United Nations A/C.6/66/SR.26

General Assembly
Sixty-sixth session

Official Records

Distr.: General
7 December 2011

Original: English

Sixth Committee

Summary record of the 26th meeting
Held at Headquarters, New York, on Tuesday, 1 November 2011, at 10 a.m.

Chair: Mr. Petr Válek . . . . . (Czech Republic)

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11-57438 (E)

In the absence of Mr. Salinas-Burgos (Chile), Mr. Petr Válek (Czech Republic), Vice-Chair, took the Chair.

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

Agenda item 81: Report of the International Law Commission on the work of its sixty-third session (*continued*) (A/66/10 and Add.1[1])

1. **The Chair** invited the Secretary of the Committee to report on the actions taken by the Secretary-General, pursuant to paragraph 7 of resolution 65/26, with regard to the identification of options for supporting the work of the special rapporteurs of the International Law Commission.

2. **Mr. Mikulka** (Secretary of the Committee), speaking as Director of the Codification Division, recalled that the Secretary-General had submitted two previous reports highlighting the significance of the special rapporteurs for the work of the Commission and providing an overview of the assistance provided to the Commission and its special rapporteurs by the Codification Division (A/64/283 and A/65/186). The information contained in those reports remained valid. During the most recent reporting period, the Secretariat had continued to render assistance to the special rapporteurs on the topics considered during the Commission's sixty-third session.

3. The two previous reports of the Secretary-General had recognized the challenges that special rapporteurs confronted in their work and had noted that in the past, in acknowledgment of their unique role, they had received research grants in the form of honorariums on an exceptional basis. Such payments were not designed to compensate them for their services but rather to acknowledge, in a token manner, their priceless contribution to the work of the Commission. The Commission had repeatedly drawn attention to the impact of General Assembly resolution 56/272, in which the Assembly had decided to set all honorariums payable to members of the Commission, including special rapporteurs, at US$ 1 per year. It had raised the issue again in the report on its sixty-third session (A/66/10, paragraphs 399 and 400), emphasizing that the Assembly's decision compromised support for the research work of the special rapporteurs. Consideration of any option concerning honorariums fell within the competence of the legislative organs and, as stated in paragraph 24 of the 2010 report of the Secretary-General (A/64/283), the matter had to be seen in the overall context of resolution 56/272.

4. **Ms. Tveiten** (Norway), speaking on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden), said that the reports of the Special Rapporteur on the immunity of State officials from foreign criminal jurisdiction gave a thorough overview of the issues involved and would provide a solid basis for future work. The concept of sovereignty was closely linked to that of the equality of States, and both were reflected in the maxim *par in parem non habet imperium*, in accordance with which no sovereign State could claim jurisdiction over another. Traditionally, those notions had crystallized into positive legal obligations emanating from international customary law. Nevertheless, in the discussions leading to the adoption of the United Nations Convention on Jurisdictional Immunities of States and Their Property in 2004, a number of notable developments of law had been recognized, including the idea that the exercise of jurisdiction by a State's courts over commercial transactions between its national or juridical persons and another State could not be construed as constituting a threat to the sovereign independence and equality of the latter State. As rules of customary international law changed over time, a closer look should be taken at developments that might shed light on the scope *ratione materiae* of acts carried out by State officials in the exercise of their functions. The requirements for immunity *ratione personae* should also be considered in the light of the development of international law, particularly relating to international crimes of concern to the international community as a whole.

5. The immunity of State officials should not be equated with impunity or lack of responsibility. Pursuant to articles 6 and 7 of the Charter of the International Military Tribunal, Nuremberg, it had been established that the principle of international law that protected the representatives of a State under certain circumstances could not be applied to acts condemned as criminal by international law, and that the perpetrators of such acts, whether heads of State or other government officials, could not shelter themselves behind their official position to escape punishment. The Tribunal's judgment and the

[1] To be issued.

principles of international law recognized by its Charter had been affirmed in General Assembly resolution 95 (I), adopted on 11 December 1946, which continued to have normative relevance. Although the Charter concerned the establishment of a particular form of international jurisdiction, the principle established therein was general; thus, there could be no doubt as to the potential personal responsibility of State officials who participated in crimes against humanity and other grave crimes under international law.

6. In his preliminary report (A/CN.4/601), the Special Rapporteur had interpreted his mandate as excluding immunity from international criminal jurisdiction, an approach which the Nordic countries considered entirely relevant. However, important developments relating to international criminal justice had contributed significantly to the normative production and clarification of rules pertaining to the scope for the invocation of immunities. International criminal justice therefore had a bearing on the general state of the law of immunities. Of course, practical considerations necessitated a coherent approach to immunity issues — for example, where a case was referred from an international tribunal to a domestic court. Nevertheless, consideration of the topic should take into account the rules pertaining to immunity before international jurisdiction, not only those applicable within the jurisdiction of the forum State. The Commission should take full cognizance of resolution 95 (I) and other sources of international law, including not only international conventions but decisions of international and national courts, as part of a broader movement towards the recognition of crimes under international law. An important priority in its work should be to promote a greater coherence of international law, taking into account major developments and their crystallization over time.

7. The Nordic Governments agreed with the Special Rapporteur that the immunity of a State official derived largely from State immunity, that immunity was the general rule and that absence of immunity in a particular case was the exception to that rule. However, the standard that had been applied in determining exceptions to immunity was perhaps too strict. Constructivist approaches that failed to take fully into account important developments of international law should be avoided. As had been pointed out by Judges Higgins, Kooijmans and Buergenthal in the 2002 International Court of Justice judgment in the case concerning the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo vs. Belgium)*, the notion of permissible jurisdiction and the law on immunity were constantly evolving, a view that contrasted with the more static approach evident in the reports of the Special Rapporteur.

8. The Special Rapporteur's approach to defining the scope of immunity *de lege lata* was the most sensible one to take in preparing for a future drafting process, provided that his findings could foster the widespread support needed. She was pleased that account had been taken of some important recent sources of law, such as the clarifications provided by the International Court of Justice in the case concerning *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti vs. France)*; the incorporation of the Court's observations to the effect that any immunity of State officials other than heads of State or Government or ministers of foreign affairs must be actively claimed by the official's home State was especially welcome. Another interesting idea that might be drawn from the Court's judgment was the possible correlation between a State invocation of immunity for one of its officials and its automatic assumption of responsibility for any corresponding internationally wrongful act committed by that official. The Special Rapporteur appeared to have acknowledged that correlation by arguing, in paragraph 24 of his report, that there were no objective grounds for drawing a distinction between the attribution of conduct for the purposes of responsibility and for the purposes of immunity. That argument seemed inherently logical; however, there might be reason to distinguish between such a presumption and the final determination of responsibility; indeed, the underlying purposes of the rules on the responsibility of States for internationally wrongful acts and the rules on the immunity of State officials were quite different.

9. The Commission's future work on the topic should reflect the well-structured and analytically strong approach of the reports submitted thus far but should be supplemented with a more functional analysis, particularly with respect to the distinction between acts and situations that required immunity for the purpose of allowing States to act freely and without interference on the inter-State level, and those in which immunity was not needed for that purpose.

10. With regard to the topic of the obligation to extradite or prosecute (*aut dedere aut judicare*), the Nordic countries shared the Special Rapporteur's view that the duty to cooperate in the fight against impunity underpinned the obligation to extradite or prosecute and trusted that the Sixth Committee's work on the topic would be guided by the common aim of combating impunity, which was a key policy objective of their Governments. Together with the principle of universal jurisdiction, the obligation to extradite or prosecute served to ensure that there would be no safe haven for the perpetrators of international crimes. Clarifying the rules of international law on the issue would help ensure maximum effect of, and compliance with, the obligations established under existing rules and provide a basis for determining where additional rules might be required. As was evident from the comments of the Commission and the Special Rapporteur, there were significant differences of opinion about fundamental issues relating to the sources of the obligation and the existence of a general duty to cooperate; those differences were addressed in the revised version of draft article 2 (Duty to cooperate), contained in the Special Rapporteur's fourth report (A/CN.4/648).

