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Chair: Mr. Kohona . . . . . (Sri Lanka)

Contents

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

Agenda item 81: Report of the International Law Commission on the work of its sixty-third and sixty-fifth sessions (A/66/10 and Add.1 and A/68/10)

1. **The Chair** recalled that in 2012, consideration of chapter IV (Reservations to treaties) of the International Law Commission's report at its sixty-third session (A/66/10 and A/66/10/Add.1) had been deferred to the current session owing to the Committee's shortened programme. The Committee would also consider the report of the Commission at its 2013 session (A/68/10). The International Law Commission continued to play an important role in the progressive development of international law and its codification. The two reports testified to the scholarly regard and existing standards that defined the work of the Commission. The consideration of the report in the Sixth Committee had been an important aspect of its work for many years.

2. The Committee would consider the Commission's report in three parts. The first part consisted of chapters I to III (the introductory chapters), chapter XII (Other decisions and conclusions of the Commission), chapter IV (Subsequent agreements and subsequent practice in relation to the interpretation of treaties) and chapter V (Immunity of State officials from foreign criminal jurisdiction). The second part was devoted solely to reservations to treaties from the 2011 report. The third part would address the remaining chapters of the 2013 report (chapter VI: Protection of persons in the event of disasters; chapter VII: Formation and evidence of customary international law; chapter VIII: Provisional application of treaties; chapter IX: Protection of the environment in relation to armed conflicts; chapter X and annex A: The obligation to extradite or prosecute (*aut dedere aut judicare*); and chapter XI: The Most-Favoured-Nation clause).

3. **Mr. Niehaus** (Chairman of the International Law Commission), introducing the first cluster of chapters of the Commission's report, recalled that in 2012, because of the disruptions caused by Hurricane Sandy, the Sixth Committee had been unable to consider chapter IV (Reservations to treaties) in the 2011 report of the Commission. That chapter, as contained in document A/66/10 and Add.1, together with the 2013 report (A/68/10), would be taken up at the current session. Following previous practice aimed at facilitating debate, he would make three statements to introduce the report as a whole. In his current statement, he would deal with the introductory chapters I to III and chapter XII (Other decisions and conclusions of the Commission), as well as the first two substantive chapters of the 2013 report, namely chapter IV (Subsequent agreements and subsequent practice in relation to the interpretation of treaties) and chapter V (Immunity of State officials from foreign criminal jurisdiction). His second statement would be devoted solely to the topic of reservations to treaties in the 2011 report. In his third and final statement he would revert to the 2013 report and address the remaining chapters VI to XI (Protection of persons in the event of disasters; Formation and evidence of customary international law; Provisional application of treaties; Protection of the environment in relation to armed conflicts; The obligation to extradite or prosecute (*aut dedere aut judicare*); and The Most-Favoured-Nation clause).

4. The current session was the second of the quinquennium. The Commission had taken steady steps towards building upon the past year's work. It had commenced substantive consideration of the topic of subsequent agreements and subsequent practice in relation to the interpretation of treaties, following the appointment in 2012 of a Special Rapporteur for the topic, and had provisionally adopted draft conclusions. It had also proceeded for the first time to adopt, provisionally, draft articles on the topic of immunity of State officials from foreign criminal jurisdiction. The Commission had continued to make marked progress on the topic of protection of persons in the event of disasters such that the completion, on first reading, of a set of draft articles on the topic was within sight. It had also held a useful debate on the topic of formation and evidence of customary international law, whose title has been changed to "Identification of customary international law", as well as on the topic of provisional application of treaties.

5. Through its Working Group, it had continued to consider the issues related to the topic of the obligation to extradite or prosecute (*aut dedere aut judicare*), bearing in mind the judgment of the International Court of Justice in *Belgium v. Senegal*; a detailed report of the Working Group appeared as annex A to the report. In the framework of its Study Group, the Commission had continued to move ahead in its work on the topic of the Most-Favoured-Nation clause, and it

had decided to include two new topics in its current programme of work, namely “Protection of the environment in relation to armed conflicts”, appointing Ms. Marie G. Jacobsson as Special Rapporteur and already commencing an exchange of views thereon, and “Protection of the Atmosphere”, for which Mr. Shinya Murase had been appointed Special Rapporteur. The inclusion of the latter topic had been on the understanding that:

(a) Work on the topic would proceed in a manner so as not to interfere with relevant political negotiations, including on climate change, ozone depletion and long-range transboundary air pollution. The topic would not deal with, but was also without prejudice to, questions such as liability of States and their nationals, the “polluter pays” principle, the precautionary principle, common but differentiated responsibilities and the transfer of funds and technology to developing countries, including intellectual property rights;

(b) The topic would also not deal with specific substances, such as black carbon, tropospheric ozone and other dual-impact substances, which were the subject of negotiations among States. The project would not seek to “fill” the gaps in the treaty regimes;

(c) The topic would not deal with questions relating to outer space, including its delimitation; and

(d) The outcome of the work on the topic would be draft guidelines that did not seek to impose on current treaty regimes legal rules or legal principles not already contained therein.

As work continued on the Commission’s programme of work, the task of identifying new topics remained an ongoing exercise for the Working Group on the Long-Term Programme of Work. At the current session, the Commission had included the topic of crimes against humanity in its long-term programme of work on the basis of the proposal prepared by Mr. Sean D. Murphy. The syllabus appeared in annex B to the Commission’s report.

6. As had been noted in the past, the Commission continued to rely on information on State practice that States submitted. Such interaction made the Commission’s efforts towards the progressive development of international law and codification unique. In chapter III of the report, attention was thus drawn to aspects of the Commission’s work concerning which information on practice would be particularly useful as it proceeded with the consideration of various topics. In introducing the chapters of the report, he would refer to the specific questions that had been addressed to States by the Commission. Following past practice, chapters II and III of the report had been circulated to missions in August several days after the completion of the Commission’s work. The early submission of information referred to in chapter III, preferably before the deadlines identified, would be immensely helpful to Special Rapporteurs and the Commission.

7. It was pleasing to note that the Commission had continued its traditional exchanges with the International Court of Justice, as well as its cooperation with the Asian-African Legal Consultative Organization, the European Committee on Legal Cooperation and the Committee of Legal Advisers on Public International Law of the Council of Europe, the Inter-American Juridical Committee and, most recently, the African Union Commission on International Law.

8. In the past 49 sessions, the Commission’s work had proceeded, in part, alongside the International Law Seminar. It was reflective of the Seminar’s value that some members of the Commission and judges of the International Court of Justice had been among its past participants. Its relevance and continued vitality depended on the sustained commitment of States that made voluntary contributions. The Commission remained grateful for such acts of generosity and encouraged more contributions. In 2014, the Seminar would commemorate its fiftieth anniversary. Accordingly, the Commission, in cooperation with the Legal Liaison Office of the United Nations Office at Geneva, would organize an appropriate event, which would coincide with the annual visit of the President of the International Court of Justice to the Commission. Invitations would be issued once the dates of the visit were known.

9. The Commission had emphasized in the past that the work of the Codification Division, which served as the secretariat of the Commission, constituted part and parcel of the working methods of the Commission. Its involvement in research projects on issues included in the Commission’s programme of work remained invaluable. At the current session, the secretariat had prepared two memorandums on the topics of provisional application of treaties (A/CN.4/658) and

the formation and evidence of customary international law (A/CN.4/659), for which the Commission was most appreciative.

10. Turning to the substantive chapters of the report, and beginning with chapter IV (Subsequent agreements and subsequent practice in relation to the interpretation of treaties), he recalled that at the 2013 session the Commission had had before it the first report of the Special Rapporteur, which contained four draft conclusions. The report had been discussed in the plenary of the Commission, and the four draft conclusions had been referred to the Drafting Committee. That Committee had decided to reformulate the four draft conclusions into five, which had then been provisionally adopted by the Commission. The five draft conclusions were general in nature; other aspects of the topic would be addressed at a later stage of the work.

11. Draft conclusion 1 (General rule and means of treaty interpretation) made plain that the current topic was to be situated within the framework of the rules on the interpretation of treaties set forth in articles 31 and 32 of the Vienna Convention on the Law of Treaties. It recalled that article 31 of the Vienna Convention was, as a whole, the "general rule" of treaty interpretation and addressed the interrelationship between articles 31 and 32, which together listed a number of "means of interpretation". Whereas article 31 set forth the general rule of treaty interpretation and the means of interpretation that must be taken into account, including certain subsequent agreements and subsequent practice, article 32 provided "supplementary means of interpretation" to which recourse could be had in the interpretation of a treaty. Draft conclusion 1 emphasized that both articles 31 and 32 must be read together, as the process of treaty interpretation was a "single combined operation" in which "appropriate emphasis" was to be placed on the various means of interpretation provided by the Vienna Convention.

12. Draft conclusion 2 (Subsequent agreements and subsequent practice as authentic means of interpretation) reaffirmed that subsequent agreements and subsequent practice under article 31, paragraph 3 (a) and (b), of the Vienna Convention were "authentic means of interpretation". The term "authentic" referred to different forms of objective evidence or proof of conduct of the parties, which reflected the "common understanding of the parties" as to the meaning of the treaty. Draft conclusion 2 thus recognized that the common will of the parties, where expressed through subsequent agreements and subsequent practice as defined in article 31, possessed a specific authority with respect to the identification of the meaning of the treaty, even after the conclusion of the treaty. The character of subsequent agreements and subsequent practice under article 31, paragraph 3 (a) and (b), as "authentic means of interpretation" did not, however, imply that those means necessarily possessed a conclusive, or legally binding, effect. As provided by article 31, paragraph 3, subsequent agreements and subsequent practice only constituted means of interpretation that must "be taken into account" as part of the "single combined operation" of treaty interpretation.

