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Summary record of the 3360th meeting

Topic:
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the Drafting Committee should be at the Special Rapporteur's initiative, although the Drafting Committee should take into account all the comments and proposals made by other members too. She was therefore in favour of referring all the texts proposed to the Drafting Committee for consideration.

76. Mr. MURASE (Special Rapporteur) said he agreed that all four draft guidelines should be referred to the Drafting Committee, on the understanding that his proposal for a revised version of draft guideline 9 and two draft preambular paragraphs as well as all other proposals made would be considered by the Drafting Committee. He had presented his proposals for new texts in the light of the request of Sir Michael and other members to present them in plenary session.

77. The CHAIRPERSON said he would take it that the Commission wished to refer to the Drafting Committee all the draft guidelines proposed in the fourth report, on the understanding that the Special Rapporteur's proposal to have one consolidated draft guideline 9 and two draft preambular paragraphs, as well as all the comments made during the debate, would also be taken into consideration.

It was so decided.

The meeting rose at 12.55 p.m.

3360th MEETING

Thursday, 18 May 2017, at 10.05 a.m.

Chairperson: Mr. Georg NOLTE

Present: Mr. Argüello Gómez, Mr. Cissé, Ms. Escobar Hernández, Ms. Galvão Teles, Mr. Gómez Robledo, Mr. Grossman Guiloff, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Mr. Jalloh, Mr. Kolodkin, Mr. Laraba, Ms. Lehto, Mr. Murase, Mr. Nguyen, Ms. Oral, Mr. Ouazani Chahdi, Mr. Park, Mr. Peter, Mr. Rajput, Mr. Reinisch, Mr. Ruda Santolaria, Mr. Saboia, Mr. Šturma, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Sir Michael Wood.

Organization of the work of the session (*continued*)^{*}

[Agenda item 1]

1. Mr. RAJPUT (Chairperson of the Drafting Committee) said that the Drafting Committee on the topic of protection of the atmosphere was composed of the following members: Mr. Murase (Special Rapporteur), Mr. Argüello Gómez, Mr. Cissé, Ms. Escobar Hernández, Ms. Galvão Teles, Mr. Hmoud, Mr. Jalloh, Ms. Lehto, Mr. Nguyen, Mr. Nolte, Ms. Oral, Mr. Park, Mr. Reinisch, Mr. Ruda Santolaria, Mr. Vázquez-Bermúdez, Sir Michael Wood and Mr. Aurescu (Rapporteur), *ex officio*.

^{*} Resumed from the 3355th meeting.

Immunity of State officials from foreign criminal jurisdiction¹⁹² (A/CN.4/703, Part II, sect. E,¹⁹³ A/CN.4/701,¹⁹⁴ A/CN.4/L.893¹⁹⁵)

[Agenda item 2]

FIFTH REPORT OF THE SPECIAL RAPPORTEUR

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

3. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that the Commission had begun its consideration of her fifth report on the topic at the previous session,¹⁹⁶ but, since the report had at the time been available in English and Spanish only, it had been decided that the consideration of the report would, on an exceptional basis, be continued and completed at the current session. Although she had already introduced the report at the previous session, she would briefly do so for a second time, primarily for the benefit of newly elected Commission members, but also to take into account the views that had been expressed by Commission members at the previous session and by States in the Sixth Committee.

4. The fifth report was dedicated to a study of limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction, an aspect of the topic that had been the subject of recurrent debate in the Commission and in the Sixth Committee and one that had, over the years, given rise to diverse and often opposing views. In the preparation of the report, she had continued to follow the same methodology as for her previous reports,¹⁹⁷ which was based essentially on an analysis of State practice, international jurisprudence and the previous work of the Commission. In addition, she had taken into account the information that States had provided in response to questions posed by the Commission. A total of 19 States had submitted written comments, which could be consulted on the Commission's website.¹⁹⁸ She had also taken into account the oral statements made by delegations in the Sixth Committee, in particular those made in 2014 and 2015.

¹⁹² At its sixty-fifth session (2013), the Commission provisionally adopted draft articles 1, 3 and 4 and the commentaries thereto (*Yearbook ... 2013*, vol. II (Part Two), pp. 39 *et seq.*, para. 49). At its sixty-sixth session (2014), the Commission provisionally adopted draft article 2 (e) and draft article 5 and the commentaries thereto (*Yearbook ... 2014*, vol. II (Part Two) and corrigendum, pp. 143 *et seq.*, para. 132). At its sixty-eighth session (2016), the Commission provisionally adopted draft article 2 (f) and draft article 6 and the commentaries thereto (*Yearbook ... 2016*, vol. II (Part Two), pp. 212 *et seq.*, para. 250).

¹⁹³ Available from the Commission's website, documents of the sixty-ninth session.

¹⁹⁴ Reproduced in *Yearbook ... 2016*, vol. II (Part One).

¹⁹⁵ Available from the Commission's website, documents of the sixty-ninth session.

¹⁹⁶ See *Yearbook ... 2016*, vol. I, 3328th meeting, pp. 329 *et seq.*, paras. 2–19.

¹⁹⁷ *Yearbook ... 2012*, vol. II (Part One), document A/CN.4/654 (preliminary report); *Yearbook ... 2013*, vol. II (Part One), document A/CN.4/661 (second report); *Yearbook ... 2014*, vol. II (Part One), document A/CN.4/673 (third report); and *Yearbook ... 2015*, vol. II (Part One), document A/CN.4/686 (fourth report).

¹⁹⁸ See the Analytical Guide to the Work of the International Law Commission: <http://legal.un.org/ilc/guide/gfra.shtml>.

5. Her fifth report formed a unitary whole with her four previous reports and, as such, should be read and understood together with them. Draft article 7, for example, acquired its full significance in the light of the draft articles that had provisionally been adopted thus far.

6. Turning to the main substantive and methodological issues in the report, she said that it had three aims: to analyse practice with a view to determining whether there were situations in which the immunity of State officials from foreign criminal jurisdiction was without effect, even where such immunity was potentially applicable; to identify such situations, if they existed, and their legal basis; and, in the light of that analysis, to propose a draft article.

