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Summary record of the 3365th meeting

Topic:
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79. In his view, only the Convention on Special Missions related directly to the report, since its article 21 provided that the Head of State, Head of Government, Minister for Foreign Affairs and other persons of high rank, when they took part in a special mission of the sending State, were to enjoy in the receiving State the facilities, privileges and immunities accorded by international law. Other conventions cited by the Special Rapporteur contained provisions on immunity but not on exceptions and limitations.

80. As to national laws, the Special Rapporteur acknowledged in paragraph 44 of her report that attention should first be drawn to the fact that national laws regulating jurisdictional immunity were very few in number and, in addition, usually referred basically to immunities of the State. In paragraph 54 of her report, she cited the Repression of Serious Violations of International Humanitarian Law Act that had been adopted in Belgium in 1993 and amended in 1999 and again in 2003 following the *Arrest Warrant of 11 April 2000* case. However, that law concerned a special case, as did the International Crimes Act of 2003 of the Netherlands, cited in the following paragraph. It seemed difficult to draw conclusions solely on the basis of those two cases.

81. As far as judicial practice was concerned, the Special Rapporteur referred essentially to the case law of foreign criminal courts. However, the Special Rapporteur also referred to international case law, given the potential influence that the latter could have at the national level. In that regard, only the *Arrest Warrant of 11 April 2000* case was of direct relevance because, as the Special Rapporteur indicated in paragraph 66 of her report, in that case the Court set out a model of immunity from foreign criminal jurisdiction of Ministers for Foreign Affairs which had become the benchmark.

82. It was difficult to regard the dissenting opinions of the judges cited by the Special Rapporteur in paragraph 68 and subsequent paragraphs of her report as being on a par with the decisions of the International Court of Justice itself. However, he supported the Special Rapporteur's reasoning and conclusions with regard to *Jurisdictional Immunities of the State* in paragraph 74 and subsequent paragraphs. With regard to national judicial practice, the summary she provided in paragraph 121 of her report was also interesting.

83. As to chapter III of her report, and in particular paragraph 170 and subsequent paragraphs, which dealt with the concept of limitations and exceptions to immunity, the explanations provided by the Special Rapporteur should be developed further. Any limitations and exceptions to immunity should be clearly identified and defined in order to facilitate their utilization by States; regrettably, that had not been done in the report.

84. With regard to draft article 7, like other Commission members, he would like to know what criteria the Special Rapporteur had used as a basis for the list of international crimes that she proposed. He agreed with previous speakers that the list should include the crimes of aggression and apartheid. As to corruption, the commentary to that draft article should perhaps explain that it concerned large-scale corruption and provide further details.

85. He agreed that it was very important to specify in paragraph 2 that paragraph 1 did not apply to persons who enjoyed immunity *ratione personae* during their term of office, since immunities were accorded to such persons precisely in order to ensure the effective performance of their functions, as pointed out by the International Court of Justice in the *Arrest Warrant of 11 April 2000* case.

86. In conclusion, he was in favour of referring draft article 7 to the Drafting Committee.

The meeting rose at 12.55 p.m.

3365th MEETING

Tuesday, 30 May 2017, at 10 a.m.

Chairperson: Mr. Georg NOLTE

Present: Mr. Argüello Gómez, Mr. Cissé, Ms. Escobar Hernández, Ms. Galvão Teles, Mr. Hassouna, Mr. Hmoud, 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 (*concluded*)

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

2. Speaking as a member of the Commission, he said that the principle of individual responsibility for international crimes was one of the great achievements of the post-war era, in response in particular to the wars of aggression and unprecedented atrocities by Nazi Germany. Progress in the development of a functioning multi-level system for the prosecution of the perpetrators of such crimes had been achieved with the establishment of the international criminal tribunals for Rwanda and for the former Yugoslavia, the International Criminal Court, other international and hybrid tribunals and national prosecutions. Nonetheless, international crimes continued to be committed on a shocking scale and existing national and international legal and cooperation mechanisms remained unsatisfactory. The Commission's work on the topics of crimes against humanity and immunity of State officials from foreign criminal jurisdiction were part of the international effort to provide a clearer and stronger legal framework for the fight against impunity. He supported the modern project to develop individual

responsibility for international crimes, but he also supported international law in general. He endorsed the Special Rapporteur's systemic approach in the sense that the law needed to be developed in a way which served and balanced all the values and interests enshrined in it. He believed that individual responsibility for international crimes must be implemented in such a way as to safeguard sustainable international cooperation and peaceful relations between States.

3. In that context, the basic principle of international law that safeguarded sustainable international cooperation was the sovereign equality of States, one of the most important aspects of which was that the courts of one State could not, as a general rule, sit in judgment of another State, thus ensuring that the judgments of national courts were respected by other States. A perception of bias could, however, easily occur if the courts of one State adjudicated claims involving official acts by another State. The International Court of Justice and other courts had recognized on numerous occasions that, in such cases, claims must be dismissed, regardless of their possible merits. Otherwise, there would be a risk of mutual recriminations between the two States concerned, challenges to the objectivity of the prosecutors and the judiciary of the forum State, and potential retaliation that would endanger peaceful relations and cooperation between States.

4. Of course, the principle of State immunity was not absolute, but the issue was where the balance and limits lay exactly, and who determined them. There was no easy answer, but the balance between two fundamental principles must ultimately be determined by the rules of customary international law. An effort was made in the report to identify the pertinent rules of customary international law. However, that was not the only relevant dimension of the issue, since, as the Special Rapporteur had rightly pointed out, the Commission's role was not limited to identifying existing law, but also to contributing to the progressive development of new international law. He would address both dimensions, first by commenting on the analysis of relevant practice in the report, and, second, by discussing whether more general legal or policy considerations should affect the conclusion drawn based on that analysis.

5. According to the report, the relevant practice established an exception to the general rule of immunity of State officials for official acts in cases where it was alleged that a State official, through an act performed in his or her official capacity, had committed an international crime. It was argued that, even if that conclusion was not accepted, practice revealed a "clear trend" in that direction. However, he agreed with the members who had presented detailed analyses of why reference could not be made to a settled practice that would support the exceptions proposed by the Special Rapporteur or the existence of a trend.

6. Regarding national judicial practice, he did not agree with the assertion in paragraph 121 of the report that "with regard to immunity *ratione materiae*, it can be concluded that the majority trend is to accept the existence of certain limitations and exceptions to such immunity". First, the identification of a "majority trend" obviously depended on which decisions were counted. The Special Rapporteur relied on certain cases which were irrelevant, such as

those in which an official invoked immunity against the State for which he or she served or had served, including the *Fujimori*, *Hailemariam* and *Adamov* cases. Cases in which a court had relied on a limitation of immunity provided for by a treaty should also be excluded, such as *Bouzari*, *Pinochet*, *Jones v. Ministry of the Interior of Saudi Arabia and Another*, and *Fang v. Jiang Zemin*, in which the courts had denied immunity *ratione materiae* on the grounds that the definition of torture in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment showed that States parties to the Convention had agreed to lift immunity with respect to criminal proceedings. Limitation of immunity by treaty did not reflect the state of customary international law.

7. The identification of a majority trend obviously also depended on which cases were counted as forming part of the minority. The footnotes to paragraph 118 of the report referred to certain cases that denied an exception to immunity *ratione materiae* with respect to international crimes. There were, however, more such cases, such as the decision by French prosecutors not to prosecute former United States Secretary of Defence, Donald Rumsfeld,²⁴³ and the suit against the former President of China, Jiang Zemin, before the Supreme Court of New South Wales, Australia, in which the immunity of the former Head of State had been upheld.²⁴⁴ The report should have counted only those decisions in which the State of the official concerned had actually unsuccessfully invoked the immunity *ratione materiae* of one of its officials, which would have made clear that there was neither a significant number nor a majority of national court decisions in favour of an exception that would include international crimes.

