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Summary record of the 3331st meeting

Topic:
Immunity of State officials from foreign criminal jurisdiction

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3331st MEETING

Friday, 29 July 2016, at 10 a.m.

Chairperson: Mr. Pedro COMISSÁRIO AFONSO

Later: Mr. Georg NOLTE (Vice-Chairperson)

Present: Mr. Cafilisch, 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 (*concluded*) (A/CN.4/689, Part II, sect. F, A/CN.4/701)

[Agenda item 3]

FIFTH REPORT OF THE SPECIAL RAPporteur (*concluded*)

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

2. Mr. ŠTURMA, after thanking the Special Rapporteur for her fifth report, said that, as the Commission's consideration of the topic would resume at its sixty-ninth session, his comments were of a preliminary nature and intended to help the Special Rapporteur in the preparation of her next report.

3. The fifth report contained many references to State practice, national and international jurisprudence and legal writings, which, although not all directly related to the Special Rapporteur's conclusions or to proposed draft article 7, could at least shed light on the issue of limitations and exceptions to the immunity of State officials.

4. In terms of methodology, a distinction should be drawn between exceptions to immunity before international criminal courts, on the one hand, and exceptions to immunity from foreign criminal jurisdiction, on the other. Similarly, there was no direct link between civil actions and criminal prosecutions in the context of immunity and its limitations. In both cases, however, a similar trend was developing. As indicated by the European Court of Human Rights in the case of *Jones and Others v. the United Kingdom*, there seemed to be "some emerging support in favour of a special rule or exception in public international law in cases concerning civil claims for torture" (para. 213 of the judgment). The European Court, national courts and other bodies were eagerly awaiting the results of the Commission's work on the topic, which made the fifth report all the more important.

5. It was useful to distinguish between a limitation and an exception to immunity. The former related to acts performed by State officials in a private capacity, while the latter related to official acts that were not covered by immunity in that they constituted serious crimes of concern to the international community as a whole.

6. Turning to draft article 7, paragraph 1 (a), he agreed with the inclusion of genocide, crimes against humanity and war crimes in the list of crimes with respect to which immunity did not apply. Although the crimes of torture and enforced disappearance could be subsumed under the broader category of crimes against humanity, the existence of multilateral treaties specific to them justified their addition to the list. He would, however, be opposed to the inclusion of the crime of aggression for a number of reasons. First, the crime was closely bound up with and dependent on the actions of a State, which meant that there would be direct implications for the sovereignty and immunity of that State. Second, while the Amendments on the crime of aggression to the Rome Statute of the International Criminal Court, reached at Kampala, included a definition of the crime, the Court did not yet have jurisdiction over it. Third, neither the draft code of crimes against the peace and security of mankind⁴⁸² nor the fifth understanding regarding these Amendments permitted exceptions to the immunity of State officials from foreign criminal jurisdiction.

7. As to draft article 7, paragraph 1 (b), corruption-related crimes appeared to be more of a limitation to immunity *ratione materiae* than an exception. In case law, the crimes of embezzlement and corruption were mostly viewed as private acts and, as such, did not fall within the scope of immunity *ratione materiae*. With regard to treaties, it was true that article 16, paragraph 2, of the United Nations Convention against Corruption established a duty to punish crimes involving foreign public officials. Moreover, pursuant to article 30, paragraph 2, of the Convention, each State party was obliged to take such measures as might be necessary to establish an appropriate balance between any immunities or jurisdictional privileges accorded to its public officials and the possibility of investigating, prosecuting and adjudicating offences established in accordance with the Convention. However, that provision referred to immunities under national, rather than international, law. It might also be asked whether other transnational offences that were the subject of multilateral treaties, such as human trafficking and drug trafficking, should appear in the list of crimes with respect to which immunity did not apply. Consequently, the inclusion of draft article 7, paragraph 1 (b), should be reviewed.

8. Article 12 of the United Nations Convention on Jurisdictional Immunities of States and Their Property and article 43, paragraph 2 (b), of the Vienna Convention on Consular Relations, which formed the main basis for draft article 7, paragraph 1 (c), referred to civil, rather than criminal, jurisdiction. Nevertheless, there was at least some evidence of relevant State practice, for example the *Khurts Bat* case. In its decision in that case, the High Court of Justice of England and Wales had cited the "*Rainbow*

⁴⁸² *Yearbook ... 1996*, vol. II (Part Two), pp. 17 *et seq.*, para. 50.

