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Sixty-eighth session (second part)

Provisional summary record of the 3330th meeting

Held at the Palais des Nations, Geneva, on Thursday, 28 July 2016, at 10 a.m.

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Immunity of State officials from foreign criminal jurisdiction (*continued*)

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Present:

Chairman: Mr. Comissário Afonso

Members: Mr. Caflisch
Mr. Candiotti
Mr. El-Murtadi
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. Murase
Mr. Murphy
Mr. Niehaus
Mr. Nolte
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

Secretariat:

Mr. Llewellyn Secretary to the Commission

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

Immunity of State officials from foreign criminal jurisdiction (agenda item 3)

(continued) (A/CN.4/701)

The Chairman invited the Commission to resume its consideration of the fifth report of the Special Rapporteur on the topic of immunity of State officials from foreign criminal jurisdiction (A/CN.4/701).

Mr. Saboia said that he wished to thank the Special Rapporteur for her fifth report on the immunity of State officials from foreign criminal jurisdiction. The report, which was supported by extensive research and reflected a balanced approach, was itself an important contribution to the understanding of a particularly complex area of contemporary international law. It was consistent with previous reports, including those submitted by the first Special Rapporteur on the topic, Mr. Kolodkin. It was also commendable that the Special Rapporteur included in her report an overview of arguments, criticisms, opinions and judicial practice that diverged from her own points of view, thus demonstrated her impartiality and objectivity. In 2012, when introducing her preliminary report, the Special Rapporteur had defined the purpose of the Commission's work on the topic in the following manner: to understand and help lay a firm foundation for a system of immunity of State officials from foreign criminal jurisdiction that could be incorporated seamlessly into contemporary international law, thereby ensuring that such immunity did not conflict unnecessarily with other principles and values of the international community that were also in the process of incorporation into international law. That starting point provided a solid basis from which to address the complex issues covered by the present report, namely the limitations or exceptions to such immunity, without precluding the consideration of all the legal and other aspects that related to the topic. Furthermore, as Mr. Murase had pointed out in his statement, the Special Rapporteur's emphasis on the normative aspects of the issues discussed in the report, in particular the study of international law from a systemic viewpoint, was very important in terms of preserving coherence and balance among the principles and values underlying the two aspects of the topic: on the one hand, the immunity of State officials from foreign criminal jurisdiction, and on the other, the sovereign right of a State to exercise its jurisdiction when immunity did not apply, the values recognized by the international community as a whole and the need to ensure that the invocation of immunity did not lead to impunity or undermine the progress made in recent decades in the field of international criminal law.

The fifth report comprised 80 pages and 332 footnotes, which referred to a large number of international instruments, examples of national and international case law, national laws, resolutions of international organizations and works of scholarly literature. He would not address them in detail but would restrict his comments to the aspects he considered particularly important. Generally speaking, he approved of the methodological approach and main thrust of the report. He also approved of the wording of draft article 7 (Crimes in respect of which immunity does not apply) and was in favour of referring it to the Drafting Committee.

In chapter II, section B, of her fifth report, the Special Rapporteur provided an account of the prior consideration by the Commission of limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction. In paragraph 19, she provided a summary — which was at once fair, impartial and objective — of the Commission's discussions to date on that subject in plenary meetings and in the Drafting Committee. In paragraph 20, she also summarized the views expressed by delegations during the discussions on the topic held in the Sixth Committee and the written contributions submitted by States. Although he had not participated in those discussions, he had no doubt that her summary accurately reflected the views expressed; they revealed that a significant number of States from different regions supported the idea of studying questions relating to exceptions to immunity from jurisdiction, in particular immunity *ratione materiae*, especially as they related to international crimes.

Chapter II presented a study of practice, including treaty practice. Paragraphs 26 to 31 of the report highlighted interesting aspects of the United Nations Convention on Jurisdictional Immunities of States and Their Property. Even though that Convention was

not directly relevant to the Commission's work on the topic, some of its provisions were pertinent, as illustrated in the report. Firstly, article 12 of the Convention, which dealt with personal injuries and damage to property, provided for a so-called "territorial tort exception", which prohibited the invocation of immunity from jurisdiction in order to prevent a court from exercising its jurisdiction in a proceeding that related to pecuniary compensation for death or injury to the person, or damage to or loss of tangible property. Secondly, it was noteworthy that that rule was also enshrined in other conventions, such as the Vienna Convention on Consular Relations, the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character and the European Convention on State Immunity. The inclusion of the "territorial tort exception" in draft article 7 therefore appeared to be sufficiently supported by practice.