8. In addition, the national court judgments cited in support of the proposition that there was an exception to immunity for international crimes, or its emergence in customary international law, were based on very different reasoning, which unfortunately had not been critically analysed in the report. While some cases had invoked *jus cogens* as a basis for an exception, others had held that certain acts, in particular international crimes, could not be considered as acts performed in an official capacity. The Special Rapporteur seemed to argue that, taken together, the individual judgments, with their different and sometimes questionable reasoning, added up to a group of cases that ultimately contributed to establishing an exception to a rule of customary international law, or at least to a trend towards its emergence. However, two or more weak arguments did not add up to a convincing argument.

9. For those reasons, and those given by others, it was clear that the proposed exceptions to immunity for international crimes did not reflect settled customary international law. While there might have been a trend in the past, that was no longer the case. The *Pinochet* judgment of the House of Lords had indeed sparked a debate 20 years previously, and there had been several judgments

²⁴³ See the letter of 16 November 2007 from the District Prosecutor of the Paris High Court (*Tribunal de Grande Instance*) (available from: www.fidh.org/IMG/pdf/reponseproc23nov07.pdf), and the letter of 27 February 2008 from the Office of the Prosecutor of the Paris Court of Appeal (available from: https://ccrjustice.org/sites/default/files/assets/Rumsfeld_FrenchCase_%20Prosecutors%20Decision_02_08.pdf).

²⁴⁴ *Zhang v. Jiang Zemin and Others*, decision of 14 November 2008.

by national courts that could be interpreted as reflecting a “trend” towards the recognition of exceptions to immunity for core crimes. However, such decisions had soon been countered by others that called the trend into question. Indeed, the majority of the national court decisions cited in the report had been rendered before international and national courts had come to the conclusion that some of the arguments on which previous judgments were based did not reflect rules of customary international law. For example, in the case concerning *Jurisdictional Immunities of the State*, the International Court of Justice had stated that norms of *jus cogens* possessed a substantive character which, as such, did not contradict the rules on immunity of States, which were of a procedural character. That reasoning necessarily also applied to immunity *ratione materiae* of State officials. The European Court of Human Rights had consolidated its jurisprudence in *Oleynikov v. Russia*, according to which the rules of international law on immunity constituted inherent limitations of the right of access to justice. The House of Lords of the United Kingdom, in the *Jones v. Ministry of the Interior of Saudi Arabia and Another* case, had also explained the reasons for the continued existence of rules on immunity. The court decisions of the past 10 years did not reveal a trend; on the contrary, international and national courts had reinforced the reasons for maintaining immunity, even for core crimes. It seemed that the Special Rapporteur’s policy preference had led her to downplay more recent countervailing developments. The Commission should be transparent in accurately describing the current state of affairs, and not nourish the illusion that the world was still living in the late 1990s or the early twenty-first century.

10. He agreed with the Special Rapporteur that it was necessary to look at the international legal system as a whole and assess whether developments in the field of international criminal law called for exceptions to immunity *ratione materiae*. However, the project of international criminal justice had thus far been carefully crafted by treaties and specific decisions in order to ensure acceptance by States. From the point of view of a systemic approach, that should also be the case with respect to the immunity of State officials. It was also necessary to fully assess the importance of the principle of sovereign equality in relation to international criminal law. Fortunately, States often voluntarily renounced aspects of their sovereign rights and entered into treaties by which they accepted foreign decisions as a way of enhancing cooperation. Nevertheless, they could not be expected to accept a decision by a foreign court that an official act by one of their officials justified prosecution, if that had not been agreed beforehand. It was therefore not surprising that States had already reacted strongly and jeopardized bilateral relations in such cases. He was concerned that more and stronger tensions would arise between States should the proposed draft article 7 be adopted by the Commission and then applied as law by national courts without additional acceptance by States in the form of a treaty.

11. He was not convinced that the goal of preventing impunity would justify such tensions; rather, future tensions might, in practice, lead to a two-tier system of justice, under which stronger States would be able to shield their officials from prosecution, while weaker States would not. Such a situation would risk exacerbating the problem

currently faced, whereby African States complained that the International Criminal Court was selectively concentrating its efforts on Africa. Suspicion of unequal treatment could undermine the whole cause of international criminal justice. Did the Commission really want to incur that risk? He agreed with other members that exceptions to immunity were inextricably connected with procedural safeguards, which were an essential element of a systemic approach. Thus, exceptions could not properly be addressed without knowing the procedural rules that would apply to them.

12. Since the exceptions for core international crimes proposed by the Special Rapporteur did not reflect settled customary international law, he wondered whether the Commission could at least indicate that the law was unclear and that it had a mandate to pursue both the codification and progressive development of international law. The question of what the existing law was could then be left open, and the Commission could propose an exception that was based, at least in part, on a policy preference in favour of an exception. One member had argued that it was the practice of the Commission not to distinguish clearly between codification and progressive development, but that had been at a time when the Commission was still mainly elaborating treaties, for which it did not make a great difference whether a proposed rule reflected existing customary law or would be new law. The negotiating States would, after all, decide what to include in a treaty and whether to accept the treaty. However, in the context of the current topic, the Commission did not seem to be elaborating a treaty. Any views it expressed on existing law might be used by national and international courts, which needed to know what the existing law was. The Commission therefore needed to be transparent about whether it was stating existing law or proposing new law. The Commission had not yet taken a clear position on whether it was proposing a draft treaty or not but, assuming it was, it would have to think carefully about whether a treaty with draft article 7 as proposed would be widely ratified. The Commission must carefully consider the implications and possible safeguards of the draft article prior to its adoption. Since the proposed exceptions in draft article 7, paragraph 1 (a), did not reflect settled customary international law, the Commission needed to clearly state the unsettled nature of the law and address the question of what was the desirable new law through progressive development.

13. He would be in favour of the Commission taking the bold step of proposing a treaty in which States agreed to waive immunity for their officials for core crimes, thus enabling the prosecution of all alleged offenders and strengthening the fight against impunity. That would clarify the situation and remove any concerns arising from sovereign equality for the parties to such a treaty. States had already waived their immunity under the Rome Statute of the International Criminal Court, but that waiver did not apply to procedures not covered by the Statute. If the Commission did not want to risk asking States to accept exceptions to immunity *ratione materiae* by way of a treaty, it should try to propose a solution that would take into account, within the framework of the existing law, the common interest that all international crimes, including those committed by State officials, needed to be punished.

14. In that spirit, he wished to make a constructive proposal, based on the duty to prosecute. It was not a stretch to say that there existed a duty, based on customary international law, to prosecute core international crimes. Although the Commission had not addressed the question in its work on the topic “The obligation to extradite or prosecute (*aut dedere aut judicare*)”, the International Court of Justice, ICRC and the General Assembly had confirmed the customary duty to prosecute the crime of genocide, war crimes and crimes against humanity. States could not avoid that duty by invoking immunity for the benefit of their officials. Other States had a legitimate interest in playing a role in ensuring that a State that invoked immunity *ratione materiae* for the benefit of one of its officials would actually prosecute the official if there was enough evidence to open an investigation, subject to procedural safeguards. The Commission should therefore propose an alternative for States that resulted in some form of pressure to prosecute their own officials for core international crimes, which might be called the obligation to “waive or prosecute”. The Commission should remind States that there existed a duty to prosecute core international crimes, and that the purpose of the rules on immunity was not to enable impunity. States needed to exercise their right to invoke the immunity of their officials for official acts in a way which did not deny the need to prosecute core international crimes, and should therefore have to choose between either waiving the immunity of their officials before the courts of a foreign State, or undertaking to fulfil their obligation to prosecute their own officials. Such an obligation to waive or prosecute could follow a paragraph reminding States of the generally accepted limitations and exceptions to immunity, including waiver and what the Special Rapporteur called the “territorial tort exception”.