7. One of the main points that she wished to address concerned the term “limitations and exceptions”, which reflected the various arguments that had been made in practice to support the non-application of immunity. Some crimes were understood not to be official acts or acts ostensibly connected with official status or simply not to be part of State functions, and they gave rise to limitations, whereas others were understood to be exempt from the regime of immunities because they violated *jus cogens* norms, internationally recognized human rights or, in a more general sense, the legal values and principles of contemporary international law, and they gave rise to exceptions. Thus, a limitation to immunity was identified as intrinsic or directly related to immunity or to one of its normative elements, whereas an exception was identified as extrinsic to immunity and to its normative elements, but as nevertheless belonging to the international legal system and thus as an element that should be taken into account in the determination of the applicability of immunity in a specific case.

8. That distinction served as a useful methodological tool with which to study the practice of the non-application of immunity and the legal basis for it. In any event, it should be noted that the two categories had similar effects in practice, namely the non-application of the legal regime of the immunity of State officials from foreign criminal jurisdiction in certain circumstances. That diversity of approaches for understanding and explaining the situations in which immunity did not apply was reflected in practice and in the positions adopted by Commission members and by States in the Sixth Committee and was captured in the comprehensive formulation used in draft article 7, namely “Crimes in respect of which immunity does not apply”.

9. Another point that she wished to address concerned the need to deal with limitations and exceptions under the specific regime of immunities and within the international legal system as a whole.

10. The issue of limitations and exceptions to immunity could not be dealt with in isolation. Indeed, limitations and exceptions acquired their full significance in the context of the study of immunity that had been undertaken in previous reports, which had made it possible to reveal the legal nature of that institution in contemporary international law and to identify the essential elements that had to be taken into account when examining the issue. Those elements included the interrelationship between

immunity and jurisdiction and the notion of immunity as an exception to the exercise of jurisdiction; the notion of immunity as a procedural institution and its effect in some situations on the responsibility of the official; the distinction between the immunity of State officials from foreign criminal jurisdiction and the immunity of the State *stricto sensu*; and the distinction between the immunity of State officials before foreign criminal courts and their immunity before international criminal courts or tribunals.

11. In her fifth report, the Special Rapporteur considered the issue of limitations and exceptions to immunity on the basis of a view of international law as a normative system. From that standpoint, the immunity of State officials was a useful and necessary institution for ensuring that certain values and legal principles of the international legal order, in particular the principle of sovereign equality, were respected.

12. At the same time, however, the immunity of State officials from foreign criminal jurisdiction, as a component of that system, had to be interpreted in a systemic fashion. That systemic approach required that other institutions that were also related to the principle of sovereignty, especially the right to exercise jurisdiction, be taken into account, together with other sectors of the international legal order that reflected and embodied other values and principles of the international community as a whole, in particular international human rights law and international criminal law. As international law was a genuine normative system, the Commission’s development of a set of draft articles meant to assist States in the codification and progressive development of international law with respect to a problematic but highly important issue for the international community could not, and should not, have the effect of introducing imbalances in significant sectors of the international legal order, whose development in recent decades was one of its defining characteristics.

13. That systemic understanding of international law made it necessary to take into account the relationship between immunity and *jus cogens*, the values and principles of international law, the legal dimensions of the concepts of impunity and accountability, the fight against impunity, the right of access to a court, victims’ right to redress and the State’s obligation to prosecute certain international crimes.

14. The last point that she wished to address concerned the role that the Commission attributed to State practice in its work. As she had noted in all her reports, the study of practice was an essential basis of the Commission’s work. No theoretical argument, personal preference or ideology could replace practice. On the contrary, practice was the necessary starting point for any rigorous study capable of facilitating the formulation of proposals for codification and progressive development. It was only after the completion of such a study that an analysis that incorporated theoretical components and that suggested options for a particular issue could be carried out, especially if the issue was a controversial one. However, the primacy of practice should be understood in its proper context. Practice should be duly taken into account, but it must also be interpreted and integrated into the international legal system. Or, to put it more simply, practice was neither neutral nor the sole basis on which decisions should be taken.

15. That had been her approach in the fifth report. It had been her clear intention to identify whether there were applicable rules of customary international law that could be codified and, if so, whether there was sufficient practice to establish the existence of a trend that would allow proposals for progressive development to be made. With regard to the existence of a rule of customary law, the report had taken into account the Commission's ongoing work on the identification of customary international law. With regard to the identification of a trend, the report was also anchored in an analysis of practice.

16. Of course, that study of practice could not be limited to international jurisprudence. Such an approach might be criticized as reductionist. On the contrary, in relation to the topic under consideration, the concept of practice should also include national legislation and the decisions of national courts, which, it must be remembered, were the bodies before which any issue related to immunity from jurisdiction was raised and whose decisions undoubtedly constituted an essential element of State practice, especially if it was borne in mind that, in accordance with the principle of separation of powers, such bodies occupied a central and privileged position in terms of the sovereign authority of the State to exercise jurisdiction.

17. On the basis of that study of practice, it was possible to conclude that the commission of international crimes must now be regarded as a limitation or an exception to immunity based on a rule of international customary law. Even if it were possible to question the existence of a relevant practice and *opinio juris* giving rise to an international custom, it did not seem possible under any circumstances to deny the existence of a clear trend in favour of certain limitations and exceptions, which would reflect an emerging custom.

18. The Commission should carry out its work in line with its mandate understood as a whole. That meant that it could, and should, address both codification and progressive development when a topic involved both components. That was certainly the case with respect to the immunity of State officials from foreign criminal jurisdiction and the issue of limitations and exceptions in particular.

19. Turning to draft article 7, she said that its three paragraphs set out all the elements that defined, in an integrated manner, the regime of limitations and exceptions to immunity.

