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Chair: Ms. Kaewpanya (Vice-Chair) . . . . . (Thailand)

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The meeting was called to order at 10 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. **Ms. O'Brien** (Under-Secretary-General for Legal Affairs, The Legal Counsel) said that the International Law Commission should be commended for its work on the codification and progressive development of international law. While it was normally her role to address legal issues, she was compelled to raise a budgetary issue in her capacity as head of the Office of Legal Affairs. In March 2011, during the budget preparation process, the Secretary-General had stressed that Member States were in serious financial distress and that the United Nations should not take anything for granted. That situation had not changed.

2. The Secretary-General had asked all departments, including her Office, to reduce their requests for financial resources for the biennium 2012-2013. They would all have to find creative ways of meeting their objectives if they were to continue operating within the current budgetary constraints. Among the areas that the Secretary-General, in his ongoing reform programme, had identified for economies were the duration of meetings, documentation and publications. When she had met with the Commission in May 2011, she had suggested that those economies, and particularly the duration of sessions, should be taken into consideration and should have a bearing on the Commission's work, and consequently on issues such as the feasibility of split sessions and the curtailment of summary records.

3. For the biennium 2010-2011, the Office of Legal Affairs had had to find approximately $550,000 from the regular budget to fund shortfalls connected with the Commission's work — a substantial amount for a relatively small department. In its first report on the proposed programme budget for the biennium 2012-2013 (A/66/7), the Advisory Committee on Administrative and Budgetary Questions had encouraged the Office to consult with the members of the Commission in order to seek alternative ways to rationalize costs and achieve possible savings.

4. It had been proposed that approximately $2 million should be allocated to travel and related costs of the Commission's members over the next two years. According to the Advisory Committee that amount would not cover the costs of a customary 10-week split session, nor, as her Office understood it, could it cover the costs of an eight-week or nine-week split session.

5. According to her Office's estimates, for the biennium 2012-2013, the cost of the Commission's proposed programme of work, based on two nine-week split sessions and an 80 per cent attendance rate, would be approximately $600,000 more than was allocated in the budget. Failure to resolve that discrepancy during the current session of the General Assembly session would constrain the budgetary resources and programme delivery of her Office for the biennium 2012-2013.

6. It was becoming increasingly difficult for her Office to absorb the budgetary shortfalls associated with the Commission's sessions, especially at a time of zero growth or reduced budgets. She therefore urged the Committee and the Commission to find ways to align the proposed budget with the Commission's sessions.

7. Her Office attached great importance to the work of the Commission. However, given the critical economic conditions in which the United Nations found itself, it was important to be aware of the situation and to address it in a manner that would produce the most beneficial outcome. She fully realized, however, that the details of the Committee's draft resolution on the agenda item were entirely up to the delegations.

8. **Mr. Yin** Wenqiang (China) said that while the international community, through the Commission, had formulated draft articles on various forms of immunity that had formed the basis of international conventions such as the 1961 Vienna Convention on Diplomatic Relations, the 1963 Vienna Convention on Consular Relations and the United Nations Convention on Jurisdictional Immunities of States and Their Properties, it had not been able to develop uniform statutory norms on the immunity of State officials from foreign criminal jurisdiction. His delegation was generally pleased with the three reports submitted by the Special Rapporteur on the topic (A/CN.4/601, A/CN.4/631 and A/CN.4/646), which reflected both substantive and procedural rules of international law and developing international practice and provided a

[1] To be issued.

sound basis for the next phase of the Commission's work.

9. His delegation was of the view that immunity *ratione personae* should cover at least the so-called troika, namely heads of State and Government and ministers for foreign affairs, as confirmed by customary international law and the International Court of Justice. In his first report (A/CN.4/601), the Special Rapporteur had maintained that immunity *ratione personae* should not be limited to those three categories of officials, a conclusion drawn from international practice, since other categories of high-level officials were representing their countries in international political, economic, trade and cultural exchanges with increasing frequency. In formulating criteria on the matter, the Commission should take into account each country's specific situation and political system.

10. His delegation supported the Special Rapporteur's conclusion, in paragraph 79 of his second report (A/CN.4/631), that there was no evidence in customary international law that would confirm the existence of exceptions to the immunity of State officials. Such immunity was not a courtesy extended by one State to another, but an important principle of international law based on the sovereign equality of States (*par in parem no habet imperium*). Allowing those fundamental legal principles to be superseded by other rules would seriously erode the very foundation of modern international relations.

11. Allowing a domestic court to indict the leader of another State would violate the principle of non-interference in the internal affairs of States and affect the political stability of the indicted leader's State. Furthermore, permitting exceptions to the immunity of State officials could give rise to politically motivated indictments and raise other practical legal issues, such as the need to avoid the use of double standards in the exercise of jurisdiction, guarantee due process in the absence of evidence or legal assistance, and ensure the legitimacy and fairness of trials.

12. He hoped that the Commission would further examine the pending issues surrounding the question of immunity, including the question of whether a State that had not invoked immunity before the court of first instance could do so on appeal. Lastly, in light of the complex and sensitive nature of the topic, the Commission should focus on codification rather than progressive development; to do otherwise would generate controversy and make it difficult to reach consensus.

13. **Mr. Hakeem** (Sri Lanka) recalled that owing, inter alia, to the paucity of practice, the draft articles on the responsibility of international organizations were more in the nature of progressive development than codification and that, since international organizations exhibited significant differences in terms of their powers and functions, some articles might apply to certain organizations and not to others. He therefore welcomed draft article 64 (*Lex specialis*), which recognized the primacy of special rules of international law that might be contained in the rules of the organization.

14. His delegation welcomed the step-by-step approach adopted by the Commission in its recommendation that the General Assembly should take note of the draft articles on the responsibility of international organizations in a resolution, and consider, at a later stage, the elaboration of a convention. Despite the difficulty of the topic, the draft articles would contribute to the progressive development of international law and provide useful guidance on the practice of international organizations and States.

