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Chair: Mr. Chekkori (Vice-Chair) . . . . . (Morocco)

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12-57339 (E)

In the absence of Mr. Sergeyev (Ukraine), Mr. Chekkori (Morocco), Vice-Chair, took the Chair.

The meeting was called to order at 10.10 a.m.

Agenda item 79: Report of the International Law Commission on the work of its sixty-third and sixty-fourth sessions (*continued*) (A/67/10)

1. **Mr. Huth** (Germany), commenting on the topic of the immunity of State officials from foreign criminal jurisdiction, said that while his delegation had no preconceptions regarding the possible outcome of the Commission's work on the topic, it was convinced that the starting point should be a solid and thorough analysis of existing State practice and a specifically identified *opinio juris*. He reiterated his delegation's position that the Commission should base its work on *lex lata*. The rules of immunity were predominantly rooted in customary international law because, in the politically sensitive area of delimitation of and mutual respect for States' sovereign powers, claims by one State to exercise jurisdiction over another's officials might encroach upon the rights of the latter State. The rules of *lex lata*, which balanced the sovereign rights of the States concerned, had proven to be generally acceptable and were therefore followed, with States basing their conduct on accepted customary rules in order not to endanger their relations with their counterparts.

2. His delegation agreed with most of the questions identified in paragraphs 71 to 77 of the preliminary report of the Special Rapporteur (A/CN.4/654) and agreed that a detailed workplan would better structure the Commission's work on the topic; however, some of its aspects warranted further consideration. In particular, an analysis of immunity in the system of values and principles of contemporary international law should be based on a specifically identified *opinio juris* and relevant State practice rather than on abstract considerations. It was doubtful whether that analysis could be undertaken at such an early stage as it might prejudice certain results. With regard to the "general issues of a methodological and conceptual nature" mentioned in paragraph 72 of the preliminary report, it would be worth discussing whether a conceptual distinction should be made between immunity from foreign civil jurisdiction and immunity from foreign criminal jurisdiction.

3. Immunity did not inevitably lead to impunity. While combating impunity was of paramount importance, States were responsible for exercising jurisdiction over their officials if the latter were suspected of having committed unlawful acts and could also waive the immunity of such officials. If those traditional mechanisms failed to function, there was always the possibility of recourse to international courts, although his delegation understood the Commission's position that the issue of the immunity of State officials from international criminal jurisdiction should be excluded from the scope of the topic.

4. The inclusion of the topic on the formation and evidence of customary international law in the Commission's long-term programme of work was to be welcomed. While his delegation fully shared and supported the aim of the Commission's study on customary international law — to provide practical guidance to judges and lawyers and to diplomats and government legal advisers who were called upon to apply such law — it agreed with those members of the Commission who favoured a modest approach. Since customary international law was too large a subject to be addressed in its entirety, the Commission should focus on practical aspects and on national judges or lawyers seeking advice. His delegation would follow the project closely and stood ready to support the Commission's work on the topic by providing information on relevant German practice. It encouraged other States and international organizations to do likewise since an analysis of State practice was crucial for producing results that would provide concrete assistance to international law practitioners.

5. Turning to the topic of the provisional application of treaties, he said that such application, provided for in article 25 of the Vienna Convention on the Law of Treaties, had become more frequent over the years, particularly when lengthy national ratification procedures prevented the rapid entry into force of a treaty. The practice was used with equal frequency for bilateral and multilateral instruments. It was his delegation's understanding that the provisional application of a treaty meant that its rules would actually be put into practice and would govern the relations between the negotiating States or prospective parties to the extent that such application was agreed. States could decide to limit the extent of provisional application of a treaty, as had been done for many

treaties concluded with the participation of Germany; in such cases, the extent of provisional application was determined either in the treaty itself or in the instrument containing the agreement on provisional application.

6. In many countries, including his own, domestic law determined the extent to which provisional application of a treaty could be agreed or implemented. If the implementation of a treaty required the amendment or adoption of a negotiating State's domestic law, provisional application by that State was impossible, at least until the relevant legislation had been changed or adopted. The same might apply if the funding demanded by the treaty required parliamentary approval. Therefore, States would often limit a treaty's provisional application to the framework of their applicable domestic law, making it clear that they might not be in a position to meet its obligations completely. Alternatively, they might agree to the provisional application of a treaty as from notification of completion of the necessary internal procedures.

7. Provisional application was not the expression of a State's consent to be bound, nor did it give rise to an obligation to declare such consent. Article 25, paragraph 2, of the Vienna Convention provided that a State that had determined that it had no intention to be bound by a treaty — for example, because parliamentary approval for ratification had been refused — could terminate its provisional application. However, the question of whether and how States that had already consented to be bound by a treaty that was not yet in force could terminate provisional application of that treaty would depend on the specific terms of the agreement on such application.

8. On the topic of treaties over time, his delegation welcomed the Commission's decision to change the format of its work, as suggested by the Study Group, with effect from its sixty-fifth session (2013) and the appointment of the Special Rapporteur for the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties". It looked forward to receiving the Special Rapporteur's first report, which would make the valuable work undertaken to date more accessible to States than when it had been conducted within the framework of the Study Group.

9. His delegation also welcomed the work of the Study Group during the last session and, in particular, the finalization of the preliminary conclusions by the Chair of the Group. The decision to change the title and restrict the scope of the topic would help the Commission to focus on the legal effect of subsequent agreements and on practice with respect to the interpretation of treaties and related matters. His delegation urged other States and international organizations to provide the Commission with information on their practice in that regard.

10. **Mr. Bonifaz** (Peru), addressing the topic of the immunity of State officials from foreign criminal jurisdiction, said that, while his delegation had previously disagreed with some of the conclusions contained in the reports of the former Special Rapporteur, the rigorous and in-depth nature of those reports would contribute to future work on the topic. The new Special Rapporteur's enthusiasm and commitment to the work of the Commission was already bearing fruit as reflected in the presentation of her first report, described as "transitional" in nature.

11. It was important to identify the substantive aspects of the topic before addressing the operational aspects of its implementation; his delegation therefore agreed with the step-by-step approach proposed by the new Special Rapporteur. In that connection, the topic of immunity should be addressed from the perspective of both *lex lata* and *lex ferenda*; separating the two approaches could lead to systemic inconsistencies given the development of the topic and its close links with various areas of international law. The methodological approach of distinguishing between immunity *ratione personae* and immunity *ratione materiae* was appropriate in view of the specific characteristics of each type of immunity and their development in international law. His delegation also agreed that the functional nature of the immunity of State officials from foreign criminal jurisdiction was key to the recognition of such immunity.

12. As the new Special Rapporteur had noted, while the immunity of State officials from foreign criminal jurisdiction had consequences for the legal regime applicable to the international responsibility of individuals, it also had direct implications for the responsibility of the State, and vice versa. Further consideration should therefore be given to its implications in order to avoid confusion in application of the regime for each type of responsibility.

13. With regard to the questions contained in paragraph 63 of the Special Rapporteur's report (A/CN.4/654), his delegation considered that the members of the so-called troika — Heads of State and Government and ministers for foreign affairs — should enjoy immunity from foreign criminal jurisdiction. However, given the reality of international relations, it was somewhat artificial to draw a dividing line that excluded other high-ranking officials, such as ministers of international trade, when the cornerstone of immunity was its functional nature. Establishing a list of officials who enjoyed immunity was not the best solution owing to the differences in the designation of officials in various countries. A restrictive approach, guided by the function of the position, should therefore be taken; the Commission might give further consideration to the characteristics that could be used to identify the officials who might enjoy immunity on the basis of their functions. It should also be borne in mind that the meaning of the term "official" varied according to the legal regime in each State. His delegation therefore endorsed the Special Rapporteur's proposal that the Commission should reconsider the matter in order to better delimit the scope of the topic. It should be stressed that the Commission's work must not give rise to situations of impunity, particularly in respect of the most serious international crimes.

14. The Committee's work on the question of the scope and application of universal jurisdiction was closely related to the topics of the immunity of State officials from foreign criminal jurisdiction and the obligation to extradite or prosecute (*aut dedere aut judicare*). Universal jurisdiction had first been included in the agenda of the General Assembly at its sixty-fourth session and had been examined in depth for two years by the Committee's Working Group; his delegation considered that it was now time to request the Commission's assistance since the topic required the legal input that the latter could provide. Some members of the Commission had already suggested that it should undertake an analysis of universal jurisdiction in view of its close relationship with other topics already on its agenda. His delegation therefore urged the Committee to recommend that the Commission address the issue of universal jurisdiction in order to harmonize its work, thereby benefiting the Committee as well.