He also wished to highlight the interesting analysis set out in paragraphs 32 to 35 of the report concerning international human rights treaties that contained provisions on individual criminal responsibility that were relevant for the purposes of the current topic. The Special Rapporteur also analysed the Rome Statute of the International Criminal Court and the international conventions on corruption, in terms of how they applied to State officials. The analysis set forth in paragraph 33 concerning the various ways in which those treaties provided for the attribution of an act to a State official was also useful. On the basis of that analysis, the Special Rapporteur had drawn the conclusion that the commission of a crime of genocide, apartheid, torture or enforced disappearance could constitute *prima facie* an exception to immunity from criminal jurisdiction. He would refrain from commenting in depth on the review of national legislative practice described in paragraphs 42 to 59, since, as the Special Rapporteur had indicated, the jurisdictional immunity of the State or of its officials was not explicitly regulated in most States. As a result, national courts generally relied directly on international consular or treaty law and often received recommendations from the Ministry of Foreign Affairs or the Attorney General's Office. However, some national laws, such as those cited in paragraphs 44 and 45, contained provisions that, for the most part, related to the "territorial tort exception". The Special Rapporteur's reference to sponsors of terrorism in paragraph 48 was also thought-provoking.

Paragraph 50 referred to the adoption of Organic Act No. 16/2015 of Spain, which established separate regimes for State officials who enjoyed immunity *ratione personae* and those who enjoyed immunity *ratione materiae*. With regard to the second type of regime, the Act expressly stipulated that persons accused of the crime of genocide, war crimes, the crime of enforced disappearance or crimes against humanity, were precluded from invoking immunity. Although few in number, those examples demonstrated the existence of a practice characterized by the recognition of the preclusion of immunity *ratione materiae* in respect of certain crimes, in particular international crimes committed by an official of a foreign State.

The discussion of national judicial practice in section D of the same chapter of the report referred to many additional elements that were indicative of a widespread practice by States. In paragraphs 109 to 122, with the help of numerous footnotes, the Special Rapporteur analysed a large number of important decisions that had been handed down by the domestic courts of various countries and concluded that practically all of those courts had recognized that there were no limitations or exceptions to immunity *ratione personae*. Conversely, with regard to immunity *ratione materiae*, the prevailing trend was to recognize limitations in cases involving the commission of serious crimes or when the acts in question contravened a norm of *jus cogens*, ran contrary to the values of the international community as a whole or could not be characterized as acts performed in an official capacity.

Lastly, in paragraph 122, the Special Rapporteur referred to the judgment of the Italian Constitutional Court of 22 October 2014 on questions arising from the incorporation into the Italian legal system of the judgment of the International Court of Justice in the case concerning *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*. As indicated in the report, although that case involved State immunity *stricto sensu*, it was nevertheless germane to the present topic, and in that regard, it should be recalled that immunity could not be considered as an acceptable sacrifice of inviolable rights when, as in

the case referred to in the report, no other effective recourse for gaining access to the courts and obtaining effective judicial protection was available.

Chapter II, section E, of the report presented a review of the previous work of the Commission, from which the Special Rapporteur had extracted a large number of relevant examples of both *opinio juris* and international practice in relation to the non-applicability of the immunity from jurisdiction of State officials who could reasonably be suspected of having committed acts constituting international crimes.

In the context of international relations, the purpose of immunity from jurisdiction was to protect the sovereign equality of States and to ensure that their officials could perform official acts without any interference that was incompatible with their status, as well as, in the case of senior officials who were protected by immunity *ratione personae*, acts performed in a private capacity during the time that they were in office. In his own view, immunity from jurisdiction should be examined in the light of the sovereign right of the forum State to exercise its jurisdiction. That prerogative, which was inherent in State sovereignty, constituted the general rule, to which immunity from jurisdiction put up a procedural bar. Thus, given that immunity was an exception to a general rule, it should be interpreted narrowly.

With regard to the previous work of the Commission, which the Special Rapporteur had examined thoroughly and carefully, he wished to draw attention to the most prominent examples, namely the Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, and the Draft Code of Crimes against the Peace and Security of Mankind. Note should be taken of the Special Rapporteur's observations in paragraph 126 of the report concerning the Commission's commentaries to the aforementioned Principles. Firstly, international law could impose duties and liabilities on individuals directly, without the need for intermediation. That commentary confirmed what the Special Rapporteur stated in her report on the subject of the dual responsibility of the State, meaning the international responsibility of the State and the criminal responsibility of the individual, for the commission of international crimes. Secondly, international law had supremacy over domestic law, given that, as noted by the Nürnberg Tribunal, "individuals have international duties which transcend the national obligations of obedience".

Mention should also be made of the points raised in paragraph 127 of the report, in which the Special Rapporteur indicated that the Nürnberg Principles were essentially substantive in nature; thus, the text that had been adopted by the Commission did not specifically refer to immunity. The Tribunal had expressly addressed that issue in several of its decisions, which were reflected by the Commission in its commentary to article 7 of the Draft Code of Crimes against the Peace and Security of Mankind, in which the Commission stated that "the principle of international law which protects State representatives in certain circumstances does not apply to acts which constitute crimes under international law. Thus, an individual cannot invoke his official position to avoid responsibility for such an act."

In relation to the discussion concerning the Draft Code of Crimes against the Peace and Security of Mankind that appeared in paragraphs 128 to 133 of the report, in particular paragraphs 131 and 132, while it was true that the Commission had indicated that judicial proceedings before an international criminal court would be the quintessential example of appropriate judicial proceedings in which an individual could not invoke any immunity based on his or her official position, the Commission had nevertheless considered that national courts were expected to play an important role in the implementation of the Code and that States should enact any procedural or substantive measures that might be necessary to enable them to effectively exercise jurisdiction, which, according to the Special Rapporteur, included the obligation to adopt provisions that ruled out the applicability of immunity under the terms defined in the Code. The list of crimes defined in the Code as international crimes, which appeared in paragraph 133 of the report, included the crime of aggression — a point that had given rise to a mini-debate at the Commission's 3329th meeting.