15. The Guide to Practice on Reservations to Treaties represented a significant contribution to the law of treaties. His delegation welcomed in principle the annex entitled "Conclusions on the reservations dialogue" and took note of the Commission's recommendation regarding the establishment of assistance mechanisms for the settlement of disputes concerning reservations to treaties.

16. On the topic of the effects of armed conflicts on treaties, he welcomed the premise, contained in draft article 3 (General principle), that the existence of an armed conflict did not *ipso facto* terminate or suspend the operation of treaties. He noted that the list of treaties referred to in draft article 7 (Continued operation of treaties resulting from their subject matter) and contained in the annex to the draft articles was indicative; it merely created a presumption that they would continue in operation, in whole or in part, during armed conflict.

17. His delegation still had reservations about the term "armed conflict" as defined in draft article 2 (b), which sought to cover internal armed conflicts between

governmental authorities and organized armed groups as well as inter-State conflicts. The circumstances under which an internal conflict would affect a treaty between States were not clear and, despite the attempted clarification in the commentary to the draft article and the use of the phrase "protracted resort to armed force", the possible impact of the definition on the stability of treaty relations between States was cause for concern. His delegation agreed with the recommendation that the General Assembly should take note of the draft articles in a resolution and consider, at a later stage, the elaboration of a convention.

18. The Special Rapporteur on the protection of persons in the event of disasters had adopted the right approach in his fourth report (A/CN.4/643 and Corr.1) by calling for recognition of the tensions underlying the link between protection and the principles of respect for territorial sovereignty and non-interference in the internal affairs of the affected States and avoiding politically contentious issues. His delegation fully endorsed the Commission's position that the concept of "responsibility to protect" was not applicable to the topic for reasons set out in paragraph 286 of the report of the Commission (A/66/10).

19. His delegation was in general agreement with draft articles 1 to 9, but with regard to draft article 10 (Duty of the affected State to seek assistance), it believed that the Government of an affected State was in the best position to determine, in good faith, the severity of a disaster and the limits of its response capacity. The duty to "seek" assistance, stipulated in the draft article, was more appropriate than a duty to "request" assistance; the hortatory "should seek assistance" was also preferable to the mandatory "shall seek assistance".

20. In draft article 11 (Consent of the affected State to external assistance), the stipulation that the provision of external assistance required the consent of the affected State embodied a fundamental principle of international law that was reflected in General Assembly resolution 46/182 and was consistent with the recognition in draft article 9, paragraph 2, that the affected State had the primary role in that regard. Nonetheless, the requirement was tempered by draft article 11, paragraph 2, which stated that consent to external assistance should not be withheld arbitrarily. Similarly, draft article 12 (Right to offer assistance) should be reformulated to present the offer of disaster relief as a positive duty of the international community rather than as a legal right.

21. The topic of the expulsion of aliens fell essentially within the sovereign domain of States and was therefore governed by domestic law, although States had to exercise the rights related thereto in accordance with international law. In formulating its draft articles, the Commission should elaborate basic standards and guarantees that were grounded in State practice, leaving a certain latitude for national policies. Although the Special Rapporteur had, by and large, maintained that balance in his reports, there were still some concerns about an alien's right of return to the expelling State. In that connection, it was important to distinguish between the lawful and unlawful presence of such aliens.

22. He agreed that no general rule of international law required the expelling State to provide a right of appeal against an expulsion decision with suspensive effect; to do so would hamper the effective exercise of the right of expulsion and encroach on the sovereign domain of States.

23. In light of the complexities involved, it was necessary to agree on matters of principle and on the general orientation of the topic of the immunity of State officials from foreign criminal jurisdiction before draft articles were formulated. The principle of sovereign immunity was well established in customary law and vital to the stability of international relations and to the effective functioning of States. Moreover, the Vienna Convention on Diplomatic Relations and related instruments guaranteed immunity for diplomatic agents and other State representatives in order to ensure that they were unhindered by the jurisdiction of the host State in discharging their functions. The Commission needed to strike a balance between preserving the immunity of State officials and addressing the exceptions to that rule.

24. His delegation believed that the troika — heads of State and Government and ministers for foreign affairs — enjoyed full immunity *ratione personae*, as recognized in customary international law and by the International Court of Justice, and that other high-level officials might, by virtue of their functions, also be entitled to such immunity.

25. With regard to possible exceptions to immunity, his delegation favoured the proposal to constitute a

working group at the sixty-fourth session in order to study the issue in greater detail, bearing in mind the Commission's 1996 Draft Code of Crimes against the Peace and Security of Mankind, and State practice, having regard to the distinction between *lex lata* and *de lege ferenda*.

26. The topic of the obligation to extradite or prosecute (*aut dedere aut judicare*) presented considerable difficulties, particularly as it had implications for other aspects of the law, including universal jurisdiction. The methodology adopted by the Special Rapporteur in proposing separate draft articles on treaties and customary law, respectively, was problematic; the focus should be on the obligation to extradite or prosecute and on how treaties and custom evidenced that rule.

27. With regard to draft article 4 (International custom as a source of the obligation *aut dedere aut judicare*), he encouraged the Special Rapporteur to undertake a detailed study of State practice and *opinio juris* and to determine which serious crimes of concern to the international community as a whole gave rise to an obligation to extradite or prosecute. The Special Rapporteur must therefore address such issues as whether the accumulation of treaties containing an obligation to extradite or prosecute meant that States accepted that there was a customary rule to that effect; extensive State practice in acceding to treaties containing that obligation would point to the existence of such a rule.

28. He welcomed the progress made by the Study Group on the topic of the most-favoured-nation clause in identifying the normative content of such clauses in the field of investment, taking into account current arbitral jurisprudence. General guidelines and model clauses designed to assist States when negotiating investment promotion and protection treaties would be beneficial to both Member States and courts. His delegation also welcomed the work of the Study Group on the topic of treaties over time.

