

Document:-  
**A/CN.4/3363**

**Summary record of the 3363rd meeting**

Topic:  
**<multiple topics>**

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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.<sup>227</sup> 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

<sup>227</sup> 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.Assembley/AU/11(XIII)), para. 5.

of the Rome Statute of the International Criminal Court that showed precisely why draft article 7, paragraph 3, was prejudicial: that provision suggested something about the content of legal rules in another regime that was subject to ongoing litigation. He himself saw that as a cause for deep concern and therefore found draft article 7, paragraph 3, to be unacceptable. The only solution would be to have a “without prejudice” clause that applied to the draft articles as a whole, rather than to only one provision.

3. Mr. JALLOH said that his point had been that draft article 7, paragraph 3, contained a reference, not specifically to the International Criminal Court, but to “an international tribunal”, which did not necessarily have to be criminal in nature. He was not convinced that a broad “without prejudice” clause was desirable, but he was open to further discussion of the matter.

4. Mr. GÓMEZ ROBLEDO, referring to the Special Rapporteur’s fifth report, said that the need to address the topic of exceptions to immunity was clear; the issue was whether the progressive development of international law should be avoided, at all costs and against the wishes of the international community, or whether the Commission should display the same boldness and creativity as it had in the past.

5. The States that had commented on the topic during the most recent debate in the Sixth Committee held divergent views on it, but that lack of consensus in no way implied that they were opposed to the consideration of the topic, as some members of the Commission had suggested. Moreover, it would be premature to draw any kind of conclusion from the debate in the Sixth Committee, which would be influenced by the ongoing debate within the Commission. As noted in paragraph 19 (a) of the report, although some past and present members of the Commission had maintained that there were no exceptions to immunity, they were in the minority.

6. In studying the topic, it was important to start from the outset of discussions on individual criminal responsibility, in 1950, when the Commission had adopted the Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal.<sup>228</sup> In its commentary to Principle III, the Commission had recognized that the immunity of State officials from foreign criminal jurisdiction could not be applied to acts that were condemned as criminal by international law.<sup>229</sup> In 1996, it had expressed the same basic idea in its commentary to article 7 of the draft code of crimes against the peace and security of mankind.<sup>230</sup>

7. In the draft code, the Commission had envisaged the concurrent jurisdiction of an international criminal court to complement the jurisdiction of national courts, whose participation it had deemed crucial to the effective implementation of the code. That sentiment had come to be embodied in the principle of complementarity on which

the functioning of the International Criminal Court was based. Pursuant to that principle, national courts had priority in terms of prosecuting the perpetrators of crimes under the Rome Statute of the International Criminal Court; it was therefore essential to strengthen their capacity to carry out such prosecution.

8. Three principles established by the Commission and enshrined in the Statute should be borne in mind, including by national courts: official capacity was irrelevant to the determination of individual criminal responsibility; immunities under national or international law did not apply before the International Criminal Court; and compliance with superior orders did not exempt perpetrators from criminal responsibility.

9. Though he was aware that the draft articles were not linked in any way to the establishment of an international court, he wondered whether the Commission could ignore the legal developments brought about by the Rome Statute of the International Criminal Court. Those developments were not vague values or mere “fragments”, as Mr. Murphy had described them; they constituted positive law, demonstrating that the international community had reached a new consensus on preventing and punishing the most serious international crimes.

10. The Commission could not overlook the content of various international criminal law and human rights treaties insofar as they explicitly provided for the individual criminal responsibility of agents of the State for international crimes. Similarly, it was important to take into account: the judgment of the Appeals Chamber of the International Tribunal for the Former Yugoslavia in *Prosecutor v. Blaškić*; the judgment of the International Court of Justice in the case concerning the *Arrest Warrant of 11 April 2000* and the joint separate opinion of Judges Higgins, Kooijmans and Buergenthal; 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,<sup>231</sup> in particular article 3 thereof; and the Commission’s own comments to the General Assembly on judicial practice, mentioned in paragraph 31 of the fifth report. Although the Special Rapporteur had been criticized for referring only to a small body of case law, in his own view, the fact that so few sentences had been handed down for crimes against humanity should be taken as a good sign.

11. In analysing the topic, it should be borne in mind that State responsibility and individual criminal responsibility were so different as to render them incomparable in the context of immunity. For that reason, the arguments put forward with regard to State immunity in the judgment of the International Court of Justice in the case concerning *Jurisdictional Immunities of the State* were not relevant to the topic under discussion.

