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Chair: Mr. Sergeyev . . . . . (Ukraine)

Contents

12-57516 (E)

The meeting was called to order at 10.05 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. **Ms. Brown** (Jamaica), addressing the topic "Immunity of State officials from foreign criminal jurisdiction", said that the rule of State immunity was grounded in customary international law and that, based on the principle of sovereign equality, the courts of one State should not exercise jurisdiction over another State or its representatives. The doctrine of immunity was based on the notion that it would be an affront to the dignity and sovereignty of a State for it or one of its representatives to be impleaded before a foreign court. While that rule was not absolute — since a distinction must be made between acts of the sovereign (*jure imperii*) and other commercial acts (*jure gestionis*) — the general principle was based on the recognition of the need for non-interference in the exercise of the sovereign prerogatives of a foreign State.

2. It was firmly established in international law (*lex lata*) that certain holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs (the "troika"), enjoyed immunities from jurisdiction in other States, both civil and criminal. The position articulated by the Special Rapporteur in the previous report of the Commission (A/66/10) was that, while immunity *ratione personae* was temporary in nature and ceased upon the expiration of the official's term of office, that official continued to enjoy immunity *ratione materiae*, which had no territorial limitation. Based on that argument, it would be contrary to international law for one State to seek to exercise criminal jurisdiction over a foreign Head of Government or Minister for Foreign Affairs, wherever that person might be.

3. The rules of customary international law applicable to diplomatic agents pursuant to the 1961 Vienna Convention on Diplomatic Relations were also applicable to Heads of State, as established by the International Court of Justice in *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, which confirmed that a Head of Government enjoyed immunity from the judicial process and could not be forced to provide evidence in connection with an investigation conducted by a foreign State. Based on article 31(2) of the Vienna Convention on Diplomatic Relations, a central authority could not authorize the taking of evidence from or the submission of documents or other items by a person such as a Head of State to a foreign State where such a person could not be compelled to give or produce such evidence in that foreign State.

4. As a case in point, the Jamaican courts had held, in the context of a request for mutual legal assistance, that they could not compel such a person to give evidence, since it seemed to have been established in customary international law (*lex lata*) that members of the "troika" enjoyed immunity before the courts of a foreign State. The Commission played an important role in identifying rules of *lex lata*, which would help provide practical guidance to domestic judges and legal practitioners who were called upon to argue and adjudicate claims of immunity involving the exercise of criminal jurisdiction by foreign States.

5. Turning to the topic "Formation and evidence of customary international law", she observed that Jamaica had a dualist legal system, which required rules of treaty law to be expressly incorporated into domestic legislation in order to have effect in domestic law, yet recognized rules of customary international law as part of the common law, such that they could be applied without incorporation into domestic legislation, provided that they did not conflict with statute law.

6. Caribbean Community (CARICOM) law also incorporated rules of customary international law if they applied to the areas addressed by the Revised Treaty of Charaguaramas establishing the Caribbean Community including the CARICOM Single Market and Economy. That Revised Treaty also instructed the Caribbean Court of Justice to refer to relevant rules of international law when considering disputes concerning the interpretation and application of the Revised Treaty, and to use all sources of international law rather than limiting itself to rules of treaty interpretation. Accordingly, that court looked for evidence from the practices of CARICOM member States, the constitutions and legislations of the region, judicial decisions and various other authoritative pronouncements in order to define rules of international law.

7. In the contemporary world, for generally accepted international practices to be identified as customary international law, they should reflect practices in different regions and cultures, including

those of the more vulnerable and marginalized members of the international community, not just those of the countries of the Organization for Economic Cooperation and Development. However, despite the changing global environment, where the rules accepted by a few great Powers no longer defined customary international law, the capacities of all States to participate in the process of rule formulation remained uneven.

8. With regard to the topic "Protection of persons in the event of disasters", her Government was still considering the texts provisionally adopted by the Commission. As a small island developing State that continued to suffer the impact of severe weather events linked to climate change, Jamaica was keen to ensure that the requisite measures were in place to help developing countries to overcome such challenges. Of particular interest was the provision of adequate resources and greater access to related technology to help with adaptation measures.

9. In that regard, draft article A (Elaboration of the duty to cooperate) was a welcome addition, although it could be further refined in future drafts. Nonetheless, any response to disasters must be delivered in accordance with the principles of humanity, neutrality and impartiality, and on the basis of non-discrimination, while taking into account the needs of vulnerable populations. The human rights of persons affected by natural disasters, in particular the inherent dignity of the human person, must be respected.

10. With regard to the topic "Treaties over time", the possible role of subsequent agreements and subsequent practice in respect of treaty modification was of practical relevance, especially in the regional context. The Commission should deepen its work concerning the most-favoured-nation clause. Given the inconsistencies in decisions of tribunals of the International Centre for Settlement of Investment Disputes following the *Emilio Agustín Maffezini v. Kingdom of Spain (Maffezini)* case, the Commission should help to raise States' awareness so that they could, at the minimum, indicate clearly in the future whether they felt that procedural and/or substantive matters should fall within the scope of the most-favoured-nation clause.

11. Lastly, when exploring the interface between bilateral investment treaties and the World Trade Organization's General Agreement on Trade in Services, the Commission might find it relevant to consider the provisions concerning the extension of national treatment to bilateral investment treaty partners and other obligations, including the commitment to fair and equitable treatment, guarantees against expropriation, and access to investor-State arbitration.

12. **Mr. Sharma** (India) said that the substantive issues relating to the topic of immunity of State officials from foreign criminal jurisdiction were cross-cutting and interrelated and should be considered in a careful and balanced manner, taking into account existing law and State practice. In that regard, the judgment of the International Court of Justice in *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, which identified State practice in respect of immunities before national jurisdictions, should be examined closely.

13. The relationship between immunity *ratione materiae* and immunity *ratione personae* should also be examined in the light of State practice and the judgment of the International Court of Justice in *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*. Clear criteria should be identified for establishing State practice on extending immunity *ratione personae* to officials beyond the "troika", taking into consideration the judgment of the International Court of Justice in *Arrest Warrant of 11 April 2001 (Democratic Republic of the Congo v. Belgium)* (the *Arrest Warrant* case). Elaboration of conclusions with commentaries or guidelines on the topic would be highly valuable for judges, scholars and practitioners facing the question of customary international law at both the national and the international levels.

14. It was important to codify and clarify the issues concerning the topic "The obligation to extradite or prosecute (*aut dedere aut judicare*)", to ensure that all criminals were brought to justice. Progress on the topic had been slow, owing to the paucity of research aimed at ascertaining whether that obligation had become part of customary law or not. The Commission should therefore continue to consider the topic even absent such customary law status. The obligation to extradite or prosecute and the concept of universal jurisdiction were not interrelated and should therefore be treated separately. The judgment of the International Court of Justice in *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* should be

analysed in detail in order to determine its implications for the topic of the obligation to extradite or prosecute.