29. Lastly, the five new topics included in the Commission's long-term programme of work were acceptable, but must be prioritized; the Commission might also wish to consider the topic of the application of international humanitarian law to non-State armed groups in contemporary conflicts.

30. **Ms. Pedrós-Carretero** (Spain) stressed that the Commission should be given the time to adequately fulfil its mandate.

31. Her delegation was pleased that the Commission had been able to consider the second and third reports of the Special Rapporteur on the immunity of State officials from foreign criminal jurisdiction (A/CN.4/631 and A/CN.4/646) but noted that, owing to the wide range of views expressed by Commission members, none of the Special Rapporteur's conclusions had been referred to a drafting committee.

32. The topic had an impact on key areas of contemporary international law and should therefore be addressed in a balanced manner. In particular, the need to ensure stability in international relations must be weighed against the equally important need to avoid impunity for serious crimes under international law.

33. In that connection, the concepts of immunity *ratione materiae* and *ratione personae* had to be distinguished more clearly, with greater emphasis placed on defining the term "official act", which, in her delegation's view, must be interpreted restrictively. Identification of the officials who enjoyed immunity *ratione personae* should be also based on restrictive criteria, considering that such immunity constituted an exception from the jurisdiction of the State in which the immunity was involved. Only after the Commission had addressed those issues could a substantive debate on the procedural aspects of immunity be undertaken.

34. Despite the undeniable difficulties it generated, the topic of the immunity of State officials from foreign criminal jurisdiction was of such importance and practicality that it deserved priority consideration by the Commission at its next session, and indeed during the next quinquennium.

35. Although the Commission had considered the topic of the obligation to extradite or prosecute (*aut dedere aut judicare*) at its sixty-third session, it had made little progress. She therefore urged the Commission to give greater attention to it at its next session, and to decide whether it should be considered separately or in conjunction with another topic.

36. She welcomed the work accomplished by the Working Groups on treaties over time and the most-favoured-nation clause and looked forward to future developments on both topics, including a clearer indication of goals and methods of work.

37. The number and importance of the new topics proposed by the Commission for inclusion in its long-term programme of work were a testament to its vitality and ability to fulfil its codification and progressive development mandates. However, she reiterated her delegation's position that the Commission should focus on a limited number of topics in order to be more efficient and effective. While all the new topics were important, the priority for the next quinquennium should be on the formation and evidence of customary international law and the provisional application of treaties.

38. **Mr. Popkov** (Belarus) said that codification of the topic of the immunity of State officials from foreign criminal jurisdiction was a pressing matter in view of the increased efforts to limit such immunities in the context of universal and quasi-universal jurisdiction. The final codifying document could take the form of an international convention or an instrument that offered greater flexibility. His delegation supported the distinction between immunity *ratione personae* and *ratione materiae* and the priority given to identifying and codifying existing customary international law before undertaking its progressive development, a process that should focus on norms that were unambiguous or depended exclusively on international comity.

39. The question of limitations on the immunity of State officials in the context of universal jurisdiction was a separate issue. There was a serious conflict between the concept of universal jurisdiction, specifically *in absentia*, and contemporary international law, particularly with regard to the principles of State sovereignty and non-interference in the internal affairs of States. The terms "international crimes" and "crimes against humanity" and the manner in which they related to the principle of universal jurisdiction required further examination. To date, universal jurisdiction had received broad recognition only when it was exercised on the basis of treaties or Security Council resolutions. Insistence on consideration of the relationship between the concepts of universal jurisdiction, international crimes and the immunity of State officials would strain relations between States.

40. The codification of international legal norms for the so-called troika should be given top priority since those officials most commonly embodied the State and represented its sovereign rights in the international arena and since the norms governing their immunity were clear and complete. Their immunities must be recognized with respect to acts undertaken by them in their personal or official capacity before, during and after their term of office. Any waiver of immunity for those individuals must be clear and unambiguous.

41. With regard to the topic of the obligation to extradite or prosecute (*aut dedere aut judicare*), the legal basis of such an obligation was at the crux of the issue. While the principle of international cooperation was accepted in international law, its exact scope depended on the context. In relation to combating impunity, the principle should be considered as part of a broader responsibility to combat crimes of international concern. The obligation to extradite or prosecute applied to a specific type of crime and it was more productive to consider the relevant international treaty or practice in order to establish its content. The nature of the primary obligation determined the corresponding secondary obligation to extradite or prosecute; however, it would be premature to deduce that the secondary obligation automatically acquired all the characteristics of the primary one. Lastly, he reiterated his delegation's position that the topic should be considered in conjunction with the topic of universal jurisdiction.

42. On the topic of treaties over time, his delegation endorsed the use of article 31 of the 1969 Vienna Convention on the Law of Treaties as the main point of departure for international treaty interpretation. It was more useful to speak of the benefits of the one means of treaty interpretation over another than to consider them individually, and greater attention should be accorded to the reasons behind the use of a particular means of interpretation and for eschewing a general rule of treaty interpretation in light of the customary meaning of its terms.

43. One key task was to determine what was meant by "subsequent practice". There was a clear difference between an interpretation of international legal norms that took into consideration how they interacted with practice and the potential shift, as a result of such interaction, from the original treaty-based norm towards a customary norm that differed in content and conditions for validity.

44. In order for subsequent practice to be accepted as a valid means of treaty-based norm interpretation, it must not give rise to divergent opinions regarding its

legal validity. While similar to *opinio juris*, practice must not serve as a source of customary international law; it was a normal process whereby a treaty-based norm was adapted to changing legal relations between the parties to a treaty, in the absence of objections on their part, over a sufficiently long period of time. The distinction between the concepts of "subsequent practice" and "subsequent agreement", which was clear in the Vienna Convention, might also need to be made in the course of codification. The Commission should clarify the extent to which subsequent practice and agreements could depart from the literal meaning of the treaty and continue to serve as a means of interpretation without becoming an amendment to the treaty, an international practice or a violation of the original treaty.