15. On that basis, he proposed that draft article 7 read:

“Limitations and exceptions

“1. Immunity shall not apply:

“(a) if the State of the official waives immunity, either in a specific case or through a treaty;

“(b) in the case of alleged crimes that cause harm to persons ... when a crime is alleged to have been committed in the territory of the forum State and the State official is present in said territory at the time that such a crime has been committed.

“2. The State of the official shall either waive immunity or submit the case for prosecution before its own courts in relation to the following alleged crimes:

“(a) genocide, crimes against humanity, war crimes, and torture;

“(b) [possible other crimes].

“3. Paragraph 1 shall not apply to persons who enjoy immunity *ratione personae* during their term of office.

“4. [Without prejudice clause].”

16. That formulation offered an appropriate and fair compromise between the requirements of the principle of sovereign equality and stable international relations, on the one hand, and the requirement for accountability and the need to prevent impunity for core international crimes, on the other. It was in line with the framework formulated by the International Court of Justice in its judgment in the case concerning the *Arrest Warrant of 11 April 2000*. Thus, States in which an alleged offender was arrested or prosecuted could seek assurances when another State invoked its immunity with regard to the alleged offender that the allegations would be submitted for prosecution in the State of which the alleged offender was an official. Such a solution admittedly carried the risk that the State invoking immunity might not undertake proper investigations, but that risk was inherent in all comparable mechanisms based on *aut dedere aut judicare*.

17. It was clear to him and some other members that there was little evidence to support the Special Rapporteur’s proposition that there was growing evidence in the other direction, and that there were powerful policy reasons for exercising caution. The Special Rapporteur had referred in her introductory statement during the current session to the question posed by Mr. McRae at the sixty-eighth session, namely on which side of history the Commission wished to stand. However, experience had shown that it was important to be modest and cautious when attempting to look into the future, not to rely on unspecified assumptions about the past, not to underestimate the staying power of certain classical principles and practices, and not to act prematurely and inadvertently produce counterproductive effects. Even if it were true that, as one member had suggested, it was unthinkable that the customary regime of immunities would have remained untouched by the quarter of a century of developments that had taken place in international criminal law, it was not clear that an exception like the one proposed in the report would follow from there.

18. In conclusion, he could not support simply sending draft article 7 to the Drafting Committee. The Commission needed to clarify and agree on certain basic parameters of its further work on the proposal contained in the fifth report, based on the plenary debate. Given the divergence of views among the members of the Commission on an extraordinarily important question, if work continued on the basis of such disagreement, the authority of the Commission’s work on the topic and more generally would be jeopardized. In accordance with the definition of consensus adopted by the Commission at its previous session, it was necessary to make every effort to achieve general agreement.

19. Mr. TLADI said that Mr. Nolte criticized the draft proposed by the Special Rapporteur for not reflecting practice and yet his own proposal envisaged the territorial tort exception and the State’s duty to prosecute core international crimes. Surely those exceptions reflected Mr. Nolte’s own policy preferences rather than actual practice?

20. The CHAIRPERSON, speaking as a member of the Commission, said, in reply to Mr. Tladi’s question, that if there was a duty to prosecute, States implicitly had a choice to prosecute or waive immunity. That choice was

arguably the implication of *lex lata*. As for the “territorial tort exception”, the concept needed to be elaborated more precisely but, in his view, the core concept could be considered as customary international law.

21. Mr. JALLOH said that he shared Mr. Nolte’s concern about the possible instability in international relations that might result from having many exceptions to immunity. However, such matters could be dealt with in due course under the appropriate procedural mechanisms. He saw no reason to forestall the discussion on draft article 7 when the Commission knew the Special Rapporteur’s next report would address such mechanisms. The Commission could then turn its attention to the balance between the principle of sovereignty and the widespread call for accountability, including the accountability of those in the most powerful positions.

22. Mr. HASSOUNA commended Mr. Nolte on an analytical and thoughtful statement that summarized the views of many members and highlighted the difficulty in reaching a consensus on limitations and exceptions to immunity. Nonetheless, he did not agree with his conclusion that the draft article should not be referred to the Drafting Committee. After all, past experience had shown that the Drafting Committee was the very place where diverging views could be reconciled and a consensus reached. He wondered if Mr. Nolte had some other kind of procedure in mind.

23. Mr. ŠTURMA said that Mr. Nolte’s views were very similar to his own, particularly with regard to the application of an exceptional waiver of immunity in relation to core crimes and the “territorial tort exception”. He too, however, was concerned about how the Commission would proceed with its work on the topic.

24. Mr. SABOIA, noting that Mr. Nolte’s thoughtful intervention had been made as an individual member of the Commission, said the discussion seemed to be shifting to issues that should properly be discussed in the debate after the summing-up by the Special Rapporteur, when the Commission would take a decision on how to proceed. He was concerned about the lack of procedural clarity in the current discussion.

25. The CHAIRPERSON said that he agreed with Mr. Saboia that it was necessary to distinguish between his intervention as a member of the Commission, on the one hand, and the debate on how to move forward after the summing-up of the Special Rapporteur, on the other. He had understood some of the previous interventions as addressing the proposal on how to move forward which he had made in his statement as a member, but he also fully agreed with Mr. Saboia that any reactions to his statement should not pre-empt the general debate of the Commission regarding the decision to be taken.

26. Ms. LEHTO said that while she welcomed Mr. Nolte’s statement, in the light of Mr. Saboia’s remarks, she would prefer to state her views after hearing the Special Rapporteur’s summing-up of the debate.

27. Ms. ORAL said that she wished to thank Mr. Nolte for his analytical and objective statement, but she wondered whether making textual proposals in plenary session was a new practice.

28. Mr. RAJPUT said he agreed with Mr. Saboia that the Special Rapporteur should be heard before the debate continued. Yet, he did not agree with Mr. Hassouna that difficulties in reaching a consensus should be left for the Drafting Committee to resolve. It was important that members who had strong reservations about the proposed draft article should be allowed to express their concerns, and there should be engagement and debate regarding their views before the draft article was referred to the Drafting Committee, especially when they were contesting the very foundations of the draft article.

29. Mr. RUDA SANTOLARIA said he agreed with Mr. Saboia that the Commission should first listen to the summary by the Special Rapporteur before further discussing the way forward. He did not believe that the differences of opinion among members should be a reason for not referring the draft article to the Drafting Committee, which in the past had been able to strike a balance between diverging views on various topics.

30. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that she could not recall one occasion in her six years as a member of the Commission when a debate on the procedure to be followed had taken place before the Special Rapporteur had summed up the debate and made a proposal. The Chairperson was of course entitled to express his view as a member of the Commission on whether to refer the draft article to the Drafting Committee; however, the current debate, in which the Commission was discussing that question solely on the basis of a proposal made by an individual member, was a highly unusual departure from standard practice.

31. The CHAIRPERSON, replying to Mr. Saboia’s comment, said that members had simply responded to the statement he had made as a member of the Commission, which had included a proposal for the way forward. He completely agreed that it was important not to pre-empt the debate that would follow the summary by the Special Rapporteur. He had certainly had no intention of “forestalling” a discussion on exceptions, as Mr. Jalloh seemed to think.