15. The most-favoured-nation clause was applied inconsistently in arbitral decisions because the claimants were usually individuals while the respondents were usually States, and the tribunal acted as a functional substitute for an otherwise competent domestic court of the home State. His delegation commended the Commission for its efforts to provide authoritative guidance on the interpretation of the most-favoured-nation clause and encouraged it to consider studies that had been conducted by other trade-related bodies, such as the World Trade Organization, the United Nations Commission on International Trade Law, and the Organization for Economic Cooperation and Development.

16. **Ms. Telalian** (Greece) said that her delegation strongly welcomed the Commission's trend towards a return to the study of questions relating to the sources of international law, since they were essential for a better understanding of the process through which rules that governed the international community emerged and developed. In considering the topic "Provisional application of treaties", the Commission should use as a starting point the previous work it had undertaken during its consideration of the law of treaties, as well as the *travaux préparatoires* of the relevant provisions of the 1969 Vienna Convention on the Law of Treaties, in particular article 25. The main purpose of including the provisional entry into force of treaties in the Commission's 1966 draft articles on the law of treaties had been to formally recognize a practice that was widespread among States at the time and that deserved such mention. Article 25 of the Vienna Convention was merely a written recognition of that practice.

17. The Commission should be cautious when considering the provisional application of treaties, because the topic touched on sensitive areas pertaining to the relationship between international law and national law, especially constitutional law, and depended on the specific circumstances and national laws of each State. The Commission's work should therefore be based on research and analysis of existing State practice, including provisional application under article 7 of the 1994 Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982.

18. It would also be useful to ascertain the legal implications of the provisional application of a treaty, including the precise meaning of the expression itself and how it differed from the expression "provisional entry into force of a treaty", which was first used in the 1966 draft articles on the law of treaties. Since the provisional application of a treaty was based on an agreement between the States parties separate from the treaty itself, the Commission should examine whether the rule of *pacta sunt servanda* applied in such cases and whether a breach of the obligations under such provisional application could engage the international responsibility of the State concerned.

19. The Commission should also consider the question of the termination of the provisional application of a treaty, which was only partially dealt with in article 25, paragraph 2, of the Vienna Convention. While her delegation agreed that it was premature to decide on the final outcome of the topic, the issues it raised could lead to the development of model clauses that could be of practical assistance to States when negotiating treaties.

20. Her delegation welcomed the Commission's decision to change the format of its work on the topic "Treaties over time" and to appoint a Special Rapporteur for the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties". That change would make it possible to determine the exact scope of the topic and to focus on the legal significance of subsequent agreements and subsequent practice with regard to the interpretation of treaties, in the light of article 31.3 (a) and (b) of the Vienna Convention, while setting aside delicate issues relating to the relationship between the various sources of international law. The Commission's work on that topic should remain within the confines of the law of treaties and aim to supplement and not circumvent or modify the relevant provisions of the Vienna Convention.

21. When examining whether subsequent practice in the application of a treaty could modify existing treaty obligations, the Commission should bear in mind that the United Nations Conference on the Law of Treaties, 1968-1969 had rejected the Commission's draft article 38 (Modification of treaties by subsequent practice). Moreover, the practice of all parties to multilateral treaties had special weight and should not be placed on the same footing as practice reflecting the position of only some of the parties.

22. With regard to particular elements of State practice relevant to the topic, it was important to determine whether the practice of lower-ranking State officials could be considered the practice of the State involved, thereby engaging its legal responsibility. The Commission's work on the topic of treaties over time should be aimed at elaborating a set of general conclusions which could provide practical guidance to States when negotiating and applying treaties.

23. As for the topic "Formation and evidence of customary international law", it was reasonable for the Commission to have focused its work on the law of treaties, rather than on customary international law, since its aim was to contribute to the codification and progressive development of international law. Generally accepted rules of international law were an integral part of the Greek constitutional order and prevailed over domestic provisions, although it was often difficult for national judges to identify and apply those rules. The Commission's work on the topic would be particularly beneficial and could help to encourage acceptance of the rule of law in international affairs, if it was aimed promoting a wider dissemination of international custom. It was therefore premature for the Commission to study the issue of *jus cogens* norms, even though they were essentially of a customary character. Nonetheless, it should not rule out a future study on the issue.

24. The topic "Expulsion of aliens" was vitally important at a time when most countries were facing problems of mixed migration flows and rising illegal and irregular immigration. The draft articles on the topic were comprehensive and captured most of the substantive and procedural aspects of the issue of expulsion, including State obligations, such as the obligation of non-refoulement and the obligation to respect the human rights of individuals under expulsion. They also identified the most important and widely recognized rights of aliens subject to expulsion, along with relevant prohibitions placed upon States by international law.

25. While her delegation agreed that a distinction should be made, where appropriate, between aliens lawfully present in the territory of an expelling State and aliens who stayed unlawfully in that State, it would have preferred to see a stronger emphasis on promoting the voluntary departure of persons subject to expulsion. The important role of readmission agreements in determining the State of destination of expelled aliens should be included in the draft articles, and some of those articles should be redrafted to reflect the different practices of States.

26. Concerning the draft articles on the expulsion of aliens, her delegation favoured the elaboration of a more focused text containing well-established fundamental guiding principles and standards, over the current text, which read like an international human rights treaty. The text should be examined more thoroughly, in the light of domestic law and the international obligations of interested States, and should be adopted as guidelines or best practices rather than as draft articles.

27. Lastly, she pointed out that her delegation's views on the immunity of State officials from foreign criminal jurisdiction were included in the complete statement that was posted on the PaperSmart portal.

28. **Ms. Smith** (United Kingdom of Great Britain and Northern Ireland) said that, where immunity *ratione personae* or immunity *ratione materiae* had been codified in an international instrument to which her country was a party, the relevant obligations under that instrument were usually incorporated into national law by statute. Accordingly, the relevant provisions of the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations had been reproduced in and given effect by the Diplomatic Privileges Act 1964 and the Consular Relations Act 1968, respectively, which contained provisions on the immunities of foreign Heads of State. However, in respect of other immunities from criminal jurisdiction, it was permissible to invoke customary international law, which for those purposes might form part of the common law.

29. In that regard, the courts had recognized the immunity *ratione personae* of high-ranking State officials such as Heads of Government, Ministers for Foreign Affairs and members of special missions, in line with the country's obligations under customary international law. The courts might also apply the same principles in recognizing the immunity *ratione materiae* of other State officials.

30. The criteria that the courts used in deciding on immunity *ratione personae* and immunity *ratione materiae* were fundamentally different. In relation to immunities *ratione personae*, the issue was essentially whether the individual in question currently held a position that attracted immunity *ratione personae*. It

was accepted in United Kingdom law and practice that the Government would have the conclusive factual evidence in that regard, given the special knowledge it might have about the individual, including whether or not the individual had been notified and received as a diplomatic or consular agent, whether or not the individual was a Head of State, and whether or not the individual had received the Government's consent to visit the United Kingdom on a special mission.