11. Her delegation believed that there was probably a basis in customary international law for an obligation to extradite or prosecute, but a more thorough analysis of specific crimes and identification of the core crimes that gave rise to the obligation was needed. The Commission could undertake that analysis while awaiting the judgment of the International Court of Justice in the case of *Questions relating to the Obligation to Prosecute or Extradite (Belgium vs. Senegal)*. The Nordic Governments were open to exploring, on a more informed basis, the possible progressive development of international law on the matter and wished to emphasize the importance of the Commission's continued attention to the topic during the quinquennium commencing in 2012.

12. Turning to the topic of treaties over time, she noted its correlation with several other topics, notably that of the fragmentation of international law. An understanding of how different adjudicatory bodies made use of subsequent agreements and practice could afford a broader view of the coherent application and integrated interpretation of treaties in accordance with the principles reflected in article 31 of the Vienna Convention on the Law of Treaties. The Nordic countries were in favour of enhanced reliance by adjudicatory bodies on the general rule of treaty interpretation set forth in that article and of continued discussion of the extent to which the nature of certain treaties might affect the approach of such bodies, the recognition of subsequent agreements and practice, and the other conclusions contained in the second report of the Chairman of the Study Group on the topic, entitled "Jurisprudence under special regimes relating to subsequent agreements and subsequent practice". It was important for the Commission to agree on a definition of the concept "subsequent practice"; it should therefore seek input on the matter from governments.

13. Concerning the topic of the most-favoured nation clause, the Commission's methodical efforts to identify the normative content of various such clauses could make an important contribution to the coherence of international law and was in keeping with the Commission's analysis of the fragmentation of international law, grounded in articles 31 to 33 of the Vienna Convention on the Law of Treaties. Examination of the practice of the General Agreement on Tariffs and Trade (GATT), the World Trade Organization (WTO), the Organisation for Economic Co-operation and Development (OECD) and the United Nations Conference on Trade and Development (UNCTAD) and consideration of a typology of sources of case law, including arbitral awards, had revealed differences in the approach of various arbitrators and the Commission's input could promote legal certainty. The Nordic countries therefore supported the continuation and completion of the work on the topic in accordance with the time frame indicated in paragraph 362 of the Commission's report (A/66/10). The Commission should conclude its work on the most-favoured nation clause before considering the related topic of the fair and equitable treatment standard in international investment law so that any work on the latter could benefit from the work currently under way on the former.

14. **Mr. Stuerchler Gonzenbach** (Switzerland) said that the topic of the immunity of State officials from foreign criminal jurisdiction was very important, particularly in light of current discussions on the question of universal jurisdiction. The scope of the immunity of State officials would vary depending on whether the offences of which they were accused fell within the jurisdiction of a national or an international

court. The Rome Statute of the International Criminal Court explicitly limited the possibility of invoking immunities deriving from other sources of international law, which was a welcome development of the law. No such limitation could apply, however, in matters that fell within the jurisdiction of a national court; the principle of equality between States must be upheld and the stability of international relations ensured.

15. The preliminary report on the topic (A/CN.4/601) examined the international rules adopted to date concerning the privileges and immunities of State officials, including diplomatic and consular representatives, members of special missions and State representatives to international organizations. The analysis contained in the report was especially valuable for States such as Switzerland, which had a long tradition of serving as host countries. His delegation was of the view that an examination of the rules governing the privileges and immunities of State officials should take into account, in addition to multilateral treaties and the rulings of national courts, the headquarters agreements concluded between host countries and organizations operating in their territory. Such agreements provided a useful indication of the generally recognized privileges and immunities of State officials and the personal and functional scope thereof.

16. As the preliminary report rightly pointed out, existing international treaties did not regulate questions of immunity of State officials from foreign criminal jurisdiction in general or in many specific situations. The Commission's work on the topic should focus on issues that were not yet regulated by international treaties. However, the formulation of general rules should not result in limitations on the scope of existing agreements or make it difficult to interpret existing rules. The Commission should seek to identify lacunae in international law, first by determining which rules of customary international law were still in need of codification and then by considering the need for new rules of international law in areas not yet regulated.

17. His delegation, like the Special Rapporteur, endorsed the conclusions of the International Court of Justice with regard to actions that a State exercising its jurisdiction in criminal matters might take without violating the immunity of a State official and agreed that a State might take criminal procedure measures that were not restrictive in nature nor likely to prevent the foreign official from performing his or her functions, in particular in the context of preliminary investigations designed to establish the facts and determine whether proceedings were appropriate.

18. Concerning the topic of the obligation to extradite or prosecute (*aut dedere aut judicare*), any analysis that failed to take account of the question of universal jurisdiction could not lead to a full and consistent understanding of the issues involved. The two subjects were closely related and should have been dealt with together, thereby making the Commission's work with respect to the effort to combat impunity more relevant. The Committee's Working Group on the scope and application of the principle of universal jurisdiction should bear in mind the issues addressed by the Commission in relation to the obligation to extradite or prosecute.

19. Work on the topic of the most-favoured-nation clause and on the fair and equitable treatment standard in international investment law would help to guard against the fragmentation of international law. The Commission should focus on bringing added value to the efforts of other actors, in particular UNCTAD, which had recently published a detailed study on most-favoured-nation treatment, and OECD, which had published a series of papers on international investment law. His delegation supported the drafting of a report that would set out the generally shared understanding of key aspects of the most-favoured-nation clause, without necessarily making recommendations or providing model clauses.

20. The report should look, in particular, at the relationship between the most-favoured-nation clause, national treatment standards and fair and equitable treatment standards; explore the reasons why arbitral tribunals had not taken a systematic approach to the interpretation and application of most-favoured-nation clauses; and assess how such tribunals had applied the rules of interpretation of the Vienna Convention on the Law of Treaties and whether their application had led to a more coherent approach.

21. The issues raised in part II of annex D to the Commission's report (The fair and equitable treatment standard in international investment law) were valid. Fair and equitable treatment was the most frequently invoked standard in practice and deserved further study. His delegation wondered, however, about the feasibility of achieving an understanding shared by a majority of States regarding the meaning of "fair and

equitable treatment". It was essential to arrive at a clear common agreement regarding the intended final product of the Commission's work before embarking on a more substantive debate. Producing guidelines that would indicate whether the standard reflected customary international law did not seem the best option as numerous States, albeit not Switzerland, rejected the existence of customary international law with respect to foreign investment. The idea of drafting a statement on the meaning of the standard was probably not very feasible for the same reason. A clear statement of the law relating to the standard, from an authoritative source, would theoretically be useful. However, given the many unanswered questions and the divergent views and interests of States, multilateral negotiation would seem to be the most appropriate means of arriving at an agreement regarding the law in relation to fair and equitable treatment. The Commission might also wish to examine whether investment treaty case law had, de facto, taken the place of customary international law as a source of obligations in relation to foreign investment and, if so, what the implications of that trend for the development of international law were.

22. Turning to the other topics recently added to the Commission's long-term programme of work, he affirmed his delegation's full agreement with the statement made in paragraph 4 of annex A to the Commission's report: flexibility remained an essential feature of the formation of customary international law. Hence, it would be difficult to systematically describe the process through which customary rules were formed without undermining the very essence of custom, which had been and should remain a major source of international law.

23. His delegation noted with interest that the Commission intended to take up the topic of protection of the environment in relation to armed conflicts and wished to underscore the importance of close cooperation with the International Committee of the Red Cross (ICRC) in order to arrive at a better understanding of the rules concerning protection of the environment, including, if necessary, through the organization of an expert meeting.

