Document:-
A/CN.4/3362

Summary record of the 3362nd meeting

Topic:
Immunity of State officials from foreign criminal jurisdiction

Extract from the Yearbook of the International Law Commission:-
2017, **vol. I**

3362nd MEETING

Tuesday, 23 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. Laraba, Ms. Lehto, Mr. Murase, Mr. Murphy, Mr. Nguyen, Ms. Oral, Mr. Ouazzani Chahdi, Mr. Park, Mr. Peter, Mr. Rajput, Mr. Reinisch, Mr. Ruda Santolaria, Mr. Saboia, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, 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. Mr. VÁZQUEZ-BERMÚDEZ said that the question of limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction had important implications for States, in particular for the legal proceedings of their national courts. He generally agreed with the Special Rapporteur's approach to that question in her fifth report on the topic (A/CN.4/701) and with her in-depth analysis of the national and international judicial practice in that regard. Her systemic argument for the non-applicability of immunity in respect of the most serious international crimes was also significant.

2. In her report, the Special Rapporteur noted that a large number of States had supported the existence of various exceptions to immunity *ratione materiae*, the main one being the commission of the most serious crimes of concern to the international community as a whole. As the Commission had observed on many occasions, international law was a legal system whose rules and principles operated in relation to other rules and principles and should be interpreted in that context. In its advisory opinion in *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, the International Court of Justice stated that "a rule of international law, whether customary or conventional, does not operate in a vacuum; it operates in relation to facts and in the context of a wider framework of legal rules of which it forms only a part" (para. 10 of the advisory opinion).

3. In its consideration of the current topic, the Commission had to balance the sovereign equality of States and the stability of international relations, on the one hand, with the prevention and punishment of serious crimes of concern to the international community as a whole, on the other. The fact that international criminal tribunals set up by the international community were limited in some ways, such as in the scope of their jurisdiction or the amount of their operating resources, lent greater importance to the role of national courts and inter-State cooperation in preventing and combating impunity for the commission of those serious crimes.

4. On the basis of her analysis of practice, and supported by the writings of publicists, the Special Rapporteur rightly concluded that it was not possible to determine the existence of a customary rule that allowed for the application of limitations or exceptions to immunity *ratione personae* or to identify a trend in that direction. However, with regard to immunity *ratione materiae*, she concluded that it was possible to identify the existence, or at least a clear trend towards the emergence, of a customary rule that excluded the applicability of such immunity with regard to the most serious international crimes.

5. That conclusion was consistent with the development of international criminal law since the Second World War, including the adoption of treaties that required States to provide for the jurisdiction of their national courts over international crimes. The application of immunity *ratione materiae* to international crimes that were addressed in current or future conventions would have a major impact on the application and effectiveness of those conventions, considering that those who perpetrated international crimes were generally State officials.

6. It would be regrettable if the State of nationality of current or former officials accused of torture, for example, were to request the forum State not to extradite such officials, but to consider that they had immunity from jurisdiction on the grounds that the alleged acts of torture had been performed in an official capacity. Such claims would conflict with the obligations of States under various treaties, such as the obligation to prosecute or extradite.

7. A request for the extradition of such an official by the State of nationality would in no way conflict with the obligation of States to prevent and punish that serious crime. However, an invocation of immunity *ratione materiae* in an effort to impede the prosecution of the official would, in the absence of any other process for determining his or her criminal responsibility, open the door to impunity for the commission of a serious crime. The risk was that the immunity of State officials from foreign criminal jurisdiction might no longer be an exclusively "procedural bar" but a "substantive bar". Along those lines, the joint separate opinion of Judges Higgins, Kooijmans and Buergenthal in *Arrest Warrant of 11 April 2000* indicated that international law sought "the accommodation of this value [immunity] with the fight against impunity, and not the triumph of one norm over the other" (para. 79 of the joint separate opinion).

8. According to the report, the balance to be struck between those norms implied that State officials had absolute immunity from foreign criminal jurisdiction in the case of immunity *ratione personae*, as well as immunity *ratione materiae* as a general rule, with certain exceptions and limitations with regard to the most serious crimes. The exceptions and limitations to which the Special Rapporteur referred in her fifth report therefore applied only to immunity *ratione materiae*.

9. In draft article 7, the Special Rapporteur rightly proposed wording similar to that used by the Commission

in the draft articles on jurisdictional immunities of States and their property.[224] It was also in keeping with most State practice and international case law, which referred to the "non-applicability" of immunity or to the fact that immunity "could not be invoked" before national courts. He supported the inclusion of crimes of corruption and the "territorial tort exception" in the draft article.

10. With regard to the future workplan on the topic, an analysis of the procedural aspects of immunity in the Special Rapporteur's sixth report would be very helpful with a view to preventing politically motivated prosecutions and addressing the invocation or waiver of immunity by an alleged offender's State of nationality. He was in favour of referring draft article 7 to the Drafting Committee.

11. Mr. MURPHY said that there were three key questions that should be considered during the debate on the topic. The first was whether draft article 7 constituted existing law (*lex lata*) or was a proposal for new law. The second was whether procedural safeguards should be associated with draft article 7 in order to prevent its misuse. The third was whether, given the importance and sensitivity of the issue of limitations and exceptions to immunity and the likelihood that it would elicit divergent views among Commission members, any draft article on that issue should be discussed and developed simultaneously with its associated commentary.