31. While there had been relatively few cases in the United Kingdom where an individual had asserted immunity *ratione materiae* to avoid criminal jurisdiction, that possibility had been recognized in principle. However, in the two most recent cases where immunity *ratione materiae* had been invoked in the context of criminal proceedings — *In re Pinochet* and *Khurts Bat v. Investigating Judge of the German Federal Court)* — the court had denied such immunity. It was generally accepted that immunity *ratione materiae* in criminal cases was a plea by the State claiming ownership of the act, which could therefore not be subject to adjudication by the court of another State. As that plea could engage the international responsibility of the State, any resulting claim or remedy would lie not in domestic law but in international law.

32. Nonetheless, that general rule might be subject to qualification, as suggested in both the *Pinochet* and the *Khurts Bat* cases. In *Pinochet*, the court had found that, for States that had ratified it, the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment constituted a *lex specialis* or exception to the usual rule on the immunity *ratione materiae* of a former Head of State in respect of crimes of torture. In *Khurts Bat*, the court had suggested that a plea of immunity *ratione materiae* would not operate in respect of criminal proceedings for acts of a State official committed on the territory of a foreign State.

33. With regard to the criteria used to identify the persons covered by immunity *ratione personae*, her country's courts had relied heavily on the decision of the International Court of Justice in the *Arrest Warrant* case. The key questions had centred on the individual's rank and functional need to travel for the purposes of promoting international relations and cooperation, which in practice had included not only Heads of State, Heads of Government and Ministers for Foreign Affairs, but also Ministers of Defence and a Minister of International Trade.

34. Turning to the topic "Provisional application of treaties", she noted that it could be of genuine practical importance to States, though in practice it could also conflict with the constitutional and other laws of States. The United Kingdom was increasingly using provisional application in its treaty practice. Her delegation agreed that it was still premature to take a decision on the outcome of the study. Given the nature of the topic, it might be preferable, at least initially, to examine how article 25 of the Vienna Convention was applied in practice, leaving general proposals or commentaries, if any, for a later stage.

35. While the topic "Formation and evidence of customary international law" was of real practical value, it was increasingly arising in a variety of new domestic contexts, where judges and practitioners were not necessarily familiar with the sources and methods of international law. When the issue was one set out in an international convention, it was relatively easy to determine the current position of international law on the topic. Absent a customary rule of international law, however, there was no authoritative point of reference to which a domestic court judge could turn for guidance. The Commission should therefore provide such guidance.

36. In relation to the customary international law of State immunity, the International Court of Justice had noted, in *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, that State practice of particular significance was to be found in the judgements of national courts faced with the question whether a foreign State was immune. Thus, national judges might find themselves in the position of both identifying relevant State practice and creating State practice. A clear and straightforward set of proposals or conclusions with commentaries relating to that topic could very well become an important reference tool for domestic judges and practitioners.

37. She welcomed the Commission's suggestion that it would not be appropriate to be unduly prescriptive in setting out its conclusions, since a central characteristic of the formation of customary international law was its flexibility. She also welcomed the Commission's intention to conclude its work on the topic during the current quinquennium.

38. There had been little substantial progress on the topic "The obligation to extradite or prosecute (*aut dedere aut judicare*)". That obligation arose as a result of a treaty obligation, and State practice and *opinio juris* had not yet reached the point where such an obligation could be regarded as a rule or principle of customary international law. Both the substantive crimes in respect of which the obligation arose and the question of whether the custodial State had discretion to extradite or prosecute were governed only by the terms of the treaty in question. She welcomed the Commission's decision to carry out an in-depth analysis of the judgment of the International Court of Justice in *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, in order to fully assess its implications for that topic. While her delegation awaited with interest the result of that analysis, for the time being it was not convinced that it would be a good use of the Commission's time to continue considering the topic.

39. The topic of treaties over time should be addressed in a narrower frame, focusing on subsequent practice in implementing a treaty and on any agreements among the parties as to its operation or interpretation, rather than attempting a broader examination that took into account all the possible factors that might affect the operation of a treaty over the span of its existence. Her Government therefore welcomed the Commission's decision to narrow the focus of the topic and to rename it "Subsequent agreements and subsequent practice in relation to the interpretation of treaties".

40. She welcomed the affirmation by the Study Group on the most-favoured-nation clause that it was not its intention to prepare any draft articles or to revise the 1978 draft articles of the Commission on the most-favoured-nation clause, but to prepare a report providing the general background, analysing and contextualizing the case law, drawing attention to the issues that had arisen and trends in the practice and where appropriate making recommendations, including model clauses.

41. She welcomed the Study Group's analysis that, while there were other areas of contemporary interest, such as the relationship between investment agreements and human rights, there was no need to broaden the scope of its work and thereby risk diverting attention from other aspects of the topic. The relationship between investment agreements and human rights should therefore not be considered.

42. Her Government welcomed the broad outline of future work for the Study Group as summarized in the Commission's report on the work of its sixty-fourth session (A/67/10), and believed that the Study Group should continue considering the various factors that were taken into account by tribunals in interpreting the most-favoured-nation clause. Her delegation also supported and welcomed the Study Group's emphasis that interpretation of that clause was a matter of treaty interpretation, which would depend on the precise wording and negotiating history of the clause at issue.

43. **Mr. Janssens de Bisthoven** (Belgium) said that immunity *ratione personae* and immunity *ratione materiae* gave rise to different legal regimes. Immunity *ratione personae* was granted to a limited number of State officials in their personal capacity and pertained to both their public and their private acts. In principle, that immunity was limited *ratione temporis*, expired once the term of office ended, and covered crimes under international law. Immunity *ratione materiae*, on the other hand, was granted to all persons acting on behalf of the State and was, in principle, not limited ratione temporis, subsisting even after the expiry of the official's term of office. Some officials also enjoyed immunity *ratione materiae* for their commercial acts (*jure gestionis*), even if the State itself had no immunity for disputes relating to those acts.

44. Immunity *ratione materiae* did not, however, extend to crimes under international law, even if those crimes were committed on behalf of the State. Given the international obligation that States had to prosecute the perpetrators of the most serious crimes under international law, there was no immunity *ratione materiae* for State officials suspected of committing such crimes. Indeed, States had the discretion to waive both types of immunity.

45. A functional criterion must be used to determine which persons enjoyed immunity *ratione personae*, as established by the International Court of Justice in the *Arrest Warrant* case. The international nature of the functions performed by the person on behalf of the State and the position held by that person in the State were factors that should be considered. The only persons who should be granted immunity *ratione personae* were those who were not obliged to present credentials, but who, at the international level, were

recognized as representatives of the State by virtue of the position they held. His Government was not amenable to broadening the scope of immunity *ratione personae* to include persons beyond the "troika".

