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Held at Headquarters, New York, on Friday, 4 November 2011, at 10 a.m.

Chair:	Ms. Noland (Vice-Chair)	(Netherlands)
later:	Ms. Kaewpanya (Vice-Chair)	(Thailand)
later:	Ms. Noland (Vice-Chair)	(Netherlands)

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In the absence of Mr. Salinas Burgos (Chile), Ms. Noland (Netherlands), Vice-Chair, took the Chair.

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 session (*continued*) (A/66/10 and Add.1[1])

1. **Ms. Maxwell** (Australia), commenting on the topic of immunity of State officials from foreign criminal jurisdiction, said that States took markedly different approaches to the immunity of State officials. There was little agreement among States concerning the categories of State officials who were, or should be, entitled to immunity from foreign criminal jurisdiction, or on the scope of the immunity or on exceptions to it. Nonetheless, it would be helpful for the Commission to seek to identify the existing rules of international law in the matter and possible improvements and developments to them. In so doing, it should pay special attention to the need to strike a balance between protecting immunity and preventing impunity for the gravest crimes. It should also focus on the link between State responsibility and immunity and on express or implied waivers of immunity. Her delegation was strongly in favour of the Commission establishing a working group on the question.

2. With regard to the obligation to extradite or prosecute (*aut dedere aut judicare*), it was apparent from the Commission's report that it would have to clarify further the exact scope of its inquiry and establish clearly the relationship between that obligation and related areas of international criminal law, including universal jurisdiction. It was doubtful that customary international law currently imposed any obligation to extradite or prosecute; for that reason, if the Commission wished to proceed with the drafting of articles containing such an obligation, it should draw upon elements in existing treaties, supplemented by such changes as it considered desirable.

3. Concerning the topic of treaties over time, the Commission, in clarifying the practical and legal significance of "subsequent agreements" and "subsequent practice", should consider the procedural requirements of the interpretative resolutions adopted by treaty monitoring bodies and their legal significance. It should consider, for example, whether parties to a multilateral convention must obtain the consent of all the parties in order to adopt such a resolution; how the views of unrepresented parties should be sought and taken into account; whether parties should be able to state their acceptance or otherwise of such a resolution; and what effect non-acceptance of an interpretative resolution would have on the interpretation and application of the convention. Questions of that kind had recently been considered by the parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal and the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, and its 1996 Protocol, and differing views had been expressed.

4. The Study Group should continue its work on the most-favoured-nation clause, including its proposed examination of the application of the clause in areas other than trade and investment law. The premise should be that its application would differ depending on the objectives sought. In considering the relationship between national treatment, fair and equitable treatment and most-favoured-nation treatment, account should be taken of the different circumstances in which each principle was intended to apply.

5. The Study Group had had a difficult task in examining the application of most-favoured-nation clauses in investment tribunal decisions. Her delegation supported its conclusion that the source of any right to most-favoured-nation treatment was the basic treaty, as opposed to a third-party treaty. The inclusion in a treaty of both a most-favoured-nation obligation and procedural requirements such as dispute settlement was evidence that the parties did not intend most-favoured-nation principles to apply to those procedural matters. A presumption to the contrary, that most-favoured-nation obligations applied across the board unless otherwise expressly stated, could result in the negation of agreed procedural requirements. The primacy of the intention of the parties must not be displaced by any presumption as to the inherent scope and application of the most-favoured-nation principle.

6. **Ms. Abdul Rahman** (Malaysia), addressing the topic of immunity of State officials from foreign criminal jurisdiction, said that the Commission needed to determine the general orientation of the topic before proceeding further. Since even the current status of the law in the matter was unclear, the Commission should focus on determining the existing basis for such

[1] To be issued.

immunity, the scope of the topic and the approach to be taken to it before embarking on progressive development of the law. It should first clarify the premise for invoking immunity. She noted that according to some members of the Commission, a distinction could be drawn between ordinary crimes and the grave international crimes for which impunity must be avoided.

7. With respect to the obligation to extradite or prosecute (*aut dedere aut judicare*), given the complexity of the topic and its relationship to the issue of universal jurisdiction, it would be appropriate for the Commission to consider the latter question, either in conjunction with the obligation to extradite or prosecute or separately. The basis in international law of the obligation *aut dedere aut judicare* was still undetermined. The status of existing law, including the distinction between "core crimes" and ordinary crimes, must be ascertained before embarking on progressive development of the topic. In the meantime, and pending the judgment of the International Court of Justice in the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, it would be premature to prepare any draft articles on the topic. Malaysia's own Extradition Act of 1992, and the bilateral and multilateral treaties to which it was a party, served as the basis of its obligation to extradite or prosecute. Malaysia also cooperated with other countries in extradition matters on the basis of reciprocity. Such cooperation was a necessity in preventing and suppressing crimes, which were increasingly transnational in nature. Another question to be considered by the Commission was that of cooperation with international courts and tribunals, including the nature of their competence and jurisdiction in relation to the requested State.

8. Turning to the topic of treaties over time, she noted that the method of evolutive interpretation had long been codified in article 31, paragraphs (3) (a) and (b), of the Vienna Convention on the Law of Treaties. However, the jurisprudence of the International Court of Justice showed that the relevant provisions of article 31 had rarely been analysed in detail, owing to the difficulty of identifying "subsequent agreement" and "subsequent practice". Although evolutive interpretation ensured the continued effectiveness of treaties, it could lead to a reinterpretation to which the parties would not have consented. Nonetheless, it was important to determine how subsequent acts, events and developments affected the obligations of a State party to a treaty. The Study Group should therefore produce illustrative guidelines for the use of international courts and tribunals. Her delegation took note of the preliminary conclusions of the Study Group and looked forward to the completion of the Study Group's discussion of the relevant jurisprudence.