12. There was, of course, a close relationship between immunity and impunity. Even though immunity was

<sup>228</sup> *Yearbook ... 1950*, vol. II, document A/1316, pp. 374–378, paras. 97–127.

<sup>229</sup> See document A/1316 (footnote 228 above), para. 103.

<sup>230</sup> The draft code adopted by the Commission in 1996 is reproduced in *Yearbook ... 1996*, vol. II (Part Two), pp. 17 *et seq.*, para. 50.

<sup>231</sup> Institute of International Law, *Yearbook*, vol. 73, Parts I and II, Session of Naples (2009), pp. 226–227; available from: [www.idi-iiil.org/Resolutions](http://www.idi-iiil.org/Resolutions).

strictly procedural in nature, its impact when individual responsibility for international crimes was being established could not be disregarded. There were a couple of points to consider in that respect. First, history had shown that, in most cases involving international crimes, the perpetrators had been agents of the State acting in their official capacity, and it had often been States themselves that had attempted to prevent those agents from being held accountable by domestic courts, where they would not necessarily have enjoyed any form of immunity from jurisdiction. Second, there were currently some limitations on the ability to combat impunity of international criminal tribunals, particularly the International Criminal Court, before which State officials did not benefit from immunity.

13. If those two factors were taken into account, it could be argued that the immunity of State officials from foreign criminal jurisdiction did indeed represent an obstacle in the fight against impunity. The aim should be to ensure that it was not an insurmountable obstacle; in other words, that immunity did not lose its procedural character and become a “substantive bar” to the attribution of international criminal responsibility. If it did, the result would be a clash of primary doctrines: on the one hand, immunity, which protected the principle of sovereign equality among States, the proper performance of State functions without external interference and the stability of international relations; and, on the other, the prohibition of international crimes as a *jus cogens* norm and the fight against impunity as one of the fundamental values and objectives of the international community as a whole.

14. The appropriate response was therefore to adopt the “conforming interpretation” developed by international human rights tribunals in order to guarantee a balance between opposing legal values and doctrines. That interpretation led to two separate conclusions that pointed in the same direction. First, international crimes could in no way be considered to have been committed in an official capacity, and, consequently, immunity *ratione materiae* did not apply to them. Second, in serious circumstances in which the fundamental legal values of the international community were undermined, immunity should be waived.

15. He agreed with the Special Rapporteur that State practice had displayed a clear tendency to view the commission of international crimes as a justification not to apply the immunity of State officials from foreign criminal jurisdiction. For that reason, and in the light of the two conclusions that he had just highlighted, he welcomed the inclusion of draft article 7 on the non-applicability of immunity, and thought it should be referred to the Drafting Committee unconditionally. Indeed, he was strongly opposed to the imposition of any kind of restrictions on the work of the Special Rapporteur. Should there be no consensus within the Commission, the matter should be put to a vote, but he trusted that such a measure would not be necessary.

16. He noted with interest that corruption-related crimes had been included among the crimes in relation to which the immunity *ratione materiae* of State officials did not apply. He shared the Special Rapporteur’s view that the suppression of corruption at the national and international levels constituted a key objective of international

cooperation. If corruption had been so very different from the core crimes under international law, it would not have made sense for Mr. Murphy, the Special Rapporteur on crimes against humanity, to model his proposed draft article on mutual legal assistance on the United Nations Convention against Corruption.

17. It should be stressed that a corruption-related act could not be performed in an official capacity, since it was an illegal, *ultra vires* act carried out for the exclusive benefit of the perpetrator and to the detriment of his or her home State. Particular attention should be paid, in that regard, to the resolution on the immunities from jurisdiction and execution of Heads of State and of Government in international law,<sup>232</sup> adopted by the Institute of International Law in 2001, in which it was indicated that former Heads of State did not enjoy immunity from foreign criminal jurisdiction when the acts of which they were accused had been performed exclusively to satisfy a personal interest, or when they constituted a misappropriation of the State’s assets and resources.

18. Even though State practice did not support the existence of a customary rule providing for an exception to immunity for corruption-related crimes, the practice stemming from national courts, international cooperation and universal and regional treaty law was reason enough for the Commission to recommend that States should establish that exception by means of a treaty.