15. **Ms. Maeng** Sujin (Republic of Korea) said that, as indicated by the Special Rapporteur, harmonization between *lex lata* and *lex ferenda* was crucial in addressing the topic of the immunity of State officials from foreign criminal jurisdiction, which was closely related to major legal issues such as strengthening the rule of law and combating impunity. In view of the Commission's mandate to promote the progressive development of international law and its codification, her delegation also considered that a deductive approach to the topic would be more effective than an inductive one and that the Commission should identify and develop the relevant rules on the basis of State practice and national and international jurisprudence.

16. Although the previous Special Rapporteur had noted that immunity *ratione personae* and immunity *ratione materiae* differed in terms of their legal repercussions for the subject of immunity, the necessity of invoking immunity and waivers of immunity, it was still difficult to clearly distinguish between the beneficiaries of the two types of immunity. Furthermore, broadening the scope of immunity *ratione personae* to include certain other "incumbent high-ranking officials" rather than confining it to the "troika" might make it difficult to determine exactly who was entitled to it, especially given the diversity of States' political systems. Clear criteria for identifying such officials were therefore needed. The 2002 judgment of the International Court of Justice in *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, which stated that the immunities accorded to ministers for foreign affairs were granted to ensure the effective performance of their functions on behalf of their respective States, might be helpful in that regard.

17. With regard to immunity *ratione materiae*, it was important to define the term "official act" and to consider the relationship between the rules on attribution for State responsibility and rules on the immunity of State officials in determining whether a State official was acting in an official capacity, as had been proposed by the Special Rapporteur. An in-depth review of the distinction between *acta jure imperii* and *acta jure gestionis* in the law of State immunity would also be helpful in establishing a list of official acts.

18. Efforts to determine the scope of exceptions to the immunity of a State official from foreign criminal jurisdiction should focus on identifying current law by analysing relevant State practice and national and international jurisprudence. If clear identification of the existing law was not possible, it would be

necessary, in the interests of protecting human rights or combating impunity, to discuss the question of whether any limitations on immunity should be recognized in cases involving violations of *jus cogens* or the commission of international crimes. Bearing in mind the divergence of positions among States and members of the Commission regarding the need for exceptions and, if they existed, the extent of their scope, her delegation requested the Commission to take a cautious approach. It supported the Special Rapporteur's proposal to analyse one group of questions at a time and hoped that the Commission would consider all relevant materials, including previous reports, the memorandum by the Secretariat (A/CN.4/596 and Corr.1) and progress in the discussions of the Commission and the Committee.

19. On the topic of the provisional application of treaties, her delegation considered it necessary to clarify the meaning of "provisional application" in article 25 of the Vienna Convention. If it meant that a treaty entered into force provisionally without the consent of the State to be bound, it was important to consider how the provisional application regime could be in harmony with the current international rules based on such consent. It was also necessary to review State practice on how a person was empowered to represent a State for the purpose of expressing its consent to be bound by a treaty "pending its entry into force", as well as the related articles 7, 8, 46 and 47 of the Convention. For example, provisional application of the free trade agreement between the Republic of Korea and the European Union had required the consent of the National Assembly of Korea, as would also be the case for its entry into force. Since the agreement had been provisionally applied with the Assembly's consent, no additional measures for its entry into force had been taken.

20. With regard to the relationship between articles 18 and 25 of the Convention, it should be noted that the two articles applied to a treaty as separate regimes before its entry into force; in other words, the obligation not to defeat the object and purpose of a treaty prior to its entry into force could be applied irrespective of its provisional application. If the treaty itself provided for such application, that provision would be protected by article 18 of the Convention.

21. Concerning the topic of the formation and evidence of customary international law, it would be appropriate to request the Secretariat to prepare a memorandum on the issue, bearing in mind that customary international law still played a significant role in the international legal system. As to the final outcome of the Commission's work on the topic, her delegation agreed with the Special Rapporteur that it should take the form of a clear, concise and comprehensible set of conclusions with commentaries, which would help people without international legal expertise to determine whether a particular rule constituted a norm of customary international law. Bearing in mind the diverse patterns of development and formation of customary international law in each area of international law, as well as in State practice, it was important to decide in advance whether the Commission should seek any uniformity in the process of the formation and evidence of customary international law throughout the international legal system. The methodology for collecting and evaluating State practice should also be considered.

22. The topic of the obligation to extradite or prosecute (*aut dedere aut judicare*) was of interest to her delegation because of its potential contribution to strengthening the rule of law and combating impunity. However, in light of the results of the Commission's discussions, it was time to reconsider the question of whether the topic was relevant to its mission, the codification and progressive development of international law. Nevertheless, she wished to comment on related substantive matters.

23. It would not be effective to harmonize provisions on the obligation to extradite or prosecute in all multilateral treaties owing to the uncertainty as to whether the relevant State practice was consistent, despite the existence of the "Hague formula" in treaties relating to aviation crimes. Nor would it be appropriate for the Commission to focus on the interpretation, application and implementation of a particular extradition or prosecution provision unless the exercise would lead to the identification of general principles of international law. With regard to the suggestion that the Commission should focus on extradition or prosecution of persons accused of the core crimes under international law, her delegation believed that such work would be redundant as article 9 of the Draft Code of Crimes against the Peace and Security of Mankind dealt with the same subject matter. Lastly, an analysis of the International Court of Justice case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* would be relevant to the

topic because one of the core issues in that case had been the State's compliance with the treaty or customary law obligation to extradite or prosecute. Some judges had formulated separate opinions denying the existence of such a customary law obligation as a matter of general international law, although the opinion of the Court itself had not been entirely clear on that point.

24. Turning lastly to the topic of treaties over time, her delegation supported the Commission's decision to appoint the Chair of the Study Group as Special Rapporteur for the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties" but considered it premature to comment on the six additional preliminary conclusions by the Chair of the Study Group.

25. **Mr. Nikolaichik** (Belarus) said that his delegation favoured the speedy drafting by the Commission of a document that reflected the customary rules of international law on the immunity of State officials from foreign criminal jurisdiction. He called on the Commission to interpret the wording of the topic literally in determining its scope and to codify the rules governing the immunity of State officials before the domestic courts of foreign States. The Commission might consider proposals *de lege ferenda* in order to allow for the progressive development of the rules and to eliminate lacunae in laws governing the international legal status of State officials. The reports of the Special Rapporteur and the Commission should distinguish clearly between *lex lata* and *lex ferenda*.

26. The immunity of State officials was derived from that of the State, as defined by the principles of the sovereign equality of States and non-interference in their internal affairs, and was a function of their official duties. Certain officials embodied the State in international relations and their immunity was, in essence, that of the State. The State's top officials possessed absolute immunity (*ratione personae*) by virtue of their status, since, in addition to representing the State internationally, they also performed domestic duties that were critical to State sovereignty. The position of the International Court of Justice in the *Arrest Warrant* case supported that view and clearly reflected *lex lata*.

27. There were difficulties associated with the effort to identify criteria for granting immunity *ratione personae* to high-level State officials other than Heads of State and Government and ministers for foreign affairs. There were also contradictions inherent in determining whether the immunity *ratione personae* of high-level officials was transmuted into functional immunity (*ratione materiae*) once they had left their posts, which meant that while the actions that they had performed in their official capacity fell outside the jurisdiction of foreign courts, their private actions were subject to criminal prosecution; the 1969 United Nations Convention on Special Missions and its preparatory materials would provide guidance in that regard. The Commission should base its consideration of the topic on the positions and practices of States, intergovernmental organizations and international judicial bodies and should rely on treaty law and customary international law for guidance. Positions set out in international legal doctrine and in non-governmental forums should be given lesser weight in identifying possible directions for progressive development.

28. His delegation did not view the proposal to examine the question of the immunity of State officials in the context of the essential values of the international community as particularly productive since an attempt to frame such values would be premature and would distract the Commission from its task. The fundamental principles of international law enshrined in the Charter of the United Nations were of genuine value to cooperation and friendly relations among States. The immunity of State officials was part and parcel of State sovereignty and immunity; thus, the question of foreign criminal prosecution of State officials, including former State officials, must be considered in light of the applicable rules of international law, respect for State sovereignty and the rules on waiver of immunity.