24. **Mr. Maza Martelli** (El Salvador), referring to the topic of the obligation to extradite or prosecute (*aut dedere aut judicare*), emphasized the importance of taking all possible measures to prevent impunity for the most serious crimes of concern to the international community as a whole. The obligation to extradite or prosecute, the principle of universal jurisdiction and recognition of the jurisdiction of international courts had all contributed to the achievement of that objective; however, those mechanisms operated differently from one another. Under the Constitution of El Salvador, for example, extradition was governed primarily by bilateral and multilateral agreements, many of which contained extradite or prosecute clauses covering a wide range of crimes, including ordinary offences subject to over three years' imprisonment and crimes that violated *jus cogens* norms. Thus, compliance with the obligation to extradite or prosecute was a wide-ranging legal cooperation mechanism.

25. With regard to revised draft article 2 (Duty to cooperate) as proposed by the Special Rapporteur, it was necessary to distinguish between the duty to cooperate imposed on States by the obligation to extradite or prosecute, and the duty that States had vis-à-vis international tribunals whose jurisdiction they had recognized in a specific treaty. His delegation was of the view that the phrase "wherever and whenever appropriate" should be deleted from the draft article because it created uncertainty about the performance of the obligation, which might lead to excessively discretionary interpretations and result in weakening or non-fulfilment of the obligation. As to draft articles 3 (Treaty as a source of the obligation to extradite or prosecute) and 4 (International custom as a source of the obligation *aut dedere aut judicare*), while his delegation supported recognition of both customary and treaty sources of the obligation, it questioned the need for two provisions aimed at regulating a single aspect of the topic and suggested that if it was decided to retain the references to both sources, they should be combined in a single article.

26. His delegation encouraged the Commission to continue work on the topic, especially in light of the rules relating to extradition and the general principles of criminal law. It did not view prosecutorial discretion as a general principle of criminal law relevant to the topic, irrespective of any connection with the obligation *aut dedere aut judicare*. The principles of criminal law were fundamental axioms that existed to guide the State along the path of justice and legal certainty. They included the principles of human dignity, minimal intervention, the presumption of innocence and, above all, legality, which stood in

direct opposition to arbitrary or overly discretionary conduct. The extent of prosecutorial discretion could not therefore be considered a general principle of criminal law; rather, it was an authority granted by each State in accordance with the provisions of its domestic law and its criminal law policy. The Commission should strive for a set of draft articles that reflected a solid grasp of the topic and was based on a thorough analysis of its nature and characteristics.

27. Regarding the working methods of the Commission, his delegation endorsed the recommendations for improvement with respect to the work of the special rapporteurs, study groups, the Drafting Committee and the Planning Group and for the preparation of commentaries to draft articles, preliminary indication as to the final form of the work undertaken on specific topics and the Commission's relationship with the Sixth Committee, all of which should benefit both the Commission and the Committee. His delegation also encouraged the Commission to take steps to ensure that its annual reports were made available well in advance of the opening of the General Assembly, which had not occurred in the current session.

28. His delegation believed that the five new topics that the Commission had decided to include in its long-term programme of work would make a useful contribution to the codification and progressive development of international law and address pressing concerns of the international community as a whole. Nevertheless, care must be taken to ensure that work on the new topics would not run counter to or fragment international law that currently existed or was being codified or progressively developed.

29. **Ms. Dascalopoulou-Livada** (Greece) said that the question of the immunity of State officials from foreign criminal jurisdiction had not yet found reflection in any normative text. The Vienna Conventions of 1961 and 1963, for example, addressed only immunities of specific categories of persons, such as diplomatic and consular personnel. Recent developments, particularly in the previous two decades, had shown a need to re-examine the topic in light of new trends in international law.

30. The most interesting and challenging question posed by the Special Rapporteur concerned exceptions to the rule of immunity; he had identified several rationales that might justify such exceptions, but had ultimately rejected them all. Her delegation saw considerable merit in one of those rationales — that peremptory norms of international law which prohibited and criminalized certain acts prevailed over the norm concerning immunity and rendered such immunity invalid — which seemed to reflect recent developments in the matter. However, the Special Rapporteur had also argued that peremptory norms were substantive in nature whereas the norms concerning immunity were procedural and that the former could not therefore conflict with the latter. Her delegation had some difficulty understanding that argument, the essence of which was that a procedural bar was raised to such a height as to completely override a rule of substantive law of the highest order, as rules of a *jus cogens* nature were.

31. Recent developments suggested that there was growing support for the idea that impunity for international crimes could not be tolerated, irrespective of the status of the perpetrator. In fact, that was not a new idea. The Nuremberg and Tokyo Tribunals had demonstrated that there was a limit to the impunity of State officials who had committed international crimes such as genocide, crimes against humanity, war crimes and aggression. And although it was true that those trials had been based on an international agreement, the Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, drawn up by the Commission, had confirmed that even the highest State officials should be held responsible, under international law, for the commission of international crimes. Those principles had been endorsed by the General Assembly and were authoritatively considered to constitute international customary law.

32. More recently, there had been further evidence of a shift in international criminal law towards complete intolerance of such crimes, irrespective of the status of the perpetrator. Nowhere in the statutes of the ad hoc tribunals for the Former Yugoslavia and for Rwanda, adopted by the Security Council, was there any mention of immunity from criminal jurisdiction for State officials. On the contrary, such officials could be subject to the jurisdiction of, and indeed had been tried by, those tribunals. Moreover, the fact that 119 States were parties to the Rome Statute of the International Criminal Court provided evidence of the international community's resolve not to exclude high-level State officials from the purview of the law; article 27 of the

Statute stipulated that immunities or special procedural rules which might attach to the official capacity of a person did not bar the Court from exercising its jurisdiction over such a person. While article 98 of the Statute provided a useful reminder of the norms concerning immunity, it addressed State or diplomatic immunity and required the consent of the sending State for the surrender of such persons to the Court and thus had no bearing on the matter under discussion. Furthermore, article 98 had been very controversial and it remained to be seen how it would be interpreted by the Court.

33. The international community's determination to combat impunity for serious crimes without discrimination as to the perpetrator was also evidenced by the almost universal acceptance of the Convention on the Prevention and Punishment of the Crime of Genocide and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Neither those conventions nor the Rome Statute differentiated between the treatment of persons enjoying personal immunity and those covered only by functional immunity since, while such a differentiation was valid for acts that did not rise to the level of international crimes, an international crime remained an international crime irrespective of its perpetrator.

34. Hence, there was clearly a trend towards the prohibition of immunity for egregious crimes. Although some States had not yet adopted legislation that would allow them not to recognize immunities in the case of such crimes, that situation was bound to change, especially in view of the need for parties to the Rome Statute to ensure domestic prosecution in keeping with the principle of complementarity. The Security Council's increasing use of the International Criminal Court for the prosecution of high-ranking officials who violate international criminal law — even where the offender's State is not a party to the Rome Statute — also provided impetus for change.

35. There was no doubt that a culture of accountability was emerging. There were examples from domestic and international jurisprudence that confirmed that trend, although there were also examples that pointed in the opposite direction, such as the judgment of the International Court of Justice in the *Arrest Warrant* case. Still, the case concerning *Certain Questions of Mutual Assistance in Criminal Matters* (Djibouti v. France), to which the Special Rapporteur had referred, suggested that the Court's stance on the question of immunity had changed somewhat. Moreover, the Special Rapporteur himself had conceded that State officials would not enjoy immunity from foreign criminal jurisdiction in a situation in which such jurisdiction was exercised by a State in whose territory a crime had been committed and in which that State had not consented either to the exercise in its territory of the activity that had led to the crime or to the presence of the official concerned.