12. In his view, draft article 7 did not constitute existing law but rather was new law, as was clear from several aspects of the report. First, the Special Rapporteur argued repeatedly that there was a "clear and growing trend" towards exceptions to immunity; her emphasis on a "trend" was an implicit acknowledgement that draft article 7 was not based on settled law and instead reflected a proposal for new law.

13. Second, the report provided no empirical assessment of the existence of a trend, and the evidence it did provide did not define any particular temporal arc in the emergence of exceptions or limitations. In fact, some evidence actually seemed to suggest the lack of a trend, for example in recent cases brought before the International Court of Justice and the European Court of Human Rights, or perhaps even a countertrend, as illustrated by a recent narrowing of the scope of some national laws.

14. Third, despite the acknowledgement in paragraph 20 (*a*) of the report that there was no clear consensus among States as to which questions concerning exceptions should be included in each of the two categories (*lex lata* or *lex ferenda*), the report downplayed that significant observation by failing to take it into account when considering whether State practice and *opinio juris* supported the existence, under current law, of a rule on exceptions to immunity.

15. Fourth, national case law did not support draft article 7. Despite the claims set out in the report that national case law supported the existence of certain limitations and exceptions to immunity *ratione materiae*, the report identified just 11 cases over the last 50 years in which a national court had denied immunity *ratione materiae* to a foreign State official in a criminal case involving the alleged commission of an international crime. Such evidence was neither widespread nor representative in terms of identifying existing customary international law.

16. Moreover, in her report, the Special Rapporteur incorrectly asserted that national courts had granted immunity *ratione materiae* in only a "small number of cases" involving alleged serious international crimes. In fact, it was possible to identify many such cases, especially by looking at both criminal and civil case law. Consequently, case law could not be declared to weigh unequivocally in favour of draft article 7. In addition, a thorough methodology for assessing national case law would have involved examining not just cases that had reached national court systems, but also situations where cases had not been pursued and the reasons for not pursuing them, which might include a belief that immunity was applicable.

17. Fifth, national legislation did not support draft article 7. As noted in paragraph 44 of the report, national laws regulating jurisdictional immunity were very few in number, and that made it difficult to identify settled law relating to any exceptions to immunity. In addition, most of those laws concerned immunity of States, not that of State officials from criminal jurisdiction. Even so, in her report, the Special Rapporteur indicated that they provided for a "territorial tort exception" that purportedly implied the existence of an analogous exception to immunity in the context of criminal jurisdiction. Yet it should be acknowledged that national laws did not provide for any exceptions to immunity in relation to the commission of genocide, crimes against humanity or war crimes—a fact that would appear to be equally relevant. Although, in her report, the Special Rapporteur mentioned several recent national laws that implemented the Rome Statute of the International Criminal Court, she also noted that many of them were applicable only to the surrender of persons to the Court, listing just five States that had enacted broader implementing statutes.

18. Sixth, international case law did not support draft article 7, and the report seemed to avoid the implications of the fairly consistent international case law rejecting exceptions to immunity for foreign State officials. In its judgment in the *Arrest Warrant of 11 April 2000* case, the International Court of Justice rejected exceptions, albeit in the context of the immunity of an incumbent Minister for Foreign Affairs. In its judgment in *Jurisdictional Immunities of the State*, it also rejected such exceptions in the context of State immunity. While those cases did not involve the immunity *ratione materiae* of State officials, the Court's decisions were based on its emphasis on the procedural nature of immunity and its rejection of the idea that exceptions to immunity should be made for specific crimes. In its judgment in *Jurisdictional Immunities of the State*, the Court asserted that "customary international law does not treat a State's entitlement to immunity as dependent upon the gravity of the act of which it is accused or the peremptory nature of the rule which it is alleged to have violated" (para. 84 of the judgment). The Court also observed that a problem of logic would arise if a denial of immunity was predicated upon the gravity of the alleged act, since, at the time immunity was denied, no such act

[224] *Yearbook … 1991*, vol. II (Part Two), pp. 13 *et seq.*, para. 28.

would have yet been proven. Such observations appeared to be influencing civil actions against State officials at the national level. Although *Jurisdictional Immunities of the State* did not concern the immunity of State officials, the implications of the Court's judgment seemed to run counter to draft article 7. Decisions of the European Court of Human Rights in the context of civil actions also seemed to run counter to draft article 7.

19. The Special Rapporteur relied in part on the *Prosecutor v. Blaškić* case, which had been decided by the International Tribunal for the Former Yugoslavia. However, that case addressed the ability of the Tribunal to subpoena State officials, not that of a State to exercise jurisdiction over a foreign State official. In fact, international criminal tribunals did not seem to have taken the position that there were exceptions to the norms governing immunity before national courts, other than those relating to cooperation that were provided for in their statutes.

20. Seventh, treaty practice generally did not support draft article 7. The fifth report was especially uneven in that regard, relying on treaty practice when it supported the draft article but setting it aside when it did not. For example, the report concluded that the territorial tort exception in treaties addressing immunity of States from civil jurisdiction supported the existence of an analogous exception in the context of criminal jurisdiction. However, it failed to consider that the lack of any such exception in treaties relating to genocide, crimes against humanity, war crimes, torture, enforced disappearance or corruption was equally relevant in that regard.