29. The issue of a link between the assertion by a State of immunity and its responsibility for the conduct of its official, raised by the Special Rapporteur, warranted extensive consideration. The Commission might discuss unauthorized or *ultra vires* acts by State officials, provided that the imperative nature of the fundamental rules governing the immunity of State officials was not called into question. However, his delegation believed that the matter had been already resolved in principle by the Commission during its work on the articles on responsibility of States for internationally wrongful acts.

30. With regard to the obligation to extradite or prosecute (*aut dedere aut judicare*), an analysis of the application of the relevant international treaties, the resulting challenges and the positions of interested States would contribute to a better understanding of the topic. The Commission and the Working Group should also conduct a systematic survey of State practice to determine whether the obligation had attained the status of a customary rule independent of an international treaty. It would be useful to learn how the exercise of universal jurisdiction over certain categories of crimes could affect the emergence of the obligation to extradite or prosecute as a customary rule and whether the obligation could similarly affect the exercise of universal jurisdiction. The Commission might undertake an analysis of the role of universal jurisdiction in light of the obligation to extradite or prosecute without waiting for the Committee to complete its work on the topic.

31. With regard to the provisional application of treaties, articles 18 and 25 of the Vienna Convention remained relevant and did not require a fundamental review. His delegation supported the Commission's decision to examine the Convention's provisions concerning reservations, provisional application and the subsequent practice of States parties in flexible documents that summarized State practice without altering the Convention. The provisional application of treaties brought legal stability to relations among States and helped remove obstacles in many areas of activity. However, one drawback of the practice was the fact that it allowed a State to delay expression of its consent to be bound by a treaty, the provisional application of which did not generate legally binding obligations. In order to encourage States to express such consent more quickly, the Commission might consider whether it would be beneficial for the extended provisional application of certain provisions of a treaty to acquire the status of international custom *de lege ferenda*.

32. Under paragraph 32 of Belarus' law on international treaties, a treaty that was subject to provisional application prior to its entry into force must be implemented in the same manner as one that had already entered into force, as from the date of its signature by Belarus. His delegation shared the view that the obligation not to defeat the object and purpose of a treaty prior to its entry into force, established by article 18 of the Vienna Convention, was independent of and parallel to the provisional application of the treaty. The outcome of the Commission's work on the topic should consider all known means of formulating agreement to the provisional application of treaties, the preconditions for such application and the effects of its termination.

33. It would be useful to analyse the different theories of the nature of customary international law in order to enable a better understanding of the process of its formation and to guide future codification efforts. The Commission should examine the interrelated issues of how the customary rules of international law were formed, what sources served to identify the existence of such rules and the extent to which the process of their formation had changed under the influence of information and communication technologies, rulings by international judicial bodies and international treaty practice. The Commission must clearly set out the main components of customary rules of international law, including an analysis of international practice and *opinio juris*. Other topics of interest were the identification of subjects whose practice could give rise to the formation of a customary rule and the subdivision of customary international law into general, regional and local customary rules. While a convention based on those findings was not warranted, the Commission's work could take the form of a set of conclusions or guidelines that practitioners could use in identifying the rules of customary international law. The main objective of the Commission's work on the topic should be to assist States and other subjects of international law in their efforts to understand and comply with their international legal obligations.

34. Regarding the topic of treaties over time, his delegation supported the decision of the Special Rapporteur to synthesize, in his first report, the three reports that he had submitted to the Study Group in his capacity as its Chair so that States and other interested parties could examine the topic on the basis of a single combined document and discuss the Chair's six preliminary conclusions.

35. **Mr. Stuerchler Gonzenbach** (Switzerland) said that, in considering the topic of the immunity of State officials from foreign criminal jurisdiction, it was necessary to strike a balance between the effort to combat impunity and the need to preserve harmonious relations between States. The divergence of opinions on such matters as the scope of immunity from

jurisdiction and the persons entitled to invoke it showed the extent of the challenge facing the Commission.

36. With regard to the Commission's request for States to provide information on their national law and practice, the Swiss courts had largely been called upon to decide on the scope of the immunity of members of diplomatic missions, permanent missions and consular posts and officials of international organizations; there was little case law regarding other State officials. However, the Federal Criminal Court had recently been required to decide whether a former Minister of Defence of another State, who had been in Switzerland for a short private visit, could legitimately invoke immunity from criminal jurisdiction following a complaint filed against him for war crimes allegedly committed several years earlier, in his home State, while he was Minister of Defence. The Federal Court, referring to the *Arrest Warrant* case of the International Court of Justice, had ruled that an incumbent Minister of Defence was entitled to immunity *ratione personae* under public international law, thereby recognizing that such immunity was not restricted to the "troika" but could also cover other high-ranking Government officials. In so doing, it had considered that a certain level of immunity survived beyond the end of official functions. However, it had also concluded that some exceptions to immunity *ratione materiae* should be allowed and that the official's residual immunity did not exempt him from potential liability for serious human rights violations. The Federal Court had refused to recognize immunity from jurisdiction in the case before it and had concluded that developments in international law were tending to limit the scope of immunity in such situations.

37. While divergent views had been expressed on the topic, it was in the interests of the international community — and of his Government in particular, both as a host State and in the context of its policy of good offices — to find solutions to outstanding questions. He encouraged the Commission to take a step-by-step approach to the topic in order to move away, at least at the current stage, from discussions that set immunity *ratione personae* against immunity *ratione materiae*. For the time being, the Commission should focus on the case of incumbent State officials without considering their position after leaving office. The first step should be to establish the officials who were entitled to enjoy immunity from jurisdiction on the understanding that consideration would be given only to categories not yet covered by international conventions and that there could be differences in the scope of the immunity granted to the various State officials identified as such.

38. Once agreement had been reached on that point, the next step might be to distinguish between official and private visits. To that end, it would be useful to define the term "official visit", which might be deemed to include all visits by a State official at the invitation or with the authorization of the Government of another State, at whatever level, bearing in mind that the scope of immunity could vary according to the rank of the State official in question. Such a definition should cover not only bilateral official visits, but also meetings of several States or State bodies held on the territory of a given State with its consent. In that regard, article 18 of the Convention on Special Missions, which provided that special missions could meet in the territory of a third State with the express consent of that State, could serve as a starting point for deliberations. Although the Convention was not universally recognized and had only 45 States parties, its less-contested elements could be retained; for example, some elements came from the *venire contra factum proprium* rule, according to which it would be undeniably wrong for a State to extend an official invitation to an official of another State and then arrest that official upon arrival in its territory.

39. Having agreed on the definitions of "State official" and "official visit", the Commission could examine the extent to which immunities should be accorded to incumbent State officials on official visits, bearing in mind that the scope of immunity might vary depending on the rank of the official. Once conclusions on those matters had been largely agreed, it should be possible to address the remaining questions, such as the status of incumbent State officials on private visits and of State officials after they had left office.

40. In light of the judgment in the *Arrest Warrant* case and the aforementioned Federal Criminal Court ruling, his delegation considered that broad immunity from jurisdiction should be extended not only to the "troika", but also to certain other high-ranking State officials who were required to travel regularly in the exercise of their functions. At the current stage, his delegation would not comment on the question of whether such officials should enjoy full immunity of jurisdiction or whether exceptions should be allowed.

Similarly, while those officials should be able to invoke some level of residual immunity after leaving office, it was premature to discuss the scope of that immunity.

41. Lastly, he noted that International Law Week provided an excellent opportunity for dialogue between the Commission and the Committee. As that relationship was well established, there was no reason for the Commission ever to meet in New York; it was essential to promote international law and its development not only from New York, but also from Geneva, which hosted the Commission and was an important centre for the development of international law.

42. **Mr. Redmond** (Ireland), indicating that a more detailed statement would be made available to delegations via the PaperSmart Portal, said his delegation hoped that the Commission would give continued priority to the topic of the immunity of State officials from foreign criminal jurisdiction. It endorsed the detailed workplan for the current quinquennium set out by the Special Rapporteur on the topic and shared her belief that, given the multiplicity of issues, it was appropriate to adopt a step-by-step approach, addressing each of the groups of questions in turn. It also welcomed her intention to continue to update the memorandum prepared by the Secretariat (A/CN.4/596 and Corr.1).

