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Held at the Palais des Nations, Geneva, on Friday, 23 May 2025, at 10 a.m.

Contents

* Second reissue for technical reasons (11 November 2025).

Present:

Chair:	Mr. Paparinskis
Members:	Mr. Akande
	Mr. Argüello Gómez
	Mr. Asada
	Mr. Cissé
	Mr. Fathalla
	Mr. Fife
	Mr. Forteau
	Mr. Galindo
	Ms. Galvão Teles
	Mr. Grossman Guiloff
	Mr. Jalloh
	Mr. Laraba
	Mr. Lee
	Mr. Ma
	Ms. Mangklatanakul
	Mr. Mavroyiannis
	Mr. Mingashang
	Mr. Nesi
	Mr. Nguyen
	Ms. Okowa
	Ms. Oral
	Ms. Orosan
	Mr. Ouazzani Chahdi
	Mr. Oyarzábal
	Mr. Patel
	Mr. Reinisch
	Ms. Ridings
	Mr. Ruda Santolaria
	Mr. Sall
	Mr. Savadogo
	Mr. Vázquez-Bermúdez
	Mr. Zagaynov

Secretariat:

Mr. Pronto	Secretary to the Commission

The meeting was called to order at 10.05 a.m.

Immunity of State officials from foreign criminal jurisdiction (agenda item 2) (*continued*) (A/CN.4/780)

Report of the Drafting Committee (A/CN.4/L.1017)

Mr. Oyarzábal (Chair of the Drafting Committee), introducing the report of the Drafting Committee on the topic "Immunity of State officials from foreign criminal jurisdiction" (A/CN.4/L.1017), said that the report contained the texts and titles of draft articles 7, 8 and 9, as provisionally adopted by the Drafting Committee on second reading at the current session.

As a result of the reduced length of the current session, the Drafting Committee had been able to devote only five meetings to the topic. It had considered draft articles 7 to 18 and the draft annex proposed by the Special Rapporteur in his second report (A/CN.4/780) and had been able to provisionally adopt three draft articles, namely draft articles 7 to 9. In accordance with standard practice for second readings and to avoid potential confusion, the Drafting Committee intended to address the renumbering of the draft articles at the end of the second reading.

The Drafting Committee had modified the text of draft article 7 as adopted by the Commission on first reading in two respects. First, it had adopted the Special Rapporteur's proposal, as reflected in his second report, to add three crimes to the list of crimes under international law in respect of which immunity *ratione materiae* did not apply. Second, it had consolidated the provision into a single paragraph, replacing the former second paragraph and the draft annex with new text at the end of what had previously been the first paragraph. He wished to emphasize that, throughout its discussion of draft article 7, the Drafting Committee had been mindful of the sensitivity of the subject matter and the need to maintain a delicate balance between the principle of sovereign equality and the need for accountability for the most serious international crimes.

After an extensive discussion, the Drafting Committee had adopted the Special Rapporteur's proposal to add the crime of aggression, slavery and the slave trade to the list of crimes in respect of which immunity *ratione materiae* did not apply. Throughout the discussion, the Committee had been motivated by two concerns: first, the need to provide a high degree of legal certainty; and second, a desire to avoid foreclosing possible future developments in international law.

With regard to the first concern, it had been noted that draft article 7 did not establish or define any crimes; nonetheless, legal certainty was desirable, as the draft article dealt with criminal jurisdiction. Moreover, it had been observed that the provision would need to provide guidance not only to States, but also to prosecutorial and judicial authorities who might not be experts in international law.

With regard to the second concern, the Drafting Committee had considered the possibility of deleting the list and providing instead criteria for the identification of the crimes concerned. Several proposals floated would have made it clear in the text that the list of crimes was not exhaustive; such proposals included the addition of the words "*inter alia*" or "including" to the chapeau, the addition of a subparagraph to the list referring to "other crimes under international law for which it is established under applicable rules of international that immunity *ratione materiae* from the exercise of foreign criminal jurisdiction shall not apply" and the addition of a new paragraph containing a "without prejudice" clause with respect to future developments. None of those proposals had found general support.

The Drafting Committee had decided to retain the format adopted on first reading in the interests of providing legal certainty and avoiding too large a change to the first-reading text. It had concluded that the possibility of future developments would be better addressed in the commentary. It had been recalled that the Commission was preparing the draft articles to serve as a basis for the negotiation of a potential convention. States would therefore be in a position to consider them and amend them, to the extent they felt necessary. It had also been observed that the Commission's work on previous topics, such as the law of the sea, had not had the effect of inhibiting developments in the law in that field.

In considering whether to retain the list of crimes and whether to add further crimes to it, the Drafting Committee had held a thorough discussion on the applicable criteria for the inclusion of crimes under the draft article. It had been agreed to expand on the discussion of those criteria in the commentary, in order both to explain the text and to guide States in their consideration of whether further crimes should be included in the future. Several relevant criteria had been discussed. It had been decided that a crime should be included in the list only if it was clearly recognized as such under international law, whether through widely ratified treaties or established rules of customary international law. Attention had been drawn, in particular, to the Rome Statute of the International Criminal Court, which several members regarded as the most comprehensive and widely accepted expression of the core international crimes. It had been emphasized, however, that States were bound by different treaty obligations and that caution should be exercised in order to avoid relying on instruments that had not achieved universal ratification, such as the Rome Statute and the Amendments to the Rome Statute on the crime of aggression (the Kampala amendments).

It had been stressed that, in addition to the criterion of recognition under international law, only crimes for which international law itself imposed direct individual criminal responsibility should be included in draft article 7. Such crimes stood in contrast to crimes that international law merely obliged States to suppress through domestic criminalization. Where international law directly held individuals responsible, such acts were no longer regarded solely as official acts, and thus functional immunity did not apply. It had been observed that where international law conferred extraterritorial jurisdiction over certain crimes and expressly permitted the prosecution of individuals for acts committed in an official capacity, it would be logically inconsistent to permit the invocation of functional immunity to block such proceedings.