13. Draft conclusion 3 (Interpretation of treaty terms as capable of evolving over time) addressed the role which subsequent agreements and subsequent practice might play in the determination of whether or not the meaning of a term used in a treaty was capable of evolving over time. It should not be read as taking any position regarding the appropriateness in general of a more contemporaneous or a more evolutive approach to treaty interpretation. Instead, it should be understood as indicating the need for some caution regarding the adoption of an evolutive approach. Draft conclusion 3 emphasized that subsequent agreements and subsequent practice, similar to other means of treaty interpretation, could support both a contemporaneous or an evolutive interpretation, as appropriate. In other words, subsequent agreements and subsequent practice might provide useful indications to the interpreter for assessing, as part of the ordinary process of treaty interpretation, whether or not the meaning of a term was capable of evolving over time.

14. Draft conclusion 4 (Definition of subsequent agreement and subsequent practice) defined the three different "subsequent" means of treaty interpretation, namely "subsequent agreement" under article 31, paragraph (3) (a), "subsequent practice" under article 31, paragraph 3 (b), and other subsequent practice under article 32. For all three "means of interpretation", the term "subsequent" referred to acts occurring after the conclusion of a treaty, which was often earlier than a treaty's entry into force. A "subsequent agreement" under article 3, paragraph 3 (a), was an agreement between the parties regarding the interpretation of the treaty or the application of its

provisions; such an agreement was not necessarily binding, however, and the question of when a subsequent agreement between the parties was binding or was merely one of several means of interpretation would be addressed at a later stage of the Commission's work. "Subsequent practice" under article 31, paragraph 3 (b), encompassed all other relevant forms of subsequent conduct by the parties to a treaty which contributed to the identification of an agreement or understanding of the parties regarding the interpretation of the treaty, and "subsequent practice" under article 32 consisted of conduct by one or more parties in the application of the treaty, namely any practice in the application of the treaty that might provide indications as to how the treaty should be interpreted. "Subsequent practice" under article 32 must not necessarily be "regarding the interpretation" of the treaty, or reflect the agreement of all the parties.

15. Draft conclusion 5 (Attribution of subsequent practice) addressed the question of possible authors of subsequent practice under articles 31 and 32. The conclusion defined positively whose conduct in the application of a treaty might constitute subsequent practice under those articles, namely any conduct in the application of a treaty which was attributable to a party to that treaty under international law. The conclusion also provided the negative corollary: that "other conduct", including by non-State actors, did not constitute subsequent practice under articles 31 and 32. Such "other conduct" might, however, be relevant when assessing the existence of a subsequent practice of parties to a treaty and/or its legal significance. The conclusion thereby emphasized the primary role of the States parties to a treaty, who were the masters of the treaty and were ultimately responsible for its application. That did not exclude that conduct by non-State actors, if attributable to a State party, might constitute relevant application of the treaty.

16. It was anticipated that the Special Rapporteur would present a second report at the Commission's sixty-sixth session in 2014.

17. With regard to chapter V (Immunity of State officials from foreign criminal jurisdiction), he said that at the 2013 session the Commission had had before it the second report of the Special Rapporteur (A/CN.4/661), which set out to develop further the methodological approaches suggested and the general workplan contained in the preliminary report. It considered: (a) the scope of the topic and of the draft articles; (b) the concepts of immunity and jurisdiction; (c) the difference between immunity *ratione personae* and immunity *ratione materiae*; and (d) the identification of the normative elements of the regime of immunity *ratione personae*. On the basis of the analysis, six draft articles had been presented for the consideration of the Commission. The report before the Committee contained three draft articles provisionally adopted by the Commission, together with commentaries.

18. Draft article 1 (Scope of the draft articles) reflected the substance of draft articles 1 and 2 as proposed by the Special Rapporteur. It had both the inclusionary and the exclusionary elements of the scope of the draft articles. As was clear from paragraph 1, the draft articles applied to the immunity of State officials from foreign criminal jurisdiction. It was understood that they addressed State officials and their immunity only in relation to criminal jurisdiction arising from the horizontal relationship between one State and another. Draft article 1 sought to make clear at the outset that the draft articles referred to the immunity of State officials, that such immunity was in respect of criminal jurisdiction and that such jurisdiction was the jurisdiction of another State. Paragraph 2 of draft article 1 related to regimes which were not prejudiced by the draft articles essentially because they were already covered by special rules of international law, some of which had been the subject of prior work by the Commission. It was cast as a saving clause, the scope of which was defined by the particular rules on immunity contained in each special regime. As was also noted in the commentary, the use of "in particular" in the paragraph was intended to signal that the clause was not exclusive, as it was recognized that special rules in other areas might be found in practice, particularly in connection with the establishment in a State's territory of foreign institutions and centres for economic, technical, scientific and cultural cooperation, usually on the basis of specific headquarters agreements.

19. Draft article 2 concerned the use of terms. The Commission's Drafting Committee had proceeded on the general understanding that the draft article on possible definitions was a work in progress and would be subject to further consideration in the future. For the time being, draft article 2 remained in the Drafting Committee and a rolling text would continue to be considered and developed.

20. Draft article 3 dealt with persons enjoying immunity *ratione personae*, which was status-based. It confined itself to identifying the persons to whom that type of immunity applied, namely Heads of State, Heads of Government and ministers for foreign affairs. It did not deal with the substantive scope of such immunity. Immunity *ratione personae* for Heads of State, Heads of Government and ministers for foreign affairs was justified based on representational and functional considerations. The enjoyment of immunity *ratione personae* by such persons was supported by State practice and jurisprudence. In its judgment in the case concerning the *Arrest Warrant of 11 April 2000* (*Democratic Republic of the Congo v. Belgium*) (the *Arrest Warrant* case), the International Court of Justice had expressly stated that in international law it was firmly established that certain holders of high-ranking office in a State, such as the Head of State, Head of Government and minister for foreign affairs, enjoyed immunities from jurisdiction in other States, both civil and criminal. The Court had reiterated its position in *Certain Questions of Mutual Assistance in Criminal Matters* (*Djibouti v. France*). The Commission was aware that the *Arrest Warrant* case had been the subject of critical commentary in relation to the immunity *ratione personae* of the minister for foreign affairs, as it was predicated on deductive reasoning rather than on an analysis of State practice, but it nevertheless considered that there were sufficient grounds in practice and in international law to conclude that the Head of State, Head of Government and minister for foreign affairs enjoyed immunity *ratione personae* from foreign criminal jurisdiction.

21. Following a detailed discussion, it had been decided that, for the purposes of the current draft articles, "high-ranking officials" should not enjoy immunity *ratione personae*. That was without prejudice to the rules pertaining to immunity *ratione materiae*, which would be the subject of consideration at a later stage. It was also noted that when such officials were on official visits, they enjoyed immunity from foreign criminal jurisdiction based on the rules of international law relating to special missions.

22. Unlike draft article 1, draft article 3 used the phrase "immunity from the exercise of" with respect to foreign criminal jurisdiction. That formulation best illustrated the relationship between immunity and foreign criminal jurisdiction and emphasized the essentially procedural nature of the immunity. It would be recalled that in the *Jurisdictional Immunities of the State* case (*Germany v. Italy: Greece intervening*), the International Court of Justice, in confirming the essentially procedural nature of the law of immunity, had stated that it regulated the "exercise of jurisdiction in respect of particular conduct ".

23. Draft article 4 (Scope of immunity *ratione personae*) combined the substance of what had originally been draft articles 5 and 6 in the Special Rapporteur's second report. Paragraph 1 dealt with the temporal nature of such immunity, which was status-based and subsisted while the person to whom it applied remained in office. Pursuant to paragraph 2, such immunity covered all acts performed, whether in a private or official capacity, during or prior to the term of office. Consequently, after a person ceased to hold the office, he or she would no longer enjoy immunity *ratione personae*. Thus, if a court of a State had jurisdiction under international law, it might try a former holder of office of another State who might have enjoyed immunity *ratione personae* for acts committed prior to or subsequent to his or her term of office, as well as in respect of acts committed during that term of office in a private capacity. That had been confirmed in the *Arrest Warrant* case. Paragraph 3 stated that the cessation of immunity *ratione personae* was without prejudice to the application of the rules of international law concerning immunity *ratione materiae*.

24. According to the workplan proposed by the Special Rapporteur, the Commission's consideration of the topic in 2014 would be devoted to aspects concerning immunity *ratione materiae*, and the Commission therefore requested information on the practice of State institutions, particularly judicial decisions, that elucidated the meaning given to the phrases "official acts" and "acts performed in an official capacity" in the context of the immunity of State officials from foreign criminal jurisdiction. It would be appreciated if such information were made available by 31 January 2014. That concluded his introduction of chapter V of the report, as well as the first cluster of issues.

25. **The Chair** said that the Commission would proceed with consideration of the first cluster of chapters, namely chapters I to V and XII.

26. **Ms. Dieguez La O** (Cuba), speaking on behalf of the Community of Latin American and Caribbean

States (CELAC), reiterated the Community's call for the sessions of the International Law Commission to be held in New York at least once every five years. The Organization's austerity measures should take into account the efficiency of its work. There was also a need for a more fluid exchange between the Commission and the Sixth Committee. That would have a positive impact on the quality of interaction in writing, via information and comments from Member States to the Commission.