45. **Mr. Jahangiri** (Islamic Republic of Iran) said that in considering the topic of the immunity of State officials from foreign criminal jurisdiction, the Commission should focus on codification rather than progressive development, using the principle of sovereignty as its point of departure and distinguishing between immunity and accountability. The immunity of heads of State and Government and ministers for foreign affairs, set out by the Institute of International Law in its 2009 resolution on the immunity from jurisdiction of the State and of persons who act on behalf of the State in case of international crimes, was well established in customary international law.

46. His delegation agreed with the Special Rapporteur on the obligation to extradite or prosecute (*aut dedere aut judicare*) that it was difficult to prove the existence of a general customary objection; even the fact that such obligations were being incorporated into a growing number of international instruments did not indicate that the parties subscribed to an existing or emerging customary rule to that effect. While the 1996 Draft Code of Crimes against the Peace and Security of Mankind had sought to establish the obligation to extradite or prosecute persons suspected of certain crimes, that attempt had not been well received by States in their practice. Moreover, States that had opted for either alternative had always acted within a treaty framework. Despite the argument that the goal of combating impunity, referred to in several Security Council resolutions and reports of the Secretary-General, could provide a legal basis for the obligation of States to extradite or prosecute, it remained a political goal rather than an explicit legal obligation.

47. Since it seemed unlikely that the Commission would find sufficient evidence of the existence of a customary obligation to extradite or prosecute, it should consider concluding its consideration of the topic; that in itself would be a sign of progress in the sense that the Commission would have exhausted its efforts on the topic. It was highly unlikely that the Committee would refer the question of the scope and application of the principle of universal jurisdiction to the Commission, and his delegation deemed it inadvisable to link that issue to the topic of the obligation to extradite or prosecute. If the Commission decided to continue work on the latter topic, the Special Rapporteur should confine himself to his existing mandate.

48. On the topic of treaties over time, the role of subsequent practice as a means of treaty interpretation should not be overestimated. His delegation was not certain that different State organs should be given equal treatment in establishing subsequent practice and had doubts concerning the meaning, scope and role of the term "social practice".

49. He hoped that after considering the topic of the most-favoured-nation clause for the third time, the Commission would finally produce tangible results. Nonetheless, given its interconnection with topics such as private international law and trade and investment law, which fell within the purview of the United Nations Commission on International Trade Law and the World Trade Organization, he was not certain of its viability.

50. Turning to the new topics on the Commission's long-term programme of work, he said that, generally speaking, the Commission should take up topics that would help resolve practical issues in international law or prevent future problems. His delegation had doubts about the topic of the formation and evidence of customary international law, which seemed intended to codify general rules for the identification of customary law and to deprive it of its essential feature, spontaneity. Such an exercise seemed undesirable and unlikely to serve a useful purpose.

51. As to the methodology proposed by the Commission, in identifying the formation of a particular customary rule it was important to distinguish between State practice and the jurisprudence of international courts and tribunals, on the one hand, and the practice and jurisprudence of

domestic courts, on the other. The Commission should also proceed cautiously in gauging how unilateral acts, especially those committed in violation of general international law, affected the identification of customary international law. Such acts, even if they persisted for years, could not serve as evidence of an emerging rule or a change to an existing one.

52. Likewise, in considering whether deviations from a customary rule had given rise to a change in customary law, the Commission should note that the silence or acquiescence of the majority vis-à-vis the unilateral act of a State did not necessarily amount to approval; it might simply be a question of political convenience. His delegation had similar concerns about the topic of the protection of atmosphere and hoped that its highly technical nature would not render the exercise futile.

53. Lastly, his delegation considered that the topic of the provisional application of treaties would help to clarify or complement the provisions of article 25 of the 1969 Vienna Convention on the Law of Treaties and would be consistent with the Commission's work on the topics of reservations to treaties and the effects of armed conflicts on treaties.

54. **Mr. Pírez Pérez** (Cuba) said that the Commission's work on the topic of the immunity of State officials from foreign criminal jurisdiction should strengthen the principles established in the Charter of the United Nations and other sources of international law, especially that of respect for the sovereignty of all States. His delegation was concerned at the tendency of certain developed States to launch political attacks against the officials of developing countries, in breach of those precepts.

55. The topic of the obligation to extradite or prosecute (*aut dedere aut judicare*) was an important topic for the international community. The principles enshrined in the Charter of the United Nations, in particular those relating to the sovereign equality and political independence of States and non-interference in their internal affairs must be fully respected. The Commission should focus on establishing the general principles that governed extradition and on the grounds for refusing extradition, taking into account article 3 (Mandatory grounds for refusal) of the Model Treaty on Extradition, contained in annex to General Assembly resolution 45/116.

56. The obligation to extradite or prosecute arose from the presence of the alleged perpetrator in the territory of a State, provided that there was a treaty or a declaration of reciprocity between the States involved. Where a State refused to grant an express extradition request, criminal proceedings must be brought in accordance with the domestic law of the prosecuting State. His delegation supported the establishment of procedural principles for requesting and obtaining extradition, which could include the submission of supporting documents; duties and rights concerning detention, preventive measures, transfer of detainees and the accused person's right of recourse in the event of violation of established extradition rules. A general list of extraditable offences should be drawn up, without prejudice to the right of each State to determine the offences for which extradition would be granted under its domestic law.

57. Although the two were related, there were significant differences between the obligation to extradite or prosecute and the principle of universal jurisdiction. The Commission should focus on regulating the obligation to extradite or prosecute and leave the other matter to the Committee's Working Group on the scope and application of the principle of universal jurisdiction, which would decide whether to refer it to the Commission.