The Drafting Committee had found that the crimes listed must be clearly and precisely defined under international law, in line with the principle of legality, or *nullum crimen sine lege*. It had been noted that such a criterion was essential to ensure predictability and legal certainty for national authorities. It was, accordingly, important to include only those crimes for which treaties or customary law provided well-established definitions.

It had also considered the question of whether the decision to include crimes in the draft article should take into account their seriousness or gravity. It had been noted that that criterion underpinned the structure of the Rome Statute and reflected the broad consensus around the core crimes under international law. Reference had been made in particular to the preamble and article 5 of the Rome Statute, which described such crimes as “the most serious crimes of concern to the international community”. However, it had been pointed out that such a characterization was inherently vague and subjective, and that past debates, such as those held during the drafting of the Rome Statute, revealed indeterminacies as to whether certain crimes, such as corruption or drug trafficking, met that threshold.

The crime of aggression had been included as it met the criteria identified for inclusion. The Drafting Committee was of the view that the crime of aggression was a crime under international law for which individual criminal responsibility was clearly established and which was typically committed by persons acting in an official capacity, thereby falling within the scope of draft article 7. The crime of aggression had been consistently recognized as a crime under international law in the Commission’s previous work, in particular the 1950 Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, both the 1954 draft Code of Offences against the Peace and Security of Mankind and the 1996 draft Code that superseded it, and the 1994 draft statute for an international criminal court. The Committee had also taken into account the Rome Statute and the Kampala amendments, which listed the crime of aggression alongside genocide, crimes against humanity and war crimes as one of the core international crimes. It had been further noted that many States had called for the inclusion of the crime of aggression in the list and that including it would demonstrate responsiveness to their views.

In addition, the complexity and sensitivity of prosecuting the crime of aggression in domestic jurisdictions, especially in the absence of a prior international determination of State responsibility, had been discussed. To address such concerns, the Drafting Committee had considered a proposal to qualify the inclusion of the crime of aggression by specifying that it would apply only where a competent international court, tribunal or organ had already

determined that an act of aggression had occurred. While that concern had been acknowledged, the proposed qualification was not retained in the text, as it was considered that to introduce such a condition would conflate two distinct legal questions, namely, the existence of jurisdiction and the applicability of immunity. Draft article 7 concerned the procedural bar of immunity *ratione materiae* and not the basis for the exercise of jurisdiction by the forum State. It had been noted that the non-application of immunity did not in itself imply or create universal jurisdiction. The question of whether a court could exercise jurisdiction still had to be assessed separately in accordance with international law. The Special Rapporteur would further address the question of jurisdictional limits in the commentary. It had also been suggested in the Drafting Committee that the matter could be revisited in the context of draft article 14, on the determination of immunity.

With regard to slavery and the slave trade, the Drafting Committee was of the view that those crimes were clearly established under international law and consistent with the identified criteria. Both crimes gave rise to individual criminal responsibility and were recognized in multiple treaties and in customary international law. A further consideration was that slavery and the slave trade were clearly defined in international law and therefore satisfied the principle of *nullum crimen sine lege* and offered legal certainty for national courts. Furthermore, slavery was recognized as one of the crimes falling within the definition of crimes against humanity under international law. The addition of those two crimes also responded to concerns raised by a number of States during the first reading. Further clarification of the legal bases and definitions of the two crimes would be provided in the commentary.

The Drafting Committee had also discussed the possibility of adding further crimes to the list. It had been suggested that the crime of terrorism should be included, given its serious impact and the existence of numerous treaties in which it was addressed as an international crime. However, the Drafting Committee had decided against its inclusion, for the reason that the definition and legal basis of terrorism remained contested. In relation to piracy, the Drafting Committee had noted that it was expressly defined under international law as conduct committed for private ends; it therefore fell outside the scope of immunity *ratione materiae*. Other crimes, such as drug trafficking, corruption and extrajudicial killings, had been mentioned during the discussion, primarily to illustrate the lack of consensus or definitional clarity associated with their treatment as crimes under international law. It had been recalled that earlier negotiations, including those on the Rome Statute, had not resulted in agreement on the inclusion of such crimes. Accordingly, the Drafting Committee was of the view that the list should remain limited to crimes that met established legal and definitional thresholds.

Regarding the order of the crimes listed, the Drafting Committee had adopted the list as presented in the Special Rapporteur's second report, which preserved the order adopted on first reading. It had been generally recognized that each of the crimes included in draft article 7 was of the utmost gravity and that there was no hierarchy among them. The order was therefore essentially irrelevant. Several possible orders had been considered. It had been suggested that the crime of aggression could be first, in light of the fact that the International Military Tribunal at Nürnberg had described it as the "supreme international crime". Another proposal had been to begin with the crimes listed in article 5 of the Rome Statute, followed by the others. While it had been recognized that many States had agreed to that order, several others were not bound by the Rome Statute. Alphabetical order had been rejected as a possibility because it would not be the same in each official language.

Another view expressed in the Drafting Committee was that the first-reading text of draft article 7 (1), with the addition of the three new crimes, was not grounded in international law and should not be maintained.

Concerning the new text in draft article 7 and the deletion of the former second paragraph and the draft annex, the Drafting Committee had held an extensive discussion on how best to address the need to define the crimes listed in draft article 7 for the purpose of delimiting when immunity *ratione materiae* did and did not apply. The text adopted on first reading had done so by reference to definitions contained in the treaties contained in the draft annex. The Drafting Committee had decided to delete the former second paragraph and the

annex and to amend the former first paragraph so as to indicate that the crimes were to be understood "as defined according to the applicable rules of international law".

