involved a limitation or an exception, the effect of those concepts would be the same, namely the non-application of the legal regime of immunity of State officials from foreign criminal jurisdiction. That point was taken into account throughout the fifth report and was reflected in particular in draft article 7, which dealt with crimes in respect of which immunity did not apply, with no distinction being made between limitations and exceptions.

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[454] *Yearbook … 2012*, 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); and *Yearbook … 2015*, vol. II (Part One), document A/CN.4/686 (fourth report).

[455] *Yearbook … 2014*, vol. II (Part Two), p. 19, para. 28.

[456] *Yearbook … 2015*, vol. II (Part Two), p. 14, para. 29.

[457] Available from the Commission's website, http://legal.un.org/ilc/guide/gfra.shtml, *Analytical Guide*.

7. The second element of the fifth report involved analysing the limitations and exceptions to immunity in a holistic manner, without restricting the analysis to the relationship between the immunity of State officials from foreign criminal jurisdiction and international crimes, for the simple reason that, although international crimes or crimes under international law had been at the centre of the debate on the limitations and exceptions to immunity, the study of practice showed that the issue had also been raised in relation to other offences, such as, for example, corruption and the misappropriation of public funds. Although cases involving those offences were rarer, they were no less important in the eyes of the international community, which viewed them as an issue of serious concern. Furthermore, the issue of immunity from criminal jurisdiction with respect to those offences was beginning to be raised in international courts, as was shown by the proceedings instituted against France before the International Court of Justice by Equatorial Guinea on 13 June 2016 in *Immunities and Criminal Proceedings*. In addition, it was possible to find in practice examples of the non-application of immunity that were based not on the nature of a given offence, but rather on the existence of a criminal act associated with the primacy of the principle of territorial sovereignty applied to the exercise of criminal jurisdiction by the forum State, referred to as the "territorial tort exception". However, that holistic approach did not prevent the issue of international crimes from occupying a central place in the fifth report, as most cases of practice referred to those crimes. Lastly, it should be explained that waiver of immunity was not considered in the fifth as a limitation or an exception. Although it could produce the same effect as a limitation or exception, namely the non-applicability of immunity, that was not due to autonomous general rules, but rather to the mere exercise of the prerogative of the State with respect to which the official concerned enjoyed immunity. The inapplicability of immunity was in that case largely procedural in nature and would as such be analysed in the sixth report.

8. The second point to which she drew the Commission's attention concerned the fact that the issue of limitations and exceptions to immunity could not be addressed in isolation. On the contrary, it acquired its full meaning in the context of the study of immunity that had been conducted in the previous reports, which had highlighted the legal nature of that institution in contemporary international law. Those considerations, which were dealt with in chapter III, section A, of the fifth report, warranted a brief introduction because they had to be taken into account for the issue of limitations and exceptions to be properly analysed. First, the concepts of immunity and jurisdiction were two inextricably linked categories. Immunity could not be understood without the prior existence of a criminal jurisdiction that could be exercised by the forum State. Consequently, immunity was itself an exception to the exercise of jurisdiction by the courts of the forum State. Although immunity and jurisdiction were both undeniably linked to the principle of the sovereign equality of States, albeit differently, the exceptional nature of immunity had to be taken into account when establishing the possible existence of limitations and exceptions. Second, from a strictly formal perspective, immunity was procedural and could have no impact on the criminal responsibility of State officials, hence the principle that immunity was not equivalent to impunity. That being said, under certain circumstances, immunity could result in the absolute impossibility of determining the criminal responsibility of a State official: immunity as a procedural institution and immunity as a form of substantive defence then overlapped. Such effect had to be taken into consideration when analysing limitations and exceptions. Third, the immunity of State officials from foreign criminal jurisdiction was intended to operate within the framework of criminal proceedings whose purpose was to determine, as appropriate, the individual criminal responsibility of the author of certain acts classified as offences. It was thus distinct from State immunity, which was subject to a separate regime, including with regard to the issue of limitations and exceptions to immunity. Fourth, the existence of limitations and exceptions to immunity had to be examined, as such, within the framework of the exercise of criminal jurisdiction by the courts of the forum State. It was thus independent of the manner in which immunity might apply before international criminal courts and tribunals. That separation between types of jurisdiction, which constituted one of the elements that defined the scope of the present topic, prevented the automatic transposition of the rule of the non-applicability of immunity, which currently characterized international courts, to the regime of the immunity of State officials from foreign criminal jurisdiction. At the same time, it prevented the mere existence of international criminal courts and tribunals from being considered as an alternative mechanism for determining the criminal responsibility of State officials, which would make it possible to conclude, ultimately and categorically, that any form of immunity from foreign criminal jurisdiction, whether *ratione personae* or *ratione materiae*, was absolute in nature.