58. Generally speaking, the obligation to extradite or prosecute arose only where there was a relevant treaty in effect, based on the principle of *pacta sunt servanda*. Legal lacunae with respect to the issue, however, had allowed some States to evade their obligation to prosecute known terrorists with whom they shared ideological links while at the same time refusing to extradite them, purportedly because of legal technicalities relating to the content of the extradition request or risks to the physical integrity of the terrorists. For that and other reasons, his delegation strongly supported a thorough study of the topic in order to delineate clearly the scope and application of the obligation to extradite or prosecute.

59. With regard to treaties over time, his delegation maintained its previously stated position, namely that work on the topic should aim only to strengthen and complement — but under no circumstances to modify — the treaty regime established under the 1969 Vienna Convention on the Law of Treaties. His delegation therefore considered that the Study Group should look not only at formal elements of treaties and

subsequent practice, but also at the effects on treaties of certain events and circumstances, such as termination or suspension, unilateral acts and serious violations, and fundamental changes in circumstances.

60. His delegation attached great importance to the study of the topic of the most-favoured-nation clause, especially as it related to investment protection treaties, and supported the idea of studying arbitral awards and the rules of interpretation of treaties contained in the 1969 Vienna Convention. The broad interpretation of the most-favoured-nation clause by some courts in the context of investment protection treaties had allowed investors to disregard some of their obligations under such treaties — for example, the obligation to exhaust domestic remedies before resorting to an international court.

61. In many cases, such interpretations had annulled obligations clearly set out in the bilateral treaty, leaving them without legal effect and instead applying criteria contained in other legal instruments or norms unrelated to the bilateral agreement in question. That was blatantly contrary to the principles of treaty interpretation and application as established by the 1969 Vienna Convention. It was extremely worrying that an investor might be allowed to claim rights and privileges that were not provided under the treaty and indeed were sometimes expressly excluded.

62. Arbitral tribunals, in seeking to assert their competence to hear cases, were improperly expanding the scope of investment protection agreements beyond the will of the contracting States. The very integrity of an agreement was threatened when, by means of the most-favoured-nation clause, courts extended the scope of the protection provided by the agreement, ignoring the restrictive criteria that States had applied in defining the concepts of “investment” and “investor”.

63. The work of the United Nations Conference on Trade and Development (UNCTAD) on the subject offered important conclusions which the Commission should bear in mind. Interpretative decisions on the most-favoured-nation clause overrode the interpretation of the contracting States and gave precedence to the interpretation of a third party, whether an investor or the court itself, thus enabling transnational corporations to attempt to claim rights and privileges to which they were not entitled while evading their fundamental obligations. Hence, his delegation supported any initiative aimed at clarifying the content, scope and limits of the most-favoured-nation clause.

64. **Mr. Leonidchenko** (Russian Federation) said that the obligation to extradite or prosecute (*aut dedere aut judicare*) was a topic of particular interest to his delegation, which had previously called for expansion of the scope of the principle to include the most serious crimes of international concern in order to fill the gaps in combating impunity that some States were unsuccessfully addressing through the unilateral expansion of universal jurisdiction. His delegation did not oppose the inclusion in the draft articles of a reference to the obligation of States to cooperate in combating impunity. However, the expression “crimes and offences of international concern” in draft article 2 (Duty to cooperate) needed to be clarified. It was unclear what purpose was served by the first paragraph of draft article 3 (Treaty as a source of the obligation to extradite or prosecute), which merely described the well-known principle of *pacta sunt servanda*, while the second paragraph of the draft article did not indicate which State’s internal law would determine the terms and conditions for extradition or prosecution. The wording of draft article 4 (International custom as a source of the obligation *aut dedere aut judicare*) raised numerous questions stemming from the Commission’s lack of consensus regarding the nature of the obligation and the crimes covered by it.

65. There were doubts as to the usefulness of considering the obligation to extradite or prosecute together with universal jurisdiction. Jurisdiction on the basis of the *aut dedere aut judicare* principle differed substantially from universal jurisdiction in its pure form as the former required both the consent of, and a request from, the other State, which could, if it chose, exercise jurisdiction on the basis of traditional links. That removed the risk of conflict between the States concerned and increased the likelihood that the State that would normally be responsible for prosecuting the offender would render maximum assistance to the State that was being asked to assert jurisdiction in ascertaining the circumstances of the crime. It was therefore appropriate to examine jurisdiction on the basis of the principle of *aut dedere aut judicare* and universal jurisdiction separately.

66. His Government was of the view that not only the so-called troika, but also other high-ranking officials enjoyed personal immunity from foreign criminal jurisdiction. That position was supported by the

judgment of the International Court of Justice in the case concerning the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* and adequately reflected the trend whereby essential international functions were delegated to other high-ranking officials. In its analysis of the scope of personal immunity from jurisdiction and in identifying possible exceptions, the Commission should take note of the opinions expressed in the *Arrest Warrant case* and in the case concerning *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*. The International Court of Justice had consistently ruled in favour of the personal immunity of the troika as a firmly established norm of international law to which there were no exceptions. The claim that existing international law recognized exceptions from the principle of the personal immunity of top officials from foreign criminal jurisdiction for specific types of crimes was unfounded. Neither were there any exceptions from functional immunity. His delegation was of the view that the principle of immunity was pivotal in ensuring stable and normal international relations; its existence flowed from the sovereign equality of States and served as reliable protection against provocation and complications in inter-State relations.

67. His delegation disagreed with those who argued that limiting personal and functional immunity was necessary in order to combat impunity; the problem could be addressed through stronger international criminal justice institutions and expanded cooperation between States. Immunity from foreign jurisdiction did not imply impunity since functional immunity covered only acts undertaken in an official capacity and there was an established procedure for prosecution of an official who failed to exercise his duties. If that procedure was not followed, the question of State responsibility could arise. For persons who enjoyed personal immunity, the State of jurisdiction could collect the relevant materials for subsequent transfer to the State of nationality or an international judicial institution for prosecution. In the light of the importance of the principle of immunity to the stability of international relations, progressive development in that area should be approached with the utmost caution.