21. The absence in the United Nations Convention on Jurisdictional Immunities of States and Their Property of any provision permitting exceptions on those grounds did not fit into the narrative of a trend towards limitations and exceptions. Moreover, the Special Rapporteur disregarded the significance of the fact that treaties which States still plainly regarded as entirely acceptable, such as the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations, to which 191 and 179 States had acceded, respectively, contained no exceptions to immunity for diplomats or consular officials accused of genocide, crimes against humanity or war crimes. Indeed, immunity for acts performed by such persons in the exercise of their official functions continued even after they had left office.

22. Treaties that specifically addressed the crime of genocide, war crimes, enforced disappearance and apartheid did not expressly deny immunity to State officials either. Many people took the view that article IV of the Convention on the Prevention and Punishment of the Crime of Genocide referred only to individual criminal responsibility and not to a person's immunity from foreign criminal jurisdiction. In any event, the Special Rapporteur could have noted that, since article VI of that Convention provided that suspects could be prosecuted solely by the State where the genocide had allegedly occurred or by an international criminal tribunal, they could be denied immunity only in that narrower context. Conventions combating corruption likewise contained no provisions denying immunity to foreign government officials, although they did deal with the immunity of government officials within their own State. If there had really been a trend towards denying immunity from foreign criminal jurisdiction to State officials accused of involvement in enforced disappearances, for example, the drafters of the relatively recent International Convention for the Protection of All Persons from Enforced Disappearance might have been expected to include a provision to that effect, but they had not done so.

23. Some treaties might possibly waive the immunity of State officials when a crime was defined in such a way that it could be committed only by a State official and every State party had an obligation to exercise jurisdiction over an alleged offender who entered its territory. Even so, it would be a purely treaty-based exception to immunity that was essentially predicated on the acceptance of the waiver when the official's State acceded to the treaty and it would operate only when the offender was present in the forum State.

24. Lastly, with respect to treaty practice, it was necessary to explain why some global treaties on crime were said to bear out the exceptions listed in draft article 7, while others, such as those on sexual slavery, child prostitution or child pornography, trafficking in narcotics, attacks on diplomats, taking of hostages, terrorist bombings or cybercrime, did not.

25. Eighth, the report was inconsistent in its use of cases, legislation or treaties that did not relate to criminal law. The report generally attached great significance to civil courts' findings when they supported draft article 7 by purportedly establishing exceptions to immunity, but deemed certain cases before the European Court of Human Rights, where exceptions to immunity had been rejected, to be of little relevance because they concerned civil and not criminal matters.

26. Ninth, the report contained a discussion, which was ultimately abandoned, of the distinction between three very different situations: when the act at issue was not official and the question of immunity *ratione materiae* therefore did not arise, where there was a limitation of immunity; when the act at issue was official but so heinous that immunity was purportedly denied, where there was an exception to immunity; and when immunity was denied for some other reason such as to ensure compensation for victims. Instead of acknowledging that the different treatment of limitations and exceptions by States and courts demonstrated that draft article 7 was not settled law, the report lumped all three situations together in the draft article, which therefore lacked a firm basis. He agreed with other members that it might be better to deal with limitations and exceptions separately, instead of addressing them in one provision on the non-applicability of immunity.

27. Turning to the text of draft article 7, paragraph 1 (*a*), he said that he was sceptical about the existence of a consistent trend in State practice towards recognizing that immunity did not apply to the crimes listed in that subparagraph. Some States lifted immunity, while others did not. In some cases, a court lifted immunity for reasons other than a belief that there was an exception to immunity for international crimes. It was therefore important to

determine, in each case, whether the court had felt bound by a rule of customary international law, or whether there had been other issues at play.

28. As for draft article 7, paragraph 1 (*b*), the three cases cited in the report, where a national court had purportedly denied immunity *ratione materiae* to a foreign State official in a criminal case involving alleged corruption, did not constitute the widespread or representative practice needed to demonstrate the existence of a norm of customary international law. One of the most common arguments in favour of the inapplicability of immunity *ratione materiae* in cases of corruption was that a corrupt act could not be an official act. A failure to differentiate between that reasoning and the rationale relating to international crimes in subparagraph (*a*) created confusion as to the meaning and scope of the draft article.

29. With regard to draft article 7, paragraph 1 (*c*), the Special Rapporteur did not explain that the territorial tort exception to immunity from civil jurisdiction stemmed from the idea that it was reasonable for a foreign State to be civilly liable for insurable risks. That explanation did not, however, easily translate into an exception to immunity for criminal behaviour by officials. While the Special Rapporteur acknowledged in her report that national laws on State immunity permitted exceptions for State acts that were essentially commercial or private (*jure gestionis*), it ignored the other side of the coin, which was the preservation of State immunity for public acts (*jure imperii*). If the existence of a territorial tort exception in such laws was relevant to the immunity of State officials from foreign criminal jurisdiction, then the retention of immunity for public acts, such as military activities, would seem equally relevant, a point which had been addressed in the *Jurisdictional Immunities of the State* case.

30. Since draft article 7 did not reflect existing law, but was a proposal for new law, the Commission would have more freedom in its approach to the topic if the Special Rapporteur acknowledged that fact. When developing new law on that issue, the Commission should link its work with the question of procedural safeguards. It should not attempt to reach agreement on draft article 7 without knowing what procedural safeguards would operate in order to prevent abuse. It might therefore wish to refrain from referring the draft article to the Drafting Committee, or to refer it only on the understanding that it would be held there pending receipt of the Special Rapporteur's next report.