9. The Special Rapporteur said that she would conclude her general comments with some remarks on the importance of the analysis of practice in identifying the limitations and exceptions to immunity and the need to supplement that analysis with a systemic approach to interpretation of immunity and the limitations and exceptions thereto. Indeed, as she had already indicated in her previous reports, the study of practice was the essential basis of the Commission's work on the topic, a methodological principle that she had duly followed in her fifth report.

10. The analysis of practice was particularly important in relation to crimes under international law, as it revealed that, although practice was varied, there was a clear trend towards considering the commission of international crimes as a bar to the application of the immunity of State officials from foreign criminal jurisdiction, either because such crimes were not considered official acts, or because they were considered an exception to immunity owing to their gravity or to fact that they undermined legal values and principles recognized by the international community as a whole. Although national courts had sometimes recognized the immunity of State officials from foreign criminal jurisdiction for international crimes, it should be recalled that those decisions largely concerned immunity *ratione personae* and only very exceptionally immunity *ratione materiae*. The aim of the analysis of practice was to determine whether that practice and its acceptance as

law were sufficient to establish the existence of a rule of customary international law pursuant to which international crimes constituted a limitation or exception to immunity. That analysis was carried out in chapter IV, section A.1, of the fifth report, in the light of the Commission's work on the identification of customary international law, in particular the draft conclusions provisionally adopted at the current session. It could be concluded from that analysis that the commission of international crimes could currently be considered to constitute a limitation or exception to the immunity of State officials from criminal jurisdiction based on a rule of international customary law. Even though there might be doubt as to the existence of sufficient general practice amounting to an international custom, it did not seem possible under any circumstances, in the light of the analysis of practice, to deny that there was a clear trend that reflected an emerging custom.

11. In addition to the indispensable analysis of practice, there was a need to examine limitations and exceptions to immunity from the perspective of international law as a normative system that included, as one of its parts or components, the institution of immunity of State officials from foreign criminal jurisdiction. That aspect, duly taken into consideration in the fifth report, required that immunity be analysed not in insolation, but in relation to the rest of the rules and institutions that made up the system. From that perspective, immunity was an undeniably valuable and necessary institution for ensuring that certain principles and legal values of the international legal order, in particular the principle of the sovereign equality of States, were respected. At the same time, as a component of the system, the immunity of State officials from foreign criminal jurisdiction should be interpreted in a systemic fashion to ensure that this institution did not produce negative effects on, or nullify, other components of the contemporary system of international law. That systemic approach required that other institutions that were also related to the principle of sovereignty, especially the right to exercise jurisdiction, should be taken into account, together with other sectors of the international legal order that enshrined values and principles recognized by the international community as a whole, in particular international human rights law and international criminal law. As international law was a genuine normative system, the development by the Commission of draft articles intended to assist States in the codification and progressive development of international law with respect to a problematic but highly important issue for the international community could not, and should not, have the effect of introducing imbalances into major sectors of the international legal order that had developed over recent decades and that were now among its defining characteristics.

12. It was in accordance with that systemic approach, on which the entire fifth report was based, in particular chapter III, sections A and B, and chapter IV, section A.2, that an analysis was conducted of the relationship between immunity and the main categories of rules of contemporary international law, such as *jus cogens*, the values and principles of international law, and the attribution of a legal dimension to the concepts of impunity and accountability, as well as the principle of combating impunity. The relationship between immunity and the right of access to a court, victims' right to redress and the State's obligation to prosecute certain international crimes were also analysed from a systemic perspective. This should reassure the numerous States and the no less numerous members of the Commission who had insisted on the need to ensure that work on the present topic was compatible with contemporary international law as a whole and did not alter the basic elements of international criminal law as it had developed since the 1990s, in particular with regard to the definition of the principle of individual criminal responsibility for crimes under international law and the need to guarantee the existence of effective mechanisms to combat impunity for crimes that profoundly shocked the conscience of humanity.