27. CELAC was pleased that the Commission's report contained a list of specific issues relating to four items on the Commission's agenda on which it would be useful to have comments from States. In the past, CELAC had requested that the questionnaires prepared by the Special Rapporteurs should focus on the main aspects of the topic under study, and it was worth recalling in that connection that General Assembly resolution 67/92 had asked that requests for contributions from Governments should relate to specific issues.

28. Due account should be taken of the difficulties faced by many States and their legal departments in providing the information requested. That was not because of a lack of interest, but rather differences in the resources available to teams of international lawyers between one country and another. A more frequent interaction between the Commission and Committee delegates in New York would increase the possibilities for more States to take part in the discussions, since Sixth Committee delegates were the natural channel between the Commission and legal offices in capitals.

29. CELAC called on States to make further contributions to the Trust Fund for the International Law Seminar so that legal advisers from all regions could take part in the Commission's work. The participation of members of the Commission and the Seminar at the conference held in July at the University of Sao Paulo, Brazil, in memory of Gilberto Amado, was also a good practice.

30. CELAC recognized the efforts made in recent years, but more could be done to improve cooperation and dialogue between the Commission and Member States. For example, it was regrettable that, due to budgetary constraints, it was not possible for all special rapporteurs on topics under consideration in the Sixth Committee to attend the discussions, which should always be scheduled on a date close to the meeting of legal advisers and should not overlap with other meetings of the General Assembly that might prevent them from attending. A short list of topics should be announced well in advance, to allow States to prepare adequately for the discussion.

31. The Commission's productivity must be matched by adequate funding so that documents of relevance to the progressive development and codification of international law had the necessary publicity. It was unacceptable that the periodic publications of the Codification Division might be placed at risk for financial reasons. CELAC supported the continuation of the publications referred to in paragraph 185 of the Commission's latest report. It welcomed the dissemination work of the Codification Division and the Division of Conference Management as well as the voluntary contributions made to the Trust Fund to eliminate the delay in the publication of the Commission's Yearbook, and it called on States to make additional contributions.

32. **Mr. Fife** (Norway), speaking on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden), welcomed the draft conclusions on the topic of subsequent agreements and subsequent practice in relation to the interpretation of treaties. The Nordic countries had in the past underlined the importance of a uniform and coherent interpretation of treaties, and they were pleased that a definition of subsequent practice was foreseen in draft conclusion 4.

33. The Nordic countries welcomed the work on the preparation of six draft articles and the provisional adoption of three clear and coherent articles under the topic of immunity of State officials from foreign criminal jurisdiction. The systematic distinctions drawn between criminal and civil jurisdiction, between immunity *ratione personae* and immunity *ratione materiae* and between different circumstances which might give rise to particular rules of immunity from criminal jurisdiction, such as special missions, contributed to an understanding of the various aspects of immunity, but they also highlighted the close relationship between those issues and perspectives and the importance of avoiding fragmentation in the final outcome of the Commission's work.

34. The Nordic countries agreed with the Special Rapporteur's remark in paragraph 48 of her second report (A/CN.4/661) that immunity *ratione personae*

and immunity *ratione materiae* had significant elements in common, including their basis and purpose, but pointed out that certain considerations related to one must be observed when considering the other. The report acknowledged that the rationale for both types of immunity should be sought in the sovereign equality of States; it was also closely linked to the need to prevent interference in their internal affairs and help maintain stable international relations. The Nordic countries noted that a scarcity or lack of decisions by national courts in that particular context might actually denote the existence of an established State practice accepted by law rather than constitute a challenge in the identification of customary international law. Moreover, the identification between the State and certain individuals acting on its behalf or between the State and certain acts carried out on its behalf was a logical consequence of that rationale. That implied that even if immunity *ratione personae* were found to be limited to the troika of Head of State, Head of Government and minister for foreign affairs, certain arguments for granting such immunity might be particularly relevant when determining the subjective and material scope of immunity *ratione materiae*.

35. Notwithstanding the point made by the Special Rapporteur and the Commission on the plans to discuss exceptions to immunity at a later stage (paragraph (4) of the commentary to draft article 4 in the Commission's report), the Nordic countries wished to underline a number of key aspects relating to that issue which they viewed as basic elements for a starting point of discussions. With respect to countering immunity for the most serious crimes of international concern, no State officials should be shielded by rules of immunity by turning them into rules of impunity. The Nordic countries looked forward to exploring evidence for the identification of prospective customary international law in that regard, taking into consideration landmark treaties and international jurisprudence in the field reaching back at least to the Nuremberg and Tokyo tribunals. They appreciated the Special Rapporteur's readiness to take into account interpretations arising from or related to international criminal jurisdiction (paragraph 29 of the second report). It was reasonable to suggest that crimes such as genocide, crimes against humanity and serious war crimes should not be included in any definition of acts automatically constituting immunity. The Nordic countries were, however, prepared to discuss those matters at a later stage under the heading "exceptions to immunity", as outlined in the Special Rapporteur's workplan.

36. The Nordic countries welcomed the Commission's decision to add the topic of crimes against humanity to its long-term work programme. That was another important step towards eliminating impunity for serious international crimes. If properly construed, it clearly met the Commission's standards for topic selection. It was sufficiently advanced due to existing treaty-based norms vis-à-vis other international crimes, such as the duty to prevent genocide and war crimes, and it addressed a pressing concern of the international community: preventing and effectively punishing crimes against humanity.

37. A rock-solid basis in customary international law for individual criminal responsibility for crimes against humanity already existed, as exemplified, in particular, by the General Assembly's affirmation in its resolution 95 (I) of the principles of international law recognized by the Charter of the International Military Tribunal at Nuremberg and the judgment of the Tribunal. That judgment had held that the very essence of the London Charter was that individuals had international duties which transcended the national obligations of obedience imposed by the individual State. It was on that basis that the Statutes of the international criminal tribunals for both the Former Yugoslavia and Rwanda had included definitions of crimes against humanity that reflected that customary international law. Although the Rome Statute of the International Criminal Court established a universally recognized and comprehensive definition of crimes against humanity that was widely recognized as satisfying all relevant criteria of the principle of *nullum crimen sine lege* and which regulated a number of aspects relating to prosecution of such crimes, it did not address the duty of States to prevent such acts or to provide a general framework for inter-State cooperation.

38. The Nordic countries supported the Commission's work on the topic, but a number of aspects needed to be addressed in its future work. First, agreed language under the Rome Statute must not be opened for reconsideration; the definition of crimes against humanity in article 7 must be retained as the material basis for any further work on the topic. Second, robust inter-State cooperation for the purpose of investigation, prosecution and punishment of such crimes was crucial, as was the obligation to prosecute or extradite alleged offenders, regardless of their

nationality. Hence the need for the Commission to conduct a legal analysis of the obligation to extradite or prosecute and to identify clear principles in that regard. Additional clarity on the scope of application of that obligation would help ensure maximum effect and compliance with existing rules.

39. Third, international efforts to eliminate such crimes could only be successful if sufficient attention was also given to their prevention. The Nordic countries encouraged the Commission to explore and articulate the relevant responsibilities in that regard and to consider innovative measures and mechanisms to ensure prevention. Lastly, recognition of a duty to prevent such crimes or an obligation of inter-State cooperation would be welcome, but must not be misconstrued so as to limit similar existing obligations vis-à-vis other crimes or existing legal obligations in the field. The Nordic countries trusted that the Commission would conduct discussions on the topic on the basis of the wide range of international law relating to crimes against humanity, including with regard to minorities exposed to persecution.

40. Like many other delegations, the Nordic countries had repeatedly expressed their scepticism about the topic of expulsion of aliens, and reference was made to their statement in that regard in 2012. It was not feasible or desirable at the current stage to attempt to develop the draft articles into legally binding norms. Instead, the end result of the work on the topic should take the form of guidelines or principles.

41. **Ms. McLeod** (United States of America), referring first to the topic of subsequent agreements and subsequent practice in relation to the interpretation of treaties, said that her delegation commended the Commission for its rapid consideration of draft conclusions by the Commission's Drafting Committee. The United States continued to believe that there was a great deal of useful work to be done on the subject and was pleased that the topic had taken on a more specific focus.

42. Her delegation welcomed in particular the emphasis placed in the Special Rapporteur's report and in the draft conclusions on preserving and highlighting established methods of treaty interpretation under article 31 of the Vienna Convention and situating subsequent agreements and subsequent practice in that framework. It was also pleased at the increasing acknowledgment in the draft conclusions and commentary of the limits of subsequent agreements and subsequent practice as interpretive tools vis-à-vis the reasonable scope of the treaty terms being interpreted. For example, subsequent agreements and subsequent practice should not substitute for amending an agreement when appropriate.

43. She was somewhat concerned about the reference to "presumed intention" in draft conclusion 3. While discerning the intention of the parties was the broad purpose in treaty interpretation, that purpose was served by applying the specific means of treaty interpretation set forth in articles 31 and 32, not through an independent inquiry into intention and certainly not into presumed intention. The text of draft conclusion 3 did not seem to capture that important distinction.

44. Turning to the difficult topic of immunity of State officials from foreign criminal jurisdiction, she said that one of the challenges in connection with immunity *ratione personae* had to do with the small number of criminal cases brought against foreign officials, and particularly against Heads of State, Heads of Government and ministers for foreign affairs. The federal Government of the United States had never brought a criminal case against a sitting Head of State, Head of Government or minister for foreign affairs of another country, nor was she aware of a state government within the United States having ever done so.