31. The connection between draft article 7 and procedural issues was illustrated by two examples. The first was the situation described in paragraph 82 of the previous Special Rapporteur's second report.[225] The second was *Ahmet Doğan v. Ehud Barak*, a case in the United States of America against Ehud Barak, a former Israeli Minister of Defence, in which it had been alleged that he had authorized the torture and extrajudicial killing of a United States national. Both the Government of Israel and the Government of the United States had supported Mr. Barak's claim to immunity on the ground that he had acted in his official capacity. In granting Mr. Barak immunity and dismissing the case, the District Court of the Central District of California had held that a defendant was entitled to immunity where the sovereign State had officially acknowledged and embraced the official's act. Thus, the procedural posture of the Government concerned was relevant to the granting or denial of immunity.

32. Given the divergence of views within the Commission on what was an important and sensitive issue, any draft article on it should be discussed and developed simultaneously with the associated commentary, either in the Drafting Committee or in a working group.

33. Mr. TLADI, referring to Mr. Murphy's suggestion that draft article 7, paragraph 1 (*a*), should be considered in tandem with procedural aspects, said that the example of the *Ahmet Doğan v. Ehud Barak* case seemed to pertain not so much to the question of exceptions as to the question of what constituted an official act. The Commission had already adopted a definition of an "act performed in an official capacity" without waiting to examine the procedural aspects of immunity. In fact, in the past, it had not been unusual for the Commission to adopt draft articles before considering other related aspects of a topic. He was therefore unconvinced by Mr. Murphy's assertion that the Commission had to discuss procedural aspects before dealing with draft article 7.

34. Mr. MURPHY said that the Commission had often considered draft articles in tandem, because it had been useful to see the relationship between them. Looking not at one draft article but at a cluster of them gave the Commission a sense of how a project was unfolding. Procedural aspects could be directly related in various ways to exceptions to immunity. Many people regarded waivers as a form of exception. In a case such as that of Ehud Barak, the concept of an official act, the ability to maintain immunity and the posture of the State advancing immunity as a procedural objection before the court were all interlinked. For that reason, the draft articles could not be viewed in isolation from each other. His principal point was that immunity was a very sensitive and complicated issue on which the Commission had held a somewhat explosive debate six years earlier. Since he was greatly concerned about what was law and what was not law, his suggestion had been aimed at facilitating agreement, first by deciding whether the Commission was trying to codify law, second by finding a way of linking exceptions to procedural issues and third by finding a way to deal with the question in the commentary.

35. Mr. JALLOH said that, while he understood that Mr. Murphy's proposals were aimed at minimizing differences of opinion within the Commission, it seemed somewhat hazardous to discuss procedural mechanisms before the Special Rapporteur had submitted her sixth report.

36. Mr. HMOUD said that the question of whether there were substantive exceptions or limitations had nothing to do with procedure.

37. Mr. MURPHY said that there would be no harm in postponing further consideration of draft article 7 until

[225] *Yearbook … 2010*, vol. II (Part One), document A/CN.4/631 (second report of the Special Rapporteur, Mr. Kolodkin), p. 423.

the following session, when the Special Rapporteur's sixth report would be available, or in sending draft article 7 to the Drafting Committee but holding it there until the Commission had examined some of the procedural aspects. The two issues of exceptions to immunity and procedure were connected, because it was impossible to demonstrate the existence of settled law on exceptions and limitations from a mere 11 cases. If the Commission wanted to develop good law, it should be careful not to open the door to the pernicious use of new exceptions. He could not support the new regime promised by draft article 7 without procedural constraints to prevent prosecutors or magistrates from initiating vindictive legal proceedings against foreign officials.

38. Mr. CISSÉ said that the substantive question of exceptions and the formal question of procedure went hand in hand. The Special Rapporteur should be allowed enough time to produce an exhaustive report on procedural issues, especially in view of the sensitive nature of the subject matter.

39. Mr. ŠTURMA said that he agreed with a number of other speakers that crimes of corruption should not be included among the grounds for allowing an exception to immunity. On the other hand, he did support the territorial tort exception, although it required some qualification.

40. The Special Rapporteur's analysis of national courts' practice in her fifth report revealed a clear trend towards acceptance of the idea that the commission of international crimes was a bar to the application of the immunity of State officials from foreign criminal jurisdiction. The justification for that position was that either such crimes could not be deemed official acts, or they were so serious that they undermined the values and principles recognized by the international community as a whole. That conclusion seemed to be based on arguments of two types: inductive and deductive arguments.

41. The inductive argument turned on national legislative and judicial practice. Despite the diversity of national courts' positions, a trend could be seen towards making exceptions to immunity. While almost all national courts held that Heads of State and certain high-ranking officials enjoyed immunity from foreign criminal jurisdiction, some courts had concluded that immunity *ratione personae* might cease to apply if an international treaty clearly established that it had been waived or lifted or could not be invoked, as was the case of article 27 of the Rome Statute of the International Criminal Court. It was, however, plain that judgments were less than uniform on the matter of immunity *ratione materiae*.

42. Relevant State practice might be reflected in national legislation, which, though far from uniform, was indicative of nascent support for certain exceptions to immunity *ratione materiae*. Last but not least, the positions expressed by a number of delegations in the Sixth Committee, whether regarded as evidence of State practice or *opinio juris*, were supportive of certain exceptions to the immunity of State officials. Several States had expressed the view that international crimes should be considered *prima facie* as grounds for exceptions to immunity.