Warrior” case and the second report on immunity by Mr. Kolodkin,⁴⁸³ the Special Rapporteur at the time. There was thus an opportunity for the Commission to contribute to the progressive development of international law.

9. The content of draft article 7, paragraph 2, was appropriate and supported by State practice and the jurisprudence of the International Court of Justice. He could understand concerns that the existence of exceptions to the immunity of State officials might create the potential for abuse; it would therefore be a good idea if procedural rules and safeguards were addressed in the Special Rapporteur’s next report. He expressed the hope that, at its sixty-ninth session, the Commission would be able to adopt draft articles that struck the right balance between exceptions and procedural rules.

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

10. Mr. SINGH said that he wished to thank the Special Rapporteur for her detailed report, which considered State practice as reflected in treaties and national legislations, decisions of the International Court of Justice, the European Court of Human Rights, international criminal courts and national courts. There was, however, plenty of very useful material on the matters raised in the fifth report that the Special Rapporteur mentioned but did not consider in any great detail, including the three reports by the previous Special Rapporteur on the topic,⁴⁸⁴ the memorandum by the Secretariat,⁴⁸⁵ the two Special Rapporteurs’ introductions to their reports in plenary and the debates within both the Commission and the Sixth Committee. As acknowledged by the Special Rapporteur herself, the fifth report should be read in the light of other relevant material.

11. In chapter I, section B, of her fifth report, the Special Rapporteur summarized in a somewhat one-sided manner the Commission’s prior consideration of exceptions to the immunity of State officials and, in particular, the reports of the previous Special Rapporteur, without indicating that there had been considerable disagreement within the Commission about important elements of those reports.

12. Chapter II, in which the Special Rapporteur dealt with a range of practice without having a clear and specific aim, was followed, in subsequent chapters, by a discussion of methodological and conceptual questions and of cases in which immunity did not apply, which took the reader back to an analysis of State practice. It would have been more helpful if the Special Rapporteur had consolidated her analyses of relevant State practice in relation to each specific exception proposed in one chapter, rather than scattered throughout the fifth report. It would also have been useful if the Special Rapporteur

had explained her reasoning in greater detail, especially when she reached conclusions that differed from those of the previous Special Rapporteur in his second report on the topic.

13. The Special Rapporteur, after explaining the theoretical distinction, as she saw it, between “limitations” and “exceptions”, stated that the distinction was hardly found in practice, that it was not necessary to maintain it for the purposes of the draft articles and that both limitations and exceptions fell under the umbrella term “non-applicability” of immunity. He was not sure that this was the right approach. The Special Rapporteur’s argument was that States used the two terms equivocally and that some conventions did not distinguish between them, in particular the United Nations Convention on Jurisdictional Immunities of States and Their Property. While it was true that Part III of that Convention was entitled “Proceedings in which State immunity cannot be invoked”, it should be noted that the Convention dealt only with civil and commercial matters, and reflected State practice in that States could not claim immunity from the jurisdiction of the courts of other States with respect to their commercial acts.

14. The Special Rapporteur emphasized the issue of impunity many times in her fifth report. As pointed out by Mr. Huang at the previous meeting, that issue had been discussed thoroughly by the Commission and it was clear that there was no link with the current topic, which dealt only with the immunity of State officials from foreign criminal jurisdiction and in no way affected the jurisdiction of the International Criminal Court with respect to serious crimes under the Rome Statute of the International Criminal Court or that of other international tribunals under their respective constitutive instruments. Moreover, immunity from the criminal jurisdiction of a foreign State did not absolve State officials who were suspected of crimes. As noted by the International Court of Justice in the case concerning the *Arrest Warrant of 11 April 2000*, such officials could be subjected to measures, such as domestic prosecution, a waiver of immunity, prosecution after the end of their term of office and prosecution by international criminal courts and tribunals.