That change had been motivated by a number of difficulties that the Drafting Committee had encountered in relation to the approach taken on first reading. It had noted that many States were not party to some of the treaties referred to in the former draft annex, including the Rome Statute. The intention behind draft article 7 was not to impose the obligations of such treaties on States not party to them, nor to compel States to ratify those treaties. It had also been noted that the draft annex, as adopted on first reading, had excluded certain relevant treaties, including the 1949 Geneva Conventions, which were universally ratified and defined certain war crimes; the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), which had been mentioned in connection with both war crimes and the crime of apartheid; and the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery. The Drafting Committee had also found it difficult to identify which version of a treaty would be the appropriate one to include in the draft annex. For example, a number of amendments to the definition of war crimes in article 8 of the Rome Statute had been adopted, but not all had been widely ratified by the States Parties to the Statute.

Furthermore, the Drafting Committee had taken into account the fact that it was not only treaties that were relevant to the definitions of the crimes included. Each of the crimes also had a definition under customary international law, which applied as between States not bound by a relevant treaty and could also apply to events that had occurred before the entry into force of a treaty for the relevant State.

The possibility of including the definitions of the crimes in the text of the draft articles themselves had been considered. However, such an approach would be outside the scope of the Commission's work on the topic and would make the draft articles excessively long.

The phrase "according to", in the phrase "as defined according to the applicable rules of international law", had been chosen instead of the word "by" to accommodate the possibility that States might consider their definitions under domestic law to be relevant. It was intended to emphasize that the normative source of a definition was less important than its conformity with the definition of the crime applicable under international law as between the States concerned.

The approach taken by the Drafting Committee circumvented the difficulties he had mentioned earlier by making it clear that it was the applicable international law that provided the definitions that delimited the exception to immunity *ratione materiae*. It was intended to point the reader to the commentary, in which the factors he had mentioned would be addressed. Overall, the Drafting Committee was of the view that, should States proceed to the negotiation of a treaty on the basis of the draft articles, they would be in a position to resolve the question of definitions in an appropriate and mutually agreeable way.

The Drafting Committee had also considered the possibility of adding an additional paragraph containing a "without prejudice" clause to draft article 7. The proposed paragraph would have specified that draft article 7 was without prejudice to the application of immunity *ratione materiae* if provided for in an international treaty, as between States Parties to such treaty, or under customary international law. The addition of such a paragraph was ultimately considered unnecessary, because any immunity of State officials provided for by special rules of international law agreed to between States fell within the scope of draft article 1 (2). That point would be made clear in the commentary to draft article 1. It had also been suggested that amendments to draft article 14 (3) could be considered in due course, to emphasize the need for the forum State to take any relevant special rules into account when determining the existence of immunity.

In conclusion, the Drafting Committee had adopted draft article 7 as amended. Some members had expressly disassociated themselves from draft article 7, indicating that it did not reflect customary international law, and had not joined the consensus on its adoption.

The title of draft article 7 remained "Crimes under international law in respect of which immunity *ratione materiae* shall not apply", as adopted on first reading.

The Drafting Committee had provisionally adopted draft article 8 with some modifications to the text adopted on first reading. Now divided into two paragraphs, as the Special Rapporteur had proposed in his second report, draft article 8 clarified the temporal and substantive scope of Part Four of the draft articles, which contained the procedural provisions and safeguards governing the application of immunity of State officials from foreign criminal jurisdiction. The formulation of the two paragraphs was based on the first-reading text.

The first paragraph of draft article 8 dealt with situations in which the procedural provisions and safeguards of Part Four applied. Three modifications had been made. The first two were intended to streamline the text: the wording had been simplified by replacing "shall be applicable" with "shall apply", and the words "current or former" had been deleted, since the inclusion of former State officials was already covered by the definition set out in draft article 2 (a), which was currently before the Drafting Committee. The third change was the replacement of the phrase "in relation to any exercise of criminal jurisdiction" with "in any situation that may involve the exercise of criminal jurisdiction". Those amendments had been guided by the desire to maintain a broad but precise formulation that ensured the application of due process at all relevant stages of criminal proceedings and with respect to all draft articles in Parts Two and Three.

The Committee's discussions had reflected a careful effort to strike an appropriate balance in the scope of Part Four and avoid an overly expansive or restrictive approach that might have unintended consequences. A central question raised during the debate had been whether the proposed wording sufficiently covered the application of Part Four to the situations set out in draft article 7.

The Drafting Committee had been faced with the possibility that a reference to situations that might "affect the immunity of an official" could be interpreted as excluding cases where immunity was considered inapplicable *ab initio*, thus potentially allowing a forum State to disregard procedural safeguards on the basis of a unilateral determination that draft article 7 was involved. A number of proposals had been considered to address that concern. The first had been to remove the reference to immunity entirely, replacing it with a broader formulation such as "may affect an official of another State", in order to ensure that the provision also covered cases where immunity did not apply. Another proposal had sought to introduce a more specific reference to the "existence or application" of immunity, to make it clear that Part Four would apply not only in cases where immunity had been confirmed, but also when it was still to be determined or had already been refused.

At the same time, the Drafting Committee had been aware of the need to avoid an excessive expansion of the scope of the provision. Too broad a formulation could lead to the activation of due process in circumstances not covered by the draft articles, such as when a State official was contacted merely as a witness. That concern was particularly related to the risk of inadvertently extending the procedural framework to situations that fell outside the concept of immunity from foreign criminal jurisdiction.

To mitigate those concerns, the adopted text preserved a nexus with the exercise of criminal jurisdiction while remaining broad enough to cover cases related to draft article 7 and maintained a functional connection with legal action before the courts, while reflecting the contingent and preliminary nature of many of the procedural safeguards provided for in Part Four.

Another important point discussed by the Drafting Committee had been the definition of a scope of application for draft article 8 that was broad enough to cover all the provisions of Part Four. The Committee had considered that provisions such as draft articles 10 and 14 referred to obligations that arose before or during the early stages of the procedure and that draft article 8 should therefore be interpreted as a general rule establishing the applicability of the procedural framework in all such instances. The Drafting Committee had sought internal coherence and consistency, considering that the general scope set out in draft article 8 was at least as broad as the broadest provision of Part Four. In any event, each provision of Part Four would apply on its own terms and would be further clarified in the commentary.