46. Turning to the topic "Formation and evidence of customary international law", he said that express references to customary international law in his country's official statements to international bodies were limited, as were references to the criteria to be used in determining whether or not a norm had achieved the status of customary international law. Even statements made by Belgian authorities before the country's parliament that recognized several provisions of the Geneva Conventions of 1949 and the Additional Protocols thereto as being part of customary international law were often silent on the underlying reason for that recognition.

47. However, his Government considered the universal obligation to prosecute perpetrators of crimes under international humanitarian law to be part of customary international law, because that norm was reflected in many international texts, including General Assembly and Security Council resolutions and the Rome Statute of the International Criminal Court, and dovetailed with many positions expressed by the international community on the topic. There were also limited express references to customary international law in the decisions and judgements of Belgian courts, and any such references concerned mainly long-standing customary rules. Those references were also rarely accompanied by a legal explanation, which made it difficult to list the relevant criteria that courts used in determining rules of customary international law.

48. However, general approval in international treaties, texts and statements, along with State practice, were the most significant criteria explicitly adopted by Belgian courts in determining customary international law. National jurisdictions could apply the same criteria when faced with the absence of a rule of customary international law.

49. **Mr. Marn** (Slovenia) said that his delegation welcomed the systemic approach proposed in the preliminary report of the Special Rapporteur on the topic "Immunity of State officials from foreign criminal jurisdiction", as well as the core issues identified for closer examination. It was important not only to identify new trends on the topic, but also to address instances of progressive development of international law by examining State practice, jurisprudence and doctrine as well as the relevant principles of contemporary international law.

50. It was important to maintain the distinction between immunity *ratione personae* and immunity *ratione materiae*, owing to their substantive differences, including those relating to expiry and scope, as well as their procedural differences. While it was common for other high-ranking officials to participate in international relations on behalf of their States, immunity *ratione personae* should only accrue to the "troika". Because the issue of immunity *ratione materiae* turned on acts performed by State officials in their official capacity, it was important to clearly define the term "official act" and to determine whether it included unlawful acts or acts *ultra vires*. A clarification of the relationship between official acts in the context of immunity and the rules on the attribution of State responsibility would also be useful.

51. The question of possible exceptions to immunity, especially immunity *ratione materiae* for the gravest international crimes, should also be examined. While the immunity of State officials from foreign criminal jurisdiction was based on the principles of State sovereignty, non-intervention and maintenance of friendly relations among States, there was a growing focus on legal humanism and combating impunity, in particular through the progressive development of international law and developments in international criminal law. The judgment of the International Court of *Justice in Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* would be instructive in that regard.

52. Turning to the topic "Formation and evidence of customary international law", he noted that the outcome should be a set of conclusions with commentaries to help domestic judges in particular to identify rules of customary international law. Clarification of the relevant terms in a brief glossary would also be helpful. The study should cover both the methods used for identifying a rule of customary law and the determination of the existence of such a rule. As had been established by the International Court of Justice in its judgment in the *North Sea Continental Shelf* case, the existence of a rule of customary international law required that there should be a settled practice along with *opinio juris*. In practice, however, additional substantive guidance was needed on the topic, which should include some examples of the

existence of a rule of customary international law, to make it easier for practitioners not versed in international law to understand the issue.

53. With regard to the topic of the obligation to extradite or prosecute (*aut dedere aut judicare*), the essence was to end impunity for core international crimes, including genocide, crimes against humanity and war crimes. It was paramount to clarify whether that obligation had attained customary law status. Although the International Court of Justice had not addressed the issue in the *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* case, an in-depth analysis of the judgment was required to assess its full implications for the topic. His delegation called on the Special Rapporteurs for the topics "The obligation to extradite or prosecute (*aut dedere aut judicare*)", "Formation of evidence of customary international law", and "Immunity of State officials from foreign criminal jurisdiction" to cooperate with each other, because their topics were closely interrelated.

54. However, although the principle of *aut dedere aut judicare* and that of universal jurisdiction both shared the goal of ending impunity, they were fundamentally different instruments and should not be linked directly. The fight against impunity before domestic courts was addressed by several items on the agendas of both the Commission and the Sixth Committee, including the obligation to extradite or prosecute, the immunity of State officials from foreign criminal jurisdiction, and the scope and application of the principle of universal jurisdiction. In that regard, the Commission should consider a comprehensive approach on those matters, including the possibility of adding to its agenda a topic incorporating all those issues, which could be entitled "State responsibility to end impunity for international crimes".

55. **Ms. Revell** (New Zealand) said that the two working papers before the Study Group on the most-favoured-nation clause, including the revised paper on the topic, entitled "Interpretation of MFN Clauses by Investment Tribunals", were a valuable resource on the factors that tribunals considered when interpreting and applying most-favoured-nation clauses. Her delegation welcomed further consideration of those clauses in relation to trade in services and investment agreements, including their relationship with the core investment disciplines, fair and equitable treatment, and national treatment standards. The work of the Study Group should be carried out against the background of general international law and the Commission's prior work, including the 1978 draft articles on the most-favoured-nation clause.

56. Her delegation supported the Study Group's general approach to the most-favoured-nation clause, including its methodologies, and especially its position that no further interpretation was necessary when those clauses expressly included or excluded dispute settlement procedures. That was the approach adopted by New Zealand in its modern free trade and investment agreements following the *Maffezini* case. She welcomed the Study Group's intention to prepare a report which would include an overview of the general background, an analysis of the case law and appropriate recommendations, as well as its intention to complete its work in 2013.

57. It would be useful to explore the question of whether the obligation to extradite or prosecute (*aut dedere aut judicare*) existed in customary international law, since the Commission's draft Code of Crimes against the Peace and Security of Mankind (1996) contained such an obligation for the core crimes in international law. She looked forward to the working paper to be prepared on that topic for the Commission's sixty-fifth session and encouraged further consideration of the relationship between that topic and universal jurisdiction.

58. The topic "Immunity of State officials from foreign criminal jurisdiction" called for a careful balancing of the fundamental principles of sovereign equality, non-interference in the internal affairs of States and the independent performance of State activities, on the one hand, and individual criminal accountability and the need to protect human rights and combat impunity for serious international crimes, on the other. While it remained vital that officials should not be subjected to politically motivated actions in foreign courts, the public also expected them to be held accountable for serious crimes.

59. Her Government looked forward to further consideration of the question of possible exceptions to immunity and took note of the Commission's intention to consider both *lex lata* and *lex ferenda*. It continued to prefer the approach taken by the Commission in its draft Code of Crimes against the Peace and Security of Mankind (1996), which provided for an exception to immunity when a State official was accused of an

international crime, particularly when prohibition of such crime had reached the status of a *jus cogens* norm. Her delegation welcomed the suggestion that terms such as "international crimes", "grave crimes" and "crimes under international law" should be clarified, since they might overlap with other topics considered by the Commission.