15. With regard to draft article 7, paragraph 1 (a), the Special Rapporteur claimed, in paragraphs 181 to 189 of her fifth report, that the non-applicability of immunity to the so-called core crimes of genocide, crimes against humanity, war crimes, torture and enforced disappearances reflected an existing rule of customary international law, or that there was at least a majority trend towards such a rule. He could not accept that conclusion. The practice relied on showed no general practice establishing such an exception to immunity, nor was there anything like adequate evidence of acceptance of such an exception as law (*opinio juris*). He agreed with the conclusions drawn by the previous Special Rapporteur in his second report, namely that there was no customary norm – or trend toward the establishment of such a norm – in contemporary international law that made it possible to assert that there were exceptions to immunity, apart from the exception concerning harm caused directly in the forum State when that State had not consented to the performance of an act or to the presence of a foreign official in its

⁴⁸³ *Yearbook ... 2010*, vol. II (Part One), document A/CN.4/631.

⁴⁸⁴ Reports of Mr. Kolodkin: *Yearbook ... 2008*, vol. II (Part One), document A/CN.4/601 (preliminary report); *Yearbook ... 2010*, vol. II (Part One), document A/CN.4/631 (second report); and *Yearbook ... 2011*, vol. II (Part One), document A/CN.4/646 (third report).

⁴⁸⁵ Document A/CN.4/596 and Corr.1, available from the Commission’s website, documents of the sixtieth session (2008). The final text will be reproduced in an addendum to *Yearbook ... 2008*, vol. II (Part One).

territory; and that restrictions on immunity, even *de lege ferenda*, were not desirable, since they could impair the stability of international relations. The previous Special Rapporteur had also questioned the effect of such exceptions on efforts to combat impunity.

16. The Special Rapporteur appeared to claim that certain exceptions to immunity *ratione materiae* in treaty-based rules were already customary international law. There was, however, no evidence of a general practice or of *opinio juris* to that effect. The analysis in paragraphs 181 to 189 of the fifth report was far-fetched, in terms of both the methodology used and the supposed evidence relied upon.

17. The Special Rapporteur set out her arguments for the existence of a customary norm that recognized international crimes as a limitation or exception to immunity in paragraph 184 of the fifth report. She claimed that, despite the diversity of positions taken by national courts, there was a trend in favour of the exception. In his view, even if there was a trend, it did not constitute a general practice. Furthermore, the claim was hard to reconcile with paragraph 220 of the report, in which the Special Rapporteur stated that there were very few national court decisions in which immunity had been withheld in connection with the commission of any of the established international crimes.

18. The Special Rapporteur also maintained that national laws had gradually included the exception. Yet, in paragraphs 42 and 44 of her fifth report, she said that the immunity of State officials had not been a matter of explicit regulation in most States. The only relevant legislation that she cited was that of Spain and, perhaps, that of Belgium and the Netherlands. However, the implementing legislation of States parties to the Rome Statute of the International Criminal Court, which was usually enacted only for the purposes of the Statute, was not relevant to the topic at hand.

19. The Special Rapporteur also seemed to suggest that the conclusion of treaties criminalizing specific conduct and providing for individual criminal responsibility was also relevant State practice for the present topic. That was not the case. In the *Arrest Warrant of 11 April 2000* case, the International Court of Justice had stated that “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” (para. 59 of the judgment).

20. In paragraph 67 of her fifth report, the Special Rapporteur suggested that the conclusions of the Court in the *Arrest Warrant of 11 April 2000* case had limited scope, but sought to attach far greater weight to remarks made in the separate and dissenting opinions. In that regard, it was necessary to bear in mind the note of caution sounded by the President of the Court, Judge Abraham, during his visit to the Commission during the present session when he had stated that separate or dissenting opinions clarified not the position of the Court but that of the judges

concerned and did not necessarily indicate what position a judge would take in a subsequent case, and that, even if judges took issue with a precedent when it was adopted, they might consider themselves bound by it and, in a subsequent case, adopt the majority opinion of the Court for the sake of judicial consistency.⁴⁸⁶

21. Additionally, in paragraphs 185 and 186 of her fifth report, the Special Rapporteur addressed the “critical arguments” of publicists with respect to the existence of a rule of customary international law on the non-applicability of immunity to certain crimes. While she claimed to have carried out a “nuanced” assessment of those arguments, it was hard to tell to what extent that was true, since there were no references to relevant materials in her analysis.