A number of suggestions had been considered as to the term used to define the scope of application. Proposed alternatives to the word "instance", in the wording proposed in the

Special Rapporteur's second report, had included "case", "circumstance" or "situation". After considering the implications of each, the Committee had agreed that "situation" was preferable, "instance" having been considered by some to be too formal or obscure, while "case" risked suggesting a formal legal procedure, which might unduly limit the scope of application.

The second paragraph of draft article 8 addressed the applicability of Part Four to the draft articles in Part Two and Part Three, relating to immunity *ratione personae* and immunity *ratione materiae*, respectively. The first-reading text had largely been retained, with only minor adjustments, including the replacement of the phrase "that concerns any of" with "The present Part is applicable to" before the phrase "the draft articles contained in Part Two and Part Three" to facilitate the division of the draft article, as adopted on first reading, into two paragraphs.

The inclusion of a third paragraph had been proposed, with a "without prejudice" clause aimed at safeguarding States' treaty obligations under other international instruments, in particular the obligations of mutual legal assistance and *aut dedere aut judicare,* the obligation to extradite or prosecute, as reflected in international conventions.

While the Drafting Committee recognized the desirability of addressing those concerns, it had decided to defer consideration of the issue until the discussion of the fifth paragraph of draft article 15, which contained a similar clause in the context of the transfer of criminal proceedings. The decision to defer the matter to that debate, which would take place in the Drafting Committee in 2026, had also been motivated by the realization that a more thorough discussion on the issue of immunities and obligations to prosecute or extradite might be warranted before deciding whether to include a new paragraph and where best to position it in the draft articles.

The title of draft article 8 remained "Application of Part Four", as adopted on first reading.

The Drafting Committee had provisionally adopted draft article 9 with a minor change to the first-reading text, specifically, the addition of the words "against an official of another State" at the end of paragraph 2 (a) for clarity and to align with the structure of paragraph 2 (b). The Drafting Committee had also considered the proposal made by the Special Rapporteur in his second report, inspired by comments by one Member State, to add the words "as far as practicable" to paragraph 1. The Drafting Committee had recognized that the forum State would require a certain degree of flexibility in order to fulfil its obligation under draft article 9 but had considered that the first-reading text already provided such flexibility to States. Concern had also been expressed that the addition implied, *a contrario*, the existence of situations where the forum State was not obligated to examine immunity because it was not practicable, which would weaken the provision. Paragraph 1 had therefore been retained unchanged.

The title of draft article 9 remained "Examination of immunity by the forum State", as adopted on first reading.

The Drafting Committee recommended that the Commission should take note of draft articles 7, 8 and 9 at the current stage. In accordance with the Commission's established practice, it would adopt the draft articles at its next session, to allow time for the preparation of commentaries.

Mr. Patel said that he wished to emphasize once again the importance of preserving friendly relations among States, the need to strike a balance between the principles of sovereign equality and accountability, and the imperative of maintaining international peace and security. Given that draft article 7 failed to achieve the required balance, he wished to reiterate his dissent.

The phrase "crimes under international law", while essential in the fight against impunity, remained ambiguous, particularly in the context of the non-application of immunity *ratione materiae*. The absence of a general criterion risked an unwarranted broadening of exceptions to such immunity, potentially undermining legal certainty and the principle of State sovereignty. That ambiguity was further compounded by the breadth of categories that could fall under the term. For instance, in his first report on the draft Code of

Offences against the Peace and Security of Mankind (A/CN.4/364), submitted in 1983, Special Rapporteur Mr. Thiam had identified three broad categories of crimes under international law: first, crimes under international law *stricto sensu*, or crimes which were international by their nature, including crimes which adversely affected a common heritage of mankind; second, crimes which had become international solely for the purposes of punishment; and, third, cases in which a combination of circumstances had caused the offence to be transferred from the realm of internal law to that of international law. While he appreciated that attempt at categorization, he did not necessarily endorse it; his aim was to highlight the breadth of, and the conceptual ambiguity surrounding, the phrase "crimes under international law".

Crimes under international law constituted the crimes that were of most concern to the international community as a whole. Notably, even the Rome Statute of the International Criminal Court did not purport to establish jurisdiction over all crimes under international law; article 5 thereof limited the jurisdiction of the Court to the "most serious crimes of concern to the international community as a whole", while the sixth preambular paragraph reminded States Parties of their duty to exercise criminal jurisdiction over those responsible for "international crimes", which could be interpreted as a broader concept than the core crimes listed in article 5. International crimes could also include terrorism, piracy and drug offences. Similarly, the *travaux préparatoires* of the Convention on the Prevention and Punishment of the Crime of Genocide made reference to other crimes considered to be "crimes under international law" which were, nevertheless, not subject to international repression, such as the counterfeiting of currency, which remained under the jurisdiction of national authorities.

The recognition of a crime under international law must rest on express recognition by States. He had proposed several times that such recognition should be grounded in positive law and could be reflected in one of two possible formulations, namely "under customary international law and recognized in domestic law" or "treaties ratified by the concerned State". For instance, the Genocide Convention expressly recognized genocide as a crime under international law, leaving no room for ambiguity. The determination of a crime under international law therefore could not be left open-ended and must be based on positive law. The objective of limiting "express recognition" to the two aforementioned forms was to uphold the consent of States in the recognition of crimes and to prevent determination based on sources other than positive law. Positive law was emphasized on the basis of the principle of legality, since the status of customary international law required *lex certa* and *lex scripta*, and the fact that customary international law and general principles of law were inherently less specific than written sources of law. Recognition in domestic legal systems was essential to ensure the clarity and legal certainty of the contents or elements of a crime. In addition, even conventions recognized the limitations of existing definitions in international law. For example, article 1 (2) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provided that the definition of torture set out in article 1 (1) thereof was "without prejudice to any international instrument or national legislation which does or may contain provisions of wider application", highlighting the relevance of domestic law and other international instruments to which a State was a Party.