He had nothing to add to that part of the Special Rapporteur's analysis that was based on the articles on responsibility of States for internationally wrongful acts, since the

Special Rapporteur herself had recognized that, although those articles did not directly address the question of immunity from jurisdiction, the commentaries to those articles did contain a number of elements that could help to situate crimes under international law more appropriately in the international legal system and could therefore be useful for the present study. References to the establishment of the primacy of peremptory norms, the affirmation of the existence of obligations towards the international community as a whole and the identification of the most serious crimes under international law as breaches of peremptory norms were particularly important.

With regard to the primacy of peremptory norms and the relationship between peremptory norms and non-peremptory norms, the Commission considered that the primacy of the former was evident whenever there was a conflict between two primary norms and also held true whenever there was a conflict between primary and secondary norms. As a result, it indicated that, in respect of rules precluding wrongfulness, the application of secondary rules did not authorize or excuse any derogation from a peremptory norm of general international law. The Commission also indicated that, on the subject of the relationship between peremptory norms and obligations towards the international community as a whole, the latter arose from the former; in other words, those obligations arose from substantive rules of conduct that prohibited what had come to be seen as intolerable because of the threat it posed to the survival of States and their peoples and the most basic human values.

Equally important were the observations described in paragraph 139 of the report concerning the special nature of obligations towards the international community as a whole and the effects of those obligations, in particular the assertion based on article 48 of the articles on responsibility of States for internationally wrongful acts to the effect that any State was entitled to invoke the responsibility of another State if the obligation breached was owed to the international community as a whole, and the possibility referred to by the Special Rapporteur of establishing a different legal regime for the immunity of State officials from foreign criminal jurisdiction.

In the interest of time, he would refrain from commenting on chapter III of the report and would proceed to chapter IV, which dealt with instances in which immunity did not apply. In it, the Special Rapporteur referred to the question of whether there was a customary norm whereby international crimes were considered an exception to the immunity of State officials from foreign criminal jurisdiction. After having examined the required elements for determining the existence of an international custom, based on the Commission's work on the identification of customary international law and the draft conclusions that it had provisionally adopted on that topic, and after having reviewed the counterarguments that had emerged from practice, she had answered that question in the affirmative. While he agreed with the principle underlying the Special Rapporteur's conclusion, he pointed out that it was the immunity of States and not of State officials, to which the Special Rapporteur referred to in paragraph 189 of her report, and he would therefore appreciate clarification in that regard.

Leaving aside the question of custom, the Special Rapporteur then proceeded to an analysis of the systemic categorization of international crimes as an exception to immunity, to which Mr. Murase had referred in his statement. Beginning with paragraph 190, she examined the issue of the protection of the values of the international community as a whole, *jus cogens* and the fight against impunity. Her analysis of the question of whether the fight against impunity for international crimes was a legal value, not just a sociological value, was particularly interesting, and she was right to respond to that question in the affirmative by referring to the gradual transformation of sociological values into legal norms. That transformation had been the result of the development of international law since the end of the Second World War, with the incorporation into international human rights law and international humanitarian law of a set of legal obligations relating to rights that were inherent in human dignity and that were applicable both in times of war and in times of peace. The Special Rapporteur had also examined the gradual evolution of accountability, one important step of which had been the Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International

Levels, by virtue of which States had undertaken commitments, which were listed in footnote 336 of the report.

Based on her consideration of the possible effects of the judgment of the International Court of Justice in *Jurisdictional Immunities of the State*, the Special Rapporteur concluded that the reasoning of the Court could not be applied automatically and in all respects to the relationship between the immunity of State officials from foreign criminal jurisdiction and *jus cogens* norms. He fully agreed with that position, as well as with the statement made in paragraph 217 of the report that the arguments analysed in the report made it clear that there were sufficient grounds in contemporary international law to conclude that the commission of international crimes could constitute a limitation or exception to the immunity of State officials from foreign criminal jurisdiction.

He also agreed with the wording proposed by the Special Rapporteur in draft article 7 (2), which indicated that exceptions to immunity did not apply to persons who enjoyed immunity *ratione personae* during their term of office, for the reasons set out in the report. The possibility of referring to other crimes of international concern, such as piracy, human trafficking, slavery and various forms of discrimination, which were traditionally covered by customary or treaty provisions that related to universal jurisdiction, could perhaps be discussed in the Drafting Committee at an appropriate time.

He was also in favour of including in the list of crimes in respect of which immunity did not apply, that of corruption, even if he believed that it might perhaps be necessary to specify its various forms, since corruption had indeed become a threat to both the economic and social development of States and peoples and the rule of law, and often led to the commission of other particularly serious offences. Lastly, he agreed with the Special Rapporteur that her next report should deal with the procedural aspects of immunity, including guarantees relating to the right to a fair trial.