43. Those inductive arguments pointing to the existence of limitations and exceptions to the immunity *ratione materiae* of State officials could be supplemented with a number of deductive arguments based on the trends and values reflected in contemporary international law. First, the acceptance of the peremptory nature of *jus cogens* norms protecting fundamental values of the international community as a whole had given rise to the interpretation of such norms, by some national courts and many authors, as a basis for limiting or waiving immunity, notwithstanding the International Court of Justice ruling in *Jurisdictional Immunities of the State*, which rejected that position but, in his view, was open to criticism.

44. Second, in view of the need to protect human rights, access to justice and the right of victims to reparation, some regional courts, in particular the Inter-American Court of Human Rights, had found that in cases involving the exceptionally serious international crimes listed in draft article 7, paragraph 1 (*a*), the State had a duty to investigate and punish those responsible for such violations. The immunity of State officials from criminal jurisdiction could be considered an obstacle to the right of access to justice in such cases.

45. Third, the emergence of individual criminal responsibility, alongside the responsibility of States, for the commission of crimes under international law had affected the traditional rules on immunity. While the International Court of Justice, in *Arrest Warrant of 11 April 2000*, had held that the extension of a State's criminal jurisdiction pursuant to an *aut dedere aut judicare* obligation under an international convention did not affect immunities under customary international law, the situation seemed different with regard to immunity *ratione materiae*, which generally covered any acts of all officials. If there were no exceptions to such immunity, the prosecution of State officials for international crimes would in most cases be impossible.

46. Fourth, the obligation of States to establish and exercise jurisdiction over crimes under international law represented a means of resolving a possible conflict of norms through the systemic interpretation of international law. The approach based strictly on normative hierarchy was suited only to cases involving a direct conflict between two incompatible norms. That was not the case of rules on immunity that were procedural in nature. It was difficult to see how such rules could conflict with *jus cogens* norms prohibiting acts that constituted crimes under international law. The finding in *Arrest Warrant of 11 April 2000* that a procedural bar of immunity did not result in impunity was correct only when there was recourse to a criminal law mechanism other than the courts of the forum State, such as the courts of the official's State or a competent international criminal tribunal. If no alternative mechanisms were available to try perpetrators of international crimes, immunity from foreign criminal jurisdiction lost its exclusively procedural nature.

47. Although State practice afforded a number of examples supporting the idea that there were exceptions to the immunity of State officials, such practice was far from uniform and also offered good arguments to the contrary. Thus, inductive arguments in favour of exceptions must be

completed and balanced with deductive arguments. One final argument concerned the need to avoid fragmentation and achieve systemic integration of international law. Given that international law was a legal order or system, it could not include one rule requiring certain conduct and another rule prohibiting the same conduct, yet that would be the result if immunity was considered to be absolute. For example, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the International Convention for the Protection of All Persons from Enforced Disappearance specifically included State officials in the definition of the crimes in question. Since States were obligated to establish and exercise their jurisdiction over those crimes, they could not at the same time be barred from prosecuting State officials by absolute immunity *ratione materiae*. Unlike the *jus cogens* argument, that approach did not portray the situation in absolute terms, as a choice between the peremptory prohibition of a crime or immunity. Instead, it advocated an interpretation that would allow both rules to have the broadest possible effect, pursuant to the principle of harmonization.

48. While he agreed with other Commission members that a report on the procedural aspects of immunity of State officials from foreign criminal jurisdiction would have facilitated the debate on exceptions, he did not wish to defer the consideration of draft article 7. Both the substantive parameters for exceptions, referring at least to core crimes under international law, and procedural rules, covering the invocation or waiver of immunity, including implicit waiver in some situations, were necessary for that purpose. It was important to consider criteria for exceptions to immunity, as immunity was not regarded as absolute in contemporary international law, but also to examine procedural rules that protected States and their officials from abuses of such exceptions in the form of politically motivated or legally unjustified investigations and prosecutions by foreign criminal authorities. He recommended that draft article 7, paragraphs 1 and 2, be referred to the Drafting Committee.

49. Ms. LEHTO said that the highly complex and politically sensitive issue of limitations and exceptions to the immunity of State officials, which was dealt with in the Special Rapporteur's well-researched and well-argued fifth report, was a key component of the topic under consideration. In referring to the Commission's earlier work on other aspects of the topic and to relevant treaties, national legislative practice and international and national judicial practice, the Special Rapporteur struck the right balance between the need for stability in international relations and the need for accountability for the most serious international crimes, concluding that there were no limitations or exceptions to the personal immunity of Heads of State or Government or Ministers for Foreign Affairs during their term of office but that exceptions could apply to such persons in the context of functional immunity.

50. Inevitably, the customary regime of immunities had been affected by developments in international criminal law in recent decades, including the establishment of international criminal jurisdictions that did not recognize official position or immunities as a bar to accountability and the key role of national courts in investigating and prosecuting international crimes. There were also internationalized or hybrid tribunals, cases that were referred from an international tribunal to a national court and the principle of complementarity in the Rome Statute of the International Criminal Court, under which national judicial systems had the primary responsibility for investigating and prosecuting grave crimes. All those situations required a coherent and predictable approach to immunity.

51. In analysing exceptions to immunity, the Commission should take into account national laws that had been adopted to implement the Rome Statute of the International Criminal Court. For example, when Finland had ratified the Statute in 2000, it had taken care to ensure that it could exercise jurisdiction over genocide, crimes against humanity and war crimes and had amended its Criminal Code to provide also for universal jurisdiction over those crimes.