45. The bulk of United States practice in the area of foreign official immunity centred on civil suits. Perhaps the most critical difference between civil and criminal jurisdiction in the United States was that civil suits were generally brought by private parties, without any involvement by the executive branch, whereas criminal cases were always brought by the executive branch. Her delegation realized that procedures differed in other countries, including those in which criminal investigations were conducted by members of the judicial branch and/or initiated by private party complaints. Of course, it was the sovereign that was concerned with reciprocity, whereas the private parties who brought civil suits were not. When the issue of immunity arose in the criminal context and decisions regarding prosecution were taken within the executive branch, the application of immunity or of related policy concerns about prosecuting a sitting Head of State might not be publicly apparent because they were

considered and resolved within the executive branch as part of the initial decision whether to proceed. Thus, the deferral of prosecution of sitting Heads of State might not be a matter of public record, which might make it more difficult to elicit the governing rules.

46. Her delegation believed that the scope of the topic and immunity *ratione personae* were prudent issues with which to begin and that the draft articles and commentary might help generate momentum to deal with issues of greater controversy, such as immunity *ratione materiae* and exceptions to immunity.

47. With respect to scope, because the rules that governed immunity in civil cases differed from those in criminal cases, the commentary should clarify that the draft articles had no bearing on any immunity that might exist with respect to civil jurisdiction.

48. The precise definition of the concept of "exercise of criminal jurisdiction" had been left to further commentary. Paragraph (5) of the commentary to draft article 1 stated that the exercise of criminal jurisdiction should be understood to mean "the set of acts linked to judicial processes whose purpose is to determine the criminal responsibility of an individual, including coercive acts that can be carried out against persons enjoying immunity in this context". It was unclear why the exercise of criminal jurisdiction should be restricted to acts that were linked to judicial processes. In the United States, there were limited instances in which the executive branch could apply police powers without the prior involvement of the judicial branch, for example arrest and detention that could be lawfully undertaken by police authorities with respect to crimes committed in their presence or when necessitated by public safety. The commentary to draft article 1 should make it clear that such application of police powers constituted the exercise of criminal jurisdiction. Any immunity that existed from the exercise of criminal jurisdiction should not depend on the branch of government that applied the coercion or the stage of the process at which that coercion was applied. As stated by the International Court of Justice in *Certain Questions of Mutual Assistance in Criminal Matters*, "the determining factor in assessing whether or not there has been an attack on the immunity of the Head of State lies in the subjection of the latter to a constraining act of authority". It followed that the types of exercise of criminal jurisdiction as to which a Head of State or other member of the troika might enjoy immunity were those that were coercive, regardless of the branch of government applying the coercion.

49. Another issue with respect to immunity *ratione personae* that would benefit from clarification in draft article 4 was whether members of the troika could be compelled to testify in a criminal case in which they were not the defendants. The reference to *Djibouti v. France* in paragraph (3) of the commentary to draft article 3 implied that they could not, since the International Court of Justice had ruled in that case that because France had issued a mere request to the President of Djibouti to testify, it had not violated his immunity. The implication of that ruling was that an order compelling the Head of State's testimony would have violated his immunity. The commentary should make it clear that the immunity of the troika from compelled testimony did not arise only in cases in which a member of the troika was a defendant or the target of an investigation.

50. She was disappointed that the topic of protection of the atmosphere had been placed on the Commission's active agenda, given the concerns that her delegation had expressed in 2012. The Commission's understandings limiting the scope of the topic were welcome, but even so, the United States continued to believe that it was not a worthwhile topic for the Commission to address, since various long-standing instruments already provided sufficient general guidance to States in their development, refinement and implementation of treaty regimes. Her delegation did not see any value in the Commission pursuing the matter and would closely follow the developments on the topic.

51. The United States welcomed the Commission's addition of the topic of crimes against humanity to its long-term work programme. The topic's importance was matched by the difficulty of some of the legal issues that it implicated, and her delegation expected that those issues would be thoroughly discussed and carefully considered in light of States' views as the process moved forward.

52. **Mr. Silberschmidt** (Switzerland), noting that a more detailed version of his statement was available on the PaperSmart portal, stressed the continuing importance of the topic of immunity of State officials from foreign criminal jurisdiction. His delegation noted the scope of the draft articles as set out in draft article

1 and the fact that the term “officials” would have to be re-examined with a view to identifying the correct terms to be used and determining the circle of persons to whom immunity applied.

53. Switzerland agreed about the need for a simple definition. At the same time, it endorsed the Commission’s decision to take the reference to criminal jurisdiction as meaning the set of acts linked to judicial processes whose purpose was to determine the criminal responsibility of an individual, including coercive acts which might be carried out against persons enjoying immunity in that context. There was no point in conferring immunity on a person if that same person could be subject to enforcement measures such as arrest. That would be contrary to one of the aims of immunity, which was to enable the person who enjoyed that privilege to carry out his or her official duties without hindrance.

54. The list contained in draft article 1, paragraph 2, was incomplete and should explicitly include “permanent missions to international organizations”. Delegations participating in an international conference should also be explicitly included, especially as such conferences were not necessarily held under the auspices of an international organization. The commentary noted that those two categories were covered by the notion of persons connected with international organizations, but in practice that was not the case, or at least it was not sufficiently clear to avoid practical difficulties if the terms currently used in draft article 1, paragraph 2, were retained. Moreover, it should be specified whether or not the list was exhaustive, as the words “in particular” might be interpreted in various ways.

55. With regard to the non-inclusion of permanent missions to international organizations on the list contained in article 1, paragraph 2, he noted that, according to the Commission’s report, the group of persons connected with international organizations carried out “various representational and other activities connected with international organizations” and that that group was covered by the special rules “applicable to persons connected with missions to an international organization or delegations to organs of international organizations or to international conferences”. In his delegation’s view, persons connected with international organizations were essentially staff of those organizations or had been seconded to them by States to work in the administration of those organizations. It should be feasible to extend the notion to include delegations to organs of international organizations. However, there was general agreement that it could not be unequivocally assumed that persons attached to the permanent missions of an international organizations were included.

56. Similarly, although many international conferences were held under the auspices of an international organization with which the host State had concluded a headquarters agreement, many such conferences did not have any tie with the international organization concerned, and the host State often had to confer privileges and immunities on the conference and its participants unilaterally, based on its national legislation. The privileges and immunities conferred on the conference and its participants by the host State were based on international law, even though they might have been formalized by a unilateral decision of the host State. Indeed, one could hardly imagine that a State would organize an international conference and invite official delegations without ensuring that they could participate freely and unimpeded in the discussions. That was why Switzerland conferred a privileged status on such conferences and applied the Convention on Special Missions to the official delegations that participated, and it also applied that Convention both to bilateral meetings in which Switzerland was a participant and to meetings between third countries taking place in Switzerland with Swiss permission, in accordance with article 18 of the Convention, which constituted a codification of customary international law.

57. Draft article 1, paragraph 2, limited itself to not prejudicing the special rules deriving from international law. In particular, that excluded the immunities that a State might confer unilaterally — through the application of national legislation — on a specific type of State representative, for example, or on State representatives participating in an international conference organized by the host State or by a group of States. Apart from cases in which a State unilaterally conferred immunities basing itself on international law — international conferences, for example — his delegation wondered what the implications of that provision were with regard to immunities conferred on foreign officials on the basis of the State’s own national legislation. It might be useful for the Commission to provide more precise information on

the competence of a State to confer more extensive immunities than those provided for in the draft articles and on the effects such immunities might have on other international treaties, such as extradition treaties.

58. In 2012, his delegation had already stressed that it was necessary to strike a balance, in considering the topic of immunity of State officials from foreign criminal jurisdiction, between the effort to combat impunity and the need to preserve harmonious relations between States. It was in that light that the Committee must approach draft article 3. His delegation noted that the Commission had decided to limit immunity *ratione personae* exclusively to Heads of State, Heads of Government and ministers for foreign affairs; that the commentary had referred to the decision taken by the Federal Criminal Court in the *Nezzar* case; that the Commission did not consider those precedents sufficient for establishing a customary international rule which would extend the benefits of immunity *ratione personae* to other persons; and that for the majority of Commission members, it was difficult to determine who might enjoy the benefits of immunity *ratione personae* other than Heads of State, Heads of Government and ministers for foreign affairs.

59. His delegation wondered whether limiting such immunity to the troika made it possible to attain the necessary balance. In view of the restricted circle of persons who could benefit from immunity *ratione personae*, in the next stage the Committee should examine the matter of the personal and material scope of immunity *ratione materiae*, given the special position within the structure of the State in which other senior officials might find themselves. Today's frequent international contacts involved a wide variety of global issues and a multitude of State officials other than just Heads of State, Heads of Government and ministers for foreign affairs. It would therefore be important, especially in determining the personal and material scope of immunity *ratione materiae*, to adopt an approach that was less static and tied to one function and was more linked to the objectives of the international contacts. A minister for economic affairs or a finance minister might have a crucial role to play in international discussions on the global economic balance. Depending on the context, a minister for the environment, a minister for defence or still others might have an equally pivotal role to play. The Commission should bear that evolution in mind as its work proceeded.

60. Noting that the Commission had not yet examined possible exceptions to immunity *ratione personae* for Heads of State, Heads of Government and ministers for foreign affairs, his delegation pointed out, without prejudging the outcome of the Commission's future discussions, that immunity *ratione personae* was based on the special position in the organization of the State of the persons performing those functions. Hence the importance of not rendering the principal aim of that immunity meaningless by introducing exceptions which could not be justified in the context of the search for a necessary balance between the effort to combat impunity and the need to preserve harmonious relations between States, and also in light of the principle of equality among States. It would also be important clearly to define all exceptions so as to avoid any possible misinterpretation and thus implementation difficulties. The Commission must therefore be absolutely clear about the impact of those exceptions on the special rules of international law referred to in draft article 1, paragraph 2, and on the special rules that a State might adopt unilaterally based on its national legislation.