36. Her observations were in no way meant to diminish the merit of the basic premise on which, as the Special Rapporteur had pointed out, jurisdictional immunity rested — the sovereign equality of States — or to disregard the need to prevent abuse of the substantive rules prohibiting the commission of certain grave crimes. Her delegation understood that there were concerns in that regard; however, it believed that when States were parties to statutes establishing international judicial bodies such as the international criminal courts and tribunals or where the Security Council referred cases to the International Criminal Court, such concerns should not prevail. Judicial scrutiny by the International Court of Justice, where possible and appropriate, would provide a safeguard against potential abuse in cases involving non-recognition of immunity from criminal jurisdiction in alleged cases of grave crimes. Where procedural issues were relevant — for example in the case of crimes other than those of international concern — her delegation endorsed the views put forward by the Special Rapporteur in his third report (A/CN.4/646).

37. With regard to the topic of the obligation to extradite or prosecute (*aut dedere aut judicare*), she agreed with the previous speaker that the source of the obligation lay in bilateral agreements on extradition or judicial assistance. However, the survey conducted by the Special Rapporteur had taken into account only multilateral agreements, which concerned the international community as a whole. The meaning of the obligation in that limited context, at least with respect to prosecution, would appear to be close to that of universal jurisdiction.

38. Her delegation could support draft article 2 (Duty to cooperate) as revised by the Special Rapporteur; cooperation was indeed an overarching idea that might be considered to encompass the obligation to extradite or prosecute. Her delegation was of the view, however, that the words "as appropriate" in the first paragraph and "wherever and whenever appropriate" in the

second were vague and might be taken to imply a wholesale import of domestic law. If the intention was that the obligation should apply in accordance with certain rules, then their nature and content should be clearly spelled out, not in an introductory or declaratory article but in subsequent ones. With regard to draft articles 3 (Treaty as a source of the obligation to extradite or prosecute) and 4 (International custom as a source of the obligation *aut dedere aut judicare*), her delegation, like some others, failed to understand the utility of categorization on the basis of the source of the rule under examination; the text should identify the crimes to which the obligation applied and then lay out the applicable conditions and procedures.

39. **Mr. Politi** (Italy), referring to the topic of the immunity of State officials from foreign criminal jurisdiction, said that the current discussion had shown that some delegations questioned both the restrictive approach applied by the Special Rapporteur in addressing the crucial question of possible exceptions to immunity, and his conclusion that there was no evidence of an emerging norm of international law that would justify such exceptions particularly in the case of grave international crimes. His delegation's view was that a balanced and comprehensive approach to the topic was crucial. Even from the standpoint of *lex lata*, State practice and the case law of domestic and international criminal courts provided a number of elements that were bound to have a significant impact on the principle of immunity as it had been understood and applied in the past. Such elements should be taken into account not merely as exceptions to a general rule but as indicative of an emerging *lex specialis*, particularly in relation to grave crimes under international law committed by high-ranking officials such as heads of State and Government and ministers for foreign affairs.

40. The principle of immunity had been upheld in some cases, for example by the International Court of Justice in the *Arrest Warrant* case. In others, immunity had been denied by domestic courts, as in the 1999 House of Lords case *Regina v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 3)*. Moreover, the ad hoc and hybrid criminal tribunals and the International Criminal Court had consistently applied the rule, established at Nuremberg and reaffirmed in article 27 of the Rome Statute, of the irrelevance of official capacity. The decisions of those bodies, far from being germane only within the domain of international criminal justice, were evidence of a more general consolidation of the applicable normative framework, which should be taken into account in the exercise of national jurisdiction. Accordingly, the Commission should give due consideration to international practice in its entirety.

41. Some of the procedural issues addressed by the Special Rapporteur in his third report should be further explored, in particular the question of timing of the consideration of immunity in national proceedings. In some cases, immunity should be granted only after a careful review of the nature of the crime and its possible characterization as an international crime.

42. With respect to the obligation to extradite or prosecute (*aut dedere aut judicare*), his delegation agreed with the Special Rapporteur's consideration of the topic in strict relation to States' duty to cooperate in combating impunity. The obligation was a normative mechanism intended to fill gaps that might allow those responsible for the most serious crimes to escape prosecution and punishment. On that basis, the various sources of such an obligation, including treaties, custom and *jus cogens*, had been examined and draft articles formulated for the different categories of norms. That aspect of the Special Rapporteur's methodology had been the subject of intense debate within the Commission. His delegation tended to agree with those who had raised doubts about the appropriateness of formulating separate articles for the different sources of law and believed that further detailed analysis of international practice was required in order to assess the extent to which the principle *aut dedere aut judicare* was embodied in existing international legislation. That analysis should cover both substantial and procedural aspects, including the types of crimes for which the principle applied and the extradition mechanisms used. As to the specific questions raised by the Commission, he noted that Italy applied the principle *aut dedere aut judicare* regularly and consistently, both in domestic implementing legislation giving effect to relevant conventions and in related case law.

43. Regarding the Commission's long-term programme of work, of the five new topics, his delegation viewed the two relating to the protection of the environment ("Protection of the atmosphere" and "Protection of the environment in relation to armed conflicts") as most deserving of consideration as they addressed fundamental aspects of environmental protection.

Although numerous international instruments on the issue existed and it was receiving ample scholarly attention, there was a need for further review and systematization in order to respond to the growing concerns of the international community. Another new topic, the provisional application of treaties, also merited the Commission's attention in order to clarify and supplement the existing legislation, which was limited to a few rules contained in the 1969 Vienna Convention on the Law of Treaties.

44. **Mr. Kittichaisaree** (Thailand) said that the Commission's consideration of the topic of the immunity of State officials from foreign criminal jurisdiction should be confined to matters relating to immunity from criminal jurisdiction since immunity from civil jurisdiction was a fundamentally different issue. The Commission should seek to codify existing international law and to explain developing trends, especially in relation to immunity, or lack thereof, from the most serious crimes under international law. The final product should strike the right balance between stability in international relations and the need to avoid impunity for such crimes.

45. Immunity was not the same as impunity; the former served as a procedural bar to criminal prosecution whereas the latter absolved a person from individual criminal responsibility under substantive criminal law. As a matter of general principle immunity should not impede criminal prosecution of State officials once such prosecution no longer posed a threat to stability in international relations. While immunity pertained to official acts of the State concerned, that State and its officials could not act without accountability. Officials who committed heinous crimes seriously tarnished the honour and dignity of the State itself; thus, immunity *ratione personae* and immunity *ratione materiae* were inseparably interrelated. As other speakers had noted, several international instruments relating to the repression of international crimes provided expressly that the immunity of State officials was not absolute, even for heads of State, and that the official position of an accused person did not relieve him or her of criminal responsibility or mitigate punishment. Examples included the Rome Statute of the International Criminal Court and the statutes of the ad hoc tribunals for the Former Yugoslavia and for Rwanda. Moreover, some States had asserted universal jurisdiction over certain grave crimes and rejected any claim of immunity by the perpetrators.

46. The fundamental question for the Commission was how to achieve the proper balance in its work on the topic. The answer might be found partly in its ongoing deliberations on the scope and application of the principle of universal jurisdiction, which aimed to prevent abuses in States' exercise of jurisdiction (through, for example, safeguards against excessive prosecutorial discretion), while preventing impunity for serious crimes of international concern. An example of an effort to balance the legitimate interests of sovereign States with concern for accountability could be found in article 98 of the Rome Statute, according to which States could not be asked by the Court to act in a manner inconsistent with their obligations under international law, including those relating to State or diplomatic immunity.