43. The Irish parliament had not enacted legislation on the immunity of State officials from foreign jurisdiction. In such cases, the courts applied the relevant rules of customary international law; in practice, however, the question of immunity had never arisen in their criminal prosecution of a foreign Head of State or Government, minister for foreign affairs or other foreign State official. On the only occasion on which, to his delegation's knowledge, a warrant for the arrest of a foreign State official, namely a Deputy Prime Minister, had been requested, the question of immunity had not been considered as the request had been refused on other grounds.

44. It was his delegation's view that the immunity of foreign State officials was solely procedural in nature, not substantive or material, in that it did not absolve an official from the obligation to respect the laws of a foreign State in which he or she was present. While immunity *ratione personae* applied to the "troika", it was important for the Commission to clarify the extent to which it also applied to other persons; in that connection, it would be useful to have an internationally agreed definition of the term "State official". In paragraphs 181 to 200 of its judgment in *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, the International Court of Justice had highlighted the importance of procedural aspects of asserting the immunity of foreign officials and the significance of the pre-trial stage of the proceedings. The Commission should also give detailed consideration to the links between the assertion of immunity in respect of the acts of a State official and the assumption of State responsibility for those acts.

45. With respect to methodological considerations, his delegation agreed that determinations involving codification and proposals comprising progressive development of the law should be clearly distinguished to maintain transparency. While there was not always a clear distinction between the two, his delegation saw value in focusing initially on *lex lata* before assessing propositions involving progressive development; such an approach would provide conceptual clarity and assist in maintaining maximum transparency.

46. While a distinction between the law of immunity and the law governing jurisdiction should certainly be maintained, it was clear that the topic of the immunity of State officials from foreign criminal jurisdiction involved concerns that were also relevant to the exercise of universal jurisdiction. His delegation therefore reiterated that it might be fruitful to refer the latter issue to the Commission in order to allow for expert analysis that could, if necessary, be followed by further discussion in the Committee.

47. On the topic of the provisional application of treaties, his delegation would welcome further elaboration of the issues identified in paragraph 151 of the Commission's report (A/67/10) and agreed that the relevance of the provisional application of treaties to the formation and evidence of customary international law might be best considered in the context of the Commission's work on the latter topic, which, as the Special Rapporteur had indicated, should cover both the method for identifying the existence of a rule of customary international law and the possible sources of such information. His delegation supported the Special Rapporteur's preference not to include the issue of *jus cogens* in the present study while keeping open the option of reverting to it at a later stage; in many ways,

jus cogens was a distinct topic with its own complexities in terms of formation, evidence and classification.

48. It was important to work towards a practical and useful outcome that would provide guidance at both the international and domestic levels. In that regard, his delegation agreed that a set of propositions or conclusions with commentaries, which should not be overly prescriptive, would be a suitable final outcome of the Commission's work on the topic. It welcomed the ambitious plan of work for the quinquennium and looked forward to the Special Rapporteur's first report.

49. **Mr. Van Den Bogaard** (Netherlands) said that the key theme in discussions on the topic of the immunity of State officials from foreign criminal jurisdiction was the relationship between international law on immunity and international criminal law. The Commission had contributed to the codification of immunity law by drafting a number of conventions, most recently the United Nations Convention on Jurisdictional Immunities of States and Their Property. International criminal law, which dealt with individual responsibility for international crimes, had evolved considerably over the past two decades, in particular through the creation of international tribunals and the International Criminal Court. The Commission should not approach the topic of the immunity of State officials from foreign criminal jurisdiction in isolation but should take into account what had already been achieved in those two areas of international law, with regard to issues of both substance and terminology, in order to ensure coherence and consistency in international law. For example, with regard to the new Special Rapporteur's comments on the appropriateness of the term "official", a more suitable term might be "representative of the State", which had been used in the Convention on Jurisdictional Immunities and clarified in the Commission's commentary to the draft articles on the same topic.

50. There was a wide variety of views among States, and even among courts within the same State, as well as among members of the Commission, as to whether national courts should play a role in holding foreign State officials accountable for the commission of international crimes in order to avoid impunity, or whether those officials must enjoy immunity in order to be able to perform their functions as representatives of a foreign State. In view of that diversity of opinion, his delegation supported the Special Rapporteur's attempt at conceptual and methodological clarification. By stepping back and looking at the issues from a broader perspective, the Commission could gain a better understanding of *lex lata* and reach better informed decisions on *lex ferenda*.

51. With regard to the distinction between immunity *ratione personae* and immunity *ratione materiae*, article 16 of the Dutch International Crimes Act (2003) granted immunity from criminal prosecution for international crimes to two categories of persons and did not distinguish between the two types of immunity. However, the explanatory memorandum to that Act indicated that immunity *ratione personae* entailed immunity for both official and private acts. Without such far-reaching full immunity, persons entitled to personal immunity could not perform their functions. At the same time, the explanatory memorandum indicated that the rules of international law on immunity had gradually become less absolute; for example, it was accepted that former Heads of State and Government and ministers for foreign affairs no longer enjoyed immunity for private acts committed while in office.

52. The trend towards more limited immunity had continued in the Netherlands in recent years. For example, its Independent Advisory Committee on Issues of Public International Law, in a 2011 report on the immunity of foreign State officials, had drawn a clear distinction between immunity *ratione personae* and immunity *ratione materiae*, finding that immunity *ratione materiae* did not extend to international crimes committed in the course of duty and that only persons enjoying immunity *ratione personae* were entitled to full immunity, including from the exercise of jurisdiction over international crimes. The Dutch Government had accepted those findings.

53. In the Netherlands, no criteria for identifying the persons covered by immunity *ratione personae* had been explicitly established. Generally speaking, those who enjoyed such immunity under international law were entitled to full immunity in the Dutch legal order, as reflected in article 16 of the International Crimes Act. At present, full immunity from criminal jurisdiction in the Netherlands was enjoyed by the "troika", accredited diplomats, members of official missions and persons granted such immunity pursuant to any convention applicable in the Netherlands. His delegation strongly encouraged the Commission to bring maximum clarity to the issue of *lex lata* and to be

courageous in developing *lex ferenda* in line with existing rules and principles in the relevant branches of international law. Therefore, it fully supported the workplan proposed by the Special Rapporteur.

54. Turning to the topic of the formation and evidence of customary international law, he recalled that States might sometimes wish not to be overly specific about which rules they considered to be rules of customary law or how such rules had achieved customary status; deliberations on the formation of a customary law rule normally took place behind closed doors and clarity was not provided unless the situation specifically called for a determination. Nonetheless, the formation and evidence of customary international law was a fundamental issue at the heart of international law and clearly warranted discussion by the Commission. Given the latter's awareness of the risk that the scope of the topic might be too broad, it was to be hoped that the project would be well managed in terms of duration and scale.

55. His delegation was uncertain whether the Commission should focus so heavily on the role of domestic judges in the determination of customary law since their capacity to make such determinations depended on the legal system of the country in question and on the ability of its courts to refer to customary international law. For example, on the basis of established case law, courts in the Netherlands might be prevented from taking customary law into account in certain situations. Thus, the role of domestic courts was more closely related to the parameters set by domestic law than to those of customary law. Furthermore, Governments were not necessarily able to present their views on customary law before domestic courts; domestic law, including constitutional law, often prevented States from participating in a case between two parties and the option of submitting *amicus curiae* briefs or similar legal opinions did not always exist.

56. Another issue that had not been raised by the Commission was the fact that, although rules on the formation of customary law made no requirements as to the language of its component elements, evaluation of the evidence of customary international law tended to focus on practice in one of the official languages of the United Nations. However, relevant practice or *opinio juris* could be expressed in many languages, which, from a legal perspective, would be equally relevant to the formation of customary law. That situation clearly had a financial aspect; many governmental or academic institutions produced well-organized and useful overviews of recent State practice and while States using languages other than the official languages of the United Nations might make efforts to translate relevant practice where they had the financial means to do so, such means did not always exist. Consequently, their practice went unrecorded or was not accessible. The same was true of judicial decisions in non-United-Nations languages. The Commission should therefore give consideration to the language used in the expression of *opinio juris* and in the presentation of practice, whether in government statements before courts or in academic overviews of official practice.