61. **Mr. Schusterschitz** (Austria) said that the high quality of the reports submitted by the Special Rapporteurs and by the Commission itself could be further enhanced by a better reflection of the views expressed by States, both through written contributions and in the discussions of the Sixth Committee.

62. Austria welcomed the reorientation and new focus of the issues initially examined under the title "Treaties over time" under the full topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties". The discussion in the Commission had helped clarify a number of aspects contained in article 31 of the Vienna Convention of the Law of Treaties. Judicial practice had already shown that such clarification was needed in order to avoid conflicting interpretations that could imperil the stability of treaty relations.

63. In Austria's view, draft conclusion 4, paragraph 1, should specify that a "subsequent agreement" did not have to be a treaty within the meaning of the Vienna Convention. Other examples were informal agreements and non-binding arrangements, as well as interpretative declarations by treaty bodies. For instance, the North American Free Trade Agreement (NAFTA) Arbitral Tribunal, in the case of *Methanex Corporation v. United States of America*, had qualified the NAFTA

Free Trade Commission's interpretation of NAFTA provisions as a "subsequent agreement". The guidelines of the Commission on reservations also dealt with "interpretative declarations"; it might be necessary to harmonize the results of the Commission's work on those two topics.

64. With regard to the role of subsequent practice in the interpretation of a treaty (draft conclusion 4, paragraph 3), his delegation emphasized that the subsequent practice of only one, or of less than all, parties to a treaty could only serve as a supplementary means of interpretation under the restrictive conditions of article 32 of the Vienna Convention.

65. The topic of immunity of officials from foreign criminal jurisdiction was of particular interest to his delegation. The significance of the subject was reflected in the rich judicial practice of national and international courts and tribunals.

66. With regard to draft article 1 (Scope of the draft articles), his delegation noted that the term "officials" would be defined at a later stage. The term "criminal jurisdiction" also needed further clarification. Usually it was confined to the jurisdiction of national criminal courts or tribunals. However, the Commission's commentary on article 29 of the Vienna Convention on Diplomatic Relations already attached a broader meaning to the term, since it also included the criminal jurisdiction exercised by administrative authorities. The same clarification was needed with respect to the draft articles currently under consideration.

67. A further issue relating to the exercise of "criminal jurisdiction" was whether preliminary investigatory steps could be taken irrespective of a possible immunity. In his opinion, measures to ascertain the facts of a case were not precluded by immunity. The procedural bar of immunity was only relevant once formal proceedings against a person were to be instituted.

68. The extent to which so-called hybrid courts fell under the ambit of the draft articles must also be addressed. Owing to the ambiguous nature of such institutions, it had to be clarified whether immunity could be invoked before them. That problem arose in particular in cases where individuals of third States were involved. A further issue was whether immunity could be invoked in relation to national judicial authorities acting on the basis of an arrest warrant issued by an international criminal tribunal. That problem had been recently encountered with arrest warrants issued by the International Criminal Court. Although the decisions of the Court regarding Chad and Malawi of 12 and 13 December 2011 were indicative in that respect, clear guidance by the Commission would be helpful. A solution should be found which was in the interest of the fight against impunity and respected the rule of law.

69. His delegation took it that the enumeration of *leges speciales* entailing immunity in draft article 1, paragraph 2, was non-exhaustive. However, it must be clarified whether those special rules took precedence over the draft articles only if the person concerned enjoyed a broader scope of immunity under those special rules or also if the special rules provided a lesser degree of immunity than the current draft articles.

70. Another question was whether the draft articles envisaged providing immunity only if persons were present in the State of the forum or also if they were absent. The draft articles, or at least the commentary, should be very clear in that respect. As his delegation saw it, such immunity also applied if the person was not in the territory of the forum.

71. Austria supported the limitation of immunity *ratione personae* to the three categories of persons referred to in draft article 3. Although other persons might also carry out similar functions, they only enjoyed immunity as members of special missions. As such, they fell under the exceptions in draft article 1, paragraph 2. One issue not addressed by the Commission so far was whether family members accompanying such persons would also benefit from immunity. There again, the Commission should follow the approach of the immunity of special missions.

72. As to draft article 4, paragraph 1, clearly immunity *ratione personae* was enjoyed only during the term of office. Immunity as a procedural device would bar any formal proceeding during that time, even for acts committed prior to the taking of office.

73. His delegation noted with interest that the topic of protection of the atmosphere had been placed on the Commission's agenda and looked forward to the first report. Due to the limits of the topic, it seemed that only a restricted number of issues could be addressed, but some of the issues currently excluded from the mandate would also have to be taken up in that context, such as liability and the precautionary principle.

74. Austria welcomed the inclusion of the topic of crimes against humanity in the Commission's long-term workplan. The Rome Statute of the International Criminal Court could not be the last step in efforts to prosecute such crimes and to combat impunity. The Court was only able to deal with a few major perpetrators, but that did not relieve States of primary responsibility for prosecuting crimes against humanity. Although the preamble to the Rome Statute required States to adopt the necessary legislation in order to be able to prosecute the crimes within the jurisdiction of the International Criminal Court, including crimes against humanity, such legislation was still missing in many States, resulting in a lack of international cooperation in the area. His delegation supported the efforts made by a number of States to improve such cooperation on the basis of a new legal instrument to combat crimes against humanity. An initiative to that effect been addressed in April 2013 in Vienna during the annual session of the Commission on Crime Prevention and Criminal Justice, but unfortunately it had not yet been possible to adopt a resolution to move ahead on the topic. The International Law Commission and the promoters of that initiative should work together to close the gaps in such cooperation.

75. **Ms. Lee** (Singapore) said that her delegation, which was deeply interested in the Commission's work on the topic of immunity of State officials from foreign criminal jurisdiction, had three initial observations. First, on article 1 (Scope of the present draft articles), Singapore agreed that immunity from foreign criminal jurisdiction was procedural in nature and served only as a procedural bar to criminal proceedings. The underlying substantive criminal responsibility remained. As such, immunity from foreign criminal jurisdiction should not be viewed as a loophole in the fight against impunity. The immunity of officials from foreign criminal jurisdiction should be respected on the understanding that it was only procedural.

76. Second, Singapore noted that the draft articles were meant to be without prejudice to any immunity which might be derived from special rules of immunity, such as diplomatic immunity. The commentary stated that in the event of a conflict between the draft articles and any special regime, the special regime would prevail. The Commission also considered that persons who were the subject of those special rules were "automatically excluded" from the scope of the draft articles. It would be helpful for the Commission to clarify whether the automatic exclusion took effect only in circumstances when an official enjoyed immunity under the special rules. In other words, if, under the special rules, an official did not enjoy immunity, would that official be entitled to apply the draft articles to determine whether he/she enjoyed immunity on that basis? For example, if under the Vienna Convention on Diplomatic Relations, a diplomatic agent did not enjoy immunity in a given situation, would he/she be entitled to apply the draft articles for that purpose? That would be especially pertinent for members of military forces because of instances where status of forces agreements provided a hierarchy of applicable jurisdiction rather than immunity per se.

77. Third, Singapore noted that the Commission had decided to confine the application of immunity *ratione personae* to the troika. Her delegation had previously suggested that the Commission could consider, as a matter of progressive development of law, the extension of immunity *ratione personae* to high officials beyond the troika, in recognition of the reality of today's world, in which foreign policy was often conducted by high officials other than a minister for foreign affairs. She noted that one of the reasons for not expanding beyond the troika was the difficulty of identifying the officials and the basis for the enjoyment of immunity *ratione personae*. In her view, that basis was the same as that for the troika, namely representational and functional. The difficulties involved in the identification of other high officials were not insurmountable. Given the rationale, the conferment of immunity *ratione personae* would be contingent upon the specific functions undertaken by the high official in question. Her delegation therefore suggested that the Commission should revisit the issue following completion of its work on immunity *ratione materiae*.

78. Her delegation took note of the new topics which the Commission had included in its programme of work (Protection of the environment in relation to armed conflicts, and Protection of the atmosphere). It agreed with the Commission that work on the topic of protection of the atmosphere should proceed in a manner that did not impede political negotiations elsewhere, given that the intended outcome of the Commission's work on that topic would be draft guidelines.

79. **Mr. Hanami** (Japan) said his delegation noted with deep sorrow that Ambassador Chusei Yamada, former member of the Commission, had passed away in March. In his 17 years of service he had assumed multiple duties in the Commission, including its chairmanship during the fifty-second session in 2000. In 2002, Mr. Yamada had been appointed Special Rapporteur on the topic of shared natural resources. As the result of the deliberations under that topic, the Commission had drafted the articles on the law of transboundary aquifers. As the coordinator of that agenda item, the delegation of Japan expressed appreciation to all delegations that had participated in the discussion on the draft resolution in a constructive manner, and it looked forward to the resolution being adopted by consensus in the Committee.

80. His delegation had a strong interest in empowering the Commission to assume greater responsibility. The selection of topics was a crucial issue in that regard. Japan proposed that the Commission should consider the possibility of gathering the ideas and opinions of the Member States to determine what topics should be included in the programme of work; that would allow the Commission to have a better understanding of the expectations of the international community. Enhancement of the cooperation between the Commission and the Sixth Committee remained important, and changing the way in which topics were selected would be a good place to start.