22. In paragraphs 187 to 189 of her fifth report, the Special Rapporteur stated that the decisions of the International Court of Justice and the European Court of Human Rights, which were usually cited as authorities, referred directly to State immunity and, when they referred to the immunity of State officials from foreign criminal jurisdiction, they had limited scope – especially those of the International Court of Justice – since they concerned immunity *ratione personae* exclusively. She considered that the decisions of national courts, domestic norms and other types of statements by States were limited in number and that their content was sometimes not fully consistent or uniform; however, she still considered that they were of greater value and concluded that it did not seem possible under any circumstances to deny the existence of a clear trend that would reflect an emerging custom. In her view, therefore, the commission of international crimes might indeed be considered a limitation or exception to State immunity from foreign criminal jurisdiction based on a norm of international customary law.

23. The Special Rapporteur sought to support her proposed exception by adding a section on what she termed the “systemic” foundation for that exception. The fact that she had found it necessary to carry out such an analysis, and the language that she used in paragraph 190 of her fifth report, suggested that she was not entirely convinced of the existence of a rule of customary international law, despite her assertions earlier in the report.

24. With regard to draft article 7, paragraph 1 (b), he saw no reason for singling out crimes of corruption as a limitation or exception to immunity from foreign criminal jurisdiction. The Special Rapporteur seemed to consider that corruption was generally a limitation to immunity; however, since it was not always easy to distinguish official acts from private acts and corruption, it could also be considered to be an exception to immunity. If crimes of corruption were considered a limitation to immunity, it was not clear why that type of act was not covered by draft article 6, paragraph 1.⁴⁸⁷ If, on the other hand, they were to be treated as an exception, it would be necessary to identify the basis for such an exception, whether under

⁴⁸⁶ See the 3317th meeting above, para. 21.

⁴⁸⁷ See document A/CN.4/L.865, available from the Commission’s website, documents of the sixty-seventh session. Draft article 6 was adopted at the 3329th meeting, on 27 July 2016 (see the 3329th meeting above, para. 24).

customary international law or a treaty, or at least to provide convincing arguments for proposing a new treaty-based exception.

25. In any event, none of the conventions cited by the Special Rapporteur which treated corruption as a separate offence supported the idea that related crimes should be considered either as a limitation or as an exception to the rules on immunity. Rather, those conventions suggested that such crimes should be prosecuted by the injured State and that, if the trial was held abroad, a waiver by the injured State was necessary.

26. Regarding the practice of domestic courts, the Special Rapporteur's analysis was incorrect and one-sided. A closer examination of the court cases cited as examples of cases in which domestic courts had generally rejected the immunities of State officials when faced with charges of corruption showed that they did not support the Special Rapporteur's views. Moreover, the *Marcos and Marcos v. Federal Department of Police* case, in which a Swiss court had upheld immunity, was merely mentioned in a footnote.

27. With respect to draft article 7, paragraph 1 (c), he said that before considering a possible territorial exception, the Commission would need to further analyse a few issues. There seemed to be general agreement that, when a foreign official allegedly committed a serious crime in the territory of a State, and that State had not consented to the activity that had led to the crime or, more generally, to the presence of that foreign official in its territory, the foreign official was not entitled to immunity. Such had been the approach of Mr. Kolodkin, and of the English Divisional court in the *Khurts Bat* case.

28. The proposed draft article was, however, silent with regard to military activities, which were generally considered to fall outside the scope of the territorial crime exception. Without clear evidence of State practice in a different direction, it would be unwise to adopt a provision that was drafted in absolute terms and that would encompass all kinds of activities carried out by State officials on the territory of the forum State. Particularly relevant in that regard was the case concerning *Jurisdictional Immunities of the State*, in which the International Court of Justice had found that State immunity for *acta jure imperii* continued to extend to civil proceedings for acts occasioning death, personal injury or damage to property committed by the armed forces, even if the relevant acts took place on the territory of the forum State. While the Court had expressly stated that its findings were without prejudice to the issue of immunity of State officials from criminal jurisdiction, the reasoning in the judgment was particularly relevant for the Commission's work. While the Special Rapporteur seemed to be of the same view, the analysis in her fifth report was not reflected in the proposed draft article.