20. Paragraph 1 sought to identify, in a general manner, the crimes in respect of which immunity did not apply. It had been drafted on the model of the United Nations Convention on Jurisdictional Immunities of States and Their Property. The expression "does not apply" was intended to take account of the various views put forward thus far on the classification of each of the situations mentioned in the report as either a limitation or an exception. Moreover, it faithfully reflected the effects of limitations and exceptions to immunity. The formulation was especially appropriate in the case of international crimes, since, while it was widely debated whether such crimes could be committed in an official capacity, there was broad support for the view that they were not covered by immunity. In addition, she had chosen to define the situations in which

immunity did not apply by reference to the crimes over which jurisdiction was sought rather than by reference to the proceedings in which those crimes could be examined.

21. The paragraph addressed three instances in which immunity did not apply, namely crimes under international law, crimes of corruption and crimes covered by the so-called "territorial tort exception". With regard to crimes under international law, she had chosen to refer explicitly to genocide, crimes against humanity, war crimes, torture and enforced disappearances. Those were the crimes that occurred most frequently in practice, were recognized in treaties and whose classification as crimes under international law was widely accepted by the international community.

22. Paragraph 2 defined the scope of limitations and exceptions. The provisions of paragraph 1 would not apply to persons who enjoyed immunity *ratione personae*—that is, Heads of State, Heads of Government and Ministers for Foreign Affairs—during their term in office. Consequently, limitations and exceptions to immunity would apply only to immunity *ratione materiae* as already defined by the Commission. The exclusion of those three categories of State officials was based on practice and had been confirmed by the International Court of Justice. However, it should be borne in mind that limitations and exceptions were inapplicable to Heads of State, Heads of Government and Ministers for Foreign Affairs only during their term of office, after which time the provisions of paragraph 1 would once again become applicable.

23. Lastly, paragraph 3, which took the form of a "without prejudice" clause, set out two scenarios in which immunity would not apply owing to the existence of special regimes. The first scenario involved the existence of a treaty in force between the forum State and the State of the official under which immunities of State officials could not be invoked before their respective criminal courts. The second involved a general obligation on the forum State to cooperate with an international tribunal. The regimes referred to in paragraph 3 reflected examples found in practice. Paragraph 3 (b), in particular, took into consideration the complex situation arising from the application of article 98, paragraph 1, of the Rome Statute of the International Criminal Court, which had been reflected in terms of the immunity of State officials from foreign criminal jurisdiction in the South African courts in *The Prosecutor v. Omar Hassan Ahmad Al Bashir*¹⁹⁹ and which had even led to the decision of the Government of South Africa to withdraw from the Statute.

24. As she had indicated on several occasions, the issue of limitations and exceptions to immunity was one of the most controversial aspects of the topic. Nevertheless, it was an aspect to which both Commission members and States continued to attach great importance. At the previous session, several Commission members had been

¹⁹⁹ Decision of 15 March 2016 of the South Africa Supreme Court of Appeal (*Minister of Justice and Constitutional Development and Others v. Southern Africa Litigation Centre and Others*) on the appeal by the Government of South Africa of the decision of 24 June 2015 by the High Court of South Africa (Gauteng Division, Pretoria) in *Southern Africa Litigation Centre v. Minister of Justice and Constitutional Development and Others*.

able to express their views on the issue both in formal statements and in mini-debates. Those views, in particular those expressed by Commission members, formed part of the general debate on the topic and would have to be taken into account in the final decision that the Commission would adopt at the current session.

25. She wished to make two comments in that regard. First, Commission members were divided in their views, and it was not yet possible to establish whether there was a majority view on the issue. Second, the debate on the topic had once again reopened the discussion on the scope of the Commission's mandate, in particular with regard to the role assigned to codification and progressive development and the manner in which *lex lata* and *lex ferenda* should be understood.

26. Several delegations in the Sixth Committee had also expressed their views on the topic during the seventy-first session of the General Assembly in 2016. A few had indicated that they would refrain from commenting on the question of limitations and exceptions to immunity until the Commission had concluded its discussion of the fifth report. The remainder, while indicating that their observations were of a preliminary nature pending completion of the debate, had commented on various issues addressed in the report and, at times, on draft article 7.

27. A number of delegations had unequivocally expressed the view that limitations and exceptions did not exist in respect of either immunity *ratione personae* or immunity *ratione materiae*, while others had expressed that view less categorically. Some delegations had declared their support for the differentiated treatment of immunity *ratione personae* and immunity *ratione materiae* with regard to limitations and exceptions, while several others had strongly supported the existence of limitations or exceptions in respect of immunity *ratione materiae*, particularly with regard to international crimes. The view had also been advanced that international crimes could not be understood as official acts and were therefore not covered by immunity *ratione materiae*.

28. Some delegations had expressed scepticism about the inclusion of crimes of corruption as exceptions or limitations to immunity. The view had also been expressed that acts of corruption were carried out for personal benefit and were therefore limitations to immunity and not covered by it. A number of delegations had expressed an interest in analysing in greater depth the subject of crimes of corruption in relation to immunity.

29. There had been general agreement concerning the non-application of limitations and exceptions in the case of immunity *ratione personae*.

30. A few delegations had emphasized the need to take into account the fact that immunity was based on the principle of the sovereign equality of States, that its objective was to preserve the stability of international relations and that, consequently, limitations and exceptions were to be avoided. A number of delegations had expressed the need to strike a balance between respect for the principle of sovereign equality—and the maintenance of stable

international relations—and the fight against impunity. According to several delegations, it was necessary for the work of the Commission to take into account the advances that had been made in recent decades in international criminal law but to ensure that, in so doing, it did not undermine those advances. A few delegations had maintained that, in dealing with immunity and possible limitations and exceptions, the Commission should confine itself to codification, while a number of others had taken the view that the Commission should exercise both aspects of its mandate, namely, the progressive development and codification of international law.