52. She did not share the concerns expressed by other Commission members about the length of the fifth report and the number of court cases cited, as a comprehensive overview of the legal landscape related to the question of exceptions was useful. In particular, the *Arrest Warrant of 11 April 2000* judgment supported the conclusion that no exceptions applied to immunity *ratione personae*, as reflected in draft article 7, paragraph 2. That judgment also presented the argument of alternative means of redress, which the Special Rapporteur rightly criticized in paragraph 151 of the report. When such alternative means were not available or not effective, rules on immunity would contrast with the norms prohibiting international crimes; in other words, a procedural bar would become a substantive bar. In her report, the Special Rapporteur addressed several aspects of that conflict, including the *jus cogens* nature of such a prohibition, the obligation and primary responsibility of States to investigate and prosecute such crimes and the victims' right to access to justice and to reparations. The detailed analysis of international jurisprudence also usefully pointed out that the issue of exceptions had been addressed only partially by different courts and tribunals, within the limits of each particular case, and that some of the conclusions were therefore not relevant to the issue of exceptions.

53. The Special Rapporteur concluded, in paragraph 121 of her report, that there was a majority trend in national judicial practice to accept the existence of certain limitations and exceptions to immunity *ratione materiae*, but that it was nevertheless difficult to identify the existence of a clear and undisputed customary law rule to that effect. That seemed to be a valid description of the situation, and the Commission did indeed face a choice that was fully within its mandate. She shared the Special Rapporteur's view that the most serious international crimes must be seen to constitute a limitation or exception to the normal procedural rules of immunity. At the same time, immunity remained the general rule that protected certain specific functions of the State in its international relations, even if former State officials were held accountable in the unlikely event that they had committed such crimes.

54. While the Special Rapporteur's distinction between limitations and exceptions was a useful analytical tool, it had no practical implications and thus should not

be included in draft article 7. She supported the inclusion of the list of crimes set out in paragraph 1 (*a*) of the draft article as categories of crimes to which immunity *ratione materiae* did not apply. Torture and enforced disappearance were crimes against humanity, but merited separate mention because there were specific treaty regimes for those crimes. It might be possible to add other categories of crimes to that subparagraph, but its scope should remain fairly limited. Aggression was undoubtedly an international crime as serious as those listed in the subparagraph, and was covered by the Rome Statute of the International Criminal Court. Finland had ratified the Amendments to the Rome Statute of the International Criminal Court on the crime of aggression, and although its Parliament had emphasized that Finland should be able to exercise its primary jurisdiction over that crime, it had not added the crime of aggression to the category of crimes over which Finland could exercise universal jurisdiction, pointing out that the crime was not undisputedly one to which universal jurisdiction would apply. She therefore agreed with the Special Rapporteur's conclusions in paragraph 222 of the report.

55. Regarding paragraph 1 (*b*) of draft article 7, she did not think that crimes of corruption had any place in the draft article. The concept was unclear and could apply to many different crimes, including transnational crimes that could not be regarded as official acts because they served private interests. In relation to paragraph 1 (*c*), she agreed that there were sufficient grounds to speak of an absence of immunity with regard to crimes committed in the territory of the forum State; that question could best be addressed in the commentary. Paragraph 2 was in line with the Commission's earlier work and reflected *lex lata*. As to paragraph 3, she supported the inclusion of a "without prejudice" clause explicitly referring to cooperation obligations that might arise from other regimes by which a State was bound.

56. While the procedural aspects of the immunity of State officials from foreign criminal jurisdiction were important, she did not agree that the Commission could not discuss draft article 7 until it had received a comprehensive report on that subject. Although it was true that in the Sixth Committee, the representative of Norway, speaking on behalf of the Nordic countries, had said that robust procedural safeguards were important for the overall regime of immunities and exceptions, he had also expressed full and unconditional support for draft article 7, paragraph 1 (*a*). She recommended that the draft article be referred to the Drafting Committee.

57. Mr. JALLOH said that, as the Special Rapporteur noted in her thoughtful and creative fifth report, limitations and exceptions to immunity were one of the central issues, if not the central issue, that the Commission had to consider in its work on the controversial topic of the immunity of State officials from foreign criminal jurisdiction. For that reason, as several Commission members had noted, it should seek to strike a balance between, on the one hand, sovereignty, the exercise of jurisdiction and the procedural limits imposed by the institution of immunity and, on the other, the contemporary demands of justice, individual accountability and the international community's ongoing efforts to combat impunity.

58. In their comments on the Special Rapporteur's fifth report, some Commission members had warned of the risk of impairing the stability of international relations and of the even graver risk of the political abuse of exceptions to immunity, especially in respect of the leaders of weaker States. Recently, a number of African leaders had echoed those arguments, but most of those who had done so had themselves been accused of fomenting atrocity crimes. While the risk of impairment to the stability of international relations was often invoked, although it was not supported by empirical evidence, the instability and other negative impacts caused by atrocity crimes in the affected State, neighbouring States and the international community as a whole were left unmentioned.

59. It should be recalled that, soon after its establishment, the Commission had concluded that a clear distinction could not be maintained between the progressive development of international law and its codification, which were defined in the statute of the International Law Commission as the object of its work. Thus, the Commission should avoid the tendency to prioritize codification over progressive development. Indeed, the Commission would be more likely to achieve an outcome on the topic that was acceptable to most or all of its members if it bore in mind the prudent, wise and practical position that it had historically adopted with regard to the impossibility of maintaining a clear distinction between the two.