68. On the topic of treaties over time, the Study Group's attempt to classify international judicial institutions according to the method of interpretation that they usually applied raised a number of questions. An institution's preference for a given method of interpretation was guided primarily by a treaty provision. It would be wrong to suggest that the text-oriented approach was specific to the appellate bodies of the World Trade Organization (WTO) as the Study Group has done in paragraph 344 of the Commission's report (A/66/10), since the text of the treaty subject to application was a basic point of departure for any international judicial body. The Commission should also clarify the meaning of the expression "practice of the parties" (note 655 to the report) in the context of a multilateral international treaty and explain whether it referred to the practice of all participants.

69. The topic of the most-favoured-nation clause touched on a number of important questions which, if resolved, would substantially influence States' drafting practice. It would be particularly useful to determine whether such a clause took precedence over other treaty provisions and whether it could substitute for the directly expressed intent of the parties. His delegation believed that, irrespective of the final results, the materials gathered by the Study Group would provide useful information to States and interested organizations.

70. **Mr. Kowalski** (Portugal) said the Commission should adopt a balanced approach to the topic of the immunity of State officials from foreign criminal jurisdiction, aimed at both codification and progressive development and based on two values, namely the immunity of State officials and the obligation to combat impunity; it could not rest on the outdated concept of absolute State sovereignty.

71. He agreed that the criterion for attribution of the responsibility of the State for a wrongful act might be relevant in determining whether a State official enjoyed immunity *ratione materiae*. In making that determination, the Commission would need to decide whether to rely on the "effective control" test applied by the International Court of Justice in its 26 February 2007 judgment in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, or the "overall control" test adopted by the International Criminal Tribunal for the Former Yugoslavia in *Prosecutor v. Duško Tadić*, which case law and practice seemed to favour.

72. Immunity *ratione personae* should be granted to heads of State and Government and ministers for

foreign affairs owing to their high degree of immediate identification with the State as a whole. There were sufficient legal arguments to support the notion that those officials enjoyed immunity *lex lata*, as illustrated by the case concerning the *Arrest Warrant of 11 April 2002 (Democratic Republic of the Congo v. Belgium)*. One way of determining whether the acts of a State exercising jurisdiction were precluded by the immunity of an official might be to decide whether the said acts would subject the official in question to a constraining act of authority, as set out in the case concerning *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*.

73. His delegation did not share the view that immunity *ratione personae* was absolute, with no possible exceptions thereto, or that immunity *ratione materiae* might not be automatically lifted in certain cases; nor did it agree that States had a moral obligation to waive the immunity of their officials in all cases, as the Institute of International Law seemed to have indicated in its 2009 resolution on the immunity from jurisdiction of the State and of persons who act on behalf of the State in case of international crimes. There was a trend in international law that supported the existence of exceptions, or perhaps even the absence of immunity, in certain cases. From a methodological perspective, therefore, the assumption of a blanket rule of immunity could lead to biased conclusions. The established sanctions for violation of international law, particularly in the case of *jus cogens* norms, could not always be set side.

74. Whether exceptions to immunity were *lex lata* or not, his delegation believed that immunity should be lifted for the most serious crimes of international concern. He encouraged the Commission to continue work on the issue of exceptions to immunity without concern about embarking on an exercise of progressive development and welcomed the proposal to establish a working group on the topic.

75. Turning to the topic of the obligation to extradite or prosecute (*aut dedere aut judicare*), he said that while the duty to cooperate was well established in international law, the wording of draft article 2 (Duty to cooperate) should be reconsidered. Before determining how States should cooperate with international courts and tribunals, the Commission must first establish the relationship between the obligation to extradite or prosecute and the duty to surrender an alleged offender to a competent international court or tribunal. His delegation also had concerns about the phrase “crimes and offences of international concern” in paragraph 1 of the draft article and sought clarity as to the specific crimes that would fall into that category. His delegation shared the concerns of some members of the Commission regarding the research and methodology underlying draft articles 3 and 4, which dealt with treaties and custom, respectively, as sources of the obligation to extradite or prosecute. However, despite the inherent difficulties, the Commission should continue its work on the topic.

76. With regard to the topic of treaties over time, his Government was conducting a survey on subsequent agreements and practice with a view to setting up a system to monitor their influence on the interpretation and application of treaties to which Portugal was a party. The preliminary findings showed that such agreements and practice were indeed considered relevant, particularly in the case of treaties on certain subjects; specific examples would be provided to the Commission at a later date. As to future work, he supported the appointment of a special rapporteur on the topic.

77. With regard to the topic of the most-favoured-nation clause, his delegation viewed with interest the Study Group’s approach of determining who was entitled to benefit and whether the preconditions for access had been met before determining whether the clause could be used to incorporate dispute settlement provisions into treaties.

78. While it might still be impossible for the Commission to deliver a clear set of unique and conclusive solutions, a comprehensive survey of approaches to the interpretation and application of most-favoured-nation clauses would provide a useful guide to their interpretation and application.

79. **Mr. Gupta** (India) said that in principle, his delegation agreed with the Special Rapporteur that the immunity of a State official from foreign criminal jurisdiction was a generally accepted norm and that any exceptions needed to be proved. It also agreed that the possibility of lifting immunity in criminal proceedings should be considered either at the initial stage of the process or at the pretrial stage; it might therefore be appropriate for the Commission to study the implications of failing to do so. Clear criteria for the extension of immunity *ratione personae* beyond the

so-called troika should be identified, cooperation between States on matters relating to the immunity of State officials should be enhanced and it should be recognized that the right to waive such immunity was vested in the State, not the official.