Mr. Candioti said that the fifth report of the Special Rapporteur represented a decisive step forward in the Commission's work on the topic. He fully endorsed the comments made by Mr. Saboia, especially his proposal to add the crimes that were traditionally subject to universal jurisdiction to the list of crimes in respect of which immunity did not apply. Modern forms of piracy were a topical issue that merited consideration by the Commission. At a time when the world was experiencing an extremely grave crisis in which the fundamental rules of the international legal order were being seriously flouted, it was essential that the Commission's message to the international community on the question of immunity should reaffirm the importance of the rule of law and the need to fight in order to protect it.

Mr. Huang said that, by addressing the issue of exceptions to immunity, the deliberations on the topic had entered a complex and delicate phase. As pointed out by the Special Rapporteur, limitations and exceptions to immunity were undoubtedly one of the central issues to be considered by the Commission in its work on the topic and also constituted a very politically sensitive issue, which, consequently, must be dealt with prudently. When the Sixth Committee of the General Assembly had discussed the Commission's report in 2015, some States had expressed concern at the proposition that serious international crimes constituted an exception to the immunity of State officials from foreign criminal jurisdiction, pointing out that customary international law did not support such an exception and that there was a lack of political will to develop one. Within the Commission, there were greatly divergent views on that issue. In his second report in 2008, the former Special Rapporteur, Mr. Kolodkin, had conducted an in-depth analysis of relevant existing rules of international law and had concluded that, in contemporary international law there was no customary norm (apart from the exception concerning acts committed in the territory of the forum State by a foreign official who had been present in the territory of the State without the State's express consent for the official to discharge his or her official functions) or trend towards the establishment of such a norm. He had added that further restrictions on immunity, even those with a *de lege ferenda* value, were not desirable, since they could impair the stability of international relations without having an effect on efforts to combat impunity. In his own view, that conclusion of the former Special Rapporteur had laid a solid foundation for the Commission's consideration of exceptions to immunity. Unless there had been important breakthroughs in international practice since

2008, it was imperative to adhere to the principle of the immunity of State officials from foreign criminal jurisdiction. Exceptions to that principle must be supported by international practice and should not be propagated at will.

However, on that key issue, it had to be said that, since her fourth report in 2015, the Special Rapporteur had gradually deviated from the right direction and had shifted the focus from the codification of *lex lata* to the development of *lex ferenda*, thus causing a loss of balance and a departure from the systematic, ordered and structural working method that the Special Rapporteur had herself proposed and that had been approved by the Commission. She had not given due attention to the principle of the immunity of State officials that was recognized in the norms of customary international law, the decisions of the International Court of Justice and national judicial practice. She had not adopted a careful and balanced attitude towards the progressive development of *lex ferenda*, in that she had attempted to restrict the application of the principle of immunity through an increase in the number of exceptions to immunity, as a way of resolving the so-called issue of impunity. That had been reflected in her proposed draft article 7, which not only listed as exceptions to immunity from foreign criminal jurisdiction the serious international crimes that were enumerated in the Rome Statute, such as genocide, crimes against humanity and war crimes, but also violations of human rights such as torture and enforced disappearance, crimes of corruption and even crimes under ordinary law that were committed in specific circumstances with harm to persons and loss of property, thus to a considerable extent negating the immunity of State officials from foreign criminal jurisdiction. Furthermore there was confusion surrounding basic concepts, such as international and domestic crimes; criminal and civil jurisdiction; universal, international, domestic and third-State jurisdiction; as well as State immunity, the immunity of State officials and diplomatic immunity. In his own view, the rules proposed in draft article 7 lacked a practical basis. They not only departed from the direction that the Commission had set for its consideration of the topic but were also unlikely to obtain support from the majority of the members of the international community. The consideration of the current topic should focus on codification instead of the development of new rules of international law.

The question as to whether there were exceptions to the immunity of State officials from foreign criminal jurisdiction and the scope thereof had always been controversial. In her fourth report, which she had introduced in 2015, the Special Rapporteur had indicated that it was widely accepted that serious international crimes, violations of *jus cogens*, *ultra vires* acts, *acta jure gestionis*, official acts for private gain and other acts could constitute exceptions to immunity. In her fifth report, which she had introduced at the current session, the Special Rapporteur had, with a view to eliminating impunity and protecting human rights, considerably expanded the rules on exceptions to the immunity of State officials. Putting aside for a moment the question of whether that development corresponded to State practice, if numerous exceptions to immunity were allowed, they would inevitably have a serious impact on the principle of sovereign equality.

The immunity of State officials from foreign criminal jurisdiction was rooted in State immunity. State immunity was not a privilege or a benefit that one State afforded another but a basic right based on the principle of sovereign equality and that of *par in parem non habet imperium*. At present, there was no basis for claiming that the norms of *jus cogens* or the rules prohibiting international crimes should prevail over the basic rights of States, let alone over the principle of sovereign equality. Given the lack of State practice and *opinio juris*, the ill-considered establishment of exceptions to immunity would subordinate the principle of sovereign equality to other rules and would gradually erode that cornerstone of international relations. At the same time, exceptions to immunity were likely to undermine the principle of non-intervention in the internal affairs of States. At present, when power politics and hegemonism were prevalent, such situations arose all the more frequently when the prosecuted officials were from small and weak States. The elimination of impunity and the protection of human rights could easily serve as pretexts for prosecuting a Head of State or high-ranking official of a country that was accused of human rights violations. Powerful countries might go so far as to use that situation as blackmail to interfere in the internal affairs of the country concerned or even to push for regime change.