81. Japan recognized the importance of the decision to include the topic of protection of the atmosphere in its programme of work and to appoint Mr. Shinya Murase as Special Rapporteur. It noted that the topic had been included based on several understandings. As his delegation had stressed in 2012, protection of the atmospheric environment required coordinated action by the international community. With due regard for existing efforts on environmental issues, it looked forward to a fruitful outcome of work on the topic.

82. Turning to the specific topics on the Commission's programme of work at its sixty-fifth session, he noted first that the Commission had decided at its previous session to change the format of work on the topic of subsequent agreements and subsequent practices in relation to the interpretation of treaties. It was new for the Commission to change the format of the topic, which had been established as a "study group", and the topic now had a much greater impact with regard to the development of international law than had been the case.

83. Concerning the five draft conclusions provisionally adopted, the Commission should clearly explain the nature of draft "conclusions". Given that the discussion had been based primarily on the Vienna Convention on the Law of Treaties, and in particular articles 31 to 33, the point of the project was, in his view, to provide useful materials for a better understanding of those articles instead of drafting new ones. However, which draft conclusions contributed to such a goal remained unclear. How did the draft conclusions differ from commentaries? What was their legal nature? Did they constitute a binding tool for treaty interpretation? The Commission should consider the topic in greater depth with a view to strengthening the treaty system of the Vienna Convention.

84. The topic of immunity of State officials from foreign criminal jurisdiction raised a fundamental question regarding two underlying principles of international law: respect for State sovereignty and the fight against impunity. Historically, the law of immunity had developed based on the notion of sovereign rights. That norm had been widely applied to several areas of international law, such as the law of diplomatic relations and State immunity, which were also the products of the Commission's work. Immunity of State officials had been widely acknowledged by the international community.

85. For the past few decades, however, new developments in international law had tended to limit such immunity for the sake of international justice. "International criminal law" had developed since the end of the Second World War, and that trend had been accelerated and reinforced in 1990s. The establishment of the International Criminal Court had been one of the symbolic events which showed that the notion of the "fight against impunity" had become part of the mainstream of international relations. In its deliberations, the Commission must strike a balance between the notions of a "fight against impunity" and "State sovereignty". His delegation was closely following the course of discussions on the topic.

86. **Ms. Faden** (Portugal) noted that the Commission continued to identify new topics suitable for inclusion in its programme of work, thus showing that there were still many avenues of international law to be explored. Her delegation was pleased at the inclusion in the

Commission's programme of work of two new topics, on protection of the environment in relation to armed conflicts — on which discussions were promising — and on protection of the atmosphere.

87. There were still a number of uncharted waters relating to sources of international law on which the Commission could focus its attention. One was the relationship between codification and progressive development of international law. In certain cases it might be difficult to distinguish between existing rules and new ones, of which the *North Sea Continental Shelf* cases before the International Court of Justice were good examples. However, what were supposed to be complementary categories were in practice often dealt with as two different types of formation of international law. The Commission's work was not just descriptive (codification); it should also be innovative (development). All too often, the Commission and States were reluctant to embark on an exercise of progressive development, even when legal lacunae needed to be filled. In that connection, it would also be useful to consider the impact of the different civic law and common law approaches to codification.

88. Another topic of the utmost importance relating to sources of international law was *jus cogens*, whose content and the relation to other international law norms and principles continued to be disputed and unclear. Her delegation acknowledged the Secretariat's work in assisting the codification and progressive development process.

89. Turning to the topic of subsequent agreements and subsequent practice in relation to the interpretation of treaties, she commended the Commission for its efforts to preserve both the normative content and the flexibility that was inherent in the concepts involved. Her delegation stressed the need to highlight the importance of subsequent practice for the purpose of treaty interpretation, which was too often neglected. She thanked the Special Rapporteur for his report and the draft conclusions contained therein. Draft conclusion 5, by examining the possible authors and attribution of subsequent practice, was of crucial importance. Portugal valued the Commission's efforts to give thorough consideration to the subsequent practice of many different international judicial or quasi-judicial bodies.

90. However, subsequent practice could also be found in the practice of international organizations that were themselves parties to treaties. The practice of the United Nations and the European Union offered good examples. That was a matter that could be further developed in the commentaries to draft conclusion 5. Her delegation also stressed that social practice — either national or international — was the context in which State practice evolved and to which State practice could not be in opposition.

91. The five draft conclusions reflected customary international law and provided valuable guidance for treaty interpretation. The work on the topic must meet a number of complex challenges. The Commission should not be tempted to develop international law that went beyond the Vienna Conventions on the Law of Treaties. Its efforts should follow a cautious path aimed first and foremost at providing clarification and guidance for States, international organizations, courts and tribunals as well as for individuals who were the subjects of a given treaty.

92. With regard to the complex and difficult topic of immunity of State officials from foreign criminal jurisdiction, in relation to which her delegation had high expectations, she said that the basis for its consideration must a clear, restrictive and value-oriented approach. Law was not neutral, but ideological in the sense that it must reflect the values of a given society. The classical State-centred perspective and the new legal humanism were not two sides of the same coin: the latter was of greater value. To build the analysis from the starting point of a "general rule of immunity" could bias the conclusions. The Commission must adopt an ontological approach to the rights of individuals. Serving the interests of the international society meant striking a balance between State sovereignty, the rights of individuals and the need to avoid impunity.

93. Following that line of reasoning, Portugal did not share the view that immunity *ratione personae* was absolute and without exception. Nor was it of the opinion that it was sufficient to accept a safety clause that was merely anchored in the moral obligation of States to waive the immunity of their officials, as seemed to be the approach adopted by the *Institut de Droit International* in its resolution on the subject. The trend in international law and international relations was towards supporting the existence of exceptions, or perhaps even more accurately, the non-existence of immunity in certain cases.

94. There were two cases in which State officials did not enjoy immunity *ratione personae*: for certain non-official acts, and for acts constituting the most serious crimes of international concern. Regarding the first case, certain non-official acts might preclude immunity *ratione personae* for the following reasons: first, given that personal immunity derived directly from State immunity, there was a trend towards limiting immunities when *acta jure gestionis* were involved. The International Court of Justice, even in its somewhat conservative approach, had recognized that trend in its judgment in the *Jurisdictional immunities of the State* case. In her delegation's view, there was no justification for establishing the immunity of State officials within parameters different from the ones used to limit the immunity enjoyed by States.

95. Second, immunities were imminently functional, as could be inferred, for instance, from the Vienna Convention on Diplomatic Relations, the Vienna Convention on Consular Relations or the Convention on Special Missions. Any act performed for personal benefit was outside the scope of immunities. As noted by the Secretariat in its 2008 Memorandum, that was the case not only for immunity *ratione materiae*, but also for immunity *ratione personae*.

96. Third, although the rationale behind the immunity of State officials was to ensure the effective performance of their functions on behalf of their States, that did not mean that every act — public or private — of a Head of State, Head of Government or minister for foreign affairs should have the same protection. A balance should be carefully drawn between the official function of representation and the private realm, where, at least in the latter domain, considerations of *ordre public* and individual rights should prevail.

97. On the other hand, acts constituting serious crimes of international concern were *ab initio* not subject to immunity, even when committed as an "official act". The draft code of crimes against the peace and security of mankind had already stipulated that the official position of the perpetrator did not confer immunity.

98. Thus, limiting immunity at the (vertical) level of the international criminal justice system must be followed by a (horizontal) harmonization at the level of relations between States and individuals within their jurisdiction. As the two dimensions, vertical and horizontal, were part of the same system, they should be harmonized with view to limiting both immunity and impunity.

99. For all those reasons Portugal did not agree with the affirmation in draft article 4, paragraph 2, that immunity covered all acts performed, whether in a private or official capacity. The distinction between immunity *ratione personae* and immunity *ratione materiae* was methodological in nature and was relevant essentially because it made it possible to recognize a State official solely by virtue of his or her office. In both cases, immunity — which in itself was an exception — should apply only to official acts.

100. Moreover, there was a level of non-compliance with the law that could never be exceeded and where the criterion of effective performance of functions by State officials was not relevant, regardless of the position of the State official. That was particularly true in the case of *jus cogens*. The draft articles should make it clear from the outset that the most serious crimes of international concern, such as genocide, crimes against humanity and war crimes, as well as other international crimes, for example transnational organized crime or terrorism, were not subject to immunity. The Commission should not be afraid to embark on an exercise of progressive development of international law.

101. Her delegation concurred with the Commission that Heads of State, Heads of Government and ministers for foreign affairs were recognized as State officials solely by virtue of their office, and it agreed with the temporal scope as proposed. However, either the various dimensions of the scope should be included in a single draft article, or there should be a draft article for each dimension, as proposed by the Special Rapporteur. Immunity could never exist as a privileged exception that prevailed over individual rights and public order.

102. **Ms. Belliard** (France) said that France was concerned about the Commission's workload and called for the utmost vigilance to ensure that its long-term programme of work was not increased to little purpose.

103. On the topic of the Most-Favoured-Nation clause, her delegation shared the concerns raised over the risk of an excessively prescriptive outcome. Although identifying and analysing examples of clauses was a long and useful matter, it was not certain that an

excessively prescriptive document or a document proposing model clauses was desirable.