57. Lastly, his delegation considered that the role of international organizations in the formation of customary international law was an important issue and should be given adequate attention at the current stage of the Commission's work. For example, it would be important to establish whether, and to what extent, the practice of those organizations should be taken into account when determining the existence of extensive or virtually uniform practice and whether international organizations could, by being persistent objectors, avoid becoming bound by rules of customary law. The Commission should also ask whether the practice of international organizations and legal opinions expressed by them should be attributed only to the organization, as a legal person separate from its members, or whether its practice and legal opinion could, under certain circumstances, also be attributed to its member States.

58. The written version of his statement, which included his delegation's comments on the provisional application of treaties, the obligation to extradite or prosecute (*aut dedere aut judicare*) and treaties over time, was available via the PaperSmart Portal.

59. **Mr. Tchiloemba Tchitembo** (Republic of the Congo), said that in light of the legally and politically sensitive and cross-cutting nature of the immunity of State officials from foreign criminal jurisdiction, his delegation had no objection to the systematic approach proposed by the Special Rapporteur for addressing issues on which there was, as yet, no consensus in the Commission.

60. As stated in paragraph 108 of the Commission's report on the work of its sixty-third session (A/66/10),

the immunity of State officials was the norm, established in numerous international instruments, and any exceptions thereto would need to be proven. State officials enjoyed immunity *ratione materiae* in respect of acts performed in an official capacity, which were attributed both to the State and to the official. The criterion for attribution of the responsibility of the State for a wrongful act determined whether an official enjoyed immunity *ratione materia*, there being no reason to draw a distinction in that regard. It was precisely by using the same criterion of attribution for the purpose of State responsibility and of immunity of State officials *ratione materiae* that the responsibility of the State, as well as the individual criminal responsibility of the official, would be engaged for the same conduct.

61. The position of the International Court of Justice, in *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, on the inseparability of the immunity of the State from that of the State official was relevant as it established a useful rule of conduct. Former State officials continued to enjoy immunity *ratione materiae* for acts performed in their official capacity while they were in office, but not for acts performed before they took office or after they had left office. Since immunity *ratione materiae* derived from the function performed, it was temporary in nature.

62. Immunity *ratione personae* was granted to the "troika". It reflected the exclusivity of their official status and functions and covered both official and private acts performed during and prior to their term of office. The extension of such immunity to another group of State officials was a sensitive matter that could undermine the exclusivity of the official status of the "troika". The dominant opinion in doctrine, and even in case law, was that immunity *ratione personae* was absolute and no exceptions could be granted. The issue of exceptions therefore applied only to immunity *ratione materiae* and in the context of the commission of international crimes.

63. While it was premature to discuss the final outcome of the Commission's work, his delegation would favour the drafting of a binding instrument because the topic had political implications and an impact on international relations. Moreover, such an instrument would fill a gap in international law since that aspect of immunity was not codified in the existing legal instruments. His delegation would support all efforts by the Special Rapporteur and the Commission to build a strong consensus on maintaining and strengthening the balance between the values of the international community and the established principles of international law on various aspects of immunity.

64. In his delegation's view, the primary sources of the obligation to extradite or prosecute (*aut dedere aut judicare*) lay in multilateral treaties, such as article 7 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Discussions in 2010 and comments by members of the Committee had convinced the Special Rapporteur that the duty to cooperate in the fight against impunity was well established as a principle of international law and could be found in numerous international instruments, including articles 86 and 87 of the Rome Statute of the International Criminal Court. The provisions of international law on the duty to cooperate constituted the basis for draft article 2, paragraph 1, of the draft articles on the obligation to extradite or prosecute, while paragraph 2 of the same draft article provided that States should apply the principle by which they must either extradite or prosecute "wherever and whenever appropriate". However, his delegation, like many others, was aware of the difficulty in proving the existence of the obligation to extradite or prosecute under customary international law.

65. It was important to establish a link between the results of the Committee's previous discussions and the major issues facing the topic, set out in paragraphs 210 to 214 of the Commission's report (A/67/10). Without prejudging the outcome of the Commission's analysis of those issues, and recognizing the value of its approach, his delegation considered it vital that the Commission should establish general principles and clear rules that would constitute the legal regime governing the obligation to extradite or prosecute, as well as the serious crimes to which extradition could apply, without, however, undermining the right of each State to establish, in its domestic law, the crimes subject to extradition.

66. **Ms. Escobar Pacas** (El Salvador), addressing the topic of the immunity of State officials from foreign criminal jurisdiction, said that the preliminary report of the new Special Rapporteur (A/CN.4/654) took the right approach by reflecting developments in international law. One such development was that the concept of immunity based on the idea that officials, by virtue of their dignity and right to respect as individuals, should not be prosecuted by foreign courts

had been replaced by one based on function. In other words, immunity could be justified only to ensure the performance of critical State functions, rather than the interests of the individuals who performed those functions. That was the position adopted by the Institute of International Law, as well as by the Commission in its commentary to the draft articles on jurisdictional immunities of States and their property.

67. Her delegation therefore agreed with the Special Rapporteur that the functional nature of immunity was a key element of the Commission's work on the topic, which should be analysed in the light of contemporary international law and, in particular, the principles and values of the international community. During the Commission's discussions, it had been said that the central issue at the core of the topic was whether to further the value of immunity or to privilege the value of the fight against impunity. Her delegation did not agree that the concept of immunity was a "value" since values did not constitute general legal rules or international customary law; rather, they were elements that underpinned and guided the legal system as a whole. That was not the case with immunity, which was solely a treaty rule with procedural effects for a certain group of individuals.

68. It was therefore essential for the Commission to maintain a balanced approach to the issue of criminal immunity, which facilitated the proper functioning of States and of international relations, without thereby affecting personal responsibility for the commission of serious international crimes. For that reason, it would be inappropriate to prepare an exhaustive list of crimes that could give rise to exceptions to immunity; it would be more useful to give in-depth consideration to the definition of "official acts" in order to establish general criteria facilitating a systematic approach to the topic.

69. With regard to the request for States to provide information on the distinction between immunity *ratione personae* and immunity *ratione materiae*, her delegation recalled the information that it had provided to the Commission in early 2012 and stated that a study of those categories should not result in acknowledgement of the existence of absolute immunity. Furthermore, while immunities exempted State officials from prosecution, they did not absolve them from the obligation to respect States' legal systems. She urged the Special Rapporteur to continue her analysis of the topic, bearing in mind that it could not be addressed solely from a perspective of *lex lata* or *lex ferenda*; both aspects were essential.

70. With regard to the topic of the provisional application of treaties, her delegation supported the Special Rapporteur's initial proposal to begin with a review of the work undertaken by the Commission on the topic concerning the law of treaties.

71. Concerning the topic of the formation and evidence of customary international law, it was important to prepare a study that would clarify the process of forming and identifying rules of customary international law and their effects. To that end, it was vital to take account of international jurisprudence and domestic practice; however, the Commission should also pay particular attention to the legal systems of States, which might show varying degrees of openness to custom as a source of law.

72. Lastly, she reiterated the importance of the obligation to extradite or prosecute (*aut dedere aut judicare*), which was based on the need to prevent impunity for the most serious international crimes, such as genocide, torture and war crimes. Her delegation considered that the Commission's apparent uncertainty regarding its future work on the topic was attributable to a lack of systematization and a failure to establish specific objectives rather than to the nature of the obligation itself. In 2004, the Working Group had indicated that the topic had attained a sufficient level of maturity to warrant codification with the possible inclusion of some elements of progressive development based, inter alia, on the real needs of States. Her delegation considered that the situation had not changed significantly since then. The recent judgment of the International Court of Justice in *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* had confirmed both the validity of the obligation and the possibility of disagreement on the issue.

73. Her delegation considered that the feasibility of the topic was not dependent on identification of the obligation as a customary norm or a principle of international law since its existence was now incontrovertible by virtue of its recognition in various international treaties. Furthermore, the existence of those instruments should not be seen as an obstacle to the continued study of the topic since, as with the topic of reservations to treaties, a multiplicity of rules and State practice did not imply that there were no

problems of interpretation, application or implementation. Her delegation therefore urged the Commission to reassess its objectives for the topic and to prepare a workplan that systematically identified the issues to be addressed. In particular, it looked forward to the working paper, to be prepared by the Chair of the Working Group, reviewing the various perspectives in relation to the topic in light of the judgment of the International Court of Justice of 20 July 2012 and any further developments.