31. Delegations had drawn attention to the need for caution in dealing with the question of limitations and exceptions to immunity. Some had also drawn attention to the risk that criminal jurisdiction might be exercised over a foreign official for political ends or without procedural safeguards being adequately respected. According to the delegations in question, in order to avert those risks, it was necessary to establish appropriate procedural mechanisms; a few others had highlighted the importance of examining the procedural aspects of immunity. Lastly, nearly all States that had participated in the debate had highlighted the importance of the topic, in general, and the question of limitations and exceptions to immunity, in particular.

32. The views expressed by delegations clearly illustrated the controversial nature of the topic, which, moreover, involved core categories of contemporary international law and touched on interests of major importance to States.

33. She recalled that, at the Commission's previous session, Mr. McRae had accurately identified the challenges posed by the question of limitations and exceptions to immunity, especially with regard to the role to be assigned to *lex lata* and *lex ferenda*, and the relative weight to be given to codification and progressive development in the Commission's work on the topic.²⁰⁰ At the current session, it was for the Commission to respond to the question raised on that occasion by Mr. McRae, namely whether it would embrace the developing trend in international law identified by the Special Rapporteur or whether it would seek to halt it.

34. Regarding the Commission's future work on the topic, her intention was to hold informal consultations during the second part of the session in order to study various procedural aspects relevant to the topic, for which purpose she proposed to distribute a short working paper in due course. She planned to submit her sixth and final report on the topic for the Commission's consideration during its seventieth session, with a view to concluding the debate on the topic and adopting the draft articles on first reading during that session.

35. Mr. PARK said that the question of limitations and exceptions to immunity was one of the most difficult aspects of the Commission's work on the topic. The question was particularly important for the Republic of Korea, where national law provided for criminal jurisdiction

²⁰⁰ See *Yearbook ... 2016*, vol. I, 3331st meeting, p. 357, paras. 53–54.

over all foreigners who committed serious international crimes outside the territory of the State but who were present in it, regardless of their official status. However, it was uncertain whether high-ranking State officials could enjoy immunity from such jurisdiction, since the courts had never dealt with such cases. In that context, the work of the Commission was very important.

36. At the previous session, while a number of members had supported the Special Rapporteur's proposition that the commission of international crimes could constitute an exception to the immunity of State officials from foreign criminal jurisdiction under international customary law, others had taken the view that no such exception existed. For his part, he considered that work on the topic should take account of both the progressive development and codification of international law. The Commission's mandate was to identify existing international law and then to decide to what extent it was necessary to incorporate *lex ferenda* provisions into it. In that regard, the starting point for the Commission's work was existing international law. In its examination of the topic, the Commission must, first of all, establish the relevant existing international law and then take into consideration the *lex ferenda*. When considering the *lex ferenda* of immunity, the Commission must above all take into account the protection of human rights. Ultimately, he was in favour of striking a balance between *lex lata* and *lex ferenda* in the draft articles, and it was important not to confuse the two.

37. The Special Rapporteur concluded in paragraph 184 of her fifth report that there were sufficient elements pointing to the existence of a customary norm that recognized international crimes as a limitation or exception to immunity. She argued that there were limitations or exceptions because there was no consistent practice against the non-applicability of such immunity. Given that the immunity of State officials was recognized, in principle, under international law, it was important to ascertain whether there was consistent practice in favour of a limitation or exception. The Special Rapporteur did not appear to have succeeded in justifying her conclusion to that effect; consequently, more research was needed in order to substantiate that conclusion.

38. Generally speaking, he endorsed the Special Rapporteur's analysis in paragraphs 236 to 242 of her fifth report. However, he disagreed with her assessment of the decision reached by the European Court of Human Rights in the case of *Jones and Others v. the United Kingdom*, from which she inferred a trend not to recognize the immunity of State officials when the latter had committed acts of torture, even though that decision related to civil proceedings. In his view, the Court in its decision did not go so far as to recognize torture as a reason for the non-applicability of immunity, but rather merely observed a trend in the development of international law towards non-applicability, without recognizing the existence of a rule that allowed for a limitation or exception to immunity. It would be wiser to conclude that the Court considered a limitation or exception in the context of torture to fall into the category of *lex ferenda*.

39. In his view, the International Court of Justice and the European Court of Human Rights did not recognize

the violation of a *jus cogens* norm as a basis for the non-applicability of immunity. For her part, in paragraph 187 of her report, the Special Rapporteur tended to downplay the value of the decisions of those courts, arguing that their decisions dealt with State immunity, not the immunity of State officials, and that their decisions could only be considered a "subsidiary means" of determination of the existence of a practice accompanied by *opinio juris* that was relevant as evidence of a customary norm and that they could never replace national courts in the process of the formation of custom.

40. To his mind, the Special Rapporteur provided no convincing explanation as to why limitations or exceptions to the immunity of State officials should be distinguished from limitations or exceptions to State immunity. Both types of immunity were procedural systems whose aim was to protect the sovereign equality of the State.

41. The value of judicial decisions as a subsidiary means under Article 38, paragraph 1, of the Statute of the International Court of Justice should not be underestimated. Those decisions served as important evidence of the formation of customary international law. In certain cases, it might be more relevant to examine the decisions of the International Court of Justice than to identify the practice of some States.

42. His own position was that it was difficult to conclude definitively that there already existed a limitation or exception to the immunity of State officials before national courts based on the commission of serious international crimes or crimes of corruption. Given the uncertainty of that situation, it would be better to consider such a limitation or exception as *lex ferenda*. The question then arose as to what extent *lex ferenda* should be reflected in the Commission's work on the topic. He had three comments in that regard.

43. First of all, in the twenty-first century, it could no longer be denied that the protection of persons against widespread and grave violations of human rights was becoming an essential value that the international community must pursue. In that regard, he fully agreed with the position taken by the Special Rapporteur in paragraphs 191 to 205 of her report.

44. Second, he supported the second approach mentioned in paragraph 157 of her report regarding the relationship between international criminal courts and national courts. When taking into account the development of international criminal law, it was also necessary to review the system of immunity before national courts. There was a growing demand throughout the world for human rights protection and for combating impunity; the system of immunity should therefore not hinder the protection of the common interests of the international community. The Commission should take that factor into account in its work as a matter of *lex ferenda*.