He was therefore of the view that a set of general criteria must be formulated and thoroughly discussed before determining which crimes should warrant exceptions to immunity *ratione materiae*.

The absence of general criteria raised the fundamental question of why certain crimes appeared on the list while others did not, particularly when the list appeared to be non-exhaustive. That question underscored the need for clarity and consistency through the formulation of general criteria to guide the inclusion of crimes that might justify exceptions to immunity *ratione materiae*.

Furthermore, crimes under international law were evolving in nature. While he did not intend to classify them in binary terms such as "traditional" crimes like genocide versus "emerging" crimes, the Special Rapporteur's decision to retain a non-exhaustive list acknowledged that evolving nature. His own view was that there was still a need for clarification as to why terrorism or acts of terrorism had not been included in the list, despite posing a threat to international peace and security and being widely regarded as one of the

most serious crimes of concern to the international community as a whole. As he saw it, that omission arose directly from the lack of general criteria for the identification and inclusion of crimes under international law.

The first paragraph of draft article 7 set out a list of crimes without providing clarity on their legal definitions. He appreciated the Drafting Committee's decision to delete the annex referring to specific treaties and conventions, but it was equally important to ensure that the commentary did not transpose or implicitly endorse legal definitions derived from instruments that had not attained universal acceptance. It was essential to respect the consent of States, particularly Asian and African States and those that were not Parties to various international conventions. Upholding that principle was crucial for maintaining the inclusivity and progressive development of international law.

The list of "crimes under international law" failed to capture the definitional nuances and thresholds that distinguished universally recognized international crimes from others with conditional internationalization. For example, genocide was expressly affirmed as an "international crime" in the preamble of the Genocide Convention. By contrast, crimes such as enforced disappearance attained the status of international crimes only when committed in a widespread or systematic manner, aligning them with the contextual elements of crimes against humanity and highlighting the nuanced thresholds that distinguished international crimes from ordinary offences.

The fundamental question was whether the exception to *ratione materiae* was recognized by customary international law and, more specifically, whether such an exception was applicable in respect of all crimes under international law. He strongly objected to the assumption of non-applicability of immunity. In addition, the Special Rapporteur had not clarified in his report the concept of "silence as State practice", meaning deliberate inaction by States in prosecuting crimes allegedly committed by foreign State officials, as identified in the commentary to the Commission's conclusions on identification of customary international law. Conclusion 6, which addressed forms of practice, recognized that inaction could, under certain circumstances, constitute practice, provided it amounted to deliberate abstention. As noted in the commentary to that conclusion, one example of deliberate inaction as State practice was a State's abstention from instituting criminal proceedings against foreign State officials. Such inaction was due not to lack of awareness or capacity, but to a legal belief in the continuing applicability of immunity *ratione materiae*. As the International Court of Justice had emphasized in the *North Sea Continental Shelf* cases, the fact that a State refrained from acting because it considered itself legally obliged to do so could provide evidence of the existence of a rule of customary law. He was grateful to the Chair of the Drafting Committee for touching on that aspect in his report.

Conventions on international crimes were founded on a strong commitment to international cooperation and the preservation of friendly relations among States, while simultaneously promoting mutual legal assistance and accountability for such serious crimes. For instance, the Genocide Convention provided for remedies to prevent impunity. Under article 4 of the Convention, public officials did not enjoy immunity in respect of genocide. The solution to impunity was already provided for in article 6, namely prosecution by a competent tribunal of the State in the territory of which the act had been committed or by an international tribunal. The solutions provided respected the immunity of State officials from foreign criminal jurisdiction. Otherwise, article 6 would not provide for territorial jurisdiction. A thorough examination of State practice was therefore essential to ensure that the draft article did not conflict with existing treaty obligations based on international cooperation and sovereign equality among States.

"International crimes" were acts that gave rise to universal jurisdiction. More specifically, they were offences that international law permitted any State in the world to prosecute, regardless of whether that State had a connection with the crime, the perpetrator or the victim. Cases in which there were several forum States would give rise to procedural issues. It was therefore imperative to clarify a number of questions. The first was whether there was any established order of priority in the exercise of jurisdiction and, more specifically, whether States with a special interest, such as those where the crime had been committed – those with territorial jurisdiction – or whose nationals had been affected – those with active personality jurisdiction – had priority over States with a general interest, such as

those asserting jurisdiction solely on the basis of universal jurisdiction, as a Party to an international convention. The second question was whether cognizance by a domestic court of one State of an alleged international crime barred other domestic courts from taking cognizance of it, or rather, whether principles such as *lis alibi pendens*, which mostly applied in private law matters, should be integrated as a safeguard against multiple prosecutions. Third, with regard to the forum State, the exercise of jurisdiction by virtue of the active personality principle might be more appropriate as a safeguard against multiple prosecutions, with the option for cooperation from other States to provide evidence and information through well-recognized mechanisms such as mutual legal assistance. That approach addressed language and cultural barriers and balanced the need to uphold accountability with the preservation of friendly relations among States. Lastly, it must be remembered that several States did not have criminal provisions governing, for example, crimes against humanity or enforced disappearance, as they did not support the definition set out in international law.

For the reasons he had set out, and with the aim of upholding the consent of States in the formation of international law, he wished to propose that the beginning of the first paragraph of draft article 7 should be reformulated to read: "Where States have expressly waived the application of *ratione materiae* immunity in relation to international crimes, such immunity shall not apply to the exercise of foreign criminal jurisdiction with respect to the following crimes under international law." In the second paragraph of the text proposed by the Special Rapporteur, the formulation "their definition in the treaties enumerated in the annex to the present draft articles" should be replaced with "international treaties to which the State concerned is a Party, or under customary international law as recognized by States". In the commentary to draft article 7, it should be clarified that such recognition by States should be reflected in their domestic legislation, which was essential for the purposes of determining "elements of crime" and for complying with the principle of legality.