The abusive exercise of universal jurisdiction in recent years had also caused concern among the international community. For example, some Western countries frequently invoked universal jurisdiction in order to prosecute and even issue arrest warrants against African leaders and senior government officials, while some anti-government organizations and individuals frequently initiated abusive litigation to that end in the courts of Western countries. The inappropriate development of exceptions to immunity would facilitate the abusive exercise of universal jurisdiction. The Sixth Committee of the General Assembly had started discussing the scope and applicability of universal jurisdiction in 2009, and most States supported the view that the application of universal jurisdiction should respect the rules of international law that recognized immunity. Some Western countries had also started to amend their domestic legislation in order to restrict the application of universal jurisdiction and to preclude certain types of proceedings against senior foreign officials. The amendment of the Statute of the African Court of Justice and Human Rights in 2014 reflected the concerns of African States in that regard. That trend was a reflection of a will to protect the international law of immunity. An increase in the number of exceptions to immunity would not only fundamentally negate the value of the principle of immunity, but it would also open the door to abusive prosecution for political ends. Such exceptions would not help to prevent the commission of crimes or to protect human rights but rather would undermine the stability of inter-State relations and international justice.

The Special Rapporteur had emphasized the issue of impunity many times in her report; however, in his own view, that issue was not necessarily linked to immunity from jurisdiction. The purpose of adhering to the principle of immunity was not to absolve State officials who were suspected of having committed crimes from criminal punishment, and the recognition of the immunity of certain State officials from foreign criminal jurisdiction was not the cause of impunity. Immunity from jurisdiction was clearly a procedural rule and did not relieve State officials from their substantive responsibilities; it did not lead to the commission of international crimes, nor did it facilitate impunity. In his previous statement, he had pointed out that there were many causes of impunity, and most of them were political in nature. Measures to eliminate impunity should start at the political level, instead of attempting to negate, remove or restrict the long-established international law principle of the immunity of State officials from foreign criminal jurisdiction. In fact, the international community had already adopted some measures to eliminate impunity, for example those enumerated by the International Court of Justice in the case concerning the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, which included the following: the prosecution of the State official by the national courts of his or her country of origin; the waiver of immunity; the prosecution of the State official following the conclusion of his or her term of office; and the prosecution of the State official before an international criminal court. Immunity was no more the main culprit of impunity than it was an accomplice in criminal acts. The fight against impunity should therefore not be invoked as grounds for restricting immunity.

He wished to make some comments on the exceptions to immunity that had been referred to in the report. In order to determine whether serious international crimes such as genocide, crimes against humanity, war crimes or violations of *jus cogens* constituted exceptions to the immunity of State officials from foreign criminal jurisdiction, it was necessary to examine recent State practice and the decisions of the International Court of Justice, such as those handed down in the *Arrest Warrant* case and in the *Jurisdictional Immunities of the State* case. Generally speaking, there was an insufficient legal basis and not enough State practice to consider serious international criminal acts or violations of *jus cogens* to be exceptions to such immunity, and there were insufficient grounds for proclaiming the existence of a general trend towards the development of such exceptions.

Firstly, as mentioned above, immunity falls under procedural rules, as had been confirmed by the International Court of Justice in the cases referred to previously. In the *Arrest Warrant* case, the Court stated the following: “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.” In *Jurisdictional Immunities of the State*, the Court reaffirmed that “the law of immunity is essentially procedural in nature It regulates the exercise of jurisdiction in respect of

particular conduct and is thus entirely distinct from the substantive law which determines whether that conduct is lawful or unlawful.” The Court further indicated that State immunity and norms of *jus cogens* were different categories of international law and that a violation of a norm of *jus cogens* did not necessarily entail a deprivation of State immunity: “A *jus cogens* rule is one from which no derogation is permitted but the rules which determine the scope and extent of jurisdiction and when that jurisdiction may be exercised do not derogate from those substantive rules which possess *jus cogens* status, nor is there anything inherent in the concept of *jus cogens* which would require their modification or would displace their application.” Although that case dealt with State immunity and not the immunity of State officials, there was no theoretical or logical distinction between those two kinds of immunity in terms of their procedural nature and their relationship to *jus cogens*. The right to immunity of a State official had nothing to do with the legality of the act itself. The rules of immunity and those of substantive law (including *jus cogens*) belonged to two different categories, and the applicability of the rules of immunity should not be negated merely on the basis of a violation of substantive law.

In international law, due process guarantees were of unique value. Due process guarantees, international justice and the fight against impunity complemented each other and should not be lightly discarded. At present, the international community had made genocide, crimes against humanity and war crimes serious international crimes, and was trying to establish universal jurisdiction. However, it was still difficult to conclude that the rules of international law that prohibited serious international crimes had generated the corresponding procedural rules that would take precedence over the rules relating to immunity. The same clear legal hierarchy that existed in domestic law did not exist in international law. In short, substantive justice should not be exercised at the expense of procedural justice, which was a prerequisite for the rule of law.