19. He agreed with the conclusion that informed draft article 7, paragraph 2, namely that no exception to immunity *ratione personae* could be deduced from State practice. That view had been espoused by States themselves in their comments on the Commission’s work on the topic. Of particular relevance was the assertion by the International Court of Justice, in the *Arrest Warrant of 11 April 2000* case, that immunity *ratione personae* from the jurisdiction of foreign courts was absolute.

20. Given the purposes of immunity in international law, and taking into account the principle of sovereign equality among States and the need to ensure the stability of international relations, on the one hand, and the fight against impunity, on the other, it had to be concluded that the immunity *ratione personae* of the members of the “troika” should be respected throughout their time in office.

21. Turning to the obligation to cooperate with international tribunals, he said that he supported the inclusion of draft article 7, paragraph 3 (b). As had been noted, immunity *ratione personae* from foreign criminal jurisdiction was essentially granted because of the role that the members of the troika played as representatives of the State in international affairs, which meant that it could be justified by the principle of *par in parem non habet imperium*. However, that principle did not apply with regard to international tribunals, which operated at the supranational level and therefore did not undermine the principle of sovereign equality among States. For that reason, draft article 7 had to contain some mention of international tribunals.

<sup>232</sup> Institute of International Law, *Yearbook*, vol. 69, Session of Vancouver (2001), pp. 742–755; available from: [www.idi-iil.org/Resolutions](http://www.idi-iil.org/Resolutions).

22. He wished to conclude by asking a question that was more relevant than whether priority should be given to *lex lata* over *lex ferenda*, an issue that tended to consume the Commission's attention and was, in reality, a pretext for blocking the progress of work on the topic. Should the Commission contribute to the establishment of a rule of law that would ultimately be the responsibility of Member States of the United Nations, or risk being accused of lacking the audacity to propose something concrete in support of the fight against impunity?

23. Mr. MURASE, noting that some members had expressed the view that immunity was a procedural matter and had nothing to do with the substantive law question of responsibility, said that he did not agree. Immunity and responsibility were intrinsically linked. To describe immunity as a mere procedural matter, divorced from the question of responsibility, could not be supported by its legislative history, by doctrine or by practice. The objective of the topic of immunity should be, not to protect State officials who committed serious international crimes from prosecution, but rather, to prevent impunity for those officials, regardless of their ranking or status. The Commission's efforts should be devoted to eliminating any impediment to proceedings before national courts, including to the lifting of immunities. The draft articles on the topic should be in line with article 27, paragraph 1, of the Rome Statute of the International Criminal Court. However, draft articles 3 to 6,<sup>233</sup> provisionally adopted by the Commission, were diametrically opposed to what was stipulated in that provision.

24. That problem was remedied by the Special Rapporteur's fifth report and the proposed draft guideline 7 on exceptions, he was happy to note. He entirely agreed with the Special Rapporteur's approach and with her statement in paragraph 142 of the report that since international law was a genuine normative system, the Commission's development of a set of draft articles could not and should not introduce imbalances in significant sectors of the international legal order that had become among its defining characteristics. It was gratifying to see a proper balance restored by the incorporation in the draft articles of exceptions to immunity. He therefore enthusiastically supported sending draft article 7 to the Drafting Committee.

25. The International Criminal Court had some serious problems, but they were due in part to the current uncertainty in international legal rules regarding the immunity of State officials from foreign criminal jurisdiction. In those circumstances, the Commission could contribute a great deal by clarifying the exceptions to and limitations of immunity, thereby helping the Court to clear the way for its efforts to combat impunity.

26. Mr. RAJPUT said that the conclusions arrived at by the current Special Rapporteur in her fifth report were the diametrical opposites of those reached by the previous Special Rapporteur in his second report.<sup>234</sup> Her freedom to

approach the topic in her preferred way could not be challenged, but she ought to have given detailed reasons for disagreeing with the conclusions of the previous Special Rapporteur and wanting the Commission to adopt a new and a contradictory course.

27. In the section of her report on treaty practice, the Special Rapporteur was trying to make two points: first, that there was a territorial tort exception based on treaties relating to diplomatic and consular staff, and, second, that the mere existence of treaties on certain international crimes meant that there were exceptions to immunity. However, the treaties relied upon to make the first point were on diplomatic and consular relations, an area beyond the scope of the present topic. On the second point, all the treaties criminalizing specific acts were silent on the question of immunity. The argument developed by the Special Rapporteur and some others, namely that allowing immunity would interfere with the obligation of *aut dedere aut judicare*, ignored the procedural nature of immunity. As the International Court of Justice had stated in paragraph 59 of the *Arrest Warrant of 11 April 2000* case, although various international conventions on the prevention and punishment of certain serious crimes imposed on States obligations of prosecution or extradition, thereby requiring them to extend their criminal jurisdiction, such an extension of jurisdiction in no way affected immunities under customary international law.