32. In speaking as a member of the Commission, he had done what other members had done, which was to formulate a proposal and respond to comments on it. As Chairperson, he was obliged to give the floor to those members who wished to speak in the mini-debate, but it had not been his intention to pre-empt the general debate. In fact, he had very carefully chosen his words in saying that he could not accept to “simply” send draft article 7 to the Drafting Committee. As he saw it, the Committee had a choice between addressing the topic as a matter of *lex ferenda*, in which case the proposal should be debated with the appropriate procedural safeguards, or as a matter of *lex lata*, which was his preferred approach. He was flexible as to the course of action to be taken, but as the Commission was speaking on a topic that directly affected courts, including national courts, it should be absolutely clear which course had been chosen.

33. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) summarizing the debate on her fifth report on immunity of State officials from foreign criminal jurisdiction, said that,

as was to be expected for such a controversial topic as the limitations and exceptions to immunity, the debate had been wide-ranging, with considerably more members having expressed their views than at the previous session. There had been some criticism of the length of the report, which she considered a matter for the Commission's Working Group on methods of work. There had also been criticism about the actual content of the report and its usefulness in addressing the topic. Mr. Tladi had found some parts of the report redundant, seeing them as mere repetition of the Special Rapporteur's previous analysis, summaries of the positions adopted by members of the Commission or the Sixth Committee, or subjects with no bearing on the topic under consideration, particularly the passages on the relationship between international criminal courts and national courts. She could not agree with that viewpoint, as all those questions were analysed from the perspective of limitations and exceptions to immunity with the intention of offering members of the Commission a basis on which to form their judgment. Nor did she agree with Sir Michael that the section on the systemic categorization of international crimes as an exception to immunity was of no interest to the Commission because it supposedly reproduced selected theories that were in favour of recognizing exceptions to immunity. Frankly, she thought that such assertions reflected a rather narrow view of the work of the Commission and its special rapporteurs. In fact, a majority of members of the Commission had commented on the usefulness of the contents of the report.

34. Several members had raised the question of the use made in the report of the excellent memorandum by the Secretariat on the topic²⁴⁵ and the three reports submitted by the previous Special Rapporteur, Mr. Kolodkin.²⁴⁶ Mr. Rajput in particular had criticized the content and methodology followed in her report, claiming that she had moved away from some of the lines of reasoning of her predecessor without explanation. However, if, as a new Special Rapporteur, she had distanced herself from draft articles that had been adopted by the Commission—not just from the individual work of her predecessor as Special Rapporteur—she would have needed to justify her approach, and that was not the case. Mr. Kolodkin himself had pointed out that what mattered were the arguments that he had put forward in his second report and those that she had put forward in the fifth report. She agreed to some extent with him that there had been no new elements to justify a change of approach to the topic since he had completed his third report six years earlier. In fact, the problem was that in the 10 years since the Commission had started work on the topic, there had been no discernible trend in one direction or the other, and the debates had produced no general agreement on whether to accept or to reject the existence of limitations and exceptions to immunity.

²⁴⁵ Document A/CN.4/596 and Corr.1; available from the Commission's website, documents of the sixtieth session (2008). The final text will be reproduced in an addendum to *Yearbook ... 2008*, vol. II (Part One).

²⁴⁶ Reports of the first Special Rapporteur, Mr. Kolodkin: *Yearbook ... 2008*, vol. II (Part One), document A/CN.4/601 (preliminary report); *Yearbook ... 2010*, vol. II (Part One), document A/CN.4/631 (second report); and *Yearbook ... 2011*, vol. II (Part One), document A/CN.4/646 (third report).

35. A majority of members of the Commission had said that the fifth report provided an important study of practice and a good basis for further work. Many of them had found the analysis of both international and national judicial practice useful, remarking on such issues as the weight to be given to the judgments of international courts in identifying rules of international customary law. Other members, however, had maintained that only international judicial practice was relevant, as it alone was consistent and coherent and offered an unequivocal assertion of the existence of limitations and exceptions to immunity. That view had been called into question by other members, who agreed with the Special Rapporteur that the judgments of the International Court of Justice and the European Court of Human Rights deserved a closer reading, especially since they dealt solely with immunity *ratione materiae* or else referred exclusively to immunity of the State, although they did not rule on the immunity of State officials from foreign criminal jurisdiction. It should be added that in the most recent cases, notably in the judgment of the European Court of Human Rights in *Jones and Others v. the United Kingdom*, there had been a noticeable shift in the law that States should follow closely.

36. She took note of the references to the case law of the Inter-American Court of Human Rights drawn to her attention by two members of the Commission.

37. Most members agreed there was a need to analyse national judicial practice as it related to the topic, but she noted the position of a minority of members who found such practice irrelevant as it was very limited, spread over a long period of time and inconsistent, and also because it concerned both civil and criminal jurisdiction. She wished to stress, however, that the proceedings of national courts ought to be analysed precisely because they were at the heart of the problems addressed under the present topic. After all, if national judicial practice was really so irrelevant, it was difficult to understand why States repeatedly stressed the importance of the topic of immunity of State officials and studied the work of the Commission so closely. She could not see, therefore, how it could be dismissed as irrelevant.

38. Leaving aside the comments on the form in which national judicial practice was cited in the report, its inclusion had enabled members of the Commission to check the cases cited and form their own judgment on them. The comments of some members on the cases included in the study of practice should be seen in that light. The task of carefully analysing each such case would be best left to the Drafting Committee.

39. She acknowledged the comments on the lack of references to case law in certain regions of the world, notably Africa and Asia, and on the need to analyse some issues mentioned in the report in greater detail. She thanked Mr. Nguyen in particular for his efforts to provide additional information on judicial decisions related to immunity in Asia, and welcomed the offer from other members to provide further information on such decisions elsewhere.

40. Several members of the Commission had expressed the opinion that the analysis of national legislative practice in the report was not relevant, since all the laws on

immunity considered in it referred to State immunity and none of them established limitations or exceptions to immunity. Nonetheless, she believed that the study of those laws was relevant for several reasons: first, they made it possible to differentiate between State immunity and immunity of State officials, which, as a rule, was not regulated other than for Heads of State; second, the analysis demonstrated that not even State immunity was considered to be absolute, and exceptions had been established; and, third, it illuminated the so-called “territorial tort exception”. She wished, moreover, to draw attention to a point not raised in the debate: article 23 of Organic Act No. 16/2015 of 27 October 2015, the Spanish law governing immunity of Heads of State, Heads of Government and Ministers for Foreign Affairs, recognized an exception to immunity *ratione materiae* in the case of genocide, crimes against humanity, war crimes and enforced disappearances.

41. A second criticism levelled by some members was that the analysis of the laws implementing the Rome Statute of the International Criminal Court was irrelevant, as they simply dealt with the implementation of international treaty obligations. That was an incorrect interpretation, in her view. The Statute contained no obligation to adopt national legislative measures, other than those establishing cooperation mechanisms with the International Criminal Court. Any law of a more general scope that was designed to implement the Statute at the national level was freely and voluntarily adopted by the State party concerned and had no other purpose than to enable the State party to benefit from the principle of complementarity, since if the State party did not incorporate the crimes set forth in the Statute into national law, or if it did not establish its jurisdiction over such crimes, it could never challenge the exercise of jurisdiction by the International Criminal Court. Nevertheless, the fact was that States parties were adopting implementing legislation, which led to the conclusion that States considered that national courts should be the first to exercise jurisdiction over those horrendous crimes. Viewed in that light, the way in which the implementing legislation dealt with the immunity of State officials from foreign jurisdiction was certainly relevant to the Commission’s work. Such legislation was an example of treaty-based practice adopted by a State under no obligation to do so. The same could be said of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which had been referred to a number of times during the debate.