13. In the light of those substantive comments, it was necessary to offer some explanations regarding draft article 7 as proposed in the fifth report and submitted to the Commission for consideration. That draft article consisted of three paragraphs setting out the various elements that defined the regime of limitations and exceptions to immunity. She drew to the attention of Commission members the fact that there was an error in the numbering of the subparagraphs of paragraphs 1 and 3, which should read respectively: "(*a*)", "(*b*)" and "(*c*)"; and "(*a*)" and "(*b*)". For the purposes of her introduction, she would refer to the various subparagraphs using the amended identifier.

14. Draft article 7, paragraph 1, defined in general terms the crimes in respect of which immunity did not apply. Its wording was similar to that used by the Commission in its work on State immunity. The expression "does not apply" took into account the fact that divergent views had been expressed as to whether the scenarios mentioned constituted limitations or exceptions, an issue that had still not been resolved. Besides, it reflected perfectly the effect produced by limitations and exceptions to immunity, namely the inapplicability of the regime of immunity in certain cases. In her view, that wording was particularly appropriate in the case of international crimes, as there was considerable debate regarding whether they could be committed in an official capacity or be considered functions of the State, although they were generally considered not to be covered by immunity.

15. Moreover, it had been decided to define the instances in which immunity did not apply by reference to the crimes in respect of which jurisdiction was sought and not, as in the case of the immunity of the State, by reference to the proceedings in which those crimes could be examined, for two reasons. The first was that it was the very nature of the crime that justified the inapplicability of immunity. It should in that regard be recalled that limitations and exceptions to immunity had always been linked to the crimes in respect of which immunity was inapplicable, and that the determinant role of the crime in the context of limitations and exceptions was confirmed both in practice and in the views expressed by Commission members and States during debates. The second reason was that immunity could be invoked in respect of various acts or in proceedings to which the beneficiary of immunity would not necessarily be party, not to mention the fact that the concept of proceedings could itself be interpreted differently for the purposes of the present topic. She had thus opted for what seemed to her a cautious approach, since the Commission had yet to reach a

conclusion with regard to either the concept of jurisdiction or the procedural aspects of immunity, which would be dealt with in the sixth report.

16. The three situations enumerated in draft article 7, paragraph 1, in which immunity did not apply were crimes under international law, corruption and what was referred to as the "territorial tort exception", which covered crimes that caused harm to persons, including death and serious injury, or to property, when such crimes were committed in the territory of the forum State and the State official was present in that territory at the time that they were committed. That categorization was based on the practice analysed in the fifth report. Rather than use the generic term "crimes under international law", she had chosen to list explicitly the various crimes that fell into that category – genocide, crimes against humanity, war crimes, torture and enforced disappearances – as they were the crimes encountered in practice and those whose classification as crimes under international law met with widespread agreement within the international community.

17. Draft article 7, paragraph 2, which defined the scope of the limitations and exceptions, stated that the provisions of draft article 7, paragraph 1, did not apply to the beneficiaries of immunity *ratione personae* – Heads of State, Heads of Government and Ministers for Foreign Affairs – during their term of office. Consequently, the limitations and exceptions to immunity applied only to immunity *ratione materiae*, as defined by the Commission. The exclusion of the aforementioned three categories of State officials was also based on practice, as it had not been possible to find cases in which States had brought criminal proceedings against a Head of State, Head of Government or Minister for Foreign Affairs, even when the latter were suspected or accused of having committed the most atrocious crimes. That State practice had moreover been confirmed by the International Court of Justice, which had granted immunity in cases in which an arrest warrant or summons to appear as a witness had been issued. That was undoubtedly due to the special representative role of the holders of the aforementioned offices in international relations, a role assigned to them directly by the norms of international law, not only by domestic norms. It was for that reason that it was so important to preserve the principle of the sovereign equality of States on which immunity rested. That being said, it should be borne in mind that the inapplicability of limitations and exceptions to Heads of State, Heads of Government and Ministers for Foreign Affairs was strictly limited in time, and that draft article 7, paragraph 1, thus again became applicable as soon their term of office had expired.