28. Paragraphs 96 to 108 of the fifth report referred to cases decided by international criminal tribunals to make the point that there were exceptions to immunity when the commission of international crimes was involved. However, to rely on such cases in drawing analogies was to compare apples and oranges. No one was denying that immunity did not exist before an international tribunal, but the scope of the present topic was limited to criminal proceedings in the national courts of a foreign State. That also applied to the references in paragraphs 123 to 140 to the past work of the Commission: again, the Commission had been concerned with immunity before international tribunals and not national courts. In paragraphs 42 to 59 of her fifth report, the Special Rapporteur referred to national legislative practice, but the material presented did not support the analysis of exceptions to immunity and raised an important and serious question of methodology: the Commission could certainly take note of a situation under domestic law and cases in national courts, but it could not interpret domestic law. Paragraphs 57 to 59 referred to laws adopted to incorporate provisions of the Rome Statute of the International Criminal Court in domestic law, but again, the legislation related to an international tribunal where immunity did not apply and did not support the claim that immunity before national courts was generally not permitted.

29. The only part of the report that could support the contention that there were exceptions to immunity when international crimes were involved was paragraphs 109 to 121, on national judicial practice. Yet even the three cases on which the Special Rapporteur laid emphasis did not support that position. In *Al-Adsani v. the United Kingdom*, the European Court of Human Rights had admitted that it was unable to discern any firm basis for concluding that, as a matter of international law, a State no longer

<sup>233</sup> *Yearbook ... 2013*, vol. II (Part Two), pp. 43 and 47 (draft articles 3 and 4); *Yearbook ... 2014*, vol. II (Part Two) and corrigendum, p. 146 (draft article 5); and *Yearbook ... 2016*, vol. II (Part Two), p. 216 (draft article 6).

<sup>234</sup> *Yearbook ... 2010*, vol. II (Part One), document A/CN.4/631 (second report of the Special Rapporteur, Mr. Kolodkin).

enjoyed immunity from civil suit in the courts of another State where acts of torture were alleged. The same conclusion had been reached in the case of *Kalogeropoulou and Others v. Greece and Germany*. Even though those were civil cases, the Special Rapporteur insisted on using them to conclude, in paragraph 95 of her report, that the prohibition against torture was defined as a *jus cogens* norm and was an absolute prohibition. As for the *Pinochet* case, it had been, not a case of prosecution in the courts of the United Kingdom, but a case of extradition. The House of Lords had been dealing, not with the position under international law, but exclusively with domestic law. The case could hardly support a blanket proposition that exceptions to immunity existed before national courts. Lastly, the case *Minister of Justice and Constitutional Development and Others v. Southern Africa Litigation Centre and Others* decided in March 2016 by the South Africa Supreme Court of Appeal had been a case under domestic law and was not an authority for stating that there were exceptions to immunity under international law. The issue of immunity *ratione materiae* had never been involved in the case.

30. The report claimed that a number of national court decisions, mostly cited in the first footnote to paragraph 114, had created a trend. As Mr. Murphy had already shown, however, of all those cases, only 11 had resulted in the rejection of immunity, and he himself had doubts even about them. The report did not mention in how many cases, and in which ones, immunity had been rejected on the grounds of *ratione materiae*, and for most of the cases, the reader was not even told whether the accused had been tried in the State of his or her nationality or a foreign State, whether immunity had been invoked and then rejected and what were the facts of the case. As Mr. Murphy had pointed out, some of the cases had been set aside on appeal. There were no cases from African or Asian courts. Was such material really sufficient? The Commission was being called upon to advise the very numerous members of the international community that the decisions of a handful of courts amounted to a “clear trend”.