42. Some members of the Commission had argued that it was necessary to take into account other forms of State practice, in particular the decisions of public prosecutors and of authorities that had the power to launch criminal investigations, on the one hand, and diplomatic procedures, on the other. That practice tended to be confidential, however, which made accessing it extremely difficult, if not impossible. For that reason, she had serious doubts over whether it could be considered relevant for the purposes of the topic. In any event, negative practice, consisting of silence or omission, was not helpful in identifying a custom or trend. Her comments did not apply to other forms of diplomatic practice, such as statements before the Sixth Committee and other bodies, which she had duly borne in mind in her report.

43. Although her analysis of the distinction between limitations and exceptions had been broadly welcomed, two main criticisms had been expressed. The first was that it was impossible to draw a clear distinction, rendering the analysis irrelevant. The second was that it was inconsistent to establish a distinction in the report, but then propose a draft article containing a simplified formula which referred only to the non-applicability of immunity.

44. With regard to the first point, she wished to emphasize that most members of the Commission shared the view that the analysis in the report was useful and necessary. Distinguishing between exceptions and limitations was not a purely theoretical exercise; it had important practical implications and was closely related to the perception of international law as a legal system rather than a jumble of norms. If only the concept of limitations was retained, the Commission would be pointing towards the existence of a stand-alone legal regime in which nothing outside of immunity was relevant. If only the concept of exceptions was retained, the Commission might run the risk of thinking that it could leave aside matters closely linked to the regime of immunity, such as the value of stable international relations or the need to ensure that certain State officials were able to perform their functions of international representation unimpeded. In short, it was only by analysing both concepts that the Commission could be sure that it had taken into consideration all relevant legal norms, principles and values.

45. However, the methodological need to conduct that analysis did not preclude the Commission from seeking pragmatic solutions to any problems that might arise in its consideration of the topic. With that in mind, the title of draft article 7 was “Crimes in respect of which immunity does not apply”. The words “does not apply” offered a pragmatic solution to a genuine problem, namely the lack of consensus over whether international crimes could be viewed as acts performed in an official capacity. Despite that lack of consensus, a number of members of the Commission, and some States and domestic courts, had concluded that international crimes that offended the conscience of humankind invariably formed either a limitation or an exception to immunity. The title of draft article 7 covered both possibilities, a fact that should be mentioned in the commentary to avoid any confusion or misunderstanding. She wished to highlight that the Commission had embraced a similar pragmatic proposal in the draft articles on jurisdictional immunities of States and their property.²⁴⁷ Consequently, she did not believe that distinguishing between the concepts of limitations and exceptions was incompatible with the concept of the non-applicability of immunity, which had, moreover, been endorsed by numerous members of the Commission.

46. The issue of whether there existed a customary rule that established limitations or exceptions to immunity had been one of the most controversial to be debated by the Commission. One group of members held that there was no custom or trend in that regard. A second group had reservations about the existence of a custom, but considered that there was a practice showing a trend in favour of

²⁴⁷ *Yearbook ... 1991*, vol. II (Part Two), pp. 13 *et seq.*, para. 28.

exceptions. The two points of view related to international crimes and were, in part, different to the views expressed with regard to corruption-related crimes and the territorial tort exception. Her conclusions on the matter were based on the Commission's work on the topic of the identification of customary international law, and she wished to point out that the commentaries to draft conclusions 2, 3, 4, 8, 10 and 14,²⁴⁸ among others, which had been provisionally adopted in relation to that topic, supported the arguments advanced in her fifth report.

47. The fact that several members had noted a clear trend in favour of exceptions to immunity raised the question of what was meant by the word "trend". While it did not imply an existing norm, or *lex lata*, it did point to an emerging norm, or *lex ferenda*, to which certain States were contributing.

48. The description of the practice analysed in her report as being either *lex lata* or *lex ferenda* was open to debate, and it was precisely the Commission's role to do so. However, the assertion that there was no trend, and therefore no element of *lex ferenda* to be considered by the Commission, was not supported by practice, unless it could be claimed that all the domestic courts that had recognized some form of limitation or exception had been wrong or, worse still, had acted outside, or in violation of, international law. The consequences of such a claim warranted a more detailed analysis than had been carried out during the debate by those members of the Commission who had denied the existence of a trend.

49. Some members had referred, in their statements, to "new law". Setting aside other considerations, she found it difficult to accept the use of that expression as the basis for the Commission's work without any kind of clarification. A couple of questions sprang to mind. Was new law opposed to existing law, or based on it? Was it law that did not yet exist, that was in the process of being formed or that was to be established independently of practice? It was also unclear whether the expression "new law" meant that draft article 7 not only did not exist as a norm but also bore no relation to existing law and was of no technical or legal value. If that was the case, she could not share the view that the Commission's sole task should be to define a "new law" governing the system of limitations and exceptions to immunity.

50. Rather, the debate within the Commission should focus on whether there was any *lex lata* and, if so, whether it was well defined. A concurrent effort should be made to identify whether it was possible to speak of *lex ferenda* that would enable the Commission to propose solutions to a problem that was of interest to States, on the basis of elements that could be found in practice and supported through a systemic analysis of international law. That, in her view, was the approach favoured by most members of the Commission.

51. The relationship between codification and progressive development had also been the subject of fierce debate within the Commission. She wished to draw attention, in that regard, to the fact that, as with other draft

texts prepared by the Commission, the draft articles on the immunity of State officials from foreign criminal jurisdiction contained some norms that represented codification and others that constituted progressive development. It did not seem in keeping with the Commission's mandate to refer systematically to progressive development as a means of reducing the scope or value of certain proposals. Neither codification nor progressive development was of lesser or greater technical and legal value.

52. The systemic categorization of limitations and exceptions to immunity—which, to her surprise, had been met with alarm and rejection by some members of the Commission—had merely been an attempt to apply to the topic at hand, in a consistent and non-contradictory manner, the Commission's mandate to progressively develop and codify international law.

53. It was clear that the decision of whether to engage in codification or progressive development could not be based on mere preference. There were technical and legal rules that indicated when one or the other was more appropriate. Even though codification required proof of the pre-existence of a norm, progressive development could not be viewed as a simple proposal that was not backed up by precedents or previous practice.

54. The statements made by members during the debate revealed that the majority preference was for the Commission's work to strike a balance between respect for sovereign equality and the need to prevent immunity from acting as a barrier to accountability for the most serious international crimes.

55. She fully agreed with the general opinion expressed with regard to the importance of dealing adequately with the procedural aspects of immunity. The reasons for that were many, and included the need to avoid any risk of politicization and the need to ensure respect for internationally established procedural safeguards, a concern that was addressed in paragraph 247 of her report.

56. She did not doubt the importance of studying procedural aspects in order to have a complete picture of the immunity of State officials from foreign criminal jurisdiction. Since that immunity was exercised before the courts of the forum State, the Commission was obliged to analyse elements such as who could invoke immunity, who should assess the applicability of immunity, and when and why. Some members of the Commission had mentioned that those issues had been dealt with in the third report by the previous Special Rapporteur, Mr. Kolodkin. However, it should be recalled that Mr. Kolodkin had analysed the procedural aspects of immunity at the end of his work, after having examined issues such as the absence of immunity and exceptions thereto. As had been noted, he had done so with good reason. After all, should the Commission not analyse the substantive aspects of limitations and exceptions to immunity before making decisions with regard to procedural mechanisms? Since that approach had been approved by the Commission in 2011, she did not see why it should no longer be considered valid. Was it because the possibility of establishing limitations or exceptions to immunity was looming on the horizon of the Commission's work?

²⁴⁸ See *Yearbook ... 2016*, vol. II (Part Two), pp. 61 *et seq.*, para. 63.