74. With regard to the topic of treaties over time, her delegation fully supported the decision to change the format of the work, which would give the Commission the opportunity to define more sharply the scope of the topic, and welcomed the appointment of the Special Rapporteur for the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties".

75. **Mr. Li** Linlin (China) congratulated Ms. Concepción Escobar Hernandez on her appointment as the new Special Rapporteur on the immunity of State officials from foreign criminal jurisdiction and as the Commission's first female special rapporteur. His delegation agreed with the focused approach proposed by the Special Rapporteur; however, in light of the topic's complexity and political sensitivity, it felt that the Commission should concentrate on reviewing existing practice and relevant rules of customary international law rather than hastening to rule-setting. Moreover, the Commission's discussions should be confined to the immunity of State officials from the criminal jurisdiction of foreign courts; it should not seek to address the question of immunity of State officials from international criminal judicial institutions.

76. Immunity was a procedural matter. Although the international community had established ethnic cleansing and crimes against humanity as international crimes, customary international law did not recognize any exceptions to the immunity of State officials from foreign criminal jurisdiction. The fact that procedural justice embodied in immunity could not be sacrificed for the sake of substantive justice against impunity was an intrinsic requirement for the rule of law.

77. The immunity of State officials was not necessarily related to the unlawfulness of certain acts: the seriousness of the crime did not affect its official character. Furthermore, immunity from jurisdiction did not exempt State officials from substantive responsibilities and the rules of immunity neither led to the commission of international crimes nor contributed to impunity. Measures proposed by the International Court of Justice in the *Arrest Warrant* case, such as waiver of immunity and prosecution in the home country by international courts or after the end of the official's term of office, might be used to bring concerned officials to justice while upholding the rules of immunity.

78. In addition to Heads of State and Government and ministers for foreign affairs, immunity *ratione personae* should be granted to heads of parliament, deputy prime ministers and government ministers in light of their ever-increasing participation in international affairs as representatives of the State, a view that was indirectly supported by the judgment in the *Arrest Warrant* case. The Commission should follow that trend and provide guidance to national courts for deciding, on a case-by-case basis, whether a particular official was entitled to immunity *ratione personae*.

79. Lastly, his delegation believed that the Commission should continue its work on the topic and should strive to complete it within the current quinquennium.

80. **Mr. Serpa Soares** (Portugal), speaking on the topic of the immunity of State officials from foreign criminal jurisdiction, said that a balance must be struck between State sovereignty, the rights of individuals and the need to prevent impunity for serious crimes under international law. Although the Commission's Statute appeared to establish a divide between codification and progressive development, its work on a specific topic might combine the two, notwithstanding the difficulties in distinguishing between them in certain cases.

81. In international law, there was a general trend towards the limitation of immunity before national courts. As noted by the International Court of Justice in *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, many States had limited the immunity that they claimed for themselves and accorded to others in respect of *acta jure gestionis* — which could include criminal acts — while maintaining it in respect of *acta jure imperii*. His delegation concurred, in many respects, with the dissenting opinion of Judge Cançado Trindade: immunities were a prerogative or a privilege that should be interpreted

and applied in the context of the current evolution of international law in respect of fundamental human values. Furthermore, immunities should be viewed as eminently functional.

82. The distinction between the scope of immunity *ratione personae* and immunity *ratione materiae* was relevant for analytical purposes but should not be overrated. Both were aimed at preserving the principles and interests of the international community as a whole. The purpose of immunity *ratione personae* was to preserve stable international relations in cases where an official had a high degree of immediate identification with the State as a whole; therefore, it should be granted to the "troika". There were sufficient legal arguments to support the notion that even ministers for foreign affairs enjoyed immunity *lex lata*, as illustrated by the *Arrest Warrant* case, since they were empowered to express the State's consent to be bound by a treaty. His Government did not rule out the possibility that other high State officials might also enjoy immunity *ratione personae*; however, owing to the different systems of government and constitutional frameworks, they might not meet the criterion of having a high degree of immediate identification with the State as a whole.

83. He agreed that the attribution of responsibility of the State for a wrongful act might be a useful criterion for determining whether a State official enjoyed immunity *ratione materiae*. In making such a determination, the Commission would need to decide whether to rely on the "effective control" test applied by the International Court of Justice in *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.

84. In considering possible exceptions to immunity, the Commission should determine which acts of a State exercising jurisdiction were precluded by an official's immunity. In that connection, it might wish to consider the criterion used in *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, whereby all acts subjecting the official to a constraining act of authority were deemed to be precluded. His delegation did not share the view that immunity *ratione personae* was absolute or that immunity *ratione materiae* could not be waived automatically 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 more accurately, the absence of immunity in certain cases. From a methodological perspective, therefore, the assumption of a general rule of immunity could bias the Commission's conclusions. The established sanctions for violation of international law, particularly in the case of *jus cogens* norms, could not always be set side.

85. Regardless of whether exceptions to immunity were or were not *lex lata*, his delegation believed that immunity should be lifted for the most serious crimes of international concern, even where committed as an official act. Moreover, as stipulated in article 7 of the Draft Code of Crimes against the Peace and Security of Mankind, the official position of an individual who committed such a crime, even a Head of State or Government, did not relieve the individual of criminal responsibility or mitigate punishment. He encouraged the Commission to continue work on the topic using a value-laden approach in line with contemporary international law, without concern about embarking on the progressive development of international law. The classic concept of sovereignty and the new legal humanism were not two sides of the same coin; the latter was more valuable. Concerning the outcome of that work, he welcomed the Special Rapporteur's proposal to prepare a set of draft articles with commentaries.

86. The Commission's decision to include the topic of the provisional application of treaties in its programme of work reflected the increasing need to study classic international law in a constantly evolving world. Whatever the justification for provisional application of a given treaty — for example, the urgency of its application or the desirability of its content — any such regime should terminate within a reasonable time frame.

87. During the *travaux préparatoires* of the 1969 Vienna Convention, there had been some dispute concerning acceptance of the provisional application regime that had ultimately been adopted as article 25 of that instrument, and it was still unclear how a treaty

could be applicable it was not yet in force and had not undergone democratic review. In *Yukos v. Russian Federation*, the Permanent Court of Arbitration had recognized that the provisional application of a treaty was binding and enforceable: once a signatory accepted such application, failure to comply could trigger international responsibility. Clauses should therefore be carefully drafted so as to afford signatories a clear opportunity to express, or not express, such consent. If an acceding State or international organization could not waive its obligation of provisional application, its domestic laws might compromise its participation in the treaty, posing a risk to all parties thereto. Thus, the treaty might be closed for signature without ever entering into force.

88. Although the obligation not to defeat the object and purpose of a treaty prior to its entry into force, established in article 18 of the Vienna Convention, and the provisional application of treaties had the same scope *ratione temporis*, they gave rise to different legal regimes and should be treated as such.

89. There was some relevance to the legal situation created by the provisional application of treaties for the purpose of identifying rules of customary international law: such application of substantive treaty norms indicated the existence of reiterated practice and of *opinio juris*, the latter in some cases even before the former. The signatory's intention to apply such norms provisionally was proof of its conviction that such norms were mandatory. Despite its relevance, however, the matter had no place within the current topic; perhaps it could be considered by the Commission under the topic of the formation and existence of customary international law.

90. Owing to the significant difference in States' domestic laws and practice regarding acceptance of the provisional application of a treaty, the Commission should adopt a broad approach in order to respect the diversity of solutions available; the adoption of one State's legal approach over another could be highly controversial. In Portugal, practice was based on a restrictive interpretation of article 8, paragraph 2, of the Portuguese Constitution, which did not permit the provisional application of a treaty.

91. While it was still premature to take a decision on the final outcome of work on the topic, his delegation supported the view that the Commission should not aim at changing the Vienna Convention and that there was no possibility for progressive development. Since the Commission's task was to clarify the legal regime governing the provisional application of treaties, the best outcome of its efforts might be the development of guidelines with model clauses.