31. The report also did not highlight the point that immunity was a procedural question. However, the International Court of Justice had consistently held that position. In *Arrest Warrant of 11 April 2000*, the Court had emphasized that immunity from foreign criminal jurisdiction and individual criminal responsibility were quite separate concepts and that while jurisdictional immunity was procedural in nature, criminal responsibility was a question of substantive law. That view had been confirmed in *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*. In *Jurisdictional Immunities of the State*, the Court had reaffirmed that the rules of State immunity were procedural in character, confined to determining whether the courts of one State could exercise jurisdiction in respect of another State. However, in paragraph 150 of her fifth report, the Special Rapporteur declared that the description of immunity as a mere procedural bar was difficult to support, particularly in the field of criminal law.

32. The Special Rapporteur and some members of the Commission had suggested that it should overrule the Court. Could it do that? It had done so once in the past, in *The Case of the S. S. “Lotus”*. Based on the casting vote

of the President, the Court had held that Turkey could exercise criminal jurisdiction, in subversion of the right of the flag State to prosecute for incidents on the high seas. But in that case, State practice had been in favour of the flag State exercising jurisdiction. Did the Commission wish to overrule the Court once again and make an exception to the procedural nature of immunity, based on the practice of a few domestic courts?

33. There were policy reasons that made immunity procedural. What if the trial proceeded and it was then found that a State official who had been tried in another State was not guilty? What happened to the liberty of such a person in the meanwhile? Were there any assurances that the trial in a foreign country would be fair? What if the proceedings were sham? It would be too late if those answers were arrived at after the trial had been completed. At the jurisdictional stage, at best, an indicative or *prima facie* determination could be made, but in order for the trial to be fair, the preliminary conclusion must not dictate the final conclusion, which had to be based on an independent analysis of the merits of the case. There could be no presumption of a breach of *jus cogens* while there was still no final determination of violation of a *jus cogens* norm. Under such circumstances, he would be unwilling to support a proposal to overrule the *jurisprudence constante* of the International Court of Justice and thought the Commission should consider what would be the consequences if it set out upon such a course.

34. He was not sure if the distinction between *acta jure imperii* and *acta jure gestionis* was relevant to the discussion on immunity of State officials from foreign criminal jurisdiction. The concept had been developed in a different context altogether to distinguish commercial actions of the State from sovereign actions. Thus, the property of a Government-owned company could be pursued in execution of a court decision but the property where an embassy was located could not. The basis for that exception to immunity was the hypothesis that once a State entered into a contract, it waived its immunity from the commercial consequences of its actions. He was unable to understand how such a framework could be applied to individual criminal acts. In the case of *acta jure gestionis*, the act was that of the State, not of an individual. To claim otherwise would be to implicitly agree that even criminal acts were acts of the State and not of the individual, which would undermine the *ratione materiae* argument. In fact, the Supreme Court of Austria had held in the 1964 *Prince of X Road Accident Case* that acts considered to be *acta jure gestionis* were covered by immunity. Moreover, not all States applied the distinction. For example, in its judgment of 8 June 2011 in the case of *Democratic Republic of the Congo and Others v. FG Hemisphere Associates LLC (No. 1)*, the Court of Final Appeal of the Hong Kong Special Administrative Region of the People’s Republic of China had not recognized that distinction, on the grounds that after the resumption of sovereignty by China, all Hong Kong laws had to be aligned with those of China, and so absolute immunity had to be recognized even in civil proceedings.

35. Turning his attention to whether there were adequate policy reasons to undo and overrule the work of the Commission and the International Court of Justice in the area

of immunity, he wished to point out that, in private international law, the doctrine of *forum non conveniens* was invoked by municipal courts to decline jurisdiction even when they had jurisdiction. The philosophy behind the *forum non conveniens* rule was that, even if a foreign court had jurisdiction, it might not be in a position to conduct an efficient trial. For instance, it could be difficult to procure evidence; most witnesses were likely to be unavailable; no site visits would be possible; and the rules of criminal procedure would be different. Moreover, in criminal trials the threshold of proof was normally higher, because the goal was a fair trial, not a conviction. However, the facts in cases of international crimes were often complex, and a foreign court would naturally face problems in accessing crucial documentary and witness evidence. If trials were started and conducted in haste, there was a greater chance of acquittal for lack of evidence, defeating the very purpose of the prosecution.