57. She had placed great importance on the procedural aspects of immunity since the outset of work on the topic, not least because she believed that it was essential to have a comprehensive idea of what was meant by “immunity from jurisdiction”. For that reason, in her second report,²⁴⁹ she had proposed definitions of two concepts that, in her opinion, were key to dealing correctly with the topic of immunity: “immunity” and “jurisdiction”. At that time, however, some members of the Commission had been opposed to the adoption of definitions on the grounds that the two concepts had never previously been defined by the Commission and that such definitions were, in any case, unnecessary, as the meaning of the concepts was clear. While she respected that viewpoint, she did not agree with it. The result of those objections had been that the proposed definitions had been before the Drafting Committee since 2012. Although it would undoubtedly have been useful to deal in greater detail with procedural issues at that time, she did not think that it was methodologically admissible to do so at the current session, when the Commission was addressing issues related to limitations and exceptions to immunity.

58. The analysis of the procedural aspects of immunity should cover not only the invocation or waiver of immunity and the question of when immunity should apply, which had been mentioned by some members of the Commission, but also communication between the authorities of the forum State and the State of the official, and the mechanisms for international cooperation and judicial assistance that could be used with a view to maintaining a balance between the various legal values and principles at stake, and to establishing “without prejudice” clauses applicable to cases of abuse and politicization that could arise in practice. The Commission had requested information on those matters from States in 2016, but, to date, only six States had responded. It was also vital, in her view and in that of several members of the Commission, to address the need to ensure respect for due process at all times.

59. Every one of the elements that she had mentioned would need to be analysed in her sixth report. In that connection, she invited the Commission to hold informal consultations on the topic during the second part of the current session, once it had concluded its consideration of the fifth report. She would be happy to circulate an informal document for that purpose.

60. She had taken careful note of the alternative proposal for draft article 7 put forward by Mr. Nolte. Although she could not endorse it in the context of the current debate within the Commission, as it did not really relate to limitations and exceptions to immunity, she did think that it contained interesting elements that the Commission could consider when it turned its attention specifically to the procedural aspects of immunity.

61. She hoped to have clarified her stance and future intentions with regard to procedural issues. However, she could not agree with those members who had called for limitations and exceptions to immunity, on the one hand, and the procedural aspects of immunity, on the other, to be addressed jointly.

62. Turning to the comments that had been expressed concerning draft article 7, she said that most members of the Commission were in favour of retaining paragraph 1, although there were differences of opinion about what should be included in the list of crimes in respect of which immunity did not apply. A few members had voiced doubts over the paragraph, and one had remained silent about it, having indicated that it should not be referred to the Drafting Committee.

63. Regarding draft article 7, paragraph 1 (a), most members had spoken in favour of including genocide, crimes against humanity, war crimes, torture and enforced disappearances, on the grounds that they represented the “hard core” of the most serious crimes that concerned the international community as a whole. Some members had drawn attention to the difference between genocide, crimes against humanity and war crimes, on the one hand, and torture and enforced disappearances, on the other, but had nevertheless supported the inclusion of the last two, which were the subject of international treaties and constituted special categories of crimes against humanity.

64. At both the current and previous sessions, there had been calls for the list of crimes in draft article 7, paragraph 1 (a), to be expanded by including, among others, apartheid, the crime of aggression, piracy, enslavement, human trafficking, the destruction of cultural property and terrorism. Each proposal merited a separate response.

65. It had not been her intention, in formulating her proposal for draft article 7, to downplay the gravity of the crime of apartheid, particularly given its historical significance in the second half of the twentieth century, in Africa above all. Bearing in mind the comments made by a number of members of the Commission, she had no problem with adding it to the list of crimes in respect of which immunity did not apply.

66. She continued to have reservations about including the crime of aggression in the list. The reasons that she had given in her report remained valid and had been supported by some members of the Commission. Moreover, the risk of politicization was especially high, as the crime of aggression was, by definition, a crime of leaders. Again, her intention had not been to downplay the gravity of the crime, but its inclusion might spark a political debate—within the Commission and, above all, in the Sixth Committee of the General Assembly—that could colour the overall treatment of limitations and exceptions to immunity. Consequently, she considered that the crime would be better addressed in the commentaries, but she would leave the decision in the hands of the Commission.

67. The other crimes referred to by certain members should be approached from a different perspective, in that, strictly speaking, they were not so much international crimes—with the exception, perhaps, of piracy and enslavement—as transnational crimes. While it was true that they had a treaty basis and that some of them were covered by the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol), there was no practice involving those crimes in relation to immunity. For that

²⁴⁹ *Yearbook ... 2013*, vol. II (Part One), document A/CN.4/661 (second report).

reason, she had serious reservations about including them in the draft article, as it did not seem possible to draw a parallel between them and the international crimes that had been included. Her reasoning could be incorporated in the commentary to the draft article, if the Commission considered it useful.

68. Some members of the Commission had mentioned the possibility of drafting a broadly worded general clause that referred only to crimes of concern to the international community, so as not to establish a set list of crimes that might need to be expanded in the future. She fully understood the proposal and could not help but sympathize with the intention behind it. However, she did not think that it was the most appropriate solution for the topic at hand or for achieving the goal of providing States with clear guidance as to the crimes in respect of which immunity did not apply. In addition, an open reference might have the undesired effect of engendering politicization.

69. Other members of the Commission had commented on the need to provide a precise definition of some of the crimes listed in draft article 7, paragraph 1 (a). She considered that it would be best to do so in the commentaries. The task would be facilitated by the fact that there were precedents in treaty practice. The Commission could draw on its work on crimes against humanity, and on the Statute, 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.

70. Various comments had been made on corruption-related crimes covered in draft article 7, paragraph 1 (b). A sizeable group of members had rejected or had reservations about mentioning corruption-related crimes in the list of crimes to which immunity did not apply, whereas a few members had expressed support for retaining the reference in the draft article, sometimes with qualifications. Their reason for not including corruption-related crimes was that treaties dealing with such crimes did not provide for exceptions to immunity. However, another group of members had expressed the opinion that corruption caused serious harm to States and society, which had repercussions on international relations, and that therefore the category of crimes should be included.

71. Nonetheless, the need for a clearer definition of “corruption-related crimes” had been recognized and several members had emphasized the fact that corruption was an issue that was easily manipulated, including for political ends. She shared those concerns: as indicated in her report, the cases in which national courts had dealt with so-called “corruption-related crimes” mainly involved the large-scale corruption or “grand corruption” referred to by several members. If the Commission decided that immunity would not apply in the case of corruption-related crimes, the concept of large-scale corruption would need to be explained in the commentary. In any event, since crimes of corruption always entailed an act for the personal gain of the official in question and could not be qualified as an act performed in an official capacity, the perpetrators would not be granted immunity. In fact, it was a typical case of limitation to immunity, which had been included in the draft article in order to clarify certain issues.

72. With regard to the “territorial tort exception” described in draft article 7, paragraph 1 (c), a few members had asserted that it was a typical means of ensuring the immunity of the State from civil jurisdiction, whose main purpose was to shield the State from responsibility in the event of harm. However, it was worth noting that the exception had also applied to diplomatic officials and officials on special mission who enjoyed personal immunity; thus, it did not relate exclusively to State jurisdiction. Other members had focused on the territorial aspect to reinforce the validity of the exception, some of whom had mentioned the special case of foreign military activities in the territory of a State, which had not been covered in her report. Nonetheless, most members had indicated that they were in favour, in a more or less qualified way, of incorporating the “territorial tort exception”.

73. The wording of the “territorial tort exception” was drawn from the second report of the previous Special Rapporteur, Mr. Kolodkin. Her intention when including it in draft article 7 was that examples of practice which were still relevant, such as acts of sabotage or espionage, should be taken into account; obviously, it was not to establish the non-applicability of immunity in relation to minor offences, such as traffic offences, as one member had implied. All those elements would be given due consideration in the Drafting Committee with a view to defining more clearly the terms of the “territorial tort exception”.