92. His delegation welcomed the inclusion of the topic of the formation and evidence of customary international law in the Commission's programme of work and agreed that it might prove difficult to identify customary international norms and the process of their formation; the *North Sea Continental Shelf* cases before the International Court of Justice might be useful examples to consider. The Commission should take a broad approach to the topic. All relevant case law should be appraised critically, not as a final revelation of existing law; indeed, his delegation had reservations as to the consistency of judicial pronouncements. Doctrine from different theoretical backgrounds was also relevant. He agreed that the practice to be analysed should be contemporary, taking into account the cultural backgrounds of various regions of the world. The *London Statement of Principles Applicable to the Formation of General Customary International Law* of the International Law Association and the study on customary international humanitarian law conducted by the International Committee of the Red Cross would also prove useful.

93. The fact that *opinio juris* was, by definition, subjective did not make it any less essential to the formation of customary international law; indeed, without it, there would be mere practice, which did not by itself constitute a legal norm. The Commission should therefore address that element without post-modern anxieties about the "mysteries of subjectivity". While the conviction that failure to follow a certain practice gave rise to international responsibility was a good indicator of the existence of *opinio juris*, the view that reiterated practice implied such existence was a presumption *juris tantum* without credible scientific basis. His delegation therefore did not agree with the view, expressed by the International Law Association, that the subjective element was not in fact usually a necessary ingredient in the formation of customary international law.

94. Although both aspects of the topic — formation and evidence — were important, particular emphasis should be given to the former. By describing the process of formation of customary law, the Commission would be better able to establish a

methodology for identifying current and future norms of customary international law.

95. Regarding the points to be covered, as identified by the Commission, his delegation suggested that reference should be made to *coutume sauvage* or cases in which the formation of customary law originated with a need for law; in such cases, opinio juris preceded reiterated practice. Referring to the *North Sea Continental Shelf* cases and other case law, he encouraged the Commission to use its expertise to shed light on that nebulous area of customary international law.

96. Lastly, the Commission would need to consider *jus cogens*, not per se but as an expression of peremptory norms that had its source in customary international law. The final outcome of the Commission's work on the topic should take the form of a set of conclusions with commentaries. Further details of his delegation's position on the topics under consideration by the Commission were available via the PaperSmart Portal.

97. **Mr. Buchwald** (United States of America), referring to the topic of the immunity of State officials from foreign criminal jurisdiction, said it was his understanding that the Commission was not seeking information from States regarding their law and practice concerning the immunity of diplomats, consular officials, officials of international organizations and persons on special missions; he would therefore limit his remarks to State officials who did not fall into those categories. In United States practice, only the "troika" generally enjoyed immunity *ratione personae*; however, his country had never experienced a criminal case directed against a foreign Head of State or Government or minister for foreign affairs. To the extent that information on civil suits could be relevant to the handling of criminal cases, his Government was prepared to provide examples of domestic courts that had recognized such immunity. Additional remarks on the topic could be found in his full statement, available via the PaperSmart Portal.

98. His delegation understood the provisional application of treaties to mean that States agreed to apply a treaty, or certain provisions thereof, as legally binding prior to its entry into force and that the obligation to apply the treaty or provisions was more easily terminated during the period of provisional application than after the instrument's entry into force. He hoped that the outcome of the Commission's work would include a clear statement to that effect. As to whether States should give notice prior to terminating provisional application, he urged caution in putting forward any proposed rule that could create tension with the clear language used in article 25 of the Vienna Convention, which contained no such restriction. A decision on the final form that the Commission's work on the topic should take was best left to a later date.

99. His delegation welcomed the Commission's decision to include the topic "Formation and evidence of customary international law" in its long-term programme of work. The Special Rapporteur's note on the topic (A/CN.4/653) provided an excellent road map for the Commission's work and highlighted a number of unresolved questions. He agreed that the outcome of that work must not be overly prescriptive. His delegation was currently reviewing United States practice on matters relating to the topic in light of the Commission's request for input from States.

100. The United States 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 to prevent impunity for such crimes as genocide, war crimes and torture. However, his delegation remained convinced, on the basis of United States practice and that of other States, that there was no norm of customary international law obliging a State to extradite or prosecute. States assumed such an obligation only by becoming parties to a binding international legal instrument that contained detailed provisions identifying a specific offence and establishing a specific form of the obligation in that context.

101. The obligation to extradite or prosecute was not uniform across the treaty regimes, as was clear from the Commission's work on the topic to date. Furthermore, while many of those regimes were adhered to widely, they were by no means universal and there were a number of major exceptions specific to each of them. The State practice described in the Commission's reports was largely confined to the implementation of treaty-based obligations, which had been recognized by the Special Rapporteur as varying widely in scope, content and formulation. Therefore, it was not possible to extract a customary norm from the existing treaty regimes or associated practice.

102. With respect to the topic of treaties over time, his delegation supported the more specific focus adopted with the appointment of the Special Rapporteur on the topic of subsequent agreements and subsequent practice in relation to the interpretation of treaties. It welcomed the emphasis, in the most recent report submitted to the Study Group, on the fact that, for the purposes of article 31 of the Vienna Convention, subsequent agreements or practice must reflect agreement among or practice by the parties to a given treaty in their application thereof. It was important for the Commission to strike the right balance when deriving general conclusions from specific treaties; caution was particularly important when extrapolating such conclusions from limited precedent. Lastly, 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.

103. Most-favoured-nation clauses were a product of treaty formation and differed considerably in structure, scope and language; moreover, their dependence on other provisions of the agreements in which they were located resisted a uniform approach. He therefore agreed with the Study Group that the development of interpretive tools or revision of the 1978 draft articles on most-favoured-nation clauses were not appropriate outcomes. 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.

104. **Mr. Czapliński** (Poland), referring to the newly reformulated topic of subsequent agreements and subsequent practice in relation to the interpretation of treaties, commended the preliminary conclusions adopted by the Study Group in 2011 and 2012 and welcomed the recent decision to adopt a more focused approach to the topic. Flexibility was of the utmost importance; the normative content of the future guidelines should maintain a balance between the *pacta sunt servanda* principle and the necessary adjustment of treaty provisions in light of the changing world. The review of decisions by national courts — an essential element of State practice — should be made a priority and the results should be reflected in future reports on the topic.

105. His delegation welcomed the Commission's decision to include the topic of the provisional application of treaties in its programme of work and looked forward to the elaboration of guidelines for States in their implementation of article 25 of the Vienna Convention; such guidelines should also be applicable to treaties concluded by an international organization with a State or another international organization. Provisional application of a treaty was useful, particularly when matters covered by the treaty must be dealt with on an urgent basis.

106. Flexibility was an essential element of the provisional application of treaties and must be preserved and analysed. While the Vienna Convention had proved an extremely useful instrument, it might be advisable to review its provisions in light of practice in the more than 30 years since its entry into force; such a task would be highly appropriate in light of the Commission's recent work on the law of treaties and other sources of international law.

107. The topic of the obligation to extradite or prosecute (*aut dedere aut judicare*) continued to be relevant owing to the need to combat impunity for the most serious crimes of international law. He hoped that the judgment of the International Court of Justice in *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* would contribute positively to the Commission's further work.

108. In dealing with the topic of the immunity of State officials from foreign criminal jurisdiction, the Commission should strive to preserve the balance between, on the one hand, the rules relating to the immunity of State officials and other principles of international law and, on the other, the need to punish the perpetrators of serious crimes under that law.

109. Thus far, the Commission's work on the topic of the most-favoured-nation clause had focused primarily on investment law; he agreed that the issue should be placed in the broader normative framework. Draft guidelines would be of practical value owing to the lack of consistency of related case law.

110. His delegation welcomed the inclusion of the topic of the formation and evidence of customary international law in the Commission's long-term programme of work. Customary international law played an important role in international and domestic judicial practice and constituted an important basis for foreign policy decisions by Governments. The

identification and application of such law was, however, far from uniform with law enforcement agencies often referring to alleged customary rules without verifying State practice or the existence of *opinio juris*. The elaboration of a set of rules governing customary international law was therefore desirable; such rules should aim to address practitioners and should not take the form of a draft convention.

111. In accordance with Article 38 of the Statute of the International Court of Justice and well-established international jurisprudence, two elements — practice and *opinio juris* — were necessary for the formation of customary international law; practice was fundamental to the formation of custom and *opinio juris* to the application of customary rules. Given that the two elements were increasingly difficult to distinguish, the Commission should consider both and, specifically, which elements should be taken into account when identifying State practice and how *opinio juris* could be ascertained. The question of whether *opinio juris* could be ascertained on the basis of the resolutions of agencies of international organizations, including the General Assembly, was a particularly important issue both politically and legally.