29. Draft article 7, paragraph 2, in making clear that any exceptions did not apply to persons enjoying immunity *ratione personae* for as long as they enjoyed such immunity, reflected existing practice and should not be controversial. However, in view of his comments, he did not support referring the proposed draft article 7 to the Drafting Committee.

30. Mr. TLADI, referring to the statement made by Mr. Singh, said that the so-called "implementing legislation" of States parties to the Rome Statute of the International Criminal Court need not be considered irrelevant: for instance, the implementing laws of South Africa did not apply only to proceedings before the International Criminal Court, as evidenced by a recent important case, in which the Constitutional Court had ultimately found that the South African authorities had an obligation to investigate alleged cases of torture taking place in Zimbabwe – a case that was not being considered by the International Criminal Court. It was therefore important to consider with some caution the question of practice emanating from or relating to the Rome Statute of the International Criminal Court. Such practice might well be relevant, but a close examination of the circumstances was needed; its relevance was, in any event, diminished by virtue of the fact that it was in application of a particular treaty.

31. Another reason for taking a cautious approach to practice relating to the Rome Statute of the International Criminal Court was that the Pre-Trial Chambers of the International Criminal Court had themselves been somewhat inconsistent in their interpretation of article 98, paragraph 1, of the Statute and its relationship to its article 27. The Commission should therefore refrain from making definitive statements about the rules relating to the immunities flowing from that particular relationship.

32. Specifically with regard to the South African cases mentioned at the previous meeting, it was interesting to note that the executive and the courts had not agreed on whether exceptions to immunity *ratione personae* existed under customary international law. While the courts had found that there were exceptions under domestic law, they had, clearly to their regret, found none under international law.

33. Mr. MURPHY said that, in implementing the Rome Statute of the International Criminal Court, some countries, for instance, South Africa, went beyond what was required under the Statute. However, as indicated in the Special Rapporteur's fifth report, the non-applicability of immunity was mentioned in the implementing laws of many other countries mainly for the purpose of ensuring cooperation with the International Criminal Court. Therefore, he had understood Mr. Singh to be emphasizing that the Commission should simply be cautious about asserting that implementing laws were building the case for any particular trend.

34. Mr. KAMTO said that he was in favour of the Commission's adopting a cautious approach to the topic of immunities. He also strongly supported Mr. Kolodkin's second report on the topic and, in that connection, regretted the overly bold statement by the Special Rapporteur in her fifth report that described the Commission members who maintained that there were no exceptions to immunity as forming a minority. He agreed with the observation that it was unwise to consider, as the Special Rapporteur did in her fifth report, separate or dissenting opinions of individual judges of the International Court of Justice on the same footing as Court decisions. Furthermore, it was important to carefully consider whether

immunities were a procedural rule for immunity *ratione personae* only, as the Special Rapporteur attempted to demonstrate in her report, or if they could also apply to immunity *ratione materiae*.

35. He did not support the arguments opposing the inclusion of the crime of aggression in the list of crimes in relation to which immunity did not apply. It was not logical that crimes against humanity and war crimes should be considered as belonging in that list, but that the crime of aggression should not, even though it was the clear cause of the other two crimes. Furthermore, if the Commission decided to exclude the crime of aggression, it would send an unfortunate signal to the international community, given that States had been struggling for years precisely to include it, most notably at the Review Conference of the Rome Statute of the International Criminal Court, held in Kampala in 2010. It was difficult to understand that a Head of State could be accused of having committed a war crime or a crime against humanity but that his or her immunity could not be limited or excluded by virtue of the fact that he had committed an act of aggression.

36. He supported Mr. Šturma's observations regarding crimes of corruption. If corruption was to be considered as a limitation or exception to immunity, it was difficult not to consider other types of organized transnational crimes, such as trafficking in persons, in a similar manner. Corruption, of course, was a serious matter and should not be ignored; however, not all serious crimes could be addressed in the same manner. If the Commission was to admit to the existence of exceptions to the application of immunity *ratione materiae*, it would need to decide in relation to which crimes exceptions might be applicable. At present, no crimes beyond those listed in article 5 of the Rome Statute of the International Criminal Court appeared to fit such a description.