45. Third, a change in the scope of the functional immunity of State officials, immunity *ratione materiae*, from foreign criminal jurisdiction was inevitable and would not conflict with contemporary thinking, in the same way that State immunity was evolving from an

absolute concept to a relative one. Such a trend had been confirmed not only in national laws, for example in Belgium, the Netherlands and Spain, but also in the opinions of publicists. One illustration of such a change was the resolution on the immunity from jurisdiction of the State and of persons who act on behalf of the State in case of international crimes, which had been adopted by the Institute of International Law in 2009.²⁰¹ Article III, paragraph 1, of the resolution clearly indicated the following: “No immunity from jurisdiction other than personal immunity in accordance with international law applies with regard to international crimes.”

46. Turning to draft article 7, he said that he supported the Special Rapporteur’s decision not to refer to “limitations” or “exceptions” in the title, but to use wording reminiscent of the phrase “proceedings in which State immunity cannot be invoked”, which was to be found in the United Nations Convention on Jurisdictional Immunities of States and Their Property. Genocide, crimes against humanity, war crimes, torture and enforced disappearances were all serious international crimes and therefore constituted a limitation or exception to immunity. Enforced disappearances, notwithstanding more limited State practice in that respect, merited inclusion in the list because it was today deemed to be a crime against humanity. He agreed with those Commission members who had stated in 2016 that it would have been preferable to include the crime of aggression in paragraph 1 (a), because it was a breach of *jus cogens* norms. On the other hand, there was insufficient evidence to support the retention of crimes of corruption in the draft article, since none of the conventions combating corruption contained an express provision on the non-applicability of immunity to such crimes. As far as paragraph 1 (c) was concerned, wide acceptance of the territorial tort exception meant that it could be said to exist in current international law.

47. With regard to paragraph 2, he agreed that a distinction should be drawn between immunity *ratione personae* and immunity *ratione materiae*. If the Commission were to conclude that a person enjoying immunity *ratione materiae* forfeited that immunity if he or she committed certain serious crimes, that would indubitably have a bearing on other immunity regimes, such as that of diplomats, which the Commission had excluded from the scope of the draft articles.

48. When drawing up a list of crimes to which immunity would not apply, the Commission must establish a balance between *lex lata* and *lex ferenda*. The interests of the international community would be compromised if it failed to make provision in international law for a response in the event of State officials committing genocide, crimes against humanity or other acts which violated *jus cogens* norms. No criminal could hide behind the screen of immunity that international law afforded to States or in respect of official acts.

49. Sir Michael WOOD said that he had a different opinion on many of the core ideas just set out by the Special Rapporteur. He very much agreed with the

thoughtful statements which had been made by Mr. Huang and Mr. Singh at the previous session. He recalled that the previous year the Special Rapporteur had indicated that it might be advantageous to consider procedural aspects in parallel with exceptions. It was unfortunate that the Commission had not yet received the Special Rapporteur’s sixth report on procedural aspects and procedural guarantees of the rights of State officials subject to foreign criminal jurisdiction. Procedural issues were of fundamental importance and were closely linked to questions of exceptions. Since their consideration must go hand in hand, it was impossible to make informed decisions on possible exceptions at the current session.

50. The Sixth Committee debate on the fifth report had been illuminating. It had shown that States expected the Commission to proceed with particular caution and to distinguish between existing rules of international law and proposals for new legal rules. Such a distinction was particularly important for States where the courts directly applied rules of existing customary international law. In that connection, he drew attention to paragraphs 51 and 52 of the topical summary of the discussion held in the Sixth Committee of the General Assembly during the seventy-first session, prepared by the Secretariat.²⁰²

51. Commenting generally on the methodology employed for the current topic and in particular for the issue of exceptions, he underscored the fact that immunities played a vital role in international relations. Provision had been made for them in long-standing, fundamental rules of international law, and attempts to curtail or remove them would pose considerable risks to the international order and to peaceful relations among States. The Commission must therefore strive to strike a proper balance between the need to punish perpetrators of crimes and respect for the sovereign equality of States. The way to do that was first to clearly distinguish between the existing law and possible new rules of law. Failure to do so would sow confusion and might lead to abuses and violations of existing law, which could potentially give rise to serious tension between States. It would be irresponsible of the Commission to foster such tensions.

52. Second, a balance could also be struck through the identification and development of proper procedural safeguards against abuse or misuse of any exceptions to immunities. For that reason, it would be useful to have the views of the current Special Rapporteur on the contents of subparagraphs 61 (a), (e), (f), (g), (h) and (i) of her predecessor’s well-received third report²⁰³ and on his conclusions with regard to waiver, all of which were well substantiated and closely related to possible exceptions. States were keen to have such safeguards put in place in order to avoid the harmful effects of politically motivated prosecution activities.

53. His first general comment on the fifth report was that very useful material was already available on the matters raised therein, such as the memorandum by the

²⁰¹ Institute of International Law, *Yearbook*, vol. 73, Parts I and II, Session of Naples (2009), pp. 226–227; available from: www.idi-iil.org/Resolutions.

²⁰² Document A/CN.4/703, available from the Commission’s website, documents of the sixty-ninth session.

²⁰³ *Yearbook ... 2011*, vol. II (Part One), document A/CN.4/646 (third report of the first Special Rapporteur, Mr. Kolodkin).

Secretariat,²⁰⁴ the first Special Rapporteur's reports, especially his second report,²⁰⁵ and the summary records of the debates in the Commission²⁰⁶ and the Sixth Committee in 2011 and 2016. The fifth report should not be read in isolation.

54. His second general point was that, although chapter I, section A, of the fifth report was entitled "General considerations" it did not set out any substantive general considerations. The list of publications on the subject contained in the first footnote to paragraph 12 was highly selective. The resolutions of the Institute of International Law mentioned in that paragraph had been controversial and had not received much acknowledgement from States. Each of the court decisions to which reference was made addressed very different points. In other words, none of the materials cited in the report told the Commission much.