74. Several members had raised the issue of the different legal bases underpinning each of the situations in respect of which immunity did not apply, or rather, to what extent the Commission was engaging in codification and progressive development. From the study of practice in the report, it was clear that the situations described in the three subparagraphs of draft article 7, paragraph 1, required different treatment.

75. While there had been broad support for draft article 7, paragraph 2, two members had been against the idea of the non-applicability of limits and exceptions in respect of officials who enjoyed immunity *ratione personae* during their term of office. Although she fully understood their arguments, aimed at strengthening the fight against impunity, she did not believe that the Commission had much leeway, since the trend in both international practice and doctrine was clearly towards the enjoyment of the full scope of immunity *ratione personae*. Moreover, it was a very special rule that ceased to be effective as soon as the term of office of the officials concerned (Heads of State, Heads of Government and Ministers for Foreign Affairs) ended. She was also aware that the situation would never apply to persons who held permanent office, such as monarchs, unless they abdicated or were dethroned, and that it could have the effect of allowing certain persons to hold on to office. Frankly, she did not believe that the Commission had the power to draw up an instrument to prevent such a situation, unless it appealed to States to consider withdrawing the immunity of members of the troika who had committed the crimes listed in draft article 7, paragraph 1, in particular in subparagraph (a). However, the withdrawal of immunity fell outside the regime applicable to limitations and exceptions to immunity and would be taken up in her next report.

76. Paragraph 2 of draft article 7 struck an appropriate balance between the protection of the principle of sovereign equality, the stability of international relations and the fight against impunity, as noted by many members; it should therefore be retained in the draft article. She could not concur with the minority view that the paragraph should be deleted and the draft article should be limited to immunity *ratione materiae*, without any reference to the troika.

77. Paragraph 3 had also received broad support among members, who deemed it appropriate to retain a “without prejudice” clause so as to define the relationship between the draft article and other international instruments with regard to the applicability of limitations and exceptions to immunity. The paragraph had been drafted in response to the undeniable fact that the immunity of State officials from criminal jurisdiction could be affected by other international legal regimes. The “without prejudice” clause was modelled on that contained in draft article 1, provisionally adopted by the Commission in 2013.²⁵⁰

78. Practice revealed that there could be some interaction between different immunity regimes applicable in two national courts or else in a national court and an international criminal court, and thus guidance should be provided on how to resolve any possible conflict of rules. The wording of paragraph 3 could not, under any circumstances, be interpreted as giving preference to the provisions of draft article 7, or as a means of indirectly introducing into the draft article the rules on immunity contained in the constituent treaty of an international tribunal. The “without prejudice” clause would oblige States to take into consideration both instruments and a conforming and harmonized interpretation thereof. In response to the two members who had raised doubts about the type of international tribunal in question, she said that the interaction would normally take place between criminal courts.

79. In view of the foregoing, like other Commission members, she considered that paragraph 3 formed an important part of draft article 7 and should be retained. Nonetheless, several members had suggested that the paragraph might be redrafted as a “without prejudice” clause applicable to the whole set of draft articles. She did not fully understand Mr. Tladi’s strong opposition to the paragraph on the basis that it might prejudice an ongoing litigation. It could also be argued to the contrary that failure to include such a reference might prejudice the final outcome of the litigation. Mr. Tladi’s concern could be dealt with in a commentary.

80. As to the future workplan, in her sixth report she intended to address the procedural aspects of immunity she had outlined previously, in connection with which informal consultations could be held during the second part of the current session, if appropriate. Thereafter, the outcome would be revised, in accordance with the Commission’s established methods of work.

81. In conclusion, she said that she had endeavoured to reflect, in a balanced way, all the views expressed in

the Commission, especially on the central issues of greatest concern during the debate. If she had not succeeded in her task, she expressed the hope that members of the Commission would inform her accordingly, at a later date. She recommended that the Commission refer draft article 7, as contained in the fifth report, to the Drafting Committee, on the understanding that the Drafting Committee would consider all the comments made during the plenary debate.

82. The CHAIRPERSON said that he would take it that the Commission wished to refer draft article 7 to the Drafting Committee, taking into account all the comments made during the debate.

83. Mr. MURPHY said that he wished to thank the Special Rapporteur for her summary of a rich and complicated debate; he appreciated the time constraints that she had faced summarizing a debate that had lasted a week. However, with respect, he did not consider that her summary neutrally captured the range of views expressed. To a certain extent, it was a continuation of the arguments she had put forward in her fifth report, without a substantive response to the criticisms levelled by some members. He did not wish to reopen the debate, but would give a few examples of what he meant. First, the argument was not that national judicial practice was irrelevant; it was relevant but did not support the text proposed in draft article 7. Upon examination, there was virtually no case law that supported various aspects of draft article 7 and there was no case that supported draft article 7 as a whole. Likewise, the argument was not that national legislation was irrelevant; what was relevant was the fact that only a few States had national laws that supported draft article 7. More significantly, the vast majority of States did not have national laws that supported draft article 7. In his view, the Special Rapporteur had not taken on those arguments and attempted to rebut them in her summary. He also had the impression that most members did not consider that draft article 7 reflected customary international law. He suggested that it would be helpful if the Commission acknowledged that, based on the debate where diverse views had been expressed, there was no consensus in plenary session that draft article 7 reflected customary international law. If the Commission could reach an agreement on that issue, it would be easier for members to endorse the referral of the draft article to the Drafting Committee.

84. Mr. HMOUD, speaking on a point of order, said that it was the first time since he had been a member of the Commission that another member had raised substantive points following the closure of a debate by a Special Rapporteur, and it would merely serve to prolong the decision-making process. The Chairperson had proposed that draft article 7 be referred to the Drafting Committee and action should be taken on his proposal, in accordance with the relevant rules of procedure of the General Assembly.

85. The CHAIRPERSON said that, in accordance with the rules of procedure of the General Assembly, if members wished to take the floor to discuss a proposal, they had the right to do so. On the other hand, they should not comment on or discuss the Special Rapporteur’s summary of the debate.

²⁵⁰ *Ibid.*, vol. II (Part Two), p. 39 (draft article 1).

86. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur), speaking on a point of order, endorsed Mr. Hmoud's comments. She had not wished to interrupt Mr. Murphy since all members had a right to have their views heard. Nonetheless, in accordance with the Commission's established procedure, it was the Special Rapporteur who should have the last word on the substance of a topic. To her recollection, it was the first time ever that a member had reopened the debate to challenge the Special Rapporteur's arguments. Of course, Mr. Murphy had the right to question the conditions for the referral of a proposal to the Drafting Committee, but, under no circumstances should he have used that opportunity to counter the arguments of the Special Rapporteur when a proposal was already before the Commission. All members had had the opportunity to state their views during the debate and it was the Special Rapporteur's responsibility to summarize that debate and put forward a proposal on the basis of which members should take their decision.

87. Mr. SABOIA, speaking on a point of order, said that he concurred with Mr. Hmoud's view. Furthermore, he wished to point out that, in terms of procedure, if the Commission was going to take any decision it should be on the first proposal made by the Chairperson to refer draft article 7 to the Drafting Committee and not on Mr. Murphy's proposal.

88. The CHAIRPERSON said that there was no second proposal; the only proposal under discussion was his original proposal regarding the referral of draft article 7 to the Drafting Committee.

89. Mr. RAJPUT said that he did not wish to reopen a substantive debate as the Special Rapporteur had already expressed her views, though some members did not share those views. However, he wished to seek clarification regarding the Special Rapporteur's summary before a decision was taken to refer draft article 7 to the Drafting Committee. The Special Rapporteur had made very clear her position that draft article 7 did not constitute a "new law". However, at one point, it seemed that she had referred to "custom" as well to a "trend" and had then said that she would like to revert the position she had taken in the report. If the Commission was expected to endorse the Special Rapporteur's proposal to refer draft article 7 to the Drafting Committee, then it wished to know whether draft article 7 reflected customary international law or an emerging trend.