36. In the *Arrest Warrant of 11 April 2000* case cited in paragraph 61 of the report, the majority view had been that immunity did not amount to impunity and that an official could be tried either in the home State, before an international tribunal or in a foreign State, if immunity was waived. While some might feel those options were inadequate, they did ensure prosecution without compromising the stability of international relations. A number of recent examples could be cited: the removal of Hissène Habré's immunity by his own people to prevent Senegal from shielding him; the prosecution of Saddam Hussein by his own people; the prosecution by people of Bangladesh of those who had committed war crimes and genocide during the conflict in Pakistan; the prosecution by the people of Cambodia of offenders with the assistance of the United Nations. The work of the International Tribunal for the Former Yugoslavia and the International Tribunal for Rwanda offered further examples. There was thus no reason to deprive people of the chance to prosecute offenders themselves. Where that was not possible, an international tribunal could be created. By allowing a foreign court, which was unaware of the history, background, social construct and sensitivities of a jurisdiction, to try such cases, there was a greater likelihood of fostering animosity between States than of fighting impunity. Moreover, most such prosecutions were unlikely to lead to convictions, but would pose a risk to international relations. In 2006, French courts had initiated proceedings against Rwandan officials, with the result that diplomatic ties had been cut off until November 2009. Also in 2006, Spanish courts had initiated proceedings against Chinese officials for genocide, and again the result had been strained relations.

37. He agreed with the Special Rapporteur that impunity had to be fought, but he was not sure that draft article 7 was the correct way to go about doing that, for legal as well as policy reasons. He therefore could not support referring the draft article to the Drafting Committee.

38. Mr. LARABA said that the Special Rapporteur was to be commended on her efforts to produce an objective, impartial and balanced report on a topic that was particularly complex and sensitive. It was not certain, however, that she had achieved her objective. Many of the legal aspects covered in the report were the subject of differences

of opinion and debates that sometimes went beyond the legal sphere. The most striking characteristic of the report was the gap between its content, especially in chapters II and IV, and the content of draft article 7. The Special Rapporteur had considered many aspects from both sides of the doctrinal debate on exceptions and limitations to the rules on the immunity of State officials from foreign criminal jurisdiction, and had reached the conclusion that such exceptions and limitations did exist, while acknowledging that not everyone shared her view. Unfortunately, she had failed to produce decisive arguments to provide a legal basis for her conclusion. Overall, her fifth report was characterized by a sort of judicial voluntarism that led her to minimize the legal aspects that ran counter to the conclusions she wished to reach.

39. Chapter II of the report dealt with treaty practice and legislative practice. Regarding national legislative practice, the Special Rapporteur stated in paragraph 42 that immunity of the State or of its officials from jurisdiction was "not explicitly regulated in most States" and that the response to immunity had been "left to the courts", underlining the importance she attached to case law in her approach to the topic.

40. Regarding the judicial practice of the international criminal tribunals, he said that with her insistence on the separate joint opinion of Judges Higgins, Kooijmans and Buerenthal and the dissenting opinions of Judge Al-Khasawneh and Judge *ad hoc* Van den Wyngaert in the *Arrest Warrant of 11 April 2000* case heard by the International Court of Justice, the Special Rapporteur attempted to minimize the importance of the judgment. Systematic references to the separate joint opinion made it easy to forget that it was not actually a dissenting opinion, and that the judgment itself had been approved by a majority. Moreover, it was no isolated ruling. Subsequent decisions, such as the Court's judgment in *Jurisdictional Immunities of the State*, had also rejected the idea that there were exceptions to the rule of immunity.

41. In paragraph 95 of her report, on developments in the judicial practice of the European Court of Human Rights, the Special Rapporteur wrote that it did not seem possible to conclude that the Court's judgments constituted a sufficient basis for confirming that the immunity of State officials from foreign criminal jurisdiction was of an absolute nature, or that there were no exceptions to such immunity. In his own view, however, it was instructive to consider the Court's judgment in *Jones and Others v. the United Kingdom*, which had confirmed the broad applicability of the immunity of State officials. It was also worth noting that the judgment in that case had been less vigorously contested than the judgment in *Al-Adsani v. the United Kingdom*.