104. With regard to the obligation to extradite or prosecute (*aut dedere aut judicare*), her delegation stressed that the concept of a peremptory norm should be treated with great caution; that the obligation to extradite or prosecute was distinct from that of universal jurisdiction, the latter being widely debated and disputed among States; and that the link between such an obligation and the mechanisms put in place by international jurisdictions deserved particular attention.

105. Concerning the topic of protection of the environment in relation to armed conflict, her delegation reaffirmed the doubts expressed earlier on the feasibility of work on such an issue, the objective of which was not apparent. It seemed neither desirable nor achievable to draw up guidelines or reach conclusions on the subject at the current stage.

106. France questioned the inclusion of the topic of crimes against humanity and echoed the concerns already expressed that the Commission should not overburden its programme of work with new projects. It was not clear that all the Commission's criteria on the choice of subjects had been met. Her delegation wondered whether a convention on the subject was really necessary. For the time being, it seemed preferable to encourage universalization of the Rome Statute and the effectiveness of existing norms, which might well not favour the drafting of new sectoral norms. Furthermore, the call for a universal jurisdiction to try the perpetrators of crimes against humanity was far from being shared by a majority of States and merited further consideration. Lastly, the question could well arise as to the compatibility of the obligations that would derive from any such convention with those imposed by existing conventions, which was why the urgency of work on the subject was questionable. As for the new topic of protection of the atmosphere, the limits imposed on the scope of the Commission's work, especially with regard to existing work on climate change and the definition of outer space, seemed to be wise precautions.

107. Turning to the topic of the identification of customary international law, she endorsed the change of title, which was now more explicit, and shared the Special Rapporteur's reservations as to the place that could be accorded to the study of *jus cogens*: the concept was difficult to identify, and it did not seem necessary to consider its relation to customary rule at the current stage. France also shared the Special Rapporteur's conclusions concerning an essentially practical approach to the subject, helpfully enhanced by occasional theoretical studies, and also on the need to establish a terminology.

108. Contributions from States seemed decisive in the identification of practice, and her delegation would endeavour to contribute. However, the importance to be given to the case law of national courts in the matter should take into account that the weight attached by constitutional requirements to customary norm in the hierarchy of norms imposed on domestic judges varied. Caution was also needed with regard to the consideration given to the acts of international organizations and non-governmental organizations. Their acts or studies were a mine of useful information, but the fact remained that it was above all the acts of States which could attest to a customary rule binding them if the subject of study remained strictly limited to the customary norm of States.

109. A tendency was occasionally observed to criticize a "conservative" view of how custom was formed. While it was necessary to ensure that concepts evolved in order to adapt them to the needs of society and its regulation, it should be done only after the conditions which had justified them no longer prevailed. She was thinking in particular of the recognition, still shared today, of the need to combine both constituent elements of a customary rule, namely practice and *opinio juris*. The combination of both elements must be maintained because it was a State's *opinio juris* which gave weight to practice, and vice versa. A State could act in a certain way while clearly indicating that its conduct was not imposed on it by a norm but resulted solely from its will in that particular circumstance. It was important not to lose sight of those elements. It would encourage caution when the Committee considered so-called "modern" theories or the scope allowed to soft law.

110. Concerning the relationship between customary norm and other sources of law, it seemed helpful to focus on the general principles of law, given the extent to which that source could remain indeterminate. In contrast, relations between custom and treaty sources seemed to be more clearly identified.

111. Her delegation took due note of the draft articles provisionally adopted on the topic of protection of persons in the event of disasters, and it endorsed the amendments made to the wording, which improved both the clarity of the text and the correspondence between the different language versions. A good example of that was the replacement in the French version of the word "*touché*" by "*affecté*" to describe a State that was faced with a disaster. An improvement could also be made to draft articles 7 and 10: while it was certainly desirable to distinguish between international organizations and non-governmental organizations, the word "appropriate" (*appropriées*) applied to the latter was more fitting than "relevant" (*pertinentes*).

112. Concerning the scope of the topic *ratione temporis*, the question of disaster prevention must not distract the Commission from the core issue, namely post-disaster assistance. Bearing in mind how useful it would be to identify the main measures which would facilitate the protection of persons, in particular by establishing an appropriate internal normative framework, she welcomed the draft articles on that issue, but believed that it would be difficult to go much further. There were many bilateral and multilateral conventions, but they were very often the result of a specific commitment by States to deal with a particular risk, or of a strengthened collaboration, and could not necessarily provide a basis for the establishment of obligations which States might not recognize as such.

113. On that point, the title of draft article 16 did not correspond precisely to the state of the law. It seemed difficult to conclude that there was a general "duty" to reduce the risk of disasters, as the wording of the title suggested. Although, as the Special Rapporteur noted, some case law suggested that States were under a positive obligation in that regard, it was an obligation of means, not of result, which remained closely linked to the circumstances of each case. Consequently, while the wording of draft articles 5 ter and 16, paragraphs 1 and 2, seemed appropriate, the title of draft article 16 should be amended to "*Prévention des catastrophes*" (Disaster prevention) in order avoid generalizing too broadly with respect to existing law and undermining the principle of State sovereignty.

114. Lastly, she reaffirmed the position adopted by her delegation on the articles examined in previous years, particularly concerning respect for the sovereignty of the affected State and the State offering assistance, and also France's reservations concerning the extent of States' obligations. It was to be hoped that that would be taken into account during the second full reading of the draft articles.

115. On the topic of immunity of State officials from foreign criminal jurisdiction, her delegation welcomed the Commission's provisional adoption of three draft articles relating to the scope of the subject, the beneficiaries of immunity *ratione personae* and the extent of such immunity. However, a query might be raised about the proposed rather restrictive identification of those officials other than the "troika" who might benefit from immunity *ratione personae*. With particular regard to the judgments of the International Court of Justice in the *Arrest Warrant* case and in *Certain Questions of Mutual Assistance in Criminal Matters*, the interpretation given in the report seemed reductive and did not take full account of recent practice and the opinions expressed by many delegations in 2012.

116. There was no doubt that a close link existed between the fact that troika members enjoyed immunity *ratione personae* and that, by virtue of their functions, they were fully authorized to represent their State and were not required to produce full powers, as the Vienna Convention on the Law of Treaties put it. However, that should not serve as a pretext for sidestepping a more detailed examination of the other criteria envisaged by the International Court of Justice. The fact that "certain high-ranking officials" benefited from the rules on immunity *ratione materiae* or special arrangements, such as those for special missions, when they were on an official visit to a third State did not exhaust the subject. In contrast, her delegation agreed with the view that any extension of immunity *ratione personae* should benefit only a small circle of "high-ranking officials".

117. Turning to the topic of subsequent agreements and subsequent practice in relation to the interpretation of treaties, she recalled that, although practice was precious in determining how States interpreted or applied a treaty, it should be borne in mind that it was the text itself which made it possible to identify the parties' intention in the first place. The whole interest of a study on the subject lay in the fact that, in international law, the State was both the author and the subject of the norm. That might be stating the obvious, but the special status of the State in the international order made analysis of the attitude it adopted all the

more relevant; and it was of course on the practice of the States parties to a treaty that the study should focus, as the report emphasized.

118. With regard to the provisionally adopted draft conclusions, draft conclusion 1 suggested that the rules set out in articles 31 and 32 of the Vienna Convention had customary value, whereas such an assertion was perhaps not quite so self-evident, at least as far as article 31, paragraph 3, was concerned. Moreover, the wording of paragraph 4 of draft conclusion 1 differed from that of article 32 of the Vienna Convention, which did not expressly refer to subsequent practice.

119. Concerning draft conclusion 2, she did not think that subsequent agreements and subsequent practice could be considered "objective evidence" of the parties' understanding as to the meaning of a treaty. The term was neither necessary nor helpful. States' interpretation of a treaty might evolve and vary according to need and circumstance. It would be preferable not to describe the evidence as "objective", although that did not detract from the relevance of giving consideration to subsequent agreements and subsequent practice in order to interpret a treaty. On the other hand, it would be useful if future work were to draw a distinction among subsequent agreements between those that were binding and those that the parties did not acknowledge as such. The consequences in terms of the interpretation of a treaty could not be similar.

120. An essentially semantic amendment should be made to draft conclusion 3, since the idea of the "presumed intention" of the parties did not reflect the commentaries, whose purpose her delegation shared, namely to raise the question of the choice between a contemporaneous approach and an evolutive approach to treaty interpretation.

121. A slight correction could also be made to draft conclusion 4. There was no difficulty with the definition of a "subsequent agreement", but "subsequent practice" could not be defined as "conduct". A State's "conduct" was not necessarily consistent and continuous: it might be variable and contradictory. A State might apply a treaty in a particular way without considering it to be the only possible way. The definition should therefore be amended to make it clear that only concordant and consistent conduct established the parties' interpretation. That idea was contained in the commentaries and even more so in those relating to draft conclusion 5 than to draft conclusion 4. It should be stipulated as soon as the term "subsequent practice" was defined.

122. Concerning draft conclusion 5, she recalled that, although non-State actors had a useful role to play in identifying practices, it would be wrong to draw hasty conclusions from that, insofar as their presentation might be influenced by the purpose of the organization or institution that prepared it. That was emphasized in the report, especially with regard to international humanitarian law, States having often reaffirmed that they were primarily responsible for the development of such law. She concluded by expressing France's support for the avenues of thought already announced, such as the question of the frequency of subsequent practice or of omission as an attitude which revealed an interpretation.