37. It was important that the Commission, in its work on the topic, not make relations between States more difficult. If the Commission stated that there were exceptions without clearly identifying and defining the exceptions, States might be motivated to invoke exceptions to immunity to prosecute Heads of another State present on their territory simply when it was to their advantage; chaos could thus be created by more powerful nations that chose to use such exceptions to their benefit, and even between States that were on an equal footing.

38. Mr. SABOIA said that he supported the statements made by Mr. Kamto regarding the crime of aggression. Even though he had previously said that the time was not yet ripe to incorporate corruption in the list of crimes in relation to which immunity could not be invoked, he agreed that the subject required more in-depth discussion.

39. Mr. CANDIOTI said that Mr. Singh's criticisms of the Special Rapporteur's fifth report seemed to be based solely on the alleged lack of any customary rules to justify the existence of crimes for which immunity from foreign criminal jurisdiction could not be invoked. In response to Mr. Kamto's statement, he said that the Commission's mandate was progressive development first and then codification. In its work, the Commission had always combined the two.

40. Mr. HMOUD said that he wished to commend the Special Rapporteur on her well-balanced report on an issue which had both legal and political consequences, namely exceptions and limitations to the immunity of State officials from foreign criminal jurisdiction. As the fifth report rested on a thorough and comprehensive analysis of extensive State practice and jurisprudence on that matter, it would assist States and other relevant actors to implement a well-defined immunity regime that took account of the various legitimate interests at stake. In view of the length and detail of the report, his comments were only of a preliminary nature.

41. It was clear from the Charter of the United Nations that principles of international law such as the protection of fundamental human rights, the sovereign equality of States, justice and compliance with the obligations arising from international law, including non-aggression and respect for territorial integrity, were not mutually exclusive but complementary, and they should always be applied and interpreted in such a way as to ensure their fullest possible realization. Since the end of the 1940s, those core principles and the peaceful settlement of disputes had contributed significantly to a reduction of international tensions and had thereby helped to avoid wars. The same could be said of endeavours to fight impunity and consolidate the rule of international criminal law and criminal justice. Accountability should not be regarded as interference in the internal affairs of a State, a violation of its sovereignty or a means of flouting the will of its people. On the contrary, impunity and the lack of justice fed global tension and undermined the core legal principles underpinning inter-State relations.

42. The Commission's approach to the topic under consideration therefore had to arrive at a balance of a wide range of legitimate interests, a balance which the Special Rapporteur had achieved in her fifth report. While a State had the right to protect its sovereignty, to exercise jurisdiction within the limits of international law and not to be made subject to the jurisdiction of another State, international law did not give it complete freedom to prevent the exercise of jurisdiction by another State when the latter had a legitimate interest to do so. In civil matters, international law had replaced the concept of the absolute immunity of the State with that of restrictive immunity in commercial cases, tort and labour and employment disputes. That development had been reflected in the United Nations Convention on the Jurisdictional Immunities of States and Their Property and in the judgment of the International Court of Justice in the *Jurisdictional Immunities of the State* case, which had likewise differentiated acts *jure imperii* from acts *jure gestionis*. A State did not commit a crime, although it would bear civil responsibility for the violation of certain norms by its officials, who could incur criminal responsibility. Criminalizing the official was not synonymous with criminalizing the State. That difference had already been recognized by the International Military Tribunal at Nürnberg when it had found that "[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced".⁴⁸⁸ The estab-

⁴⁸⁸ International Military Tribunal, *Trial of the Major War Criminals, Nuremberg, 14 November 1945–1 October 1946*, vol. 22, Nürnberg (1949), p. 466.

ishment of international criminal courts and tribunals had been made possible by distinguishing between State and individual responsibility and between State and individual immunity.

43. There was, however, a worrying trend towards questioning the legitimacy of the international justice system. Obviously, political interests still persisted in the world, and spurious arguments using the injustices that did occur as a pretext for weakening international criminal justice, or which posited the immunity of State officials in an effort to promote their impunity, were again gathering steam. As a matter of legal policy, the interest of the international community as a whole in protecting itself from the commission of the most serious crimes and from violations of *jus cogens* had to be preserved. Consideration therefore had to be given to preserving legitimate interests, including that of fully upholding the obligation of national and international courts to cooperate. For that reason, the Commission's aim should be ultimately to arrive at a balance between the rights of States and the rights of individuals while at the same time giving effect to *jus cogens* norms.