55. Section B of chapter I disregarded the fact that within the Commission and the Sixth Committee there had been some strong disagreement with the Special Rapporteur's earlier reports. For example, she had not acknowledged his own position that the "values and legal principles that are affected by immunity" of which she had spoken in her preliminary report were vague and entirely subjective and, as such, could not be a basis for serious work by the Commission. A clear analysis of all relevant State practice in relation to each specific exception would have been more useful than the scattering of explanatory material through the report under consideration.

56. Third, although he did not intend to comment in detail on the wealth of theoretical questions raised in the report, as they were of no great significance for the decisions which the Commission would have to take, his silence should not be taken as agreement with the Special Rapporteur.

57. One of those questions was the distinction between limitations and exceptions. According to the Special Rapporteur, limitations were related to normative elements, while exceptions were defined by external elements. However, the practical significance of that distinction was unclear, perhaps because of the terminology employed in the report. Although the Special Rapporteur seemed to have in mind what her predecessor had more simply termed exceptions and absence of immunity, she had a much broader understanding of "exceptions". In her view, compliance with the values and legal principles of international law as a whole and the need to avoid undesired effects in certain areas of international law would constitute the starting point for defining exceptions to immunity. Such a subjective approach was certainly not a sound basis for establishing *lex lata* or making proposals for new law.

²⁰⁴ 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).

²⁰⁵ Reports of the first Special Rapporteur, 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).

²⁰⁶ See *Yearbook ... 2011*, vol. I, and *Yearbook ... 2016*, vol. I.

58. The Special Rapporteur had suggested that, since for the purposes of the draft articles it was unnecessary to maintain the distinction between limitations and exceptions, which hardly existed in practice, they could be subsumed under the umbrella term of "non-application of immunities". However, that approach should be taken only if the Commission was unable to agree on how to distinguish between limitations and exceptions. He believed that such a distinction was possible and, for that reason, he would prefer not to deal with them in one provision.

59. The two claims advanced in the report in support of draft article 7, paragraph 1 (a), namely that it reflected an existing rule of customary international law and that there was a majority trend towards such a rule, were inconsistent and he disagreed with both. On the contrary, he agreed with the conclusion drawn in paragraph 90 of the former Special Rapporteur's second report which the current Special Rapporteur had noted in paragraph 16 of her fifth report—that there was no customary norm, or trend towards the establishment of such a norm, making it possible to assert that there were exceptions to immunity—because in fact there was no general practice establishing any such exceptions or adequate evidence of their acceptance as law.

60. He had expected the Special Rapporteur to propose that the Commission recommend to States in the General Assembly that they should consider adopting treaty-based rules—with the essential procedural safeguards—embodying certain exceptions to immunity *ratione materiae* as new rules of law which States could adopt, modify or reject. He would not have been opposed to working on such a proposal for new law. However, the Special Rapporteur appeared to claim in her fifth report that such exceptions were or might already be customary international law, whereas in 2016 many States in the Sixth Committee had noted that this was not the case. The methodology of the analysis in paragraphs 181 to 189 and the specific evidence relied on therein were therefore unconvincing.

61. As for methodology, the Special Rapporteur purported to invoke elements from the Commission's work on the topic "Identification of customary international law", but her approach had little to do with it. An examination of the various materials to which she referred made it clear that they did not support her thesis. The judgment in the *Bouterse* case had been set aside by the Supreme Court of the Netherlands and the *Hailemariam* case seemed to be irrelevant, since it involved an Ethiopian national.

62. As for the core arguments for the existence of an exception to immunity as a rule of customary international law when international crimes had been committed, the Special Rapporteur claimed that there was a trend towards such an exception in national courts, although there was no evidence of any such a trend and she contradicted that claim in paragraph 220 of the report, which pointed to a paucity of practice. She also maintained that national laws had gradually included that exception, but paragraphs 42 and 44 contradicted that idea. The implementing laws of the Rome Statute of the International Criminal Court were of dubious relevance, as they had in principle been enacted solely for the purposes of that treaty. The Special

Rapporteur also seemed to rely on the conclusion of treaties criminalizing specific conduct and providing for individual criminal responsibility. But, as the International Court of Justice had explained in the case concerning the *Arrest Warrant of 11 April 2000*, such treaties in no way affected immunities under customary international law. In that connection, he drew attention to the Court's findings in paragraph 59 of its judgment of 14 February 2002, where it 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 ... These remain opposable before the courts of a foreign State, even where those courts exercise such a jurisdiction under these conventions".

63. The Special Rapporteur was seeking to bolster that proposed exception by including a section in the report, section A.2 of chapter IV, on what she termed the "systemic foundation" for it. That section, which seemed to simply put forward "various arguments in favour" of the exception, was totally unconvincing and unnecessary for the purposes of determining the *lex lata*. Its very inclusion in the report already showed that the Special Rapporteur was not convinced that the exception formed part of customary international law. Moreover, any true systemic foundation should not only look at arguments in favour, as was done in the report, but should also develop and look at those against, and then try fairly to weigh them.

64. Draft article 7, paragraph 1 (b), proposed a limitation or exception for what, in the English translation, read "corruption-related crimes". The French text had similar wording, while the term used in the Spanish text was *los crímenes de corrupción*. He had three general comments in that regard.

65. First, even in Spanish, the expression *los crímenes de corrupción* was extraordinarily vague. What relationship to corruption must an offence have in order to be covered by the proposed exception? What crimes were covered by the Spanish text? Did they include bribery, embezzlement, misappropriation of property, abuse of functions, illicit enrichment and money-laundering? Perhaps, however, there was no need to go into those questions, because the proposed exception in question seemed not to be a very serious one. There was no basis whatsoever for singling out, for the purposes of the present topic, among all transnational crimes, corruption-related crimes.

66. Second, he understood that the Special Rapporteur did not see that draft subparagraph as *lex lata*. That was apparent from paragraph 234 of the report, where she simply stated that it "might be appropriate" to have a provision establishing corruption-related crimes as a "limitation or exception"—which implied, he supposed, that it might not be appropriate.