18. Lastly, draft article 7, paragraph 3, which took the form of a "without prejudice" clause, dealt with two scenarios in which immunity would be inapplicable owing to the existence of special regimes. The first scenario concerned the situation in which treaties in force between the forum State and the State of the official would render the immunities of State officials non-applicable in the respective criminal courts of the two States. In that scenario, the general rule of immunity would be set aside by the collective will of the States concerned. The second scenario was that in which the forum State had a general obligation to cooperate with an international tribunal exercising criminal jurisdiction. However, that provision could not be interpreted as excluding the applicability of immunity in all cases in which a State was required to cooperate with an international tribunal. In such cases, the applicability of immunity would depend on many factors: the nature and content of the obligation to cooperate; the extent to which the obligation to cooperate was enforceable against the forum State; and the legal relationship between the forum State and the State of the official stemming from that obligation. Those elements would have to be analysed on a case-by-case basis, as it was not possible to draw the *a priori* conclusion that the obligation to cooperate with an international tribunal automatically excluded the possibility of applying any form of immunity to a State official.

19. The two regimes referred to in draft article 7, paragraph 3, were based on examples from practice. The scenario identified in draft article 7, paragraph 3 (*b*), in particular, took into account the complex situation created in South Africa by the application of article 98, paragraph 1, of the Rome Statute of the International Criminal Court, which had eventually been resolved by the refusal of the courts of that country to grant immunity from foreign criminal jurisdiction to State officials.

20. Turning to the future workplan, she said that the report due for submission in 2017 would be dedicated to the procedural aspects of immunity, including issues relating to the invocation and waiver of immunity, the role that might be played by the State of the official in proceedings conducted in the forum State and international legal cooperation in relation to immunity. That report should also contain an analysis of a number of elements linked to the concept of jurisdiction itself, the definition of which was still under consideration in the Drafting Committee. In relation to those issues, it would be necessary in particular to analyse when immunity should apply and the types of act of the forum State that would be affected by immunity. All the issues that she had included in the programme of work in her preliminary report[458] would then have been examined. The Commission would thus be in a position to adopt the draft articles on first reading in 2017 or, at the latest, in 2018, depending on how the study of the subject developed over the forthcoming quinquennium and on the decisions taken by the Commission in its new composition. To conclude, she said that she looked forward with great interest to the views of members, on the understanding that the debate would not be closed at the current session, but would be continued at the following one.

21. Mr. KITTICHAISAREE said that he was not sure that he understood what was meant by "hermeneutical criteria", to which the Special Rapporteur referred in paragraph 175 of her fifth report, or why those criteria had to be used to determine the existence of a limitation or exception to immunity; he would appreciate clarification in that regard. Moreover, in his view, the distinction between the concepts of limitation and exception was not clear, and the Special Rapporteur's explanations on that point would benefit from simplification. Lastly, he would like to know why, as suggested by paragraph 17 of the fifth report, the Special Rapporteur seemed to want to return to the issue of the values of the international community when that issue had already been dealt with in detail in her

[458] See *Yearbook … 2012*, vol. II (Part One), document A/CN.4/654, pp. 50–51, paras. 71–77.

preliminary report and had given rise to concerns on the part of many Commission members.

22. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that, although it was not the Commission's practice to allow members to pose questions to the Special Rapporteur immediately after the introduction of a report, she was prepared, on a very exceptional basis, to respond to Mr. Kittichaisaree's questions, as they addressed essential points. With regard to the distinction between the concepts of limitation and exception, she believed that her fifth report contained all the necessary explanations on the matter. The hermeneutical criteria were the criteria of interpretation, and it was necessary to distinguish between limitations and exceptions because the applicable criteria of interpretation were different in each case. With regard to limitations, only the three normative elements of immunity approved by the Commission to date applied, whereas, in the case of exceptions, other criteria could also apply. As for the values of the international community, the treatment of that issue in her preliminary report had not provoked only hostile reactions from members of the Commission, as some members had reacted very positively. While she had no intention of reopening the debate at the current stage of work, the issue was nevertheless an integral part of the study of the topic, as was clear from all the reports that she had submitted to the Commission since the start of her work on immunity, and her fifth report made clear that the values in question were legal values, incorporated into international law, and not only political or sociological values.