Mr. Zagaynov said that the Commission's plenary debate on the topic had only strengthened his opinion that draft article 7 had no foundation in international law. There was little relevant practice to support the draft article. The Special Rapporteur's second report, in particular, had not received the necessary support of States; the draft article could not be described as contributing to the progressive development of international law. The problems related to the proposed list of crimes in respect of which immunity *ratione materiae* would not apply had not been resolved; furthermore, a compelling explanation had yet to be provided as to why that list had been expanded ahead of the second reading even though no practice had been presented in the second report to support it. Adopting such an approach to the existence of exemptions would likely have a negative impact on international relations, and there was no guarantee that it would contribute to combating impunity. It was unfortunate that the many proposals to improve the text of the draft article had been rejected. He wished to dissociate himself from the Drafting Committee's decision on draft article 7 and reserve his position regarding the final text of the draft article, together with the commentary thereto, if and when they were presented for adoption by the Commission.

Mr. Fathalla said that, although he had joined the consensus on draft article 7, clarification was still needed regarding a number of issues, including whether all the crimes in respect of which immunity *ratione materiae* should not apply were reflective of international law; whether the concept of a "without prejudice" clause would be reflected in the commentary, given its great importance for the text of the draft article as provisionally adopted; and how draft article 7 was related to the draft articles contained in Part Four, as the latter contained safeguards that could guarantee the correct and fair application of draft article 7.

Mr. Argüello Gómez said he wished to recall that when, at its sixty-ninth session, the Commission had provisionally adopted, by a vote, draft article 7, it had been on the understanding that safeguards would be developed to guarantee a fair and apolitical process. The idea had been that, although the draft articles would not be reflective of the current status of international law, they would express the aspiration of combating impunity through the development of international law, which States would be free to pursue if and when the draft articles became a treaty. Despite all the Commission's efforts since then, the draft articles still did not contain the procedural safeguards, based on the principle of good faith, that would

guarantee a fair and apolitical process and achieve a balance between the fight against impunity and friendly relations between States. In reality, the current text did nothing more than facilitate the exercise of universal jurisdiction; it did not offer effective safeguards for State officials.

Mr. Jalloh said that, as a member of the Drafting Committee for the topic at hand, he was glad that the Committee had worked on the basis of consensus and had adopted its report without a vote; it was important that the Commission should be seen to be speaking with one voice, especially at such a sensitive time for international law and international relations.

He endorsed the Commission's decision to take note of the draft articles, including draft article 7, which had finally rectified a legal error committed at the Commission's sixty-ninth session, when the Commission, then in a different composition, had failed to include the crime of aggression among the list of the most serious crimes under international law in respect of which immunity *ratione materiae* would not apply. That failure had undermined the Commission's long-standing position of condemning the crime of aggression as one of the most serious crimes of concern to the international community as a whole. Indeed, in 1946, the Nürnberg Tribunal had aptly described that crime as the supreme international crime differing only from other war crimes in that it contained within itself the accumulated evil of the whole. It had been clear, since the adoption of General Assembly resolution 33/14 (XXIX), by which the Member States of the United Nations had adopted a definition of aggression by consensus, and the inclusion of the crime of aggression in the Rome Statute of the International Criminal Court, that that crime could give rise to criminal proceedings in domestic and international courts and that, in the view of many experts in the field, it constituted customary international law. Indeed, the International Criminal Court already had jurisdiction over the crime of aggression precisely because States had agreed to codify the crime and ensure its protection nationally and internationally. Several instruments developed by the Commission referred to the crime of aggression, including Principle VI (a) of the Nürnberg Principles, article 2 (a) of the 1954 draft Code of Offences against the Peace and Security of Mankind, article 56 of the 1996 draft Code of the same name, and article 20 (b) of the 1994 draft statute for an international criminal court. Furthermore, some 40 States had passed domestic legislation prohibiting the crime of aggression.

He also welcomed the inclusion of the crimes of slavery and the slave trade, as proposed by Sierra Leone and several other States, in the list of crimes in respect of which immunity would not apply. Those crimes had long been condemned by international law, including in the 1926 Slavery Convention and the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, both of which were now considered customary international law.

Mr. Fife said that, in his view, the Chair of the Drafting Committee had produced an even-handed, precise and accurate reflection of the Committee's debate.

Mr. Ma said that, as he had stated in the Drafting Committee, he still had serious concerns about draft article 7. In his opinion, the term "crimes under international law" was unclear. The main problem was that it did not distinguish between crimes under international treaties and those under customary international law, which might be binding on non-contracting States or impose new obligations on States. In his view, the application of draft article 7 should be without prejudice to the application of the existing rules of international law. International treaties were only binding upon States Parties, whereas customary international law was binding on all States except for those that were persistent objectors. At the current session, he had proposed the addition of a "without prejudice" clause containing the elements he had just mentioned, but unfortunately his proposal had not been accepted. He was therefore still unable to join the consensus on draft article 7.

Mr. Grossman Guiloff (Special Rapporteur) said that he wished to express his thanks to the Chair of the Drafting Committee for producing such a balanced report of the Committee's debate and for his leadership, which had enabled the Committee to provisionally adopt the draft articles without a vote, even though a few members had not joined the consensus. He further wished to express appreciation for members' contributions to the work of the Commission more generally. The Commission was a unique body, in which lawyers from different legal traditions could share their opinions freely and with the utmost

legal rigour. Indeed, the Commission enjoyed a different status from the Sixth Committee in that its members were completely independent politically. Nevertheless, the Commission had been established by the Member States and remained in a constant dialogue with them, specifically through the Sixth Committee. Proposed changes therefore had to be supported by States' comments. The Drafting Committee had shown great flexibility, allowing numerous changes to be made to the draft articles and the commentary thereto. In addition to emphasizing a basis in international law, the Committee had highlighted the need to reconcile the sovereign equality of States and issues such as impunity and accountability. In particular, he took note, for the purpose of his next report, of members' comments on safeguards and on the criteria established in the commentary for identifying certain crimes. He hoped that it would one day be possible to make a recommendation to the General Assembly, through the Sixth Committee, to hold a diplomatic conference to consider the draft articles as part of a future treaty.