44. In at least two cases turning on the criminal responsibility and immunity of officials, the International Court of Justice could have declared that the only type of immunity which existed under international law was State immunity, but it had not done so. State officials had immunity *ratione personae* and immunity *ratione materiae* from foreign criminal jurisdiction. He agreed with the Special Rapporteur that under customary international law there did not appear to be any limitations or exceptions to the immunity *ratione personae* of the troika, because a State would be unable to function and its sovereignty would be undermined if another State could exercise criminal jurisdiction over its Head of State, Head of Government or Minister for Foreign Affairs. Even if any of those persons had committed an act violating *jus cogens*, they should have immunity from foreign criminal jurisdiction as long as they were in office, and redress should be sought by other means, possibly including international prosecution.

45. While a State should be able to exercise its legitimate jurisdiction within the confines of customary international law over foreign officials who had committed a crime, notwithstanding their immunity *ratione materiae*, procedural guarantees should be in place to prevent their sham or politically motivated prosecution. Draft article 6, on the scope of immunity *ratione materiae*, reflected the customary rule that a State official enjoyed immunity from foreign criminal jurisdiction only with respect to acts performed in the exercise of State authority. However, it was not always clear when an act was "performed in an official capacity". Practice had shown that this rule was difficult to implement, that the position of States and their courts diverged on that issue and that State officials could not be granted immunity for all acts performed in an official capacity. Furthermore, that rule required the forum State and its courts to determine the scope of the official capacity of the person in question for the purpose of exercising its jurisdiction. The commentaries to that draft article should therefore assist a forum State making that determination on the

basis of objective criteria, in accordance with the relevant procedure.

46. In the past, forum courts had exercised jurisdiction over acts that could be deemed to have been performed in an official capacity when those acts specially affected the forum State. A crime committed in a forum State that injured persons, or outside its territory that harmed its nationals or its national interests, could be said to fall into that category; hence they were crimes to which immunity *ratione materiae* did not apply, but again procedural guarantees should be put in place to avoid politically motivated prosecution. He therefore agreed with the Special Rapporteur on the inclusion of the "territorial tort exception" in draft article 7, although he would prefer not to use that term, which had a civil law connotation, whereas the draft articles dealt with the exercise of criminal jurisdiction.

47. Immunity *ratione materiae* should not apply to corruption, irrespective of whether the act in question was committed in an official capacity.

48. Turning to international crimes and violations of *jus cogens* norms, he drew attention to the fact that, in the *Arrest Warrant of 11 April 2000* case, the International Court of Justice had not addressed the distinction between immunity *ratione personae* and immunity *ratione materiae*. Its judgment in that case should not therefore be read as establishing a customary law right to immunity *ratione materiae* against the exercise of criminal jurisdiction for all violations of *jus cogens* norms by any foreign official. On the other hand, if a State's right to exercise its sovereign functions would be impaired by the forum State's exercise of jurisdiction over the other State's official, its legitimate interests should, under certain conditions, be protected against the exercise of that jurisdiction over its official even when that person had violated a *jus cogens* norm. One of those conditions was indeed the existence of an alternative forum where the official could be prosecuted. However, since the implementation of the substantive rules of *jus cogens* took precedence over the implementation of the rules on the immunity *ratione materiae* of foreign officials, the latter rules must be disregarded in instances where they would result in impunity for violations of *jus cogens* norms. Moreover, in such instances it was well established in customary international law that the official capacity of the perpetrator was irrelevant with regard to both individual criminal responsibility and immunity.

49. The Special Rapporteur had demonstrated in the fifth report that there were sufficient grounds in international law to include in the Commission's draft articles exceptions and limitations to immunity *ratione materiae* when international crimes or violations of *jus cogens* had occurred. At the same time, the necessary guarantees had to be provided to ensure that the State of the official was not subjected to the unlawful exercise of jurisdiction by the forum State through sham or politically motivated prosecution. The sovereign functions of the official's State should not be impaired and must be taken into account when deciding whether to grant immunity. At the same time, the effective implementation of *jus cogens* norms should be the ultimate goal when weighing up legitimate interests.