80. Concerning the topic of the most-favoured-nation clause, he welcomed the paper entitled "Interpretation and Application of MFN Clauses in Investment Agreements". It was important to study the different formulations of such clauses and the implications of including them in treaties and to give further consideration to the topic in relation to trade-in-services and investment agreements and to the relationship between most-favoured-nation, fair and equitable treatment and national treatment standards.

81. On the topic of the obligation to extradite or prosecute (*aut dedere aut judicare*), his delegation agreed that States had a duty to cooperate in combating impunity, as set out in draft article 2 (Duty to cooperate) and that the topic required in-depth analysis of conventional and customary international norms and of national regulations.

82. In that connection, India's Extradition Act of 1962 and the bilateral extradition treaties to which it was a party all contained provisions concerning the obligation to extradite or prosecute, which the Commission should continue to consider. The establishment of a Working Group on the topic was a welcome initiative, as was the reconstitution of the working group on the long-term programme of work for the quinquennium. Lastly, the topics selected for consideration by the Commission must be of practical value to the international community.

83. **Ms. Revell** (New Zealand) said that she welcomed further consideration of the most-favoured-nation clause, including its relationship to the core investment disciplines and to fair and equitable treatment and national treatment standards, and endorsed the Study Group's general understanding of the topic and methodologies. In particular, she supported the Group's proposal to look at the use of the clause in other areas of international law and its belief that no further interpretation was necessary where dispute settlement procedures were expressly included or excluded. New Zealand had taken that approach in its own free trade and investment agreements, following the model of *Emilio Agustín Maffezini v. Kingdom of Spain*. In light of the constantly evolving nature of international investment jurisprudence, the Commission's work on the topic would make a timely and valuable contribution. She looked forward to reading the draft report of the Study Group and to completion of its work in the second year of the coming quinquennium.

84. On the topic of the obligation to extradite or prosecute (*aut dedere aut judicare*), her delegation considered that while there was merit in exploring the question of whether such an obligation existed under customary international law, the topic presented inherent difficulties in light of the precision required by domestic criminal law. She encouraged the Commission to attempt to clarify the direction to be taken in line with the 2009 general framework for consideration of the topic, including its relationship to universal jurisdiction and to the duty to cooperate, before undertaking further substantive work.

85. She welcomed the introductory report, prepared by the Chairman of the 2010 Study Group on Treaties over Time, on the relevant jurisprudence of the International Court of Justice and arbitral tribunals of ad hoc jurisdiction and the second report of the Chairman on the jurisprudence under special regimes relating to subsequent agreements and subsequent practice. Her delegation was generally supportive of the nine preliminary conclusions reformulated by the Chairman and of the expectation that the Commission's work on the topic should be concluded during the next quinquennium and should result in conclusions on the basis of a repertory of practice.

86. Turning to the topic of the immunity of State officials from foreign criminal jurisdiction, she said that the law in that area required a balancing of the fundamental principles of sovereign equality, non-interference in the internal affairs of States, the need for individual accountability and the desire to end impunity for serious international crimes. While it was vital that officials should not be subjected to politically motivated prosecution in foreign courts, shifting public attitudes in an increasingly globalized world might indicate increasing support for the accountability of State officials for serious crimes. She looked forward to further consideration of possible exceptions to immunity and of the approach (*lex lata* or *lex ferenda*) to be taken. Her delegation continued to prefer the approach taken by the Commission in the 1996 Draft Code of Crimes against the Peace and Security of Mankind, which provided for an exception to immunity

when a State official was accused of international crimes and especially where prohibition of such a crime had reached the status of a *jus cogens* norm. She welcomed the suggestion that terms such as "international crimes", "grave crimes" and "crimes under international law" should be clarified for the purposes of the topic and noted that they might overlap with other topics under consideration by the Commission.

87. She looked forward to further consideration of the topic, including the question of whether immunity *ratione personae* should be absolute and should cover acts performed in an official and a personal capacity, both while in office and prior thereto. Any extension of immunity beyond the troika of incumbent heads of State and Government and ministers for foreign affairs should be clearly justified and should include a careful analysis of customary international law. Her delegation would also be interested in further study of whether immunity *ratione materiae* should apply to unlawful acts and acts ultra vires.

88. **Mr. Nguyen** Huu Phu (Viet Nam) said that his Government complied with the obligation to extradite or prosecute (*aut dedere aut judicare*) under the bilateral and multilateral treaties to which Viet Nam was a party and would welcome the development of clear legal frameworks on that issue at the national and international levels. He encouraged the Special Rapporteur on the topic to give further consideration to its relationship with universal jurisdiction in order to assess the latter's relevance for the draft articles to be prepared.

89. On the topic of the most-favoured-nation clause, he welcomed the Study Group's view that it should strive for an outcome that would be of practical utility to those involved in the investment field and to policymakers and would promote greater coherence in the approaches taken in arbitral decisions. To that end, he encouraged the Group to propose answers to questions arising from the variable methods used to interpret those clauses and to establish the limits of such interpretations, taking into account the interests of both States and investors.

90. He supported the inclusion of new topics in the Commission's long-term programme of work; the topics on the formation and evidence of customary international law and the fair and equitable treatment standard in international investment law were particularly relevant to States that were actively promoting global and regional trade and investment. The Commission's work on those topics would help States comprehend their rights and obligations in relation to the protection of investments made by their nationals in other States, as well as those made in their territory by foreign investors, and would give them clearer guidance in matching their specific interests to investment treaties. The topics were, moreover, at the heart of various disputes that involved large sums of money and might affect the proper functioning of States as public administrators for their societies. Unfortunately, those disputes were currently being handled by tribunals that had neither the interest nor the capacity to thoroughly examine such complex situations. He therefore urged the Commission to commence work on the two new topics as a matter of urgency.

91. **Mr. Hill** (United States of America) said that while he appreciated the work of the Special Rapporteur on the controversial and difficult topic of the immunity of State officials from foreign criminal jurisdiction, important and pressing questions remained. His delegation was committed to striking the correct balance between the prevention of impunity and the protection of immunity.