42. Difficulties also arose with regard to the Special Rapporteur's analysis of national judicial practice: the importance the Special Rapporteur attached to its role was reflected in paragraph 187, in which it was stated that even though the decisions of the International Court of Justice and the European Court of Human Rights were of great importance, they would "never be able to replace national courts in the process of formation of custom". According to the Special Rapporteur, therefore, the study

of national judicial practice was decisive in determining whether there were exceptions to the rule of immunity of State officials. The Special Rapporteur's decision to rely on national judicial practice to reach the desired conclusions could also be seen in paragraphs 109 to 122 and 179, 183 and 187, among others. In paragraph 179, she stated that the practice of domestic courts, "[a]lthough varied, ... reveals a clear trend towards considering the commission of international crimes as a bar to the application of the immunity of State officials from foreign criminal jurisdiction". That raised the question of how to reconcile variability and clarity. Paragraph 184 (a) was ambiguous, because the Special Rapporteur stated that "[d]espite the diversity of positions taken by national courts in the cases analysed above, it is possible to identify a trend in favour of the exception". Again, the question was how to reconcile such diversity with the balance tipping in favour of the exceptions. Given the importance attached to the decisions of national courts—"an irrevocable element in ascertaining what a given State considers to be international law", according to paragraph 187—greater attention should have been paid to the variability and diversity of national court decisions that the Special Rapporteur herself had identified. Instead, she had proposed a draft article that did not fully reflect the true situation.

43. If draft article 7 was to be sent to the Drafting Committee, it was important to clearly identify what the objective was, as other members had already noted. Did the Commission wish to approach the topic from the perspective of *lex lata* or *lex ferenda*, or perhaps both? As things stood, he could not support draft article 7, but he was open to solutions that might be identified in a more in-depth debate and was confident that the Special Rapporteur would be able to put forward more balanced proposals that would generate a consensus.

44. Mr. PETER said that he generally agreed with the Special Rapporteur's treatment of exceptions and limitations to immunity. By and large, he was not in favour of immunities, as they placed certain categories of persons above the law and allowed criminals to escape punishment simply because of their positions. In his view, the bottom line was that everybody—without exception—should have to answer for his or her actions in court. That was the essence of the rule of law and equality before the law. That was also the essence of article 27 of the Rome Statute of the International Criminal Court, which provided that the Statute should apply equally to all persons without any distinction based on official capacity and that immunities or special procedural rules which might attach to the official capacity of a person should not bar the Court from exercising its jurisdiction over such a person. The Statute had been ratified by 124 States—almost two thirds of all Member States of the United Nations. However, the remaining States that were not parties to the Statute, or that had ratified it but had subsequently withdrawn, obviously did not support its objectives. From a democratic perspective, it was the Statute that should set the standard, not an obscure tradition or custom whose evolution, establishment and acceptance was questionable.

45. Draft article 7, paragraph 1, which was presented as an exception to the general rule of immunity, was

consistent with the letter and spirit of the Rome Statute of the International Criminal Court, clearly identifying the types of crimes in respect of which immunity did not apply. Three of the crimes fell squarely under article 5 of the Statute, but the Special Rapporteur had also added torture and enforced disappearance, corruption-related crimes and crimes that caused harm to persons, including death and serious injury, or to property. Torture, enforced disappearance and crimes that caused harm to persons or to property were close to the core crimes under the Statute and could thus easily be accommodated. However, it might be difficult to justify the inclusion of corruption-related crimes, particularly since many such crimes, like petty corruption, would not necessarily be classified as serious. The reference should have been to grand corruption, which more fully corresponded to the core crimes under the Statute.

46. The fact that draft article 7, paragraph 2, provided that those who enjoyed immunity *ratione personae* during their term of office had total immunity even if they committed all the crimes enumerated in draft article 7, paragraph 1, was problematic in two regards. First, persons holding high office were in a position to influence the level of immunity they themselves enjoyed and could thus create a safety net for themselves once they took office and consolidated their power. Second, in certain developing countries, the phrase "during their term of office" was devoid of meaning since some rulers remained in office for life and some monarchs, who reigned for life, had full executive powers. While he understood that the Special Rapporteur would not be able to please everyone, it made very little, if any, sense to him that a person who had committed serious crimes could escape justice because he or she enjoyed immunity *ratione personae*. The Special Rapporteur might therefore wish to review the wording of draft article 7, paragraph 2, and draft article 4, paragraph 2, which had already been provisionally adopted by the Commission. The former made reference to immunity *ratione personae* "during their term of office", while the latter said "during or prior to their term of office".<sup>235</sup> Perhaps the Special Rapporteur could refresh his memory as to why acts committed by an official before assuming office were protected by immunity. If that were the case, a person could stand for office and use the newly gained status to protect him or herself from prosecution for previously committed acts. In addition, if the formulation in draft article 4, paragraph 2, was correct, why had it not been extended to draft article 7, paragraph 2?