50. He agreed that, in draft article 7, genocide, crimes against humanity, war crimes, torture and enforced disappearances should be listed among the crimes to which immunity did not apply, since they were crimes of concern to the international community as a whole. He concurred with Mr. Kittichaisaree and Mr. Murase that aggression should also be included, because it involved a violation of *jus cogens* norms. Because an act of aggression, by a State, and the crime of aggression, by an individual, were two separate matters, the draft articles should contain a without prejudice clause in order not to undermine the authority of United Nations organs. He was also in favour of including the crime of apartheid, since it was a violation of a peremptory norm of international law.

51. In conclusion, he recommended sending draft article 7 to the Drafting Committee.

52. Mr. McRAE said that he wished to congratulate the Special Rapporteur on her well-researched fifth report, which constituted a commendable effort to bridge differences of opinion within the Commission on the question of exceptions to immunity. She had suggested a thoughtful approach to the scope of offences to which exceptions to immunity would apply and to the persons who enjoyed immunity without exception, namely those who had immunity *ratione personae*. In doing so, she had said quite frankly that what she proposed was not existing international law, but that she was identifying a trend and inviting the Commission to play a role in continuing that trend. She was not suggesting that the Commission subscribe to the view of those who considered that, since State practice amounting to customary international law did not endorse exceptions to immunity, neither should the Commission.

53. The Special Rapporteur recognized that granting or denying immunity to foreign State officials charged with serious international crimes could have an impact on States' ability to conduct international affairs without harassment. The questions which he asked himself in that connection were whether exceptions to immunity could have implications for the drive to avoid impunity, whether there was any evidence that the relatively few cases where foreign officials had been charged with serious offences had actually impeded the conduct of international affairs and what kind of procedural guarantees would make exceptions to immunity more plausible when foreign State officials were being prosecuted.

54. He wondered whether the future Commission would use only what States had agreed to as a touchstone for its work. Would it see its primary role as that of identifying *lex lata* or would it regard the progressive development of international law as *lex ferenda* as an integral part of its role and not separate from and less important than codification? Would it embrace the developing trend identified by the Special Rapporteur or would it seek to halt it? He would watch with interest to see on which side of history the new Commission would want to be.

55. Mr. PETRIČ said that he fully agreed with Mr. McRae that the Commission should display more vision. The position that only the troika could enjoy immunity from foreign criminal jurisdiction had been based

on what had been deemed to be international practice in the form of a decision adopted many years earlier by the International Court of Justice with many dissenting opinions, but it ignored the reality of the modern world where ministers of defence or of finance could have more functions than the Minister for Foreign Affairs.

56. Mr. KITTICHAISAREE asked the Special Rapporteur if she intended to submit a sixth report in 2017.

57. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that, in 2017, she intended to submit a sixth report on procedural aspects and procedural guarantees of the rights of State officials subject to foreign criminal jurisdiction, for it might be advantageous for the Commission to consider those questions in parallel with the exceptions and limitations to the immunity of State officials from such jurisdiction.

The meeting rose at 11.40 a.m.

3332nd MEETING

Tuesday, 2 August 2016, at 10 a.m.

Chairperson: Mr. Pedro COMISSÁRIO AFONSO

Present: Mr. Caffisch, Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. McRae, 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.

Draft report of the International Law Commission on the work of its sixty-eighth session

CHAPTER IV. *Protection of persons in the event of disasters (A/CN.4/L.882 and Add.1)*

1. The CHAIRPERSON invited the members of the Commission to adopt the part of chapter IV of the draft report contained in document A/CN.4/L.882, paragraph by paragraph.

2. Mr. TLADI said that, in order for his silence not to be interpreted as a sign of approval, he wished to make clear that he would not participate in the adoption of the chapter of the Commission's report devoted to the protection of persons in the event of disasters because he strongly disagreed with the general direction in which the Commission had decided to take its work on the topic, in particular with regard to the rights and duties of States, a direction that he felt was inconsistent with existing international law.

3. Mr. MURPHY said that, like Mr. Tladi, he believed that several provisions of the draft related to rights, obligations and duties were not sufficiently substantiated by treaty or State practice. It was regrettable that the Commission had not been able to specify, in the