60. Her delegation was also pleased to see the scope of immunity being given careful consideration and looked forward to further analysis of the topic, in particular whether immunity *ratione personae* should be absolute and whether it should apply to acts performed by officials prior to and during their term in office and in both an official and a personal capacity. Any extension of the class of persons entitled to immunity beyond the "troika" must be clearly justified and must include a careful analysis of customary international law. The question of whether immunity *ratione materiae* should apply to unlawful acts or acts *ultra vires* deserved further consideration. She supported the Special Rapporteur's intention to prepare draft articles addressing the core issues of the topic for a first reading during the current quinquennium.

61. Her Government took note of the inclusion of the topic "Provisional application of treaties" in the Commission's work programme and agreed that issues relating to provisional application should be clarified, in particular the relationship between articles 18 and 25 of the 1969 Vienna Convention on the Law of Treaties and their different legal regimes. The various forms, procedural requirements and legal effects of provisional application should also be identified. The memorandum to be prepared by the Secretariat on the previous work undertaken by the Commission on that topic, in the context of its work on the law of treaties and on the *travaux préparatoires* of the relevant provisions of the Convention on the Law of Treaties, should be helpful in that regard.

62. Lastly, in examining the issue of provisional application, the Commission should consider the internal positions of States on the topic, because a State's legal regime on the matter could not be divorced from its constitutional and procedural requirements.

63. **Mr. Sinhaseni** (Thailand) said that it would be difficult to give effect to the essential values of the international community which the Special Rapporteur on the topic referred to in her preliminary report (A/CN.4/654) and which were captured in the Commission's report (A/67/10). Certain values cherished by States in a particular geographical region should not be privileged over the values of other States in a different geographical region of the world. A balance should be struck between the need to respect the sovereignty of States and ensure international stability, on the one hand, and, on the other, the need to combat impunity for the most serious crimes under international law. To that end, the Special Rapporteur should focus initially on considerations that reflected *lex lata* and then, at a later stage, take into account any proposals *de lege ferenda* when there was an international consensus to do so.

64. The topic of the obligation to extradite or prosecute was important in preventing and combating impunity, as underscored in the judgment of the International Court of Justice in *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*. The Commission should continue to work on the topic as a matter of priority and produce a final outcome setting out rules of international law that would guide States on the matter. Based on its recent reports, the Commission did not seem to have sufficient information regarding the laws and judicial practice of States on the obligation to extradite or prosecute that would allow it to conclude whether the obligation was a rule of customary international law or not.

65. Nonetheless, States in his part of the world had been actively cooperating in extraditing or prosecuting perpetrators of crimes of common concern, such as international terrorism, drug trafficking and human trafficking. Thailand was an active participant in both the Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime and the Bali Counter-Terrorism Process. States participating in those two processes were legally bound under their domestic laws to extradite or prosecute perpetrators of serious crimes of international concern, and most of them did not require a treaty to do so. Such practice could crystallize into regional customary law. Although it had not yet been determined that the obligation to extradite or prosecute had attained the status of customary law, the Commission should continue to engage in codification as well as progressive development on that important topic.

66. With regard to the topic of the fair and equitable treatment standard in international investment law,

which was in the Commission's long-term programme of work, his delegation hoped that it could lead to the development of a balanced and predictable international investment law regime. It strongly urged the Commission to commence work on that topic at its sixty-fifth session, starting with the appointment of a Special Rapporteur for the topic.

67. **Mr. Dahmane** (Algeria), commenting on the obligation to extradite or prosecute (*aut dedere aut judicare*), said that while it had had a significant impact both on the law of treaties and on international practice, particularly in the context of efforts to fight impunity, it had not been formally established by the Commission, except for the most serious crimes. His delegation strongly supported the addition of terrorism to the list of such crimes.

68. Referring to the draft articles as proposed by the Special Rapporteur, he said that the customary obligation set out in draft article 4 remained to be demonstrated in most situations, and the enumeration of serious crimes in draft article 2 remained vague. Draft article 3 offered the main basis for the obligation to extradite or prosecute by deriving it from the existence of an international treaty to which the State concerned was a party. His delegation supported the language of draft article 3, paragraph 2, specifying that internal law established the particular conditions for extradition or prosecution, but urged caution with respect to the additional requirement that the "general principles of international criminal law" should also be followed, because the precise content of such principles remained to be clarified. Full account should also be taken of important principles found in certain national legal systems, such as the prohibition against the extradition of nationals.

69. Regarding the immunity of State officials from foreign criminal jurisdiction, his delegation shared the view that it was a firmly established rule of international law, and any exceptions to it must be proved. A restrictive interpretation of immunity *ratione personae*, confining it to the "troika", would not be in conformity with current international norms or State practice. Nor should the Commission consider the subject in isolation from the question of politicized or selective prosecutions and their negative impact on the stability of inter-State relations, judicial independence and the rules of fair trial. Moreover, even supposing that exceptions to immunity could be invoked, the prosecution of serving State officials by a foreign criminal court raised technical and political problems, especially where the officials were prevented from discharging their functions and inter-State relations were affected during the protracted process of establishing the facts of a case. The situation was further complicated if the State official was ultimately found to be innocent. The Commission should pay more attention to those aspects of the question.

70. As for the immunity of State officials upon expiry of their term of office, his delegation supported the view that it continued to exist; however, its scope needed to be defined, as it was subject to different interpretations. Moreover, the entire topic of immunity could not be considered in isolation from other topics, such as *aut dedere aut judicare* or, in particular, the principle of universal jurisdiction. It was also important to maintain an international legal order characterized, like national domestic systems, by security, predictability and clarity. The Commission could, as required, continue to consider certain aspects of the application of that principle, without prejudice to its inclusion in the agenda of the Sixth Committee.

71. His delegation welcomed the initial work on the formation and evidence of customary international law, given its importance for the development and codification of international law. However, there should be no attempt to codify the topic itself, because of the spontaneous manner in which custom developed. Rather, the aim should be to identify and describe recent trends in the formation of customary law, without attributing normative value to them.

72. The Commission had complied overall with the criteria it had laid down in 1998 for its programme of work, especially with regard to meeting the needs of Member States in dealing with a specific topic. The proposal that the Commission should hold part of its annual session in New York merited serious consideration, as did any proposal likely to help it perform its work more effectively.

73. **Mr. Song** (Singapore) said that his delegation looked forward to the new perspective that the new Special Rapporteur would bring to the Commission's work on the topic of immunity of State officials from foreign criminal prosecution and hoped that she would adopt a balanced approach. Regarding the provisional application of treaties, his country, as an aviation hub, took more than an academic interest in that topic, since bilateral and multilateral civil aviation treaties often

continued to be applied on a "provisional" basis, even in cases where they had been updated. Concerning the topic of formation and evidence of customary international law, his delegation supported the Special Rapporteur's view that the outcome of the Commission's work could take the form of conclusions or guidelines with commentaries, since a convention would not lend itself to preserving the degree of flexibility inherent in the customary process. In that regard, he agreed with the Special Rapporteur that it would be appropriate to seek certain information from Governments.