47. It had been proposed that draft article 7 not be sent to the Drafting Committee and be held in abeyance pending the consideration of procedural issues when the Special Rapporteur submitted her next report. No substantive reasons had been given for that proposal other than an obscure precedent by the Commission some years previously. He agreed with other members that the proposed course of action made no sense. Logic dictated that the Commission should begin with the substance and then move on to procedural matters to guide that substance, and not the other way round.

<sup>235</sup> See *Yearbook ... 2013*, vol. II (Part Two), p. 47 (para. 2 of draft article 4).

48. He had noticed a tendency among special rapporteurs to avoid dealing with issues that were contrary to their points of view. He therefore hoped that the Special Rapporteur would address the issues raised during the debate with sincerity. In conclusion, he recommended that the new draft article prepared by the Special Rapporteur should be forwarded to the Drafting Committee.

#### Organization of the work of the session (*continued*)\*

[Agenda item 1]

49. The CHAIRPERSON drew attention to the revised programme of work for the last week of the first part of the session, which included an additional plenary meeting on the topic of immunity of State officials from foreign criminal jurisdiction. If he heard no objection, he would take it that the Commission wished to adopt it.

*It was so decided.*

*The meeting rose at 1 p.m.*

### 3364th MEETING

*Friday, 26 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. Sturma, 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. Ms. ORAL said that she appreciated the methodology, detail and comprehensiveness of the fifth report on the topic. She noted that debates during the current session had focused on three main issues: first, the nature of the Commission's work; second, whether the Special Rapporteur had demonstrated the existence of a rule of customary international law supporting any exceptions to immunity *ratione materiae* from foreign criminal jurisdiction; and third, the arguments for and against the Commission's endorsement of such an exception.

2. On the first issue, the question had been raised as to whether draft article 7 constituted existing law or new law. In that regard, she agreed with Mr. Jalloh that it had not been the practice of the Commission to characterize its work as falling into either the codification or the progressive development of international law. Nonetheless, the Commission must, of course, undertake its mandate cautiously and conscientiously.

3. On the second issue, it was clear from the review of national legislation and judicial practice contained in the report that the law was settled with regard to the immunity *ratione personae* of Heads of State and some other high-ranking officials, but not settled in respect of their immunity *ratione materiae* from foreign criminal jurisdiction. It was indeed questionable whether there was adequate support for concluding that customary law permitted any exceptions to immunity *ratione materiae* from foreign criminal jurisdiction. Although a number of national criminal and civil cases would seem to point to a trend in that direction, there was no standard for actually determining what constituted a trend in that area of legal practice. The judgments of international courts also failed to provide any clear guidance on the matter. The case concerning the *Arrest Warrant of 11 April 2000* had dealt with the extension of immunity *ratione personae*, not functional immunity, to a Minister for Foreign Affairs. The cases concerning *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)* and *Jurisdictional Immunities of the State* had dealt with the immunity of States, not the immunity *ratione materiae* of individuals. Indeed, in the latter case, the International Court of Justice had stated that the question of whether and, if so, to what extent, immunity might apply in criminal proceedings against a State official was not in issue. Since the decisions of the European Court of Human Rights cited in the report had dealt mostly with civil damages, they too failed to shed any light on the legal status of immunity *ratione materiae* in relation to foreign criminal jurisdiction.

4. On the third issue, while the principle of sovereign equality and non-interference in internal affairs, together with the need to ensure the stability of international relations, were policy arguments in favour of immunity, they had to be weighed against the international interest in ensuring accountability and preventing impunity for the most serious international crimes. In that respect, she shared Mr. Jalloh's view with regard to the impact of atrocity crimes on peace and security. Indeed, the 124 States parties to the Rome Statute of the International Criminal Court had explicitly recognized in the preamble thereto that grave crimes threatened the peace, security and well-being of the world. Although sovereign equality was an important principle that had been acknowledged in the Charter of the United Nations and many other instruments, she, like Mr. Hmoud, believed that the protection of fundamental human rights was an equally important tool for preserving peace and avoiding war and that justice was not incompatible with respect for the obligations arising from international law.

5. On the question of procedure, although she concurred with Mr. Huang that substantive justice should not be at the expense of procedural justice, she feared that immunity had been elevated to a higher legal status in

\* Resumed from the 3360th meeting.