Secondly, the applicability of immunity was determined by criteria relating to immunity itself and was not affected by the legality of the act involved. Some took the view that the commission of serious international crimes could not be considered as official acts in the context of representing a State. Nevertheless, an act was considered to be official if it was performed in an official capacity, and its legality did not affect its “official nature”. In fact, widespread atrocities were usually committed by the State apparatus through resources at its disposal and as part of a regime policy. From that perspective, such crimes could not be based on anything other than an act performed in an official capacity. It was also worth noting that genocide, crimes against humanity, war crimes and other serious international crimes were highly political, without a clear definition or scope, and it was difficult to separate such crimes from ordinary crimes and then go on to determine the applicability of immunity. If immunity was linked to the severity of the offence, it would result in a paradoxical situation in which, in order to determine procedural issues, such as those related to its jurisdiction and to immunity, a court would first have to hear the merits of the case it was trying. In *Jurisdictional Immunities of the State*, the International Court of Justice had pointed to that set of contradictions when, with reference to immunity from jurisdiction, it observed the following: “It is, therefore, necessarily preliminary in nature. Consequently a national court is required to determine whether or not a foreign State is entitled to immunity as a matter of international law before it can hear the merits of the case brought before it and before the facts have been established. If immunity were to be dependent upon the State actually having committed a serious violation of international human rights law or the law of armed conflict, then it would become necessary for the national court to hold an enquiry into the merits in order to determine whether it had jurisdiction. If, on the other hand, the mere allegation that the State had committed such wrongful acts were to be sufficient to deprive the State of its entitlement to immunity, immunity could, in effect, be negated simply by skilful construction of the claim.”

Thirdly, international conventions on the prevention and punishment of certain serious international crimes, which required States to extend their jurisdiction or to investigate, arrest, extradite and engage in other forms of cooperation, did not affect the immunity of State officials from foreign criminal jurisdiction under customary international law. In the *Arrest Warrant* case, the International Court of Justice had stated the following: “Although various international conventions on the prevention and punishment of certain serious crimes impose on States obligations of prosecution or extradition, thereby requiring

them to extend their criminal jurisdiction, such extension of jurisdiction in no way affects immunities under customary international law, including those of Ministers for Foreign Affairs. These remain opposable before the courts of a foreign State, even where those courts exercise such a jurisdiction under these conventions.” The Court furthermore found that “these rules likewise do not enable it to conclude that any such an exception exists in customary international law in regard to national courts”. The Special Rapporteur mentioned in paragraph 33 of her fifth report that international conventions concerning the prevention and punishment of serious crimes, such as the Convention on the Prevention and Punishment of the Crime of Genocide, the International Convention on the Suppression and Punishment of the Crime of Apartheid, and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, provided for the criminal responsibility of the authors of those crimes, and on that basis, concluded that those crimes constituted exceptions to immunity. That analogy gave rise to the question whether all international conventions that contained clauses on criminal responsibility should serve as the legal basis for exceptions to immunity. Obviously, such a conclusion was hard to substantiate and lacked legal foundation.

Fourthly, since a treaty did not create either obligations or rights with regard to a third State without its consent, the inapplicability of or exceptions to immunity agreed upon by States in the provisions of a treaty, as in the case of the Rome Statute of the International Criminal Court, applied only to States parties or in the circumstances stipulated in the treaty. Those provisions could not be used to demonstrate the applicability before a national court of rules of customary international law on the immunity of State officials from foreign criminal jurisdiction, nor could they be used to demonstrate the development of rules recognizing such immunity before a national court. The immunity of State officials from the jurisdiction of international criminal judicial institutions and from that of foreign domestic courts represented two parallel lines that did not meet. In fact, the analysis of judicial practice pointed to two opposing trends: the domestic courts showed a greater penchant for maintaining traditional immunity rules, while international criminal judicial institutions tended towards limiting immunities. He did not subscribe to the idea that the provisions of the Rome Statute on the immunity of State officials should be reproduced in their entirety, since that would run counter to the position adopted by the Commission in the past and would confuse the relationship between international and domestic criminal jurisdiction. Article 27 of the Rome Statute established the principle of the irrelevance of official capacity, on the basis of which the government officials of a State party did not enjoy procedural immunity from the jurisdiction of the International Criminal Court. That provision had often been cited as strong evidence of exceptions to the immunity of State officials. However, it did not apply to officials of States that had not acceded to the Rome Statute, not to mention the fact that the jurisdiction of the Court was merely complementary to that of domestic courts. Article 98 of the Rome Statute provided, in addition, that the Court could not proceed with a request for the surrender of a person that would require the requested State to act inconsistently with its obligations under international law with respect to the immunity of the State or the diplomatic immunity of a person, unless the Court first obtained the cooperation of that third State for waiving such immunity. That also showed that the rules relating to immunity that were applicable before the International Criminal Court did not affect those applicable before national courts. Even so, in practice, the interpretation of the articles of the Rome Statute on the immunity of State officials had given rise to widespread controversy. The failure of South Africa to comply with an arrest warrant issued by the International Criminal Court against Sudanese President Omar Hassan Ahmad Al Bashir was a good example of that. At the request of South Africa, the Assembly of State Parties to the Rome Statute at its fourteenth session held in December 2015 had deliberated on the relationship between relevant articles of the Rome Statute relating to the immunity of State officials and the application of those articles. South Africa had observed that, although article 27 of the Statute provided that immunities or special procedural rules that might attach to the official capacity of a person, whether under national or international law, did not bar the Court from exercising its jurisdiction over such an official in the event that that official had committed a serious international crime, South Africa would itself violate international law and its obligation under the Constitutive Act of the African Union if it honoured the arrest warrant of the International Criminal Court. Based on its right under article 97 of the Rome Statute, South Africa had then requested