47. A vital balance could be established by expressly excluding constitutional heads of State with merely nominal or ceremonial functions from individual criminal responsibility. For instance, the definition of the crime of aggression recently adopted by the Review Conference of the Rome Statute limited the category of persons who could commit such a crime to those "in a position effectively to exercise control over or to direct the political or military action of a State". For the sake of legal certainty, however, until customary international law had crystallized with regard to the State officials who were or were not entitled to immunity, the judgment of the International Court of Justice in the *Arrest Warrant* case must be followed.

48. His delegation would prefer that the procedural issues raised in the Special Rapporteur's third report (A/CN.4/646) be dealt with after definitive conclusions on the substantive aspects of the topic had been reached.

49. Concerning the obligation to extradite or prosecute (*aut dedere aut judicare*), his delegation agreed that there was a need to differentiate between categories of crimes that were subject to the obligation and those that were not. Not all crimes currently subject to universal jurisdiction were also subject to the obligation to extradite or prosecute, which arose primarily from treaty obligations. His delegation could accept, in principle, the amended wording of draft article 3 (Treaty as a source of the obligation to extradite or prosecute) except for the phrase "and with general principles of international criminal law" in paragraph 2, which was too vague to be helpful to national legislators. The principles should be fleshed

out, as pointed out in paragraph 317 of the Commission's report.

50. His delegation had strong reservations about draft article 4 (International custom as a source of the obligation *aut dedere aut judicare*). Thai law took a dualist approach to international law: international norms were not legally enforceable but the courts might, in some circumstances, take them into account in interpreting legislation or law codes in order to avoid potential conflicts with customary international law. Prosecuting a person under an international customary rule that was not already part of Thai law would violate the principle of legality. Thailand could extradite a person only on the basis of an extradition treaty with or assurances of reciprocity from the requesting State, or pursuant to another binding international obligation. His delegation took note of the views on draft article 4 expressed by members of the Commission as described in paragraphs 320 and 321 of the Commission's report.

51. The topic of the most-favoured-nation clause was of practical significance; in the current globalized and economically interdependent world, the role of international investment agreements, which had become a prominent mechanism for strengthening economic intercourse, was more important than ever. The rapid increase in cross-border flows of goods, services, people, capital and technology gave rise to serious challenges that could not be addressed by States individually. The interpretation and application of most-favoured-nation clauses in investment agreements was especially complex. As the Commission's report noted, there was little consistency in the reasoning of both tribunals that permitted and tribunals that rejected the use of such clauses to incorporate dispute settlement mechanisms into an investment treaty. His delegation agreed with the conclusions contained in paragraphs 361 and 362 of the Commission's report and supported the Study Group's effort to ensure greater coherence in the approaches taken in arbitral decisions, greater certainty and stability in the field of investment law and greater security and predictability for foreign investors and States.

52. **Mr. Sánchez Contreras** (Mexico) said that he welcomed the considerable progress made by the Study Group on the topic of treaties over time. Relations between States were influenced by changes in international policy, and it was necessary to determine what impact various events and global challenges had on the Vienna treaty regime.

53. The preliminary conclusions of the Chairman of the Study Group showed how useful the reports of the Study Group could be for States. Their publication in the annual report of the Commission would enable States to be better informed about the progress of work on the topic, which in turn would enable them to provide better feedback to the Commission and ensure greater transparency in the treatment of the subject. The final outcome would thus be broader in scope and of greater practical utility. His delegation would also support the appointment of a special rapporteur.

54. The preliminary conclusions justified the decision to divide work on the topic into several phases. They showed that the interpretation and evolution of treaties through subsequent agreements and practice revitalized them and made them dynamic instruments, demonstrated the importance of article 31 of the Vienna Convention on the Law of Treaties and provided a good overview of the interpretive approaches employed by the various international tribunals. Greater clarity was needed, however, with respect to the fifth conclusion on the concept of subsequent practice as a means of interpretation. It was not clear to what extent the concept of subsequent practice in the broad sense used by the International Tribunal for the Law of the Sea and the International Court of Justice, which did not require agreement between the parties to a treaty, was compatible with article 31, paragraphs 3 (a) and (b), of the Vienna Convention of the Law of Treaties and whether the use of that concept by international courts signalled the emergence of a new method of treaty interpretation.

55. The question of the possible modification of treaties through subsequent agreements and practice and the relationship of subsequent agreements and practice to formal treaty amendment procedures remained of interest to his delegation, which favoured a comprehensive approach to the topic and encouraged the Commission to examine, in light of subsequent agreements and practice, matters such as the relationship between treaties and customary law; subsequent practice as a source of interpretation and formation of new customary international law; and the role of informal mechanisms.

56. He hoped that the Study Group on the topic of the most-favoured-nation clause would conclude its work

by the end of the Commission's sixty-fifth session. In general terms, his delegation agreed that the Study Group should seek to safeguard against the fragmentation of international law by encouraging greater coherence in arbitral decisions, thus fostering greater certainty and stability in the field of investment law. Its work was useful given the divergences in the case law on the matter and the lack of consistency in the reasoning of tribunals that had allowed use of the clause to include dispute settlement provisions in investment agreements. Interpretation of the scope of most-favoured-nation clauses should preserve the balance between protecting the investor and its investment and allowing the receiving State the necessary policy space.

57. His delegation agreed with the Study Group that the source of the right to most-favoured-nation treatment was the basic treaty and not the third-party treaty; that the concurring and dissenting opinion in *Impregilo S.p.A. v. Argentine Republic*, referred to in paragraphs 357 and 359 of the Commission's report, could provide a framework for clarifying issues relating to application of the most-favoured-nation clause to dispute settlement; and that the final product of the Study Group's work should be a report providing an overview of issues and existing trends in application, together with, where appropriate, recommendations and model clauses.

58. **Mr. Ferrero Costa** (Peru) said that while his delegation shared many of the views of the Special Rapporteur on the topic of the immunity of State officials from foreign criminal jurisdiction, it questioned others and felt that a more in-depth examination of some issues was needed. Concerning the approach to the topic, it must be recognized that since the Commission's work would entail both codification (*lex lata*) and progressive development (*lex ferenda*), the choice presented in paragraph 36 of the Commission's report, while conceptually valid, was rather artificial. The topic should be examined from both perspectives and the possibility of a *lex ferenda* approach should not be ruled out, although the Commission should exercise caution and ensure that any conclusions reached had a solid basis in international law. In addition, the approach must strike a balance between two principles: respect for the institution of immunity of State officials in order to ensure that international relations were conducted properly, and the need to combat impunity, especially for international crimes. It should be emphasized, however, that immunity from jurisdiction was procedural in nature and did not affect the rules of substantive law; it did not imply impunity or exoneration from criminal responsibility.

59. The scope of the topic was limited to national criminal jurisdiction and did not include matters relating to immunity from international criminal jurisdiction, which was treated differently under international law. As immunity *ratione personae* and immunity *ratione materiae* were also treated differently under international law, a distinction should be drawn between them. State responsibility should be clearly distinguished from individual criminal responsibility.

60. His delegation agreed that the issue of immunity should be addressed in the initial stage of judicial proceedings or even earlier, in the pretrial stage. A State seeking to exercise jurisdiction in respect of a foreign official should make its intentions known as early as possible so that the official's State could claim immunity *ratione materiae* in a timely manner, thereby blocking the proceedings, or, alternatively, decide not to invoke immunity *ratione materiae* or *ratione personae*. A State's communication of its intention to exercise jurisdiction should be transmitted in writing through the diplomatic channel and should provide precise details as to the acts of which the official was accused so that the official's State could make a fully informed decision as to the extent of any immunity *ratione materiae* or *ratione personae*; if it decided to waive immunity, it should indicate the scope of the waiver with respect to the acts of which the official was accused and decide on the mechanism through which the waiver was to be made. Consideration should be given to establishing a time frame for the waiving of immunity *ratione materiae* so as to ensure that the waiver occurred in a timely manner and to establish certainty with respect to the authority of the State seeking to exercise jurisdiction. His delegation agreed that an express waiver should be irrevocable. While silence on the part of the official's State would enable the State seeking to exercise jurisdiction to proceed, it was not clear where third-party liability for actions taken before the State of the official invoked immunity would lie.