74. Referring to the obligation to extradite or prosecute (*aut dedere aut judicare*), he said that the Working Group set up on that topic could expect to be given greater impetus by the judgment handed down by the International Court of Justice in the *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* case. His delegation appreciated the progress made by the Study Group on treaties over time; its six additional preliminary conclusions would shed light in an area of international law currently clouded with uncertainty. The Study Group's work on the most-favoured-nation clause, in seeking to promote greater coherence in the approaches taken in arbitral decisions on such clauses, could likewise make a significant and much-needed contribution towards certainty and stability in the field of investment law; as a country whose economy was highly dependent on trade, Singapore urged the Commission to expedite its work on that issue.

75. **Mr. Pérez de Nanclares** (Spain) said that his delegation appreciated the importance of the progress achieved by the International Law Commission during its sixty-fourth session, particularly on the topic of the immunity of State officials from foreign criminal jurisdiction. Such immunity was not only complex, because it derived ultimately from customary law and affected present-day international law in a wide variety of ways, but also difficult, because the necessary stability of international relations had to be somehow reconciled with the fight against the most serious international crimes. A balanced and cautious approach was required, in which respect for the basic principle of the sovereign equality of States would coexist with efforts to combat impunity. Immunity could not be absolute, but it should not be limited in such a way as to be divested of its essential nature. Indeed, the recent case law of the International Court of Justice, particularly its judgment in the *Jurisdictional Immunities of the State (Germany v. Italy, Greece intervening)* case, tended to support the view that the limits to immunity should be based on realistic criteria. The Commission should accordingly be mindful in its work of the distinction between codification and the progressive development of international law. In that context, the systemic approach of the Special Rapporteur was of considerable importance, since it would largely determine the fate of the topic; objectivity and neutrality were of the essence. If the abstract and deductive dimension were not adequately combined with the necessary practice-based inductive elements, the usefulness of the outcome could be compromised.

76. The distinction between immunity *ratione personae* and immunity *ratione materiae* was therefore crucial. If the former were to be extended to State officials outside the "troika", the criteria needed to be extremely restrictive and must in any case be clearly spelled out; with regard to the latter, the discussion would necessarily hinge on what was understood by *ultra vires* official acts, which similarly must be interpreted restrictively. Once the distinction had been carefully established, the core problem would probably be to consider possible exceptions to immunity from foreign criminal jurisdiction, particularly in the context of immunity *ratione materiae*; that would require a rigorous study of practice. His delegation considered, in the light of those considerations, that it would be premature to decide on the final form to be taken by the Commission's work on the topic; it remained unconvinced of the viability of preparing draft articles with a view to the elaboration of a binding instrument.

77. Turning to the topic of provisional application of treaties and, in particular, the relationship between articles 18 and 25 of the 1969 Vienna Convention on the Law of Treaties, his delegation considered that the general obligation not to defeat the object and purpose of the treaty prior to its entry into force, on the one hand, and provisional application, on the other, gave rise to totally different legal situations and regimes. It also considered that related practice on the part of both States and other subjects of international law was an essential benchmark for application and interpretation. In the case of the European Union, for instance, the provisional application mechanism was used to advance the application of those parts of treaties with third-party States that were within its own exclusive

jurisdiction. The problems thus arising merited specific study and illustrated the impact of a special international regime on the provisional application of a treaty, since the determination of what was or was not within the exclusive jurisdiction of the European Union could be a source of conflicts that would affect a third State. The Greece rescue package presented interesting problems in that regard.

78. As for the complex topic of formation and evidence of customary international law, the final outcome would be determined largely by its practical focus. In any case, it would be difficult to do any more than draw up a set of conclusions with commentaries whose value would depend on the thoroughness of the study made of the practice of courts and arbitral tribunals, as well as of States and international organizations.

79. On the topic of *aut dedere aut judicare*, his delegation remained unsure about the issues to be addressed and the viability of the topic, owing to the different ways in which the obligation operated under the various treaty regimes and the uncertainty as to whether it was to be considered a norm of customary law or a general principle of law. The recent judgment of the International Court of Justice in the *Belgium v. Senegal* case did not significantly affect that view.

80. His delegation welcomed the decision to appoint a Special Rapporteur for the topic of treaties over time. A change in the structure of the work and a more restrictive approach to that thorny topic, confined to subsequent agreements and subsequent practice, would be beneficial for the Commission's work. The main challenge was to define the scope of the topic adequately through such a restrictive approach and ensure that the content of proposals was sufficiently normative. It would remain for the Commission at future sessions to look more closely at controversial issues, such as the precise nature of the topic, the possibility of treaty modification through subsequent practice or agreement, the possible effects of contradictory subsequent practice, the possibility of subsequent practices not being specific or difficulties in the internal handling of subsequent agreements under article 31.3 of the 1969 Vienna Convention.

81. Regarding the topic of the most-favoured-nation clause, his delegation noted with interest the results of the work of the Study Group and looked forward to a rich debate that would take due account of all the contrasting case law and doctrine.

82. **Mr. Zappala** (Italy) welcomed the new Special Rapporteur on the topic of immunity of State officials from foreign criminal jurisdiction and recalled the fundamental principle that all State officials must be immune from foreign jurisdiction for actions carried out in their official capacity, except for crimes under international law; such official acts were to be attributed to the State of origin, under ordinary rules of State responsibility, and were to be dealt with in the framework of inter-State relations; however, acts performed by such officials in their private capacity were subject to ordinary rules on jurisdiction, unless special types of personal immunity applied, as in the case of the "troika". The area in which difficulties arose and where more work was needed concerned the few categories of specific crimes under international law that were listed in the statutes of such bodies as the United Nations ad hoc tribunals and in the Rome Statute of the International Court of Justice. Immunity must not entail impunity and, for that reason, appropriate rules or mechanisms might be required to allow redress.

83. The need for adequate legal responses to international crimes, either through national courts or through international mechanisms, did not necessarily entail exceptions to the rule on immunity of State officials, as there could be specific norms in respect of the individual criminal responsibility of officials in certain cases. War crimes, crimes against humanity and genocide, in particular, could come under the responsibility of both the individual and the State. It would indeed be useful to explore further the entire relationship between jurisdiction and immunities along those lines, under the guidance of the Special Rapporteur. Concerning the distinction between *ratione materiae* and *ratione personae*, Italy considered it important to determine that immunity by virtue of the former could not justify international crimes, even though the *ratione personae* dimension might temporarily bar prosecution before foreign courts.

84. Turning to the topic of *aut dedere aut judicare*, he said that that obligation relied on a principle of cooperation that was particularly important for the prosecution of crimes of concern to the international community as a whole and served to combat impunity and avoid States' becoming safe havens for alleged perpetrators of serious crimes. The question whether

principles could be identified in customary law that established such an obligation, outside the context of treaty-based law, still needed to be determined.