67. Third, the Special Rapporteur's approach to the issue seemed to be that corruption-related crimes could be either a "limitation" of immunity *ratione materiae* or

an exception thereto. Clarity was needed in that regard. If it was a limitation, that type of act would not be covered by draft article 6, paragraph 1,²⁰⁷ and would therefore fall outside the scope of immunity *ratione materiae*. If it was an exception, it would be necessary to demonstrate the existence of an exception under customary international law or some rationale for distinguishing that crime from all other transnational crimes.

68. In support of draft article 7, paragraph 1 (b), the Special Rapporteur referred in paragraph 37 of her fifth report to a number of conventions that criminalized corruption. None of those instruments, however, supported the idea of crimes of corruption as a "limitation or exception". He would draw attention in that regard, for example, to an interpretative note to article 16 of the United Nations Convention against Corruption, which concerned the criminalization of bribery of foreign public officials and officials of public international organizations. That note read: "This article is not intended to affect any immunities that foreign public officials or officials of public international organizations may enjoy in accordance with international law."²⁰⁸

69. Draft article 7, paragraph 1 (c), concerned a possible territorial crime exception. The matter had been carefully considered in Mr. Kolodkin's second report and in the 2008 memorandum by the Secretariat. Such an exception could certainly be considered, although it was controversial, and the Commission would need to address some additional issues not covered in the Special Rapporteur's fifth report, including procedural ones. At the previous session, Mr. Singh had pointed out a whole series of omissions, such as the need to address military activities;²⁰⁹ he agreed with what Mr. Singh had said on that occasion.

70. Draft article 7, paragraph 2, reflected existing practice and should not give rise to much debate within the Commission. However, in order to express more clearly the important point made therein, it might be preferable to dispense with that paragraph and simply to specify in the title and text of the draft article that the entire draft article only applied with respect to immunity *ratione materiae*.

71. Draft article 7, paragraph 3, raised a number of questions. For example, it was not clear why subparagraph (a) was limited to treaties under which immunity would not be applicable, rather than to treaties under which immunity would be applicable, and it was not clear what kind of tribunal was envisaged in subparagraph (b).

72. Turning to the future of the topic, he said that it was difficult to see where the topic was heading unless and until the Commission was able to reach agreement on the question of whether to include exceptions to immunity *ratione materiae* at all and, if so, on what basis—*lex lata*

²⁰⁷ See *Yearbook ... 2016*, vol. II (Part Two), p. 216 (draft article 6).

²⁰⁸ UNODC, *Travaux préparatoires of the negotiations for the elaboration of the United Nations Convention against Corruption* (United Nations publication, 2012), p. 186. Available from: www.unodc.org/documents/treaties/UNCAC/Publications/Travaux/Travaux_Preparatoires_-_UNCAC_E.pdf.

²⁰⁹ See *Yearbook ... 2016*, vol. I, 3331st meeting, p. 354, para. 28.

or as new law. Only then might it be possible to engage constructively on what those exceptions should be. As he had explained, he did not see the central proposal in the fifth report, as set out in draft article 7, paragraph 1, as providing a basis for agreement. He saw no basis in existing State practice for an exception for so-called “international crimes”, and no support whatsoever for singling out corruption-related crimes. In his view, it would not be right at the current stage, and on the basis of the report under consideration, to propose a text like draft article 7, paragraph 1, even as a new rule of international law.

73. For all those reasons, and like some of those who had spoken in the debate the previous year, he did not support sending draft article 7 to the Drafting Committee.

74. It was worth stepping back and seeing where the Commission was with the topic. The Commission had adopted four draft articles and one paragraph of another, together with some rather extensive commentaries. In 2015, the Drafting Committee had provisionally adopted a further two draft provisions, which the Commission would presumably adopt at the current session, together with commentaries. He looked forward to seeing the Special Rapporteur’s drafts for those commentaries and he trusted that Commission members would have sufficient time to consider them carefully, perhaps even in a working group, before they were asked to adopt them in plenary.

75. The Commission also needed to return to some of the draft articles already adopted to ensure a degree of consistency between them, including on terminology. That was a matter for the Drafting Committee, which also had to complete work on some of the drafts already submitted to it, in particular some of the proposed definitions in draft article 2.

76. There were inconsistencies and uncertainties of language within the texts so far adopted by the Commission, and he hoped that it would have an opportunity to return to those texts before the first reading was completed. For example, it had yet to be explained what was meant by “immunity from jurisdiction”. Particularly important in practice would be the question of whether that included, as surely it must, inviolability of the person, such as freedom from arrest and detention. Perhaps the Commission would come back to that matter in 2018, when it would hopefully return to the all-important procedural aspects of the topic.

77. Indeed, as he had said before, he did not see how the Commission could seriously consider exceptions, except perhaps in an entirely preliminary way, without knowing anything about the procedural matters that would be proposed to it. The Commission—and States—needed to have the overall picture. For example, it could be seen from paragraph 245 of the report that the Special Rapporteur had not covered in the present report what was perhaps the main and least controversial exception, namely waiver. To deal with exceptions without covering waiver would be to give a very misleading picture. It seemed clear that the Drafting Committee could not deal definitively with the issues raised by draft article 7 until the Commission had received and debated the Special Rapporteur’s proposals on related procedural matters, to be addressed in the sixth report, which would not now be available until 2018.

78. In conclusion, he said that it would now be for the Commission to decide how to proceed with the topic, in the light of further careful study and a report from the Special Rapporteur on procedural issues, or at least an indication of the extent to which she agreed with what the previous Special Rapporteur had said on procedure in his third report. As he had said, he would not support sending draft article 7 to the Drafting Committee, but he did look forward to the Commission’s further informal consultations referred to earlier by the Special Rapporteur of those matters later in the session on the basis of a brief working document presented by the Special Rapporteur.