consultation with the Court, but the Court had declined that request. Rather than dropping its request for South Africa to execute the arrest warrant under article 98, the Court, through its own verdict, demanded the execution of its warrant by South Africa, which presented South Africa with a dilemma of conflicting obligations. The Supreme Court of Appeal of South Africa, to which the case had been referred, had reached the verdict that South Africa should execute the arrest warrant, basing its decision on the Rome Statute, to which South Africa was a party, rather than on its interpretation of the rules of international law governing the immunity of State officials. However, the Government of South Africa had not approved of that decision. Consequently, that case could not serve as an example of State practice for the purposes of illustrating an exception to the immunity of State officials in the Special Rapporteur's fifth report. On the contrary, it demonstrated the advisability of proceeding more cautiously on the subject of the immunity of State officials.

With regard to whether serious international criminal offences or acts that violated *jus cogens* constituted exceptions to the immunity of State officials from foreign criminal jurisdiction, the Special Rapporteur cited dissenting opinions that were attached to the relevant judgments of the International Court of Justice, as well as civil cases before certain national courts or international judicial institutions, such as the European Court of Human Rights. However, those examples lacked relevance; they were visibly biased and were hardly convincing, since the dissenting opinions of the judges of the Court were not actual judgments, and the civil cases decided by the European Court of Human Rights or the national courts had no relevance to the immunity of State officials. In view of the above, State officials suspected of serious international crimes or violations of *jus cogens* did not lose their entitlement to immunity from foreign criminal jurisdiction, since, at present, no rule of customary international law to the contrary had been identified.

On the question of whether an exception to the immunity of State officials from foreign criminal jurisdiction applied to the commission of a tort that resulted in the death or injury of a person, or in the damage to or loss of property, in the territory of the forum State, according to the Special Rapporteur, such would be the case if the offences had occurred in the territory of the forum State and the State official had been present in the territory of that State at the time of their commission. In order to illustrate her point, the Special Rapporteur had mainly relied on provisions contained in conventions on diplomatic, consular and State immunity, as well as those contained in domestic legislation. For instance, article 43 (2) of the Vienna Convention on Consular Relations provided that exceptions to immunity from jurisdiction in the courts of the receiving State applied to consular officials in respect of a civil action brought by a third party for damage arising from an accident in the receiving State caused by a vehicle, vessel or aircraft. Putting aside differences in the type of immunity granted to diplomats, consular officials and other State officials, the Commission had decided many years previously that, in the course of its consideration of the present topic, it would not deal with the immunity of diplomatic and consular officials, which was the province of the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations. In addition, although article 12 of the United Nations Convention on Jurisdictional Immunities of States and Their Property provided that a State could not invoke immunity from jurisdiction before a court of another State in a proceeding which related to pecuniary compensation for death or injury to the person, or damage to or loss of tangible property, when the act in question occurred in the territory of the forum State, that exception was expressly confined to pecuniary compensation in civil litigation. In the 13 States that had special legislation on State immunity, including the United Kingdom of Great Britain and Northern Ireland, the United States of America, Australia, the Russian Federation, and other States, the exceptions in the cases mentioned were also confined to civil litigation, and the same was true of many of the national judicial practices cited by the Special Rapporteur.

Jurisdictional immunity comprised both civil and criminal jurisdictional immunity, which were not identical in nature. With regard to State immunity, exceptions were valid only in respect of immunity from civil jurisdiction, since no State recognized any exception to State immunity from criminal jurisdiction. Yet, the Special Rapporteur had, by analogy, applied exceptions to the immunity of the State from civil jurisdiction and exceptions to the immunity of consular officials from civil jurisdiction to the immunity of State officials from criminal jurisdiction. She had thus confused the two concepts of immunity — from civil

and from criminal jurisdiction — when, in fact, there was no convincing justification for “territorial tort exceptions” to the immunity of State officials from foreign criminal jurisdiction.