92. The United States of America was a party to a number of international conventions that contained the obligation to extradite or prosecute (*aut dedere aut judicare*) and viewed such provisions as an integral, vital aspect of collective efforts to deny safe haven to terrorists and other criminals. He agreed that certain issues, such as the question of whether and to what extent the obligation had a basis in customary international law, could be considered only after a careful analysis of the scope and content of the obligation under existing treaty regimes. His delegation remained convinced, on the basis of United States practice and that of other States, that customary international law and State practice did not provide a sufficient basis for the formulation of draft articles extending the obligation beyond the relevant international agreements. States assumed the obligation to extradite or prosecute by becoming parties to such agreements, and only to the extent provided therein. If that were not the case, they could be required to extradite or prosecute in situations where they lacked the necessary legal authority, such as a bilateral

extradition relationship or jurisdiction over the alleged offence.

93. There was little need — at least at present — to broaden the topic of treaties over time, on which a great deal of useful work remained to be done. Of particular interest was the Special Rapporteur's work on the extent to which the special nature of certain treaties — notably human rights treaties and treaties in the field of international criminal law — might affect the approach of the relevant adjudicatory bodies to treaty interpretation. The Commission had renewed its request for information from governments regarding examples of subsequent agreements or practice which were or had been relevant to the interpretation and application of one or more of their treaties and, in particular, instances of interpretation by way of subsequent agreements or practice which had not been subject to judicial or quasi-judicial proceedings. Examples of practice by national courts would be a particularly fruitful source of information; for example, his delegation would be curious to learn how States addressed the domestic legal questions raised by shifting interpretations of international agreements on the basis of subsequent practice in cases where the legislative branch had been involved in approving such agreements prior to ratification.

94. Most-favoured-nation clauses were principally a product of treaty formation and differed considerably in structure, scope and language; moreover, their dependence on other provisions in the agreements in which they were located resisted a uniform approach. He therefore supported the Study Group's decision not to revise the 1978 draft articles on most-favoured-nation clauses or to prepare new ones. He encouraged the Group to continue its study of current jurisprudence, which could serve as a useful resource for governments and practitioners, and would be interested to learn what areas beyond trade and investment it intended to explore.

95. Concerning the working methods of the Commission, he agreed that with some exceptions, the special rapporteurs should set 50 pages as the general benchmark for the length of their reports and should prepare concise draft commentaries for the draft articles adopted at each session as soon as possible after their completion. He also supported the Commission's goal of fostering greater dialogue with the Committee.

96. **Mr. Kamto** (Chairman of the International Law Commission) said that the Commission welcomed the views that States had provided orally or in writing with regard to the Commission's work and the issues raised in its report (A/66/10). He encouraged delegations to submit comments on the questions raised in chapter III of the report.

Agenda item 143: Administration of justice at the United Nations (*continued*) (A/C.6/66/L.13 and L.14)

Draft resolution A/C.6/66/L.13

97. **Mr. AlFarhan** (Saudi Arabia) said that a new preambular paragraph, to be inserted after the first preambular paragraph, should read "Recalling also the invitation made in the relevant resolutions to the Sixth Committee to consider the legal aspects of administration of justice at the United Nations without prejudice to the role of the Fifth Committee as the Main Committee entrusted with responsibilities for administrative and budgetary matters". In section 2 (a) of the annex to the draft resolution (Code of conduct for the judges of the United Nations Dispute Tribunal and the United Nations Appeals Tribunal), the word "bias" should be deleted and replaced with the word "prejudice".

98. **Mr. Hill** (United States of America), supported by **Mr. De Borja** (Philippines), drew attention to the oral request by the Chair of the Working Group on the Administration of Justice at the United Nations that the Internal Justice Council should consider the question of transparency and provide further clarification with respect to the principle of open justice.

99. *Draft resolution A/C.6/66/L.13, as orally revised, was adopted.*

Draft resolution A/C.6/66/L.14

100. **Mr. AlFarhan** (Saudi Arabia) said that a new operative paragraph, to be inserted after the first operative paragraph, read: "Decides not to approve the amendment to the rules of procedure of the United Nations Dispute Tribunal contained in annex 1 of document A/66/86, adopted on 14 December 2010 in accordance with article 37, paragraph 1, of the rules of procedure of the United Nations Dispute Tribunal, concerning article 19 (Case management)".

101. *Draft resolution A/C.6/66/L.14, as orally revised, was adopted.*

Agenda item 78: Criminal accountability of United Nations officials and experts on mission (*continued*) (A/C.6/66/L.16)

102. **Ms. Telalian** (Greece), introducing draft resolution A/C.6/66/L.16, said that the text was similar to General Assembly resolution 65/20 with a few technical updates. Paragraph 8 invited further comments from Member States on the report of the Group of Legal Experts on ensuring the accountability of United Nations staff and experts on mission with respect to criminal acts committed in peacekeeping operations (A/60/980), which would be considered during the sixty-seventh session of the General Assembly within the framework of a working group of the Committee. Paragraph 15 had been updated to take into account General Assembly resolution 65/20; it also urged Governments, when providing information to the Secretary-General, to provide specific details in respect of the establishment of jurisdiction, particularly over crimes of a serious nature committed by their nationals while serving as United Nations officials or experts on mission, in order to facilitate a focused debate on whether States had addressed domestically the question of a jurisdictional gap. In paragraph 16, the Secretary-General was requested to report to the General Assembly on the implementation of the resolution, including the amended paragraph 8 thereof. Lastly, the phrase "including information on efforts made to ensure the completeness of incident reporting" had been added to paragraph 17.

Agenda item 82: Report of the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization (*continued*) (A/C.6/66/L.17)

103. **Mr. Salem** (Egypt), introducing draft resolution A/C.6/66/L.17, said that the text was based on that of General Assembly resolution 65/31 with a few technical changes.

The meeting rose at 1 p.m.