60. With regard to methodology, he agreed with other Commission members that the Special Rapporteur had provided a wealth of information on practice, which was necessary as a foundation for the draft article and might, in the future, prove to be a useful source for publicists and practitioners at the national and international levels. However, he had a number of concerns regarding the approach taken in the report. Above all, he did not think that customary international law currently provided for exceptions to the immunity of foreign officials from prosecution for war crimes, crimes against humanity and the crime of genocide before the national courts of third States, as the International Court of Justice had repeatedly emphasized since its decision in the *Arrest Warrant of 11 April 2000* case.

61. Although he could, at a normative level, accept the Special Rapporteur's conclusion that there was a "clear and growing trend" towards the acceptance of limitations and exceptions to immunity, he was not sure that the cases cited in support of that conclusion were the most relevant, as a number of them dealt with civil rather than criminal matters. Moreover, the judgment of the International Court of Justice in *Arrest Warrant of 11 April 2000*, which was discussed extensively in the report, seemed to undermine the conclusion that express legal limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction currently existed. He nonetheless agreed with the Special Rapporteur that the judgment in that case was more limited in scope than was often recognized. Thus, while he accepted the Special Rapporteur's conclusion, he was not sure that she had chosen the best means of reaching it. She should perhaps have hewed more closely to the established process for identifying customary international law set out in paragraph 183 of the report. Nevertheless, if the Commission was engaged in the process of progressive development, that concern would largely disappear.

62. The fact that the report was in places a little tentative and perhaps even a little contradictory was not fatal to the Special Rapporteur's ultimate conclusion that there was a "clear trend" in favour of limitations and exceptions to immunity, at least in respect of certain core crimes, such as those included in the Rome Statute of the International Criminal Court. Indeed, such a conclusion could be reached on the basis of the practice of international courts and tribunals, their vertical relationship with national courts notwithstanding.

63. Turning to draft article 7, he recommended the retention of paragraph 1 (*a*), the deletion of paragraph 1 (*b*) and (*c*) and the retention of paragraphs 2 and 3.

64. He was in general agreement with paragraph 1 (*a*), which established that immunity did not apply in respect of the crime of genocide, crimes against humanity and war crimes, the three core international crimes over which the International Criminal Court currently exercised its jurisdiction. As stated in the preamble to the Rome Statute of the International Criminal Court, those crimes had come to be considered the "most serious crimes of concern to the international community as a whole" that "must not go unpunished". However, the Special Rapporteur's explanations for the omission of the crime of aggression from that paragraph were unconvincing. While it was true that the crime of aggression, like crimes against humanity, was not currently covered by a separate convention, the proceedings of 30 September 1946 of the Nuremberg Tribunal established that to initiate a war of aggression was "the supreme international crime".[226] The General Assembly's adoption of a definition of aggression by its resolution 3314 (XXIX) of 14 December 1974 and the inclusion of the crime of aggression in the Statute showed that it could give rise to criminal proceedings in domestic and international courts. Moreover, it was inaccurate to assert that there were very few pieces of national legislation that addressed the crime of aggression, as approximately 40 States currently exercised jurisdiction over it, and a very broad definition had been included in article 28M of the Statute of the African Court of Justice and Human Rights as amended by the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol).

65. If, as was widely expected, the Assembly of States Parties to the Rome Statute of the International Criminal Court voted to activate the jurisdiction of the International Criminal Court over the crime of aggression, pursuant to the Amendments adopted in Kampala, the Court would acquire automatic jurisdiction over that crime. However, States parties to the Statute could opt out of these Amendments, and the Court would have no jurisdiction over the crime when committed by the nationals or in the territory of a State that was not a party to the Statute. Furthermore, in the *Regina v. Jones (Margaret) and Others* case in the United Kingdom, the Law Lords had found in 2006 that the crime of aggression was part of customary international law but was not prosecutable in domestic courts, absent legislative approval.

66. In that context, to permit the application of immunity in respect of the crime of aggression, while excluding its application in respect of the crime of genocide, crimes against humanity and war crimes, would undermine the Amendments adopted in Kampala. The Special Rapporteur could, within the framework of the Drafting Committee, add the crime of aggression to the list in paragraph 1 (*a*), which would be his own preference, or could at least refrain from adopting a final decision with regard to its non-inclusion until the Commission had had the opportunity to review the decision to be adopted in December 2017 by the Assembly of States Parties to the Rome Statute of the International Criminal Court. If the Commission decided not to add the crime of aggression to the list in paragraph 1 (*a*), it would leave a significant legal loophole that would obstruct the effective investigation and prosecution of the crime. Moreover, by establishing a hierarchy between the crime of genocide, war crimes and crimes against humanity, on the one hand, and the crime of aggression, on the other, the Commission would downgrade the status of the crime of aggression, thereby undermining the scope and reach of the Statute, which was predicated on the conduct of national prosecutions pursuant to the principle of complementarity.

67. While legitimate concerns might be raised regarding the inclusion of torture as a separate crime in draft article 7, paragraph 1 (*a*), particularly the fact that the view of torture as a war crime or a crime against humanity was more firmly grounded in customary international law, its inclusion was nonetheless justifiable, especially in the light of its presumed peremptory status. It was defined as a discrete crime in article 1, paragraph 1, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and, as clarified in several judgments of the International Tribunal for the Former Yugoslavia, the main elements of that definition met with general international acceptance. Thus, he commended the progressive decision to include torture in paragraph 1 (*a*), which might be a welcome legal development that complemented the emerging international consensus that torture was a discrete and heinous international crime.