123. On the topic of provisional application of treaties, her delegation believed that study of the legal regime should focus on the form of consent given to provisional application; the hypothesis of implicit intention should be approached with care. The primary aim of the work should be to examine the legal effects of provisional application, given the extent to which that question remained unclear. While her delegation agreed that there was not much to be gained from examining States' responsibility, the question of the legal consequences arising from a State's failure to comply with the provisions of a treaty that it had agreed to provisionally apply deserved further consideration. The situation appeared to be different in the case of failure to comply with an obligation in force. The question that arose was whether such acceptance only entailed duties, or rights as well. Another question concerned the provisional establishment of bodies created by a treaty. The subject could be usefully extended to include provisional accession.

124. It also did not seem possible to rule out any consideration of domestic law obligations, which were mainly of a constitutional nature. Although those requirements did not allow a State to escape its international obligations, the situation was perhaps not quite so clear-cut when it came to the scope of a provisional undertaking, in particular because its performance could be rendered impossible in domestic law. Lastly, she stressed that the richness of work on the subject would inevitably depend on the material

provided by States concerning their practice in the matter.

125. France would submit its observations on the topic of expulsion of aliens to the Commission within the given time limit and would endeavour to produce the observations requested by the Commission on issues relating to the identification of customary international law. The Guide to Practice on Reservations to Treaties would be the subject of a separate address at the end of the week.

126. **Mr. Diener Sala** (Mexico), referring first to the topic of subsequent agreements and subsequent practice in relation to the interpretation of treaties, said that, although paragraphs 2 and 3 of draft conclusion 1 could be considered to be a repetition of the Vienna Convention, their inclusion clearly situated subsequent agreements and subsequent practice in the context of the general rule and other means of interpretation established in the Convention and acknowledged in international custom. His delegation welcomed the inclusion of paragraph 4, which was particularly important. On draft conclusion 2, Mexico agreed that the concepts in article 31, paragraph 3 (a) and (b), were authentic — but not binding — means of interpretation, because although they represented the common and ongoing will of the parties to the treaty, to make them binding would jeopardize the general rule of interpretation. Authentic interpretation referred to both the subsequent agreement (article 31, paragraph 3 (a)) and to subsequent practice which established the agreement (article 31, paragraph 3 (b)).

127. His delegation was pleased that the Commission did not take a position on whether the contemporaneous or the evolutive interpretation method was more appropriate. The presumed intention of the parties should be established by applying the rule in article 31 first; recourse could be had to article 32, subparagraphs (a) and (b), only in order to confirm the meaning resulting from the application of article 31, the aim being to have consistency in the interpretation of treaties and, above all, to ascertain the true intention of the parties to the treaty.

128. On draft conclusion 4, the use of the word “understanding” in the English version of paragraph (11) of the commentary was illustrative and crucial to a comprehension of article 31, paragraph 3 (b); the Spanish text should therefore use the word “*entendimiento*”.

129. His delegation welcomed the clarification that interpretation and application should be in relation to the provisions of a treaty. It was also important to be clear that practice in the application of the treaty also involved an interpretation, and the means accorded to apply certain provisions of a treaty contained useful criteria for understanding the meaning and scope of such provisions.

130. The fact that the text of article 31, paragraph 3 (b), did not explicitly require that subsequent practice should be that of the parties did not pose a problem. An excessively literal interpretation would not make much sense in the context of the rule in the commentary. In respect of paragraph 3, Mexico agreed with the Commission that in those cases in which subsequent practice was unable to establish what the agreement of the parties was, it was necessary to resort to the means of interpretation in article 32.

131. With regard to draft conclusion 5, his delegation stressed the importance of adjudicatory bodies for attributing subsequent practice to a party; the Commission should address their role as evidence and formation of subsequent practice of States.

132. Concerning the topic of immunity of State officials from foreign criminal jurisdiction, Mexico was pleased that the draft articles had made it clear that immunity was granted to the troika of Heads of State, Heads of Government and ministers for foreign affairs. It also noted that, as explained in the commentary, if the parties wished to establish a binding interpretation through a subsequent agreement, that could be done without prejudice to the meaning and scope to be given to article 31, paragraph 3 (a).

133. **Mr. Martín y Pérez de Nanclares** (Spain) welcomed the Committee’s decision to include in its agenda the topics “Protection of the environment in relation to armed conflicts” and “Protection of the atmosphere”. The Commission should also consider the inclusion of the topic of crimes against humanity in the long-term programme of work. Contrary to the other two categories of international crimes (war crimes and genocide), crimes against humanity were not covered by an international treaty requiring States to prevent and punish such acts and to cooperate towards that end. The proposed topic met the selection criteria established by the Committee. It would require a careful analysis of the specific elements of a definition to be included in a convention and its precise

relationship with the Rome Statute and the International Criminal Court, without overstepping their provisions.

134. With regard to the topic of subsequent agreements and subsequent practice in relation to the interpretation of treaties, his delegation did not think that the draft conclusions met the expectations raised by the report, as they were at times too general. They should be more precise and should include sufficient normative content. From a methodological standpoint, it would be more appropriate to make a clearer distinction between bilateral and multilateral treaties.

135. With regard to draft conclusion 1, he said that articles 31 and 32 of the Vienna Convention did in fact reflect customary law, but it would be interesting to clarify whether the non-inclusion of article 33 might mean that that provision did not reflect customary law, an interpretation with which Spain would not agree. In that connection, it might be useful to compile specific examples of means of interpretation and, if relevant, to classify them in the commentary in order to obtain an overview, although not necessarily a comprehensive one, of such means of interpretation.

136. His delegation endorsed draft conclusion 2, since the hierarchical organization of the various means of interpretation could be a distorting element for the development of the parties' intention regarding the interpretation of the relevant treaty, especially if interpretation was considered to be a single combined operation in which there was no hierarchy among the means of interpretation of article 31.

137. On draft conclusion 3, his delegation attached the highest relevance to the delicate matter of intertemporal law. It shared the view that most international courts had not recognized evolutionary interpretation as a separate form of interpretation, but that they had come to it, always on a case-by-case basis, as a result of applying articles 31 and 32 of the Vienna Convention. The Commission must not extrapolate the specific jurisprudence of the European Court of Human Rights on two cases, which were very specific in their factual background and very complex in their analysis of intertemporal law. Extreme caution must therefore be exercised before applying an evolutionary approach in any specific case.

138. The definitions of subsequent agreement and subsequent practice in draft conclusion 4 required a consideration of the role played by the conduct between States, between States and international bodies and between international bodies regarding the interpretation of treaties. That should be the case, for example, with acquiescence. Accordingly, it might be useful to move ahead in the study of conduct in the application of a treaty which established the agreement of the parties in the interpretation thereof, as referred to in paragraph 2. However, his delegation was not sure of the actual scope that might be attached to subsequent practice in cases which, for example, might result in the modification of the initial agreement being interpreted.

139. His delegation also attached great importance to an accurate definition of the role that might be played by lower-ranking or local officials as subsequent practice in the application of treaties, provided that such practice was unequivocal and accepted by the higher authorities.

140. With respect to the topic of immunity of State officials from foreign criminal jurisdiction, his delegation endorsed the Special Rapporteur's intention of distinguishing between *lex lata* and *lex ferenda*. The three draft articles and commentary thereto represented a significant improvement over the six initially submitted.

141. However, debate still remained on the difficult balance between the protection of sovereignty and the inviolability of a State office, on the one hand, and the need to punish international crimes, on the other. It was questionable, for example, whether there were exceptions to immunity *ratione personae*. At the heart of the matter lay the specific nature of the crimes to be covered by the draft articles. Hence the need to clarify whether the most serious crimes (genocide, war crimes and crimes against humanity) were also covered by immunity. State practice and jurisprudence as well as doctrine should also be given closer consideration.

142. With regard to draft article 1, the term "officials" raised serious issues. In the Spanish version, the word did not seem to be appropriate. Secondly, the controversial issue of the obligation to cooperate with international criminal courts could not be avoided at the initial stage. Thirdly, Spain welcomed the decision to include a reference to military forces in paragraph 2. Lastly, a number of matters arose in connection with such fundamental aspects as the concept of the State within international law, not only for the purpose of determining the officials serving the State, but also for

the purpose of exercising criminal jurisdiction and invoking immunity. For example, what would be the impact of the draft articles on a "State" recognized only by a small number of members of the international community? A question also arose for non-recognizing States regarding the exercise of criminal jurisdiction in cases in which the officials of a non-recognized State invoked immunity. The Commission should address that issue either at the current stage when it determined the scope of application, or at a later stage, and it should also give consideration to the case of Non-Self-Governing Territories whose international relations depended on another State. Lastly, a reference should be made in paragraph 2 to the question of a State's unilaterally granting immunity from foreign criminal jurisdiction to a foreign official.

143. With respect to draft articles 3 and 4, the inclusion of the troika of Heads of State, Heads of government and ministers for foreign affairs as beneficiaries of immunity *ratione personae* was an appropriate reflection of the current situation in international law; there was no reason to exclude foreign ministers. On the other hand, related matters of interest should also be treated, at least in the commentary, such as the status of heirs of monarchies and Heads of State elected but not yet in office, and also the possibility of extending immunity for crimes committed during their tenure to State representatives who had left office, or even to a person indicted before taking office as president or minister.

144. His delegation agreed with the Commission's decision not to include the article on definitions yet, since it was premature and likely to be incomplete and also because the distinction between criminal jurisdiction and immunity from criminal jurisdiction was contentious. It was no accident that the Vienna Convention on Diplomatic Relations, the Vienna Convention on Consular Relations and the Convention on Special Missions did not define "criminal jurisdiction", although the issue had also been raised at the time by the Commission.

The meeting rose at 1.05 p.m.