The Chair said he took it that the Commission wished to take note of the report of the Chair of the Drafting Committee.

It was so decided.

Settlement of disputes to which international organizations are parties (agenda item 6)

Oral report of the Chair of the Working Group on settlement of disputes to which international organizations are parties

Mr. Reinisch (Chair of the Working Group on settlement of disputes to which international organizations are parties) said that the Working Group had held only one meeting since its establishment at the Commission's 3702nd meeting. The Working Group had been created to allow for a preliminary exchange of views on his third report as Special Rapporteur for the topic (A/CN.4/782) because, as a consequence of the reduction in the length of the current session, the Commission had been unable to consider the report in plenary.

At the meeting of the Working Group, he had recalled the informal consultations held on the topic at the Commission's seventy-fifth session and had briefly introduced the report, which he would introduce in full in plenary at the seventy-seventh session. Members of the Working Group had generally expressed appreciation for the thoroughness of the report, which focused on disputes between international organizations and private parties.

Several members had expressed support for distinguishing in the draft guidelines between such disputes on the basis of the parties involved, rather than the subject matter or applicable law, whereas others had encouraged him to still distinguish according to the applicable law in the draft guidelines, where appropriate. It had been highlighted that disputes between international organizations and private parties made up the bulk of the dispute settlement practice of international organizations. The evolution of the scope of the topic since it had first been proposed in the 2016 syllabus towards a more inclusive approach had been noted. It had also been observed that it was possible for a dispute to involve an international organization, a State and private parties. Some members had offered further examples of the relevant practice of international organizations and the case law of national courts.

Several members of the Working Group had expressed views on the draft guidelines proposed in the report. Concerning draft guideline 7, the possibility of defining "private parties" in the text had been raised. It had also been noted that the proposed title, "Disputes between international organizations and private parties", was not fully aligned with that of the analogous provision, draft guideline 3, and would be more appropriate as the title of a part of the draft guidelines, comprising the provisions proposed in the third report.

A number of members had suggested modifying draft guideline 8 to take into account the power imbalance between international organizations and private individuals. It had been observed that the notion of good faith was often interpreted differently in different legal systems, and that the reference to "a spirit of cooperation" did not adequately take that power imbalance into account. Considering the increasing financial challenges facing many international organizations, the Working Group had been encouraged to consider the

possibility that an international organization might be the less powerful party in a dispute with a private entity.

A number of members had supported the further development of draft guidelines 9 and 10, on the jurisdictional immunity of international organizations and access to justice, respectively, with a view to clarifying the relationship between the two concepts. Although immunity had been excluded from the scope of the topic in the 2016 syllabus, several members had argued that it was necessary to address immunity in greater detail. The need to achieve the right balance between immunity and access to justice had been highlighted. It had been noted that effective access to justice was particularly important to private parties. Several members had reflected on whether the word "should" or "shall" was most appropriate in each of the provisions. The possibility of merging draft guidelines 9 and 10 had also been raised. Additionally, the deletion of the words "arbitration" and "judicial settlement" in draft guideline 10 had been proposed so as to refocus the provision on alternative means of dispute settlement.

Concerning draft guideline 11, several members had highlighted the importance of explaining the relevant human rights, both under customary international law and applicable treaties, in the commentary. The additional relevance of labour standards and other protections for private parties to contracts had been underscored.

A number of members had made suggestions for additional draft guidelines addressing legal issues discussed in the report. They included the exercise of diplomatic protection in relation to an international organization; distinguishing cases where arbitration was based on mutual consent from those where unilateral recourse to arbitration was possible; and the right to an effective remedy. It had also been proposed that further questions relating to compensation should be explored.

Members of the Working Group had been invited to express their views on the possibility of developing model clauses. In general, members had advocated a cautious approach, emphasizing that the preparation of model clauses would require both careful drafting and substantial additional time. Some members had observed that a large number of model clauses would be necessary to address the diversity of the relevant practice. One alternative suggested was for the Commission to identify sample provisions. According to another view, the identification of examples of effective and reasonable alternatives to judicial and arbitral dispute settlement would be of most use to States and international organizations. Further emphasis on practical guidance to States, international organizations and private parties had also been encouraged.

Overall, members of the Working Group had expressed the hope that the Commission would be able to proceed expeditiously with its work on the topic at its seventy-seventh session. Several members had encouraged him to prepare commentaries in advance of that session to allow for the possible conclusion of the first reading. He was open to that approach and had begun exploring the practicalities of it in consultation with the secretariat.

He intended to reflect on the views and suggestions expressed in the Working Group and hoped that the progress made at the current session would facilitate work towards the conclusion of the first reading on the topic at the seventy-seventh session. The secretariat had circulated a preliminary bibliography and table of cases, and he would appreciate receiving additional suggestions in order to prepare a revised version for the conclusion of the first reading.

The Chair said he took it that the Commission wished to take note of the oral report of the Working Group on settlement of disputes to which international organizations are parties.

It was so decided.