61. Caution should be exercised in determining which officials were covered by immunity *ratione personae*. The Special Rapporteur had suggested that

"other persons of high rank", in addition to heads of State and Government and ministers for foreign affairs, might be covered because the performance of their functions was important for ensuring State sovereignty. However, that could be taken to mean that virtually any State official enjoyed immunity *ratione personae*. The determination of whether a State official's acts had been carried out in an official capacity and were therefore covered by immunity *ratione materiae* should be made on a case-by-case basis. Both the State seeking to exercise jurisdiction and the State of the official had to analyse the situation but, as the Special Rapporteur had noted, a foreign court was not obliged to blindly accept a claim of immunity, although it could not disregard such claims, either. That being the case, disputes were likely to arise in connection with immunity claims and a system for referring them to dispute settlement mechanisms should perhaps be envisaged. Acts that constituted grave crimes under international law clearly could not be considered official functions covered by immunity *ratione materiae*; therefore, no immunity could be invoked in respect of such acts.

62. His delegation wondered whether the scope of the topic of the obligation to extradite or prosecute (*aut dedere aut judicare*) should be broadened to encompass the exercise of jurisdiction by States, including the obligation to extradite or prosecute, and to address the link between that obligation and universal jurisdiction.

63. The Special Rapporteur's fourth report (A/CN.4/648) referred to the "principle *aut dedere aut judicare*". However, in order to maintain consistency with his earlier reports, it would be preferable to use the term "obligation" rather than "principle". The fourth report focused on the question of principal sources of the obligation to extradite or prosecute, in particular treaties and custom. However, the obligation was not an abstract concept, but a secondary rule of law; hence, discussion of whether it derived from custom or treaties should be preceded by an analysis of the scope of the primary source in order to determine whether it gave rise to the obligation.

64. His delegation had doubts about draft article 2 (Duty to cooperate), which seemed to limit the duty to cooperate and assist in criminal matters; the duty to cooperate in combating impunity was not limited to serious crimes of concern to the international community as a whole. The draft article also referred to the duty of States to cooperate with international courts, but it might not be appropriate to address that issue in the Commission's work on the topic or, if it was to be considered, it should perhaps be dealt with separately from the duty of States to cooperate with one another since States had a duty to "surrender" individuals to such courts, not to "extradite" them. With regard to draft article 3 (Treaty as a source of the obligation to extradite or prosecute), his delegation agreed that States should adopt internal measures to give effect to the obligation. However, the draft article referred only to the provisions of the treaty establishing the obligation and to general principles of international criminal law, which could exclude obligations of the State arising from other relevant treaties. In addition, some examples of the general principles of international criminal law might be given, without establishing an inclusive list.

65. Section C of the Special Rapporteur's fourth report (A/CN.4/648) on the principle *aut dedere aut judicare* as a rule of customary international law, addressed the issue only from the perspective of crimes against humanity; the analysis should be broadened in order to determine whether the obligation to extradite or prosecute had a customary nature in respect of other international crimes. Regarding draft article 4 (International custom as a source of the obligation *aut dedere aut judicare*), recognition of the prohibition of conduct that constituted an international crime and had acquired *jus cogens* status did not mean that the obligation to extradite or prosecute, which was a secondary rule, had also acquired such status. The Commission should consider the procedural ramifications of *jus cogens* norms.

66. **Mr. Janssens de Bisthoven** (Belgium), referring to the topic of immunity of State officials from foreign criminal jurisdiction, said that in accordance with its mandate to promote the progressive development and codification of international law, the Commission should address the topic from the perspective of both *lex lata* and *lex ferenda*. As a first step, it should identify first the existing rules of international law and then controversial areas to target for progressive development, such as the scope and characteristics of immunity *ratione personae*. Immunity from criminal jurisdiction had traditionally been accorded to heads of State and Government and ministers for foreign affairs; other State officials should be granted immunity only in accordance with relevant international agreements,

such as the 1961 Vienna Convention on Diplomatic Relations.

67. With regard to exceptions to immunity, a distinction should be made between immunity *ratione materiae* and *ratione personae*. His delegation was of the view that *de lege lata*, crimes that violated international treaties or international customary law gave rise to exclusion from immunity *ratione materiae*. Such crimes included those recognized under the Rome Statute of the International Criminal Court, torture and genocide.

68. Article 4 of the Convention on the Prevention and Punishment of the Crime of Genocide, for example, provided that persons committing genocide should be punished, whether they were constitutionally responsible rulers, public officials or private individuals. The statutes of the international criminal courts and tribunals also excluded immunity from criminal jurisdiction for officials accused of genocide, crimes against humanity or war crimes. Since those statutes reflected international custom, there was reason to conclude that international customary law was moving in the same direction as treaty-based international law. That trend had already been evident in the judgment of the International Military Tribunal at Nuremberg, which had established that the authors of acts condemned as criminal by international law could not shelter themselves behind their official position in order to escape punishment. That rule had been endorsed by the International Law Commission in 1950 when it had adopted the Nuremberg Principles, the third of which provided that heads of State and responsible Government officials who committed crimes under international law could not be relieved of responsibility under international law.

69. Those rules were fully consistent with the obligation to combat impunity that had been repeatedly affirmed by the international community, either in agreements requiring States to extradite or prosecute the perpetrators of crimes covered by them or through resolutions of the General Assembly and the Security Council. While the International Court of Justice judgment in the *Arrest Warrant* case appeared to preclude prosecution of crimes under international law committed by an incumbent minister acting in his official capacity, the Institute of International Law had shed further light on the matter in its resolution on the immunity from jurisdiction of the State and of persons who act on behalf of the State in case of international crimes, adopted at Naples in 2009, which provided that no immunity from jurisdiction other than personal immunity in accordance with international law applied with regard to international crimes. While it might be generally accepted that immunity *ratione materiae* was excluded for crimes under international law, his delegation was of the view that the Commission should so state explicitly.

70. The issue of immunity *ratione personae* should be examined in light of agreements between States; States that were parties to the same treaty on international criminal law could be deemed to have declined ipso facto to invoke personal immunity for their officials if the treaty precluded the invocation of any form of immunity or provided that the official capacity of the alleged perpetrator was an element of the crime. Even in such a scenario, a State could choose to admit, in the context of an official visit, a person suspected of committing an international crime. It went without saying, however, that the State remained bound to comply with any pre-existing obligation to cooperate with an international court and so could not, for example, fail to execute an arrest warrant issued by such a court.

71. In Belgium, immunity from criminal jurisdiction was governed by the 2003 Code of Criminal Procedure, which referred to the rules of customary and treaty-based international law. Immunity was therefore recognized only within the limits established by international law.

72. With respect to the topic of the obligation to extradite or prosecute (*aut dedere aut judicare*), his Government would, for the moment, refrain from responding to the questions raised in chapter III of the Commission's report as it was a party to a case currently pending before the International Court of Justice in which the obligation *aut dedere aut judicare* was at issue (*Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*). However, his Government had previously submitted written comments on the customary nature of the obligation (A/CN.4/612, paras. 19 and 31 to 34).

73. **Ms. Malys** (Poland) said that the Commission's discussion of the topic of the immunity of State officials from foreign criminal jurisdiction had revealed differences of opinion regarding the scope of the immunity of State officials from foreign jurisdiction and exceptions to immunity. Although,

regrettably, no draft articles reflecting the existing practice of States and codifying international customary rules in regard to immunity of State officials had been proposed as yet, the Commission's thorough discussion of substantive and procedural aspects of the topic would be useful for future codification work. Her delegation shared the views expressed by the Special Rapporteur in paragraphs 56 and 79 of his second report (A/CN.4/631) with regard to the interdependence of, and the similarities and differences between, the issue of immunity, the principle of universal jurisdiction and the obligation to extradite or prosecute. As to whether a *lex lata* or *de lege ferenda* approach should be taken, her Government favoured a combination of the two.