The Special Rapporteur had also, in an effort to substantiate her reasoning, mentioned a conclusion that had been reached by the former Special Rapporteur, Mr. Kolodkin, in his second report on the topic, who had stated that an exception to immunity *ratione materiae* could be applied in the case in which certain offences had been committed in the territory of the forum State when the acts in question had been committed in the territory of the forum State by a foreign official who had been present in the territory of that State without the State’s express consent for that official to discharge his or her official functions. He himself agreed in principle with that exception, which had also been widely accepted by States. The question was whether the exception allowed by Mr. Kolodkin differed from the “territorial tort exception”, as the latter was described by the current Special Rapporteur. The former Special Rapporteur’s reasoning emphasized the fact that the discharge of official functions in the territory of the forum State without its consent seriously jeopardized the State’s sovereignty, which gave it the right not to recognize the official nature of the act in question and to treat that conduct as an exception to immunity *ratione materiae*. In other words, that exception could not be used to justify the “territorial tort exception”, which was what the Special Rapporteur had done.

As to the question of whether crimes of corruption constituted an exception to the immunity of State officials from foreign criminal jurisdiction, he recalled that corruption was an offence associated with the exercise of duties, the perpetrators of which were government officials who possessed varying degrees of public authority. Corruption eroded social justice and equity, and jeopardized the image and credibility of the Government and its economic development. It was a social disease that should be eradicated. In the globalized era, corruption had grown worldwide. It was imperative to strengthen international cooperation among States in fighting corruption through such measures as refusing to provide a safe haven for the ill-gotten gains of corrupt officials; extraditing or returning corrupt officials who had fled from their country of origin; and strengthening supervision at immigration checkpoints and the exchange of information and cooperation between law enforcement agencies. However, the question of corruption as an exception to immunity from foreign criminal jurisdiction was entirely different. At its sixty-seventh session, the Commission had discussed the normative elements of immunity *ratione materiae* and had concluded that State officials enjoyed immunity in respect of the acts that they performed in an official capacity, given that “acts performed in an official capacity” meant any act performed by a State official in the exercise of State authority. In order to determine whether an act of corruption was likely to give rise to an exception to immunity, it was necessary, first and foremost, to determine whether the act in question constituted an act performed in an official capacity. Numerous acts of corruption committed by officials were closely associated with personal activities whose aim was to seek individual enrichment rather than to protect the sovereign interest of the State. They therefore, by nature, had nothing to do with the performance of State or Government authority. Consequently, those acts in and of themselves did not fall within the scope of immunity *ratione materiae*. Despite the fact that certain acts of corruption were committed by State officials in their official capacity, there was, to date, no judicial practice that recognized such corrupt acts as exceptions to immunity. Article 30 of the United Nations Convention against Corruption stipulated that each State party was required to take such measures as might be necessary to establish or maintain an appropriate balance between any immunities or jurisdictional privileges accorded to its public officials for the performance of their functions and the possibility, when necessary, of effectively investigating, prosecuting and adjudicating offences established in accordance with the Convention. In other words, that article affirmed the immunity of State officials in respect of certain acts of corruption. In fact, the fight against corruption had little to do with the topic under discussion. Corrupt public officials were prosecuted at the national level. If the suspect was abroad, he or she was subject to extradition or repatriation or was persuaded to return to his or her home country for the purposes of prosecution, and when he or she was prosecuted in a foreign country, mutual legal assistance could be provided, and the State concerned could waive the

immunity enjoyed by the official. It was therefore not necessary to include corruption among the offences that gave rise to an exception to immunity.

In paragraphs 170 to 176 of her report, the Special Rapporteur introduced the distinct concepts of exceptions and limitations with a view to clarifying the situations in which immunity was not applicable. The difference between the two concepts was that limitations were derived from the normative aspects of immunity, while exceptions were derived from aspects that were external to it. However, at the end of the report, when describing situations in which immunity did not apply, the Special Rapporteur had not drawn any distinction between the two. In his own view, therefore, it was not necessary to introduce the concept of limitations. The cases in which immunity *ratione materiae* was not applicable in terms of its normative elements should be determined in the context of analysing the scope of application of that type of immunity, when the Commission defined the scope of the acts to which the immunity described in draft article 6, as adopted by the Commission at its sixty-seventh session, was applicable. For their part, the cases in which immunity was not applicable, as described in the Special Rapporteur's fifth report, corresponded to simple exceptions to immunity.

In view of the foregoing, the proposed draft articles required further refinement, and he did not recommend referring them to the Drafting Committee.

Mr. Kittichaisaree recalled that, as part of the Commission's consideration of the topic of the obligation to extradite or prosecute (*aut dedere aut judicare*), the Special Rapporteur for that topic had proposed a draft article providing that the obligation to prosecute or extradite arose automatically from the commission of an international crime that violated a norm of *jus cogens*. That proposal had elicited strong negative reactions from States in the Sixth Committee. The issue that had arisen in the context of the current topic was similar; it concerned whether the commission of an international crime deprived a State official of immunity. The problem was not so much to determine whether or not that statement was correct as it was to assess whether the approach taken to it was appropriate. When referring to the comments and observations of States in the Sixth Committee in her report, the Special Rapporteur had failed to mention the position of Malaysia, which had apparently proposed a two-step approach that was quite pertinent. In order to enable States to make informed decisions, it was advisable to determine, first of all, which provisions in the set of draft articles fell into the category of customary international law and subsequently to determine which ones the Commission considered to fall into the category of progressive development.

The meeting rose at 11.40 a.m.