79. Mr. HMOUD said that he wished to note that there was an understanding that members who had spoken on the topic at the previous session had the right to take the floor again, for example if they wished to respond to a point raised at the current session.

80. Mr. NGUYEN said that he would like to thank the Special Rapporteur for her well-documented fifth report. Although the report exceeded the specified page limit, its length was acceptable in view of the complexity and sensitivity of the topic under discussion. However, the analysis of cases and the reference to State practice concerning Asia should be further developed. For instance, in the section on national judicial practice, only one footnote, the second footnote to paragraph 110, dealt with the *Bo Xilai* case heard by the Bow Street Magistrates’ Court in the United Kingdom concerning the request for an arrest warrant against a Chinese minister of trade. The lack of examples of regional practice might affect the Special Rapporteur’s conclusions on the questions considered in the report.

81. Like other speakers, he was of the view that there was a need to strike a balance between *lex lata* and *lex ferenda*, in accordance with the Commission’s mandate. Similarly, a balance should be struck between the need to punish the perpetrators of international crimes and to respect State sovereignty.

82. He agreed with the Special Rapporteur’s reasoning for not using the words “limitations” and “exceptions” in draft article 7. However, as the wording of the title and the content of the draft article in fact referred mainly to the notion of “exception” rather than “limitation”, the question of limitations and exceptions should be further clarified. In particular, he agreed with other Commission members who had spoken at the previous session that the Special Rapporteur should clarify the legal nature of exceptions to immunity for the crimes listed in draft article 7. In paragraph 219 of the report, she identified only two categories of international crimes: the first included international organized crimes such as piracy, corruption and human trafficking, while the second concerned such crimes as war crimes and crimes against humanity. However, draft article 7, paragraph 1, provided for three categories of crimes in relation to which immunity did not apply: international crimes undermining the fundamental legal values of the international community, corruption-related crimes and crimes committed in the territory of the forum State. Although apartheid was mentioned in paragraph 219 along with other international crimes such as genocide, it had been omitted from draft article 7 for

no clear reason. All international crimes universally recognized as such and falling under international jurisdiction should be included in draft article 7, paragraph 1, including apartheid.

83. The crime of aggression had not been included in draft article 7, paragraph 1, for the reasons given in paragraph 222 of the report. The identification of an act of aggression fell within the responsibility and functions of the Security Council under Chapter VII of the Charter of the United Nations and of the General Assembly in the event of a deadlock in the Security Council. Under article 5 of the Rome Statute of the International Criminal Court, provision was made for the Court to exercise jurisdiction with respect to the crime of aggression in accordance with the relevant provisions of the Charter of the United Nations. Furthermore, the crime of aggression was provided for in article 16 of the Commission's 1996 draft code of crimes against the peace and security of mankind.²¹⁰ Therefore, the crime of aggression must fall within the scope of international jurisdiction, rather than domestic jurisdiction. Crimes against the peace and security of mankind were crimes under international law and punishable as such, whether they were punishable under national law. Accordingly, in the light of the above, no rule of immunity should apply in national jurisdictions for a crime of aggression committed by State officials. Hence, he would agree with other members who, at the previous session, had proposed the inclusion of that crime in the list of exceptions to immunity.

84. Customary law generally recognized immunity *ratione personae* for Heads of State, Heads of Government and Ministers for Foreign Affairs in all circumstances. Therefore, bearing in mind the need for consistency with paragraph 2, the term "*ratione materiae*" should be inserted after the word "immunity" in paragraph 1 of draft article 7 in order clearly to identify the type of immunity in question. Such mention would also reflect the spirit of international law and the treatment at the national level of crimes committed by foreign State officials, without distinction based on official capacity. The paragraph should provide for the possibility of including new core international crimes that were universally recognized as such and subject to punishment, and to which immunity did not apply. Some national laws, for instance the 2015 Criminal Code of Viet Nam, provided for questions of criminal liability and exceptions to immunity to be settled through diplomatic channels on a case-by-case basis.

85. Among the various forms of international organized crime, draft article 7, paragraph 1 (b), referred only to corruption-related crimes. That might be explained by a concern about the threat that such crimes posed to sustainable development and to the stability and security of societies and about the need to give priority to fighting corruption at all levels. Even though 181 States had become parties to the United Nations Convention against Corruption, exceptions to immunity for crimes of corruption should be considered in the light of a series of factors, such as the economic nature of the crimes involved and the capacity—private or official—in which the acts concerned had been performed. The commentary should provide clarification

²¹⁰ The draft code adopted by the Commission in 1996 is reproduced in *Yearbook ... 1996*, vol. II (Part Two), pp. 17 *et seq.*, para. 50.

of the relevant circumstances. The explanation provided in paragraphs 230 to 234 of the report to support the inclusion of corruption-related crimes should be further developed. In that connection, the footnote to paragraph 230 did not support the general assessment that the response of national courts had generally been to deny immunity; more proof of national practice was required to substantiate such a claim. It should be further noted that article 4 of the United Nations Convention against Corruption, on protection of sovereignty, included provisions on respect for sovereign equality and non-intervention in the domestic affairs of other States. Accordingly, the reference to corruption-related crimes in the draft article should be accompanied by a requirement not to undermine sovereignty or to interfere in domestic affairs.

86. While supporting the inclusion of the concept of the territorial tort exception in draft article 7, paragraph 1 (c), he had doubts about the use of the conjunction "or" in the clause "Crimes that cause harm to persons, including death and serious injury, or to property". Its use might suggest that, even though the crimes in question caused harm only to property, State officials forfeited their right to invoke immunity. In reality, serious crimes caused harm to both persons and property; the level of harm should be specified.

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

The meeting rose at 12.30 p.m.

3361st MEETING

Friday, 19 May 2017, at 10.05 a.m.

Chairperson: Mr. Georg NOLTE

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

Immunity of State officials from foreign criminal jurisdiction (*continued*) (A/CN.4/703, Part II, sect. E, A/CN.4/701, A/CN.4/L.893)

[Agenda item 2]

FIFTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRPERSON 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).