Non-legally binding international agreements (agenda item 9) (A/CN.4/784)

Oral report of the Chair of the Working Group on non-legally binding international agreements

Mr. Forteau (Chair of the Working Group on non-legally binding international agreements) said that the Group had held only one meeting since its establishment as a working group of the whole at the Commission's 3702nd meeting. At that meeting, he had introduced his second report as Special Rapporteur on the topic (A/CN.4/784), which included an introduction to the general elements – the purpose and scope of the topic, the use of terms and a possible "without prejudice" clause – and a study of the first substantive issue of the topic, namely the distinction between treaties and non-legally binding international agreements. He had briefly mentioned in that context the judgment of the International Court of Justice handed down on 19 May 2025 in the case *Land and Maritime Delimitation and Sovereignty over Islands (Gabon/Equatorial Guinea)*, which appeared to confirm what he had intended to reflect in the draft conclusions proposed in the report with regard to the approach to follow in assessing whether or not a given agreement was legally binding under international law. He proposed four draft conclusions for the introductory part and two draft conclusions on the general approach to be followed to assess whether an agreement was legally binding or not.

The aim of the meeting of the Working Group had been to have a very preliminary exchange of views on the second report, in particular with a view to helping him identify how best to prepare for the seventy-seventh session. Members had expressed their regret at the lack of time for the consideration of the second report at the current session; he fully shared their frustration.

Members of the Working Group had generally expressed appreciation for the second report, especially for its cautious and non-prescriptive approach and the fact that it took into account contemporary practice and the views of States while remaining concise. They had also stressed again the great practical importance of the topic. From the preliminary exchange of views, it seemed that the main challenge would be to strike the right balance between the need to propose texts that could provide more legal certainty in the field while maintaining flexibility.

Members had welcomed the fact that the third report would analyse the elements of the aforementioned judgment of the International Court of Justice, including the indicators used to determine whether a document was a treaty or a non-legally binding agreement. Some members had expressed the view that the Court's emphasis in that judgment on the intention of the parties provided additional support for the approach taken in the second report and some of the proposals on the possible indicators.

It had been highlighted that the purpose of the topic was to clarify the features of non-legally binding instruments and help distinguish them from treaties. Some members had expressed the view that some of the content of proposed draft conclusion 1 on the purpose of the topic could be better addressed in the commentary and that draft conclusion 3 on the scope should be shorter, in line with the usual practice.

Concerning draft conclusion 2, differing views had been expressed about the use of the term "agreements" in the title of the topic. Several members had expressed support for that term, in particular in the light of the *travaux préparatoires* and text of the Vienna Convention on the Law of Treaties. Some members had been of the view that the term might be misleading and problematic in some languages or legal systems and had argued that other possible terms, such as "instruments", should be considered. Other members had said that, while they would go along with the use of the term "agreements" for the moment, that was without prejudice to a final decision on the issue once the draft conclusions had been discussed in the Commission and the Sixth Committee. It had been noted that, if the Commission were to opt for an alternative term, that term ought to be an improvement on "agreement" and should not give rise to any new problems. A suggestion had been made to refer to the fact that non-binding agreements were not governed by international law. Some proposals had also been made to bring the title in the English version into line with the other language versions. Clarity had also been requested about the relationship between non-

legally binding international agreements and Article 38 of the Statute of the International Court of Justice.

Support had been expressed for the scope of the topic to be limited to written instruments between States, between States and international organizations, and between international organizations, as proposed in draft conclusion 3. Some members had been of the view that further study regarding agreements concluded directly by ministries and sub-State actors at the international level was necessary, including to better define what specifically was meant by the term "sub-State actors". Some had questioned the utility of the "without prejudice" clause in draft conclusion 4.

Support had been expressed for proposed draft conclusion 5, on the assessment of whether an agreement was legally binding or not, which was considered to be in line with the Vienna Convention on the Law of Treaties and its *travaux préparatoires*. The analysis and suggested indicators that could be used to distinguish between treaties and non-legally binding international agreements had been considered useful. It had been suggested that the indicators could be included either in the draft conclusions themselves or as an indicative list in an annex. Some members had cautioned against being overly prescriptive when developing such a list.

When it came to the indicators, members had agreed that the intention of the parties should be the essential criterion and that the remaining elements should be considered in context. To stress the importance of the intention of the parties, a suggestion had been made to invert the order of paragraphs 1 and 2 of draft conclusion 5. Some members had provided comments on specific indicators whose relevance needed to be assessed, including the terms used, the circumstances of the conclusion of the instrument, the subsequent conduct of the parties, the presence of final clauses or clauses on the governing law, registration with the United Nations, dispute settlement provisions, and clauses providing expressly that the instrument was non-legally binding. Proposals had been made to classify the indicators and to elaborate on the weight to be given to them. Some members had highlighted that suggesting overly detailed indicators might risk limiting the evolution of State practice.

With regard to proposed draft conclusion 6, which dealt with a scenario where all the parties to an agreement expressly indicated that it was or was not legally binding under international law, a concern had been raised that the provision might raise real issues over the status of instruments that did not contain a specific clause identifying the parties' intention. A suggestion had been made to address that issue in the commentary.

In relation to the form of the final output, several members had expressed support for draft conclusions, while others had expressed openness to a different form. It had been argued that draft conclusions would provide useful clarification for States based on existing practices. On the other hand, the view had been expressed that draft conclusions would not be appropriate as they were reserved for the Commission's work in relation to sources of international law. Finally, support had been expressed for a renewed call to be made to States to share their practice on the subject.

As he had mentioned at the meeting, he intended to present a third report at the seventy-seventh session, taking into consideration the recent judgment of the International Court of Justice, the views of States in the Sixth Committee and any additional materials that became available concerning the practice of States. The report would address the second substantive issue of the topic, namely the possible legal implications of non-legally binding agreements. He would take fully into account all the remarks made at the current session in the Working Group. He had duly noted that the views expressed in the Working Group had been of a preliminary nature and were without prejudice to more substantial views to be shared when the second report was discussed in plenary at the seventy-seventh session.

The Chair said he took it that the Commission wished to take note of the oral report of the Chair of the Working Group on non-legally binding international agreements.

It was so decided.

The meeting rose at noon.