85. His delegation welcomed the inclusion of the topic of formation and evidence of customary international law in the Commission's work, but cautioned against formulations that might restrict the action of judges at the domestic and international levels, as well as that of other interpreters. The almost spontaneous nature of customary law was one of its distinctive traits and, while it might be useful to study elements contributing to its formation and evidence, that would not be an exhaustive undertaking. Customary law could not be circumscribed by a codification exercise, and any attempt to strictly determine its rules *in statu nascendi* could run counter to necessary developments of international law. In any case, a great deal of flexibility should be left to the interpreter in that area. It needed to be ascertained not so much whether there were elements that helped to identify the formation or evidence of customary law as whether the fact of so doing implied the exclusion of other elements. *Opinio juris* might sometimes be stronger and more relevant than practice, but actual practice might sometimes lack clear expressions of *opinio juris*. While the results of a thorough mapping exercise might be less satisfactory than expected, his delegation stood ready to contribute to the Special Rapporteur's efforts in that area.

86. **Ms. Del Sol Dominguez** (Cuba) said that the Commission's work on the topic of the immunity of State officials from foreign criminal jurisdiction was important, as it should further strengthen the principles laid down in the Charter of the United Nations and other sources of international law, particularly those relating to the sovereignty of all States. Her delegation favoured the codification of existing norms of international law in order to guard against the danger of including exceptions to immunity in customary law and considered that neither the principle of universal jurisdiction nor the obligation to extradite or prosecute should be applied to State officials who enjoyed immunity. It was up to each country to decide on the high-ranking officials concerned; in Cuba, the Criminal Procedure Act (Law No. 5 of 13 August 1977) contained a provision to that effect. Under Cuban law, there was no impunity for perpetrators of human rights violations and crimes against humanity; however, existing rules on immunity of State officials under public international law and domestic law must be respected. Cuba continued to support any initiative to clarify the content of the topic and preserve the time-hallowed regime of criminal immunity for State officials, based on international conventions and the principles of international law.

87. The topic of the obligation to extradite or prosecute was of great importance to the international community. The principles enshrined in the Charter of the United Nations, in particular those relating to the sovereign equality and political independence of States and non-interference in their internal affairs, must be strictly respected during judicial proceedings based on the principle of universal jurisdiction. The Commission should focus on establishing the general principles that governed extradition and on the grounds for refusing extradition, taking into account article 3 (Mandatory grounds for refusal) of the Model Treaty on Extradition, contained in the annex to General Assembly resolution 45/116.

88. It would be useful to establish a general framework of extraditable offences, while bearing in mind that each country had to identify in its legislation those offences for which extradition would be granted. Moreover, the obligation to extradite or prosecute arose from the presence of the alleged perpetrator in the territory of a State, but only if there was a treaty or a declaration of reciprocity between the States involved.

89. The purpose of the obligation in question, like that of the principle of universal jurisdiction, was to combat impunity in respect of certain types of offence harmful to the international community. It was important in that connection to specify the scope and application of the principle of universal jurisdiction, taking into account the negative implications for State sovereignty of the improper use of that principle.

90. Her delegation supported the establishment of regular procedural principles for requesting and obtaining extradition, which could include aspects such as the submission of supporting documents; duties and rights concerning detention; preventive measures; transfer of detainees; and the accused person's right of recourse in the event of violation of established extradition rules. The obligation to extradite or prosecute depended not only on practice but also on international law and its relationship to each State's domestic law. Indeed, where a State refused to grant an extradition request, that State had a duty to bring

criminal proceedings, but only in accordance with its domestic law. In Cuban legislation there was no category of offence for which extradition was an obligation, nor had the matter ever come before the courts. Acceptance or rejection of a request to that effect was based on the principles of independence, sovereignty, non-interference in internal affairs and reciprocity between States.

91. On the topic of the most-favoured-nation clause, her delegation commended the Study Group for its work, especially as it related to investment protection treaties, and supported the idea of studying the principles applicable to international agreements on the basis of the Vienna Convention on the Law of Treaties. It was worrying that the most-favoured-nation clause could be used to claim rights that had not been provided for in the agreement and indeed were sometimes expressly excluded. Such questionable use of the criteria contained in other legal instruments or norms unrelated to the treaty in question was blatantly contrary to the principles of treaty interpretation and application as established by the aforesaid Vienna Convention. Her delegation noted with concern that arbitral tribunals, in seeking to assert their competence to hear cases, were improperly expanding the scope of investment protection agreements on the basis of such principles as the most-favoured-nation clause. A broad interpretation of that clause affected the balance of the investment protection agreement and restricted the sovereignty of the investment-receiving State in respect of policy-making. Accordingly, the terms of the treaty, whereby most-favoured-nation provisions were expressly spelled out in the text, particularly with regard to the settlement of disputes, must be complied with; otherwise there would be no scope for extensive interpretation.

92. Turning to the topic of the provisional application of treaties, she said that Cuba attached great importance to it and welcomed its inclusion in the Commission's work. Her delegation looked forward to a fruitful outcome to the work on that topic, as well as on the topic of formation and evidence of customary international law, for the further development of international law.

93. **Mr. Leonidchenko** (Russian Federation) said that the topic of immunity of State officials from foreign criminal jurisdiction touched upon the very foundations of State sovereignty. The previous Special Rapporteur had produced a comprehensive analysis of the issue that took into account existing practice and theory, laying the foundation for further work. The election of a new Special Rapporteur should not change the course already set by that work. Future work should continue to make a distinction between immunity *ratione personae* and *ratione materiae*. In view of the topic's legal complexity and political sensitivity, which required maximal clarity, the adoption of draft articles and the elaboration of a convention on the basis thereof was an appropriate goal.

94. The new tendency to limit immunity, noted by the Special Rapporteur in her preliminary report (A/CN.4/654), revealed itself in the establishment of international criminal justice institutions, but not within the scope of the topic at hand. There was a growing consensus within the international community favouring the development of the international criminal justice system and the view that the official position of relevant persons did not affect the capabilities of that system in any way. However, attempts to expand universal jurisdiction at the national level and to limit the immunity of officials in foreign rather than international courts had led to political tensions and ran counter to the main objective of serving justice. As was evident from the legislative limitations placed by Belgium and Spain, the pioneers of universal jurisdiction, on the practice, the international community was not prepared to progressively develop international law in that direction.

95. The judgment of the International Court of Justice in the *Jurisdictional Immunities* case confirmed the position taken by the Court in the *Arrest Warrant* and the *Djibouti v. France* cases: the immunity *ratione personae* of the members of the "troika" was firmly established in international law and did not provide for any exceptions. The view contained in the outcome document of the 2012 summit of the Movement of Non-Aligned Countries and the position taken by the Department of State of the United States of America in the recent *Doe et al. v. Zedillo* case indicated that there was no tendency to favour exceptions from the rule of immunity for the "troika".