68. The inclusion of enforced disappearance in paragraph 1 (*a*) was also justifiable and commendable from the perspective of progressive development. However, some States might object to its inclusion. The crime was defined in article 2 of the International Convention for the Protection of All Persons from Enforced Disappearance, to which 56 States were parties. In the *Prosecutor v. Kupreškić* et al. judgment, the International Tribunal for the Former Yugoslavia had found that enforced disappearance fell under the category of "other inhumane acts", and the case law of the inter-American system was particularly instructive in that connection.

69. Alternatively, instead of specifying the crimes in respect of which immunity did not apply, a more general formulation could be used in paragraph 1 (*a*) to exclude the application of immunity in respect of "the most serious crimes under international law".

70. With regard to paragraph 1 (*b*), he was not convinced that the concept of crimes of corruption was completely clear. In the African regional system, efforts had

[226] International Military Tribunal, *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945–1 October 1946*, vol. 22, Nuremberg, 1949, p. 427.

been made to define the scope of corruption and related offences within a single provision. Corruption and related offences, irrespective of their gravity, were defined in article 4 of the African Union Convention on Preventing and Combating Corruption, and that definition was reproduced in article 28I of the Statute of the African Court of Justice and Human Rights as amended by the Malabo Protocol, where it was prefaced with the qualification that the acts specified therein constituted acts of corruption if they were "of a serious nature affecting the stability of a [S]tate". That qualification was intended to establish a gravity threshold for international criminal responsibility. In fact, it could be argued that the Protocol on the Statute of the African Court of Justice and Human Rights did not adequately convey the gravity of the crime of corruption, which had far-reaching consequences for States and, according to some authors, could amount to a crime against humanity. He nevertheless had doubts regarding the inclusion of corruption among the crimes in respect of which immunity did not apply.

71. Concerning paragraph 1 (*c*), it did not seem appropriate to include a territorial tort exception, which applied to civil rather than criminal proceedings.

72. He did not share Mr. Tladi's concern that the provisions of paragraph 3 were prejudicial to ongoing judicial proceedings, as the obligation to cooperate with an international tribunal would arise for States parties to the relevant statute and might not arise for States that were not parties, unless that obligation was imposed by a Security Council resolution adopted under Chapter VII of the Charter of the United Nations. With regard to the case of *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Pre-Trial Chamber II of the International Criminal Court had found, in its April 2014 decision on the cooperation of the Democratic Republic of the Congo regarding Omar Al Bashir's arrest and surrender to the Court, that the very fact that Security Council resolution 1593 (2005) of 31 March 2005 had referred the situation to the Court gave rise to an obligation to cooperate with it, and that the Security Council had "implicitly waived the immunities granted to Omar Al Bashir under international law and attached to his position as a Head of State" (para. 29 of the decision). In his view, article 98, paragraph 1, of the Rome Statute of the International Criminal Court entailed a general obligation on the part of the Sudan to cooperate with the Court, stemming from a resolution that constituted a "decision" within the meaning of Article 25 of the Charter of the United Nations and, in the event of any conflict, would prevail in accordance with the supremacy clause contained in Article 103 of the Charter of the United Nations. In any case, the provisions of paragraph 3 did not apply to the Court only, but to any "international tribunal", whether or not it was a criminal tribunal, and applied only to the "forum State".

73. With regard to the future programme of work, he was comfortable with the Special Rapporteur's proposal to examine the procedural aspects of immunity in her sixth and last report. He believed that the development of procedural safeguards such as those provided for in article 18 of the Rome Statute of the International Criminal Court would address many of the objections that Commission members had raised. In that connection, he noted that, in a 2009 decision adopted by the Assembly of the African Union, African States had identified the need for an international regulatory body with competence to review and/or handle complaints or appeals arising out of abuse of the principle of universal jurisdiction by individual States.[227] In addition, the provisions of the Statute included an example of a mechanism for the postponement of execution of a request in respect of an ongoing investigation or prosecution. In any case, he would urge the Special Rapporteur to put forward proposals in her sixth report to address the concerns that had been raised regarding the possible abuse of exceptions to immunity. However, the Commission should not defer the adoption of draft article 7 pending its consideration of a procedural mechanism.

74. He fully supported the referral of draft article 7 to the Drafting Committee, subject to the amendments proposed by Commission members, including the proposed deletion of crimes of corruption and of the territorial tort exception.

The meeting rose at 1.05 p.m.

3363rd MEETING

Wednesday, 24 May 2017, at 10 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. Laraba, Ms. Lehto, Mr. Murase, Mr. Murphy, Mr. Nguyen, Ms. Oral, Mr. Ouazzani Chahdi, Mr. Park, Mr. Peter, Mr. Rajput, Mr. Reinisch, Mr. Ruda Santolaria, Mr. Saboia, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, 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).

2. Mr. TLADI recalled that at the Commission's 3361st meeting, he had argued that the "without prejudice" clause in draft article 7, paragraph 3, was, in fact, wholly prejudicial. Mr. Jalloh, in attempting to rebut that argument at the 3362nd meeting, had given an interpretation

[227] See Decisions and declarations of the Thirteenth Ordinary Session of the Assembly of the African Union, 1–3 July 2009, Sirte (Libyan Arab Jamahiriya), Decision on the abuse of the principle of universal jurisdiction (Doc.Assembly/AU/11(XIII)), para. 5.