23. Mr. MURASE thanked the Special Rapporteur for her fifth report on immunity of State officials from foreign criminal jurisdiction, which was devoted to the exceptions to immunity. The long-awaited report offered new insights that would not fail to give full reassurance to the many Commission members, academics and experts who had criticized the choices that the Commission had made and the content of its work. It was thus important to commend the courage of the Special Rapporteur, who, in draft article 7, paragraph 1, on exceptions to immunity, proposed categorical wording, without reservations and without ambiguity, although he was not convinced by draft article 7, paragraph 2, which provided for exceptions to those exceptions. The Special Rapporteur had drafted her fifth report with great care: as there were two sides to every coin, she had tried to strike a balance between general rules and exceptions to those rules. Thus, there were 72 occurrences of the word "however" in the fifth report, compared to 24 in the second report on crimes against humanity (A/CN.4/690). That was certainly not to say that Mr. Murphy, the Special Rapporteur for that topic, had looked at only one side of the coin, but it gave an idea of the fierce struggle that she had had to wage throughout the drafting of her report.

24. He had already had the opportunity to state, at previous sessions, that a fundamental methodological error had been made from the outset of work in 2011. Members would remember that, following the consideration of the second and third reports presented by Mr. Kolodkin,[459] who had been the Special Rapporteur for the topic at the time, two crucial questions had been raised. The first was which State officials would enjoy immunity and the second was which crimes were to be covered by the draft, the two aspects being of course closely linked. The Commission, which had put those two questions to Member States,[460] had examined the first, but had yet to address the second.

25. If exceptions to the rules set out in draft articles 3 to 6, which had already been adopted by the Commission, had not been introduced, the draft texts would have been in complete contradiction with the wording of article 27, paragraph 1, of the Rome Statute of the International Criminal Court, even though the Statute established a vertical relationship between the International Criminal Court and States parties, and the present project was intended to govern the horizontal relationships among States. In any case, he welcomed the fact that the problem had finally been resolved by the introduction of appropriate exceptions to the rules set out in those draft articles.

26. In paragraph 142 of her fifth report, the Special Rapporteur insisted that the methodological and theoretical aspects of immunity should be examined in the context of international law seen as a normative system. That approach, she reasoned, involved examining immunity not in isolation, but in relation to the other norms and institutions that made up the international legal system. As one of the elements of that system, immunity of State officials from foreign criminal jurisdiction should be interpreted in a systemic manner in order to ensure that it did not produce negative effects on, or nullify, other components of the contemporary system of international law understood as a whole. He fully endorsed that approach and agreed with the Special Rapporteur that, as international law was a genuine normative system, the Commission's development of the draft articles could not and should not have the effect of introducing imbalances in significant sectors of the international legal order that had developed over recent decades and that were now among its defining characteristics. While the effect of the Rome Statute of the International Criminal Court on the Commission's draft articles should not be underestimated, the introduction of exceptions to immunity would thereby restore a welcome and proper balance.

27. In paragraphs 143 to 147 of her fifth report, the Special Rapporteur made necessary clarifications regarding the relationships between the following basic concepts: immunity and jurisdiction; immunity and responsibility; and immunity of the State and immunity of State officials. However, it should not be forgotten that, as indicated in paragraph 150, immunity and responsibility were intrinsically linked and that, other than by departing from practice, the former could not be considered a mere procedural bar, divorced from the latter. He himself had made the same comment at the previous session.

28. The Special Rapporteur was right to note, in paragraphs 156 to 169 of the fifth report, that the invocation of immunity before national courts and the invocation of immunity before international courts were closely linked

[459] *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).

[460] *Yearbook … 2011*, vol. II (Part Two), p. 20, paras. 37–38.

and that those two situations should be examined in a systemic manner. In that context, he welcomed the emerging concept of "positive complementarity", referred to by the Special Rapporteur in paragraph 168 of her fifth report. The Rome Statute of the International Criminal Court, under the principle of complementarity, was clearly intended to ensure respect for the sovereign right of States to prosecute the perpetrators of serious international crimes. It was important that the international rules relating to immunity not hinder the effectiveness of the system of complementarity established by the Statute, which encouraged the active exercise by States of their jurisdiction with regard to those crimes.