96. Any attempt to compare values that stood at the core of the topic, such as the stability of international relations and the fight against impunity, should take the rules of customary international law and international and domestic court practice into consideration. The immunity of a State official from foreign criminal

jurisdiction applied to aspects of the criminal proceedings that imposed a legal obligation on the official, but not to the substantive law of a foreign State. An investigation or criminal prosecution under national jurisdiction did not in itself constitute a violation of immunity. The State in whose service the official was employed also faced a dilemma in deciding whether assert immunity, since by doing so the State assumed responsibility for the unlawful act and its consequences. His delegation supported the idea that immunity *ratione personae* could apply to other officials, which would correlate with the International Court of Justice judgment in the *Arrest Warrant* case and the fact that States were often represented in international relations by officials other than the members of the "troika". A list of qualifying officials would be preferable to a list of criteria.

97. The formulation of new rules *de lege ferenda* required an exceptionally balanced approach. His delegation welcomed the Special Rapporteur's proposal to approach the topic from the viewpoint of codification of the existing rules of international law. As the grey areas were identified, the Commission could undertake the progressive development of those aspects of international law on the basis of consensus. The procedural aspects of claiming immunity offered many opportunities for progressive development, much more so than the issues of the scope of immunity and exceptions to it.

98. Turning to the topic of the provisional application of treaties, he called for a careful and pragmatic approach by the Commission. The concept played an important role for individual types of treaties, making any strict rules counterproductive. He welcomed the decision to request from the Secretariat a special memorandum on the Commission's previous work on the topic in the context of its work on the law of treaties and the *travaux préparatoires* of the relevant provisions of the 1969 Vienna Convention on the Law of Treaties.

99. Considering the lack of common understanding of the process of formation of customary international law, practical recommendations by the Commission would be extremely useful to national law enforcement agents and practitioners who needed to apply the rules of customary international law. His delegation supported the Special Rapporteur's proposal that the Commission's work should take the practical form of a set of conclusions with commentaries. The Commission should take care not to damage the flexibility and future development of customary international law. The search for evidence of customary norms was inseparably linked with research on the process of formation of customary international law and the role State practice and *opinio juris* played in it. Contemporary customs allowed the international community to react to global challenges but were often formulated in situations where the practice of States was insufficient or contradictory; particular attention should therefore be paid to contemporary customs that reflected the practice of all States. A glossary on the topic in the six official languages would also be useful. The consideration of *jus cogens* in the context of the topic was not appropriate.

100. The topic of the obligation to extradite or prosecute was of particular interest to his Government, which had consistently called for the expansion of the scope of the principle to include the most serious crimes with international repercussions, thereby helping to fill the gaps in the fight against impunity that individual States were hopelessly trying to address by unilaterally extending their universal jurisdiction.

101. The topic of the obligation to extradite or prosecute should be considered separately from the topic of universal jurisdiction, the scope and application of which was still under discussion. When jurisdiction was exercised on the basis of the obligation to extradite or prosecute, with the consent and at the request of another State that could exercise jurisdiction itself on the basis of traditional linkages, it ruled out the risk of inter-State complications and problems with obtaining assistance in the investigation of the crime, both associated with universal jurisdiction in its pure form.

102. His delegation welcomed the progress made by the Commission on treaties over time and the most-favoured-nation clause and maintained the view that, irrespective of the outcome, the analytical material elaborated on those topics by the Commission would be useful for all States and interested organizations.

103. Turning to the proposal to develop a universal convention that would incorporate legally binding norms to regulate cooperation among States in the protection of the atmosphere, his delegation noted that such cooperation was already governed by existing universal instruments such as the Declaration of the United Nations Conference on the Human Environment

(Stockholm Declaration) and the 1992 Rio Declaration on Environment and Development, which contained general legally non-binding principles. The non-binding nature of those principles ensured flexibility on that sensitive topic and provided for future development. Making the principles legally binding would automatically limit future progress of international law in that area and complicate the search for consensus among States. The proposed approach to extract certain general principles applicable to the topic from existing treaties was unrealistic. Every treaty reflected both the legal position of States and the fragile consensus that had been achieved in each specific case and would not have been acceptable in another case. It was not certain that a parallel could be drawn with part XII of the United Nations Convention on the Law of the Sea, which contained legally binding rules dealing with specific aspects of protection of the marine environment, rather than a set of general principles regulating the cooperation of States in that area. The topic was better suited for scientific research than for a legal analysis by the Commission. His delegation supported the transparent decision of the Commission not to start work on the topic for the time being.

104. **Ms. Che Meh** (Malaysia) said that Malaysia recognized the complex and sensitive nature of the topic of immunity of State officials from foreign criminal jurisdiction, which it considered to be governed by the principles of international law concerning the sovereign equality of States and non-interference in internal affairs; by virtue of those principles, country representatives could carry out their functions without hindrance. The topic was still at a preliminary stage and could not be considered in isolation: both *lex lata* and *lex ferenda* aspects must be taken into account, in keeping with the Commission's mandate to pursue simultaneously the codification and progressive development of international law. In any case, with regard to immunity *ratione materiae*, her delegation believed that the scope of "official acts" should be determined before any thought was given to such issues as exceptions to such immunity. Likewise, the scope of immunity should be determined prior to the study of whether international crimes or acts contrary to *jus cogens* norms allowed a waiver of immunity. As for immunity *ratione personae*, she urged caution in the exploration of the possible extension of that privilege beyond the "troika".

105. Her delegation welcomed the inclusion of the topic of formation and evidence of customary international law in the Commission's long-term programme of work. In the light of the varying views that existed as to what constituted customary international law, an in-depth analysis was required. In determining the scope of the topic, the Commission should take into account the widest possible practices of States and their terminological approaches so as to establish a common understanding, which would be bound to affect future work thereon.

106. Concerning the topic of *aut dedere aut judicare*, and in the light of the particular attention given to the judgment of the International Court of Justice in the *Questions relating to the Obligation to Prosecute or Extradite* case, Malaysia considered that, while that judgment did not appear to make that obligation a part of customary international law, it shed light on how provisions to that effect should be interpreted, applied and implemented in a treaty. In any event, before pursuing any progressive development in that area of international criminal law, the Commission must ascertain the status of the obligation, as its meaning and nature needed to be further clarified.

107. Turning to the topic of the most-favoured-nation clause, she said that, in view of diverging case law as to the applicability of that clause in particular contexts, it would be wise to be guided by the State's intention in including the clause in their treaties; the clause should accordingly be interpreted in such a way as not to be prejudicial to the State's interest in respect of the treatment it wished to accord. Possible guidelines in that regard should not limit the sovereignty of States to decide how they wished to interpret and apply that clause; as guidelines, they should remain non-binding and should not crystallize into customary international law.

The meeting rose at 1.05 p.m.