90. Mr. HMOUD, speaking on a point of order, said that if members insisted on reopening the debate they could propose it as a point of procedure, otherwise the Commission should take action on the Chairperson's proposal.

91. Mr. SABOIA, speaking on a point of order, said that he endorsed Mr. Hmoud's comments.

92. Mr. TLADI said that he agreed with those members who had spoken about the procedural aspects of the discussion. Mr. Murphy had raised a substantive point and a procedural point. Mr. Murphy's procedural point, rather, procedural proposal, was that the Commission should decide in plenary session that it was not taking a position on whether draft article 7 reflected customary international

law. However, as had been pointed out, members had had an opportunity to express their views, and whoever wished to know what those views were should refer to the relevant summary records and determine for themselves whether there was agreement within the Commission on the matter.

93. Mr. SABOIA, speaking on a point of order, proposed, in accordance with the rules of procedure of the General Assembly, that the Chairperson should close the debate and that the Commission should take a decision immediately on the matter under discussion. If his motion was carried, it would take precedence over the list of speakers and any other matter.

94. The CHAIRPERSON, noting that Mr. Saboia insisted that the Commission take a decision before the remaining members on the list of speakers were allowed to take the floor, said that a vote, by a show of hands, should be held to decide on his original proposal, namely whether draft article 7 should be submitted to the Drafting Committee.

95. Sir Michael WOOD, speaking on a point of order, said it was his understanding that Mr. Saboia had proposed the closure of the debate. Thereafter the Commission could take a decision on the Chairperson's proposal to refer draft article 7 to the Drafting Committee.

96. The CHAIRPERSON invited members to indicate by a show of hands whether they were in favour of Mr. Saboia's proposal to close the debate.

97. Mr. HMOUD, speaking on a point of order, said that he was not certain whether the intent of Mr. Saboia's proposal was to close the debate on the item under discussion, in accordance with rule 119 (d) of the rules of procedure of the General Assembly, and sought clarification in that regard.

98. Mr. SABOIA said that his proposal was to close the debate on the proposal to refer draft article 7 to the Drafting Committee.

99. The CHAIRPERSON invited the Commission to take a vote on that proposal.

A vote was taken by a show of hands.

100. The CHAIRPERSON said that according to the vote, 20 members were in favour and 3 members were against the proposal, with 1 abstention.

101. Sir Michael WOOD, speaking in explanation of position before the decision on referral, said that as he had stated previously in plenary session, he was not in favour of referring draft article 7 to the Drafting Committee; however, if the Commission should decide to refer the draft article, he would not block the consensus. In his view, that could not be interpreted as taking any position on the question of whether draft article 7 represented existing law. On that understanding, he would not object to the consensus to refer the draft article to the Drafting Committee.

102. The CHAIRPERSON, speaking as a member of the Commission, said that his vote was based on procedural considerations. The issue was so important that the Commission should have taken more time and made every possible effort to achieve consensus. In his view, 10 minutes of debate was not enough. For that reason, he had not been in favour of the proposal to close the debate; his vote did not relate to the substance of the original proposal.

103. Mr. RAJPUT expressed support for those comments as the reason for his vote against closing the debate.

104. The CHAIRPERSON said he would take it that the Commission wished to refer draft article 7 to the Drafting Committee, taking into account all the comments made during the debate on the topic.

It was so decided.

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

[Agenda item 1]

105. Mr. RAJPUT (Chairperson of the Drafting Committee) said that the Drafting Committee on the topic of immunity of State officials from foreign criminal jurisdiction was composed of the following members: Ms. Escobar Hernández (Special Rapporteur), Mr. Argüello Gómez, Mr. Cissé, Ms. Galvão Teles, Mr. Hmoud, Mr. Jalloh, Ms. Lehto, Mr. Murase, Mr. Murphy, Mr. Nolte, Ms. Oral, Mr. Ouazzani Chahdi, Mr. Park, Mr. Reinisch, Mr. Ruda Santolaria, Mr. Saboia, Mr. Šturma, Mr. Tladi, Mr. Vázquez-Bermúdez, Sir Michael Wood and Mr. Aurescu (Rapporteur), *ex officio*.

The meeting rose at 1.10 p.m.

3366th MEETING

Thursday, 1 June 2017, at 10 a.m.

Chairperson: Mr. Georg NOLTE

Present: Mr. Argüello Gómez, Mr. Cissé, Ms. Escobar Hernández, Ms. Galvão Teles, Mr. Grossman Guiloff, Mr. Hassouna, Mr. Hmoud, 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.

Crimes against humanity (*continued*)** (A/CN.4/703, Part II, sect. A, A/CN.4/704, A/CN.4/L.892 and Add.1)

[Agenda item 6]

REPORT OF THE DRAFTING COMMITTEE

1. Mr. RAJPUT (Chairperson of the Drafting Committee), introducing the report of the Drafting Committee

on the topic of crimes against humanity (A/CN.4/L.892), said that the Drafting Committee had devoted 10 meetings to the consideration of a draft preamble, draft articles and a draft annex relating to the topic. It had examined the seven draft articles and the draft preamble initially proposed by the Special Rapporteur in his third report (A/CN.4/704), together with a number of reformulations proposed by the Special Rapporteur in response to suggestions made or concerns raised during the debates in plenary meetings and in the Drafting Committee. At the current session, the Drafting Committee had provisionally adopted five draft articles, a draft preamble and a draft annex.

2. The Drafting Committee had studied the draft preamble after examining the substance of the entire set of draft articles and the draft annex. The draft preamble comprised nine paragraphs based on a revised text submitted by the Special Rapporteur. The first and second paragraphs borrowed language from the Rome Statute of the International Criminal Court. The third paragraph, which had been added by the Special Rapporteur further to the plenary debate, reflected the fact that the prohibition of crimes against humanity was a peremptory norm of general international law, as had been recognized by the International Court of Justice in its judgment in *Jurisdictional Immunities of the State*. The fourth paragraph encapsulated the draft articles' primary purpose, namely the prevention of crimes against humanity. The fifth paragraph, which likewise borrowed language from the Rome Statute of the International Criminal Court, linked the prevention of crimes against humanity to the fight against impunity. The sixth paragraph, which had been proposed by the Special Rapporteur, stemmed from the suggestion that the draft preamble expressly refer to the Statute, since the definition of crimes against humanity set forth in draft article 3 reproduced article 7 of the Statute. Although the language of the seventh paragraph was based on wording in the preamble to the Statute, the Drafting Committee had eschewed the phrase "those responsible for" crimes against humanity, since it might conflict with the presumption of innocence. The eighth paragraph referred to national measures and international cooperation, as two further means of ensuring the effective prosecution of crimes against humanity. The ninth paragraph was a reminder that the rights of victims, witnesses, alleged offenders and others must be respected throughout the fulfilment of the obligations set forth in the draft articles.

3. As the Drafting Committee had altered the order of several draft articles, that had affected their numbering. The only change made to draft articles 1 to 4 had been the deletion of the words "or control" from draft article 4, paragraph 1 (*a*), for the sake of consistency with the formulation used for references to territory in all the other draft articles. That was not, however, a substantive modification.

4. The Drafting Committee thought that draft article 12 (*Non-refoulement*) was best placed after draft article 4 (*Obligation of prevention*), since the *non-refoulement* of persons could effectively prevent their exposure to crimes against humanity; this draft article thus became draft article 5. The principle set forth in that draft article was embodied in numerous treaties specifically addressing

* Resumed from the 3363rd meeting.

** Resumed from the 3354th meeting.