29. As the Special Rapporteur noted in paragraphs 170 to 176 of her fifth report, there was no need to make a clear distinction between the concepts of limitation and exception. Consequently, he would use the word "exception" in the rest of his statement, which would deal largely with draft article 7. In draft article 7, paragraph 1, it was stated that immunity did not apply to genocide, crimes against humanity, war crimes, torture and enforced disappearances. He fully endorsed that wording, which was simultaneously clear, categorical and simple; the international crimes mentioned were well established in customary international law. He also agreed that torture and enforced disappearances should be mentioned explicitly because those crimes did not necessarily have the elements required for crimes against humanity.

30. He shared the concerns expressed by the Special Rapporteur with regard to the crime of aggression, which was not covered in the draft article for the reasons given in paragraph 222 of her fifth report. In that regard, it should be noted that, following the Review Conference of the Rome Statute of the International Criminal Court in 2010, it had been stipulated in the fifth understanding of the Amendments on the crime of aggression to the Rome Statute of the International Criminal Court that the Amendments "shall not be interpreted as creating the right or obligation to exercise domestic jurisdiction with respect to an act of aggression committed by another State".[461] However, it would have been preferable to include that crime, for two principal reasons: first, and regardless of that understanding, there was a tendency among States parties to enact legislation to implement these Amendments; and second, it was a crime committed by State officials in the context of their official functions. Indeed, it was stated clearly in the definition of the crime of aggression set out in the above-mentioned Amendments – in article 8 *bis* – that it was a crime committed by "a person in a position effectively to exercise control over or to direct the political or military action of a State". To take that crime into account would highlight the main point of the draft articles, which was to ensure that, even if he or she had committed the acts in an official capacity, the State official did not benefit from immunity.

31. He was not sure that it was appropriate to mention "corruption" in draft article 7, paragraph 1 (*b*) because that offence was, from a criminal perspective, very far removed from the international crimes mentioned in draft article 7, paragraph 1 (*a*). The acceptance of a bribe did not fall within the scope of the exercise by a State official of his or her functions, and it was difficult to imagine that immunity would be invoked for acts of that kind, as it had to be invoked by the State of the official. Nor was he convinced that it was necessary to introduce a territorial tort exception in draft article 7, paragraph 1 (*c*). It had caused many problems in the context of State immunity and, in the context of the immunity of State officials, there was limited practice to substantiate that exception. Furthermore, it had not been established that the issue fell within the scope of the topic, which concerned "foreign criminal jurisdiction". It would thus be better if draft article 7, paragraph 1, read: "Immunity shall not apply in relation to genocide, crimes against humanity, crimes of aggression, war crimes, torture and enforced disappearances."

32. He also had serious concerns regarding draft article 7, paragraph 2, pursuant to which immunity applied to State officials "during their term of office". State officials who perpetrated serious international crimes should never enjoy immunity, either during or after their term of office.

33. Article 27 of the Rome Statute of the International Criminal Court provided that "official capacity… shall in no case exempt a person from criminal responsibility under this Statute" and that "[i]mmunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person". In accordance with the principle of complementarity, national courts were required to exercise their criminal jurisdiction even if the crimes had been committed by State officials "during their term of office", at the very least in the case of genocide, crimes against humanity, crimes of aggression and war crimes. In his view, draft article 7 should thus be brought into line with the Statute to the fullest extent possible, which would involve deleting the second paragraph. Furthermore, the draft articles on the scope of immunity *ratione materiae* and the scope of immunity *ratione personae*, on the one hand, and the draft article on exceptions to immunity, on the other, should be clearly linked. He thus proposed inserting in draft article 4 (Scope of immunity *ratione personae*) and in draft article 6 (Scope of immunity *ratione materiae*) an additional paragraph to read: "This is without prejudice to the limitations and exceptions provided for in draft article 7." Lastly, he endorsed the "without prejudice" clauses in draft article 7, paragraph 3, and supported sending the draft text to the Drafting Committee.

Mr. Nolte, First Vice-Chairperson, took the Chair.

34. The CHAIRPERSON, noting that there were no other speakers on the list, proposed that the meeting be adjourned to enable the Drafting Committee on *jus cogens* to meet.

It was so decided.

The meeting rose at 11.15 a.m.

[461] See *Review Conference of the Rome Statute of the International Criminal Court, Kampala, 31 May–11 June 2010, Official Records*, International Criminal Court publication, RC/9/11, resolution 6, The crime of agression (RC/Res.6), annex III.