74. In the Commission's discussions on the topic on the obligation to extradite or prosecute (*aut dedere aut judicare*), numerous members had commented on the new draft article 2 proposed by the Special Rapporteur and most had supported its inclusion; States did have a duty to cooperate. Her delegation supported that view. It also agreed with the Special Rapporteur that the categories of crime identified in article 5 of the Rome Statute, particularly genocide, crimes against humanity and war crimes, might be seen as a directory of customary rules giving rise to the obligation to extradite or prosecute.

75. Her delegation agreed that the topic required in-depth analysis of treaty-based and customary international law norms and of domestic laws, which, especially in recent years, had developed and changed significantly. The overwhelming majority of Commission members had stressed that its work should continue without interruption, a view which her delegation supported; suspension of work on the topic could create a false impression that it was not appropriate or sufficiently developed for codification.

76. The Commission had focused on a single aspect of the topic of treaties over time: subsequent agreements and practice as a means of interpretation of treaties. The report on international judiciary decisions by the Chair of the Study Group illuminated the position of various international courts and tribunals on the usefulness of allowing treaty interpretation based on subsequent agreements and practice, but it was devoid of any normative component. As responses from Governments on their practice in respect of the topic had thus far been rather sparse, the Commission should give priority to compiling decisions of domestic courts. Such decisions could be seen as part of the practice of States, as suggested by Chair of the Study Group; his ninth preliminary conclusion on possible authors of relevant subsequent practice listed courts among the organs creating State practice; the decisions of domestic courts could be compiled relatively quickly. Accordingly, the Commission should request States to provide information on their domestic court decisions relating to subsequent agreements and practice as a means of treaty interpretation as soon as possible.

77. **Ms. Quidenus** (Austria) said that her Government attached great importance to the topic of the immunity of State officials from foreign criminal jurisdiction; States were increasingly confronted with cases involving possible criminal immunity and as international law did not offer complete responses to all the questions connected with the issue, States might come to different conclusions, generating confusion rather than useful practice that could serve as guidance. The Commission should therefore deal with the topic as a matter of high priority, concentrating first on identifying existing rules. In international relations the greater emphasis on combating impunity and on the accountability of States and their organs seemed to signal a trend towards limiting immunity, and it was unclear to what extent existing international law was reflecting those developments. Once the Commission had answered that question, it could propose rules *de lege ferenda* aiming at bringing international law into line with recent developments.

78. The International Court of Justice, in its judgment in the *Arrest Warrant* case, had given a convincing answer to the question of which holders of high-level State office enjoyed absolute immunity *ratione personae* under existing international law or should enjoy such immunity *de lege ferenda*: heads of State and Government and ministers of foreign affairs enjoyed absolute immunity. There was currently no indication that other persons of high rank enjoyed immunity *ratione personae* under customary international law, although other immunities were accorded under various conventions and agreements such as the Vienna Convention on Diplomatic Relations, the Convention on Special Missions, and headquarters agreements, which established absolute immunity for persons other than the "troika" of high-level officials and applied as *lex specialis*.

79. On the third issue of particular interest to the Commission — which crimes were, or should be,

excluded from immunity *ratione personae* or *ratione materiae* — the distinction between the two types of immunity must be borne in mind. The concept of the immunity of State officials had evolved over the years from absolute immunity to functional immunity. Currently, State officials generally enjoyed immunity in the exercise of their functions and any limitation of such immunity would constitute an exception. In the case of international crimes, however, the question of exclusion from either form of immunity might need to be treated differently. Generally, there was a tendency to deny immunity in respect of such crimes. War crimes and torture were, by definition, committed by State officials or other persons acting in an official capacity. Hence, persons enjoying functional immunity could not, in principle, invoke immunity for such crimes.

80. Exceptions to immunity could not apply, however, if immunity was based on a special treaty regime, such as the Convention on Special Missions, or on a comparable rule of customary law, as in the case of an explicit invitation for an official visit or if the official in question was a head of State or Government or a minister for foreign affairs. In the *Arrest Warrant* case, the International Court of Justice had found no reason to deduce that there existed under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent ministers for foreign affairs who were suspected of having committed war crimes or crimes against humanity. That finding must, a fortiori, also apply to heads of State or Government. The Institute of International Law, in its 2001 resolution on immunities from jurisdiction and execution of heads of State and of Government in international law, had recommended that States should waive immunity where the head of State was suspected of having committed crimes of a particularly serious nature or where the exercise of his or her functions was not likely to be impeded by the measures that the authorities of the forum State might be called upon to take. The same rule applied to heads of Government and, in the light of the reasoning of the International Court of Justice, to ministers for foreign affairs.

81. International crimes certainly included all crimes under the jurisdiction of the International Criminal Court, such as war crimes, genocide and crimes against humanity. When the participants in the 2005 World Summit had discussed the responsibility of States to protect their populations, they had referred to those crimes and others. The responsibility to protect could be understood as including also the duty to prosecute such crimes, which would further restrict functional immunity.

82. Turning to the topic of the obligation to extradite or prosecute (*aut dedere aut judicare*), she noted that her Government had submitted a report on Austria's legislation and jurisprudence, in which it had expressed the view that there was no obligation to extradite or prosecute under customary international law; such an obligation could arise only from treaty law or domestic law. Her Government adhered to the principle of legality, according to which its authorities were under a legal obligation to prosecute crimes. In view of Austria's extended criminal jurisdiction, that obligation had wide-reaching effect. Moreover, so-called "international crimes" had the same status as any other crime under Austrian law. For those reasons, her delegation had difficulties with draft article 4 (International custom as a source of the obligation *aut dedere aut judicare*) in its current form, particularly the reference to *jus cogens*. Despite the emerging link between certain international crimes and *jus cogens*, the latter was still a very unclear concept in international law. Her delegation would like to emphasize the usefulness of the general framework proposed by the Working Group on the topic in 2009, which had raised issues and questions of particular interest to States.

83. Concerning the topic of treaties over time, her Government had also submitted an extensive report on its practice regarding subsequent agreements and practice as a means of treaty interpretation. In particular, reference had been made to the Gruber-de Gasperi Agreement (Paris Agreement of 5 September 1946) between Austria and Italy, which had subsequently been interpreted by means of two additional agreements — the calendar operations and the South Tyrol Package — neither of which had achieved the status of formal treaties. Her delegation concurred with most of the preliminary conclusions of the Chair of the Study Group, contained in paragraph 344 of the Commission's report (A/66/10). The second one, which recognized the need to distinguish between different types of treaties according to their substance and, consequently, their object and purpose was particularly important. Human rights treaties, for example, were frequently interpreted by different means than other

treaties. It might also be worthwhile to examine the extent to which treaties containing synallagmatic obligations were interpreted differently from treaties containing *erga omnes* obligations. However, her delegation did not consider the evolutionary approach to be a special kind of interpretation by subsequent practice as it did not represent the practice of States parties to a treaty, but rather the general development and evolution of the political environment.

84. Lastly, her delegation welcomed the work of the Study Group on the complex topic of the most-favoured-nation clause and agreed that the final result of that work need not be draft articles; it could also take the form of a substantive report as proposed by the Study Group. Regarding the question raised by the Commission in chapter III of its report, her delegation wished to emphasize that most-favoured-nation clauses were not limited to the fields of trade and investment law; they were frequently used in other areas, such as international agreements on navigational matters and headquarters agreements of international organizations.