112. While important, theoretical studies of the bases of customary law, general principles of law, peremptory norms of international law and their relationship to customary international law should not be considered by the Commission, at least during the initial stages of its work; they were not relevant to the main topic and could unnecessarily prolong that work. Nor was it desirable to consider the origins of Article 38 of the Statute of the International Court of Justice. It would, however, be useful to consider the issue of the binding force of customary law on new States, which had not been influenced in the formation of custom. It was well established in international legal theory and practice that new States were bound by the customary law in force at the time of their founding. While his delegation did not support the clean-slate rule and was in favour of promoting clarity and certainty in the international legal order, some flexibility in respect of particular norms, comparable to a persistent objector's position, might be granted to new States in exceptional situations. In the same interests of clarity and certainty, his delegation also rejected a differentiated approach to customary law; all international legal norms should be subject to the same test regarding their nature, origin and binding force. The fragmentation of international law would lead to destruction of the legal order and would therefore be contrary to the interests of the international community.

113. **Ms. Miculescu** (Romania), referring delegations to a fuller version of her statement on the PaperSmart Portal, said that the topic of the immunity of State officials from foreign criminal jurisdiction should be considered together with the issue of State immunity as both were based on the premise of State sovereignty and were often claimed at the same time. The Commission should also take into account its previous codification efforts, particularly in preparation of the Vienna Convention on Diplomatic Relations, the draft articles on consular relations, the draft articles on special missions and the United Nations Convention on Jurisdictional Immunities of States. It was necessary to ensure the protection of human rights and the avoidance of impunity. She commended the Special Rapporteur's focused approach to the topic and looked forward to examining the future draft articles.

114. Her delegation agreed that the first basis for the Commission's consideration of the topic of the provisional application of treaties should be the work undertaken by the Commission on topic of the law of treaties, as well as the *travaux préparatoires* of the relevant provisions of the Vienna Convention. The final outcome of the Commission's work on the topic would best be decided at a later stage.

115. She hoped that the Commission's work on the topic of the formation and evidence of customary international law would lead to a set of conclusions with commentaries, which, in order to be of practical use, should identify and clarify the relevant rules. To that end, the Special Rapporteur should focus on State practice, the previous work of the Commission and the judgments and advisory opinions of the International Court of Justice.

116. There was a close relationship between the obligation to extradite or prosecute (*aut dedere aut judicare*) and universal jurisdiction. Although finalization of the Committee's work on universal jurisdiction was important, it should not preclude the Commission's analysis of that relationship in light of the role of the obligation to extradite or prosecute in international criminal justice.

117. Concerning the topic of treaties over time, she welcomed the extensive debates within the Study Group on the second and third reports of its Chair, as

well as the decision to change the format of the topic. She agreed that the main focus of the Special Rapporteur's first report should be the legal significance of subsequent agreements and practice for interpretation of treaties in conformity with article 31 of the Vienna Convention. While it was important to preserve flexibility, further efforts to develop conclusions and guidelines with a normative content were needed.

118. On the topic of the most-favoured-nation clause, her delegation welcomed the Study Group's efforts to identify relevant issues and cases and formulate proposals to safeguard against the fragmentation of international law. It also appreciated the debates held within the Study Group and the two working papers highlighting various interpretative approaches, primarily in arbitral decisions. She hoped that the Commission would make further progress towards an outcome document that would give greater stability and certainty to investment law. The recommendations and model clauses prepared should be situated within the broader normative framework of general international law; the Commission's previous work on the topic and developments within international organizations should also be taken into account.

119. Lastly, she welcomed the decision to establish a Working Group on the Long-Term Programme of Work for the present quinquennium.

120. **Ms. Dwarika** (South Africa) said that she welcomed the approach taken by the Special Rapporteur on the immunity of State officials from foreign criminal jurisdiction in her preliminary report, which adequately identified the most salient issues pertaining to the topic. Such immunity had strong historical foundations in classic international law and was essential to the principle of State sovereignty and the conduct of international relations; it was, however, an evolving, dynamic issue, as seen from the establishment of the International Criminal Court. Therefore, the Commission should place sufficient emphasis on the progressive development of international law insofar as it related to the topic. Her delegation would appreciate a thorough analysis of the emerging trends pertaining to immunity in light of contemporary international law.

121. Further reflection on the scope of immunities, both *ratione materiae* and *ratione personae*, was needed. The Commission should clarify the scope and extent of the applicability of immunity *ratione personae* to the "troika" and consider whether there were benefits to restricting its application to other officials. In response to the Commission's request, her Government would provide specific information on the legal consequences of drawing a distinction between immunity *ratione personae* and *ratione materiae* in domestic cases.

122. South Africa had sought to balance the need to combat impunity and the need to protect human rights through the adoption of instruments such as the Implementation of the Rome Statute of the International Criminal Court Act of 2002. Recalling the judgment of the International Court of Justice in *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, which related to State immunity, she encouraged the Commission to consider whether the commission of serious international crimes that bore individual criminal liability could result in exceptions to immunity. Since the scope of the topic was limited to individual criminal responsibility, the Commission should also reflect on the definition of an "official act" and the possibility of exceptions to immunity *ratione materiae* should such an act be contrary to *jus cogens* norms.

123. There was merit to dealing with both substantive and procedural matters since clarifying the latter might contribute to overall progress on the topic. It would be advisable for the Commission to consider the relationship between the nature of certain serious crimes and the circumstances under which a State could be said to have implicitly waived immunity. Her delegation welcomed the time frame proposed for production of a set of draft articles.

124. Her delegation supported the decision to include the topic of the provisional application of treaties in the Commission's long-term programme of work. On the basis of the negotiating history of article 25 of the Vienna Convention and recent arbitral awards concerning provisional application, it was clear that States which agreed to apply a treaty provisionally were bound to apply its relevant provisions in the same way as if it had entered into force, subject to the conditions of the provisional application clause.

125. South Africa's Constitution provided for two distinct procedures by which the State could be bound to an international agreement, depending on the latter's nature: agreements of a technical, administrative or

executive nature required executive approval and were considered binding upon signature, while all other agreements must first be approved by Parliament. The relationship between the provisional application of treaties and domestic law, particularly where parliamentary approval was required for an international agreement to become binding on a State, remained a major issue. The Commission's guidance regarding the legal significance of provisional application and the legal effect of its termination would be useful in determining the scope of obligations under treaties that applied provisionally.

126. On the topic of the formation and evidence of customary international law, her delegation supported the Special Rapporteur's proposal to focus on practical rather than theoretical aspects and to produce, as an outcome, a set of conclusions with commentaries for practitioners. Customary international law retained validity despite the inconsistencies often associated with it; moreover, the flexibility associated with it should be considered a strength rather than a weakness. Her delegation did not, therefore, expect the Commission to rewrite the rules of customary international law or to produce a draft convention.

127. She encouraged Governments to provide information on any significant national, regional or subregional court cases that might shed light on the formation of customary international law. Under South Africa's Constitution, customary international law was automatically incorporated into its domestic law unless it was inconsistent with the Constitution or an act of Parliament. In practice, important decisions by its Constitutional Court, including in a death penalty case, had relied on customary international law. Her delegation looked forward to continued work on the topic and would provide further information to the Commission in writing.

128. On the topic of the most-favoured-nation clause, her delegation supported the overall objective of the Study Group, namely, to safeguard against the fragmentation of international law and to stress the importance of greater coherence in the approaches taken in arbitral decisions involving investment law, particularly in relation to most-favoured-nation clauses. It specifically welcomed the Commission's proposal to make recommendations in the Study Group's report on the topic, including guidelines and model clauses where appropriate.

129. Unless it so provided, the most-favoured-nation clause in a basic treaty could not incorporate the procedural provisions of another treaty. Regrettably, a number of investment arbitral awards had held differently. Her Government was concerned about the divergent interpretations of such clauses by different arbitral tribunals since the apparent lack of consistent reasoning resulted in legal uncertainty among those responsible for negotiating bilateral investment treaties; such clauses should be formulated in a manner that conveyed only the rights that the States parties were willing to grant to each other, and consequently to each other's investors. She hoped that the Commission's work on the topic would provide clarification and, ultimately, greater predictability in the interpretation of most-favoured-nation clauses in dispute resolution forums.

The meeting rose at 1.05 p.m.