85. **Mr. Huth** (Germany), referring to the topic of the immunity of State officials from foreign criminal jurisdiction, said that he welcomed the comprehensive compilation of relevant State practice contained in the second report of the Special Rapporteur and supported his careful and balanced approach, which had focused on *lex lata* and emphasized the relevant practice of States, international organizations and international courts. The topic clearly lent itself to codification, not progressive development, for several reasons. First, the sensitivity of the subject made it unwise to lay down rules that could run counter to what States considered necessary for the conduct of international relations. Second, State practice in regard to immunity was often formulated not by governments, but through court decisions; courts had a responsibility to apply the law, including international law, as it stood and as they focused on *lex lata* when applying international law, they needed a predictable, undisputed framework of rules. In the German legal system, for instance, the question of the immunity of foreign State officials was addressed under section 20 of the Judiciary Act, which referred explicitly to general rules of international law, including customary law, and required the courts to determine whether immunity existed in a given case.

86. His delegation agreed that exceptions to the principle of immunity must be grounded in customary international law; an extensive analysis of State practice was essential in identifying possible exceptions. His delegation also agreed with the Special Rapporteur's observation that a violation of a *jus cogens* norm did not necessarily remove immunity; as noted during the Commission's discussion on the topic, to conclude that such norms were superior to rules governing immunity would be to confuse rules of substantive law with rules of procedure.

87. While combating impunity was of paramount importance to his delegation, it rejected the idea that immunity led to impunity and wished to stress that criminal acts by foreign officials were not covered by immunity per se. State officials who committed unlawful acts bore full responsibility under the laws of their own States, which were required to exercise jurisdiction over them; that was a traditional and undisputed rule. Moreover, there was always the possibility of a waiver. The exercise of jurisdiction by the official's State and waivers of immunity were important tools in the common effort to combat impunity and States should be encouraged to make use of them. In cases involving grave crimes under international law, where those two mechanisms had, for whatever reason, proved ineffective, a careful approach was needed. A balance had to be found between the need to ensure stability in international relations and the need to avoid impunity for grave crimes under international law, as underlined in the Commission's discussion and the best way to deal with such cases would appear to be through international institutions such as the International Criminal Court.

88. On the difficult but crucial question of which high-level State officials were entitled to immunity *ratione personae*, his delegation supported the Commission's approach of collecting relevant State practice. Lastly, every effort should be made to avoid framing the debate on the immunity of State officials in a way that pitted modern positions against traditional ones.

89. Turning to the topic of treaties over time, he said that elucidating the role of subsequent agreements and practice as a means of interpretation was vital as major treaties aged and contexts changed; many international treaties could not be easily amended, yet they must continue to fulfil their purpose. Subsequent agreements and subsequent practice were means of interpretation that were particularly characteristic of international law. Although their importance could not be denied, the way in which they had been used had not been

sufficiently explored; an exhaustive analysis of the practice of States and international organizations was needed.

90. The Commission's work to date represented a fundamental step towards the establishment of manageable, predictable criteria for the use of subsequent agreements and practice as a means of treaty interpretation. The extensive analysis, by the Chair of the Study Group, of approaches to interpretation by different international adjudicatory bodies and his nine preliminary conclusions would serve as a valuable basis for further elaboration of the topic; the latter were well-balanced and showed the importance of subsequent agreements and practice without ignoring their relationship to other means of interpretation. In addition, they were worded in an open and flexible manner, leaving room for the incorporation of additional conclusions arising from future reports and from examination of the practice of States and international organizations. His delegation encouraged States and international organizations to provide the Commission with examples of relevant practice and considering the importance of the topic, it supported the appointment of a special rapporteur.

Agenda item 143: Administration of Justice at the United Nations (*continued*) (A/C.6/66/L.13)

91. **Mr. Kittichaisaree** (Thailand), Chair of the Working Group on the Administration of Justice at the United Nations, recalled that in his oral report to the Committee during its 17th meeting, he had indicated that the Working Group on the Administration of Justice at the United Nations had recommended that the Chair of the Committee should send a letter to the President of the General Assembly drawing attention to certain specific issues relating to the legal aspects of the reports on the item that had emerged from the Committee's discussions and to issues on which further information or additional clarifications were sought. A draft letter had been circulated during the same meeting. In light of the comments on the draft letter made by some delegations, he had conducted informal consultations with interested delegations with a view to incorporating their concerns and arriving at a generally agreed text. The draft letter had subsequently been revised and recirculated.

92. In the fourth paragraph, new language had been added: "[Delegations emphasized the importance of respecting the legal framework within which the system of administration of justice operates,] recalling that recourse to general principles and the Charter is to take place within the context of the Statute of the United Nations Dispute Tribunal and of the United Nations Appeal Tribunal and the relevant General Assembly resolutions and administrative issuances". In the fifth paragraph, the second sentence had been amended to bring it into conformity with paragraph 4 of resolution 61/261. In addition, the sentences relating to the conduct of the proceedings before the Tribunals, which had appeared in the tenth paragraph of the previous version of the draft letter, had been moved to the fifth paragraph. In the sixth paragraph language had been added to indicate that delegations had advised that "the Fifth Committee be requested to consider the issue of reporting by various elements of the administration of justice system on the various developments in the field of administration of justice in a comprehensive manner".

93. The seventh paragraph had been amended in order to make it clearer: "[Concerning the number of judges of the United Nations Dispute Tribunal,] delegations expressed concern that the expiration of the terms of office of three ad litem judges by the end of 2011 would reduce the number of judges by half and that, considering that the number of cases before the Tribunal may be increasing or at least remaining relatively constant, this may result in a backlog and significant delays in the handling of cases which in turn may raise serious concerns regarding due process". Some editorial changes had been made in the eighth paragraph and a sentence had been added at the end: "In addition, some delegations inquired about reports regarding the amounts of compensation awarded by the Tribunals".

94. In the tenth paragraph, text on the issue of dispute settlement mechanisms for non-staff personnel, had been added: "As to categories of non-staff personnel not covered by the arbitration procedure, delegations proposed that the Secretary-General be requested to provide information on measures that might appropriately be made available to assist such individuals in addressing disputes that might arise. Delegations further recalled that possibilities for categories of non-staff personnel not covered by the arbitration procedure to access the informal system, i.e. to take their case to the Ombudsman, would provide a useful means of redress for this group of persons. Some delegations showed interest in all

categories of non-staff personnel having access to the informal system. Delegations recalled that the General Assembly had on many occasions underlined that informal conflict resolution was a crucial element of administration of justice and that all possible use should be made of the informal system to avert unnecessary litigation. As regards access for non-staff personnel to the management review process, delegations showed interest in further information on possible implementation of such a possibility".

95. In the twelfth paragraph, a new sentence had been added: "Regarding the draft Code of Conduct, delegations reiterated their request for the Internal Justice Council to further elucidate the principle of 'open justice' under the heading 'Transparency'". In that regard, the Working Group also noted that the phrase "namely that justice must be seen to be done" in the draft code of conduct for the judges of the United Nations Dispute Tribunal and the United Nations Appeals Tribunal (A/C.6/66/L.13) did not adequately explain the principle of "open justice" and might suggest obligations that the Dispute Tribunal and the Appeals Tribunal might not be able to carry out under the current circumstances.

96. In keeping with past practice, the revised letter, which he trusted would enjoy the full support and consensus of the Committee, would contain a request that it should be brought to the attention of the Chair of the Fifth Committee and circulated as a document of the General Assembly. He would also appreciate it if his oral report could be brought to the attention of the Internal Justice Council and borne in mind in the Council's clarification of the principle of "open justice".

97. **The Chair** said that if there was no objection, he would take it that the Committee wished to send the letter to the President of the General Assembly.

98. *It was so decided.*

The meeting rose at 1 p.m.