9. On the topic of the most-favoured-nation clause, her delegation welcomed the Commission's efforts to study the use and implications of the clause in various forums. Developments in the field, including a wealth of jurisprudence, made it necessary for the Commission to keep abreast of contemporary issues. Its resumed consideration of the subject should have as its objective the elaboration of a non-binding set of guidelines for States. At the current stage, it was unnecessary to consider preparing draft articles or revising the 1978 draft articles on most-favoured-nation clauses. The Study Group should focus on examining further the decisions of investment tribunals and individual arbitrators and the application of the most-favoured-nation clause in other areas of international law. While its work was proceeding and guidelines were being developed, no limitation should be placed on the inherent right of States to determine the situations in which it would be appropriate for them to interpret and apply the most-favoured-nation clause. The Vienna Convention on the Law of Treaties should remain the authoritative guide in interpreting treaties.

10. **Mr. Charania** (United Kingdom), commenting on the immunity of State officials from foreign criminal jurisdiction, agreed with the Special Rapporteur that immunity *ratione personae* of certain officials was absolute for as long as they held the office to which immunity attached. The International Court of Justice had recognized that the immunity and personal inviolability of high-ranking State officials such as a serving Head of State, Head of Government or foreign minister applied even where the alleged crimes were serious crimes of international concern; it had also recognized that that list of high-ranking officials entitled to such immunity was not exclusive. In the United Kingdom, there was some judicial authority for extending immunities from criminal process to other visiting ministers for whom international travel was intrinsic to their functions, as in the case of a serving minister of defence or a minister of international trade. Under the Vienna Convention on Diplomatic Relations, absolute immunity from criminal jurisdiction, and

personal inviolability, was enjoyed by diplomatic agents and administrative and technical staff members of diplomatic missions, as well as by members of special missions while on mission. The immunity of consular officials was covered by the Vienna Convention on Consular Relations.

11. As regards possible limitations to immunity *ratione materiae*, discussion had rightly focused on the relationship of that immunity to the development of universal jurisdiction for certain serious international crimes, especially where State officials were alleged to have participated in such crimes under colour of their public authority. In principle, because official acts by State officials were attributable to the State, the courts of another State could not adjudicate on them. However, immunity *ratione materiae* was not synonymous with impunity, which the United Kingdom was committed to challenging. It could be waived by the State whose official was accused of a serious international crime, and the waiver could be made by way of a treaty. In the *Pinochet* case (1998-99) some of the judges then sitting in the House of Lords had taken the view that the immunity *ratione materiae* of a former Head of State did not extend to the crime of torture, because both the defendant's State and the States asserting universal jurisdiction were parties at the material times to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which contained an implied waiver of immunity from criminal jurisdiction in that connection. That reasoning could also apply to certain other crimes under international conventions. However, there was little State practice as yet to support a proposal to that effect, which would therefore be *lex ferenda*. The Commission must keep clearly in mind the distinction between codifying existing law (*lex lata*) and making proposals for progressive development of the law (*lex ferenda*), and it must rigorously think through any future proposals for draft articles on the subject.

12. There had been little substantial progress on the topic of the obligation to extradite or prosecute. The United Kingdom held to its view that the obligation was treaty-based and could not yet be regarded as a rule or principle of customary international law. International agreements must therefore continue to govern both the crimes in respect of which the obligation arose and the question of the custodial State's discretion whether to extradite or prosecute.

13. With regard to the work of the Study Group on the most-favoured-nation clause, his delegation supported the intention not to prepare new draft articles or to revise the 1978 draft articles, but instead to produce a draft report providing the general background, analysing the case law, drawing attention to trends and, where appropriate, making recommendations, including model clauses. The Study Group was correct in asserting that tribunals had not shown any consistency in deciding whether to permit or reject the use of the most-favoured-nation clause to incorporate dispute settlement provisions and that the source of the right to most-favoured-nation treatment was the basic treaty, not the third-party treaty. It was also correct in saying that the key question was how to determine the scope of the right.

14. While the interpretation of most-favoured-nation clauses in the field of post-establishment investment had generated considerable case law, that jurisprudence was specific to the field of investment, and one should be cautious about attempting to draw from it universally applicable principles. The Study Group should continue to focus on issues raised by the use of most-favoured-nation clauses within the specific field in which they were employed, in particular the field of investment. His delegation was not aware of any contemporary use of most-favoured-nation clauses outside the fields of trade and investment, but would be interested in any insights gained from looking to other areas of international law for examples of their application. The Commission's work could help to safeguard against fragmentation of international law by contributing to greater coherence in the approaches taken in arbitral decisions.

15. **Ms. Ní Mhuircheartaigh** (Ireland) said that her country was a strong supporter of the Commission, which over the years had begun or developed many of the building blocks of international law. Its membership, which should rotate from time to time, should consist of a good mix of academics, diplomats and practitioners. That mix was the best guarantee of its achieving the necessary academic standard while keeping its work in line with the practical realities of the international community. The composition of the Commission should also, in line with its statute, reflect the main forms of civilization and the principal legal systems of the world.

16. Her delegation welcomed the Commission's decision to set up the Working Group on Methods of

Work. With regard to the length and nature of future sessions, costs might be reduced by holding sessions alternately in New York and Geneva. Split sessions should be retained, but only on condition that the time was used efficiently. In particular, Special Rapporteurs should be encouraged to produce their reports in time for the first part of the session to enable members to work on them during the period between the first and second parts. Sessions must be long enough to allow the Commission to address its agenda, but less time might be required for sessions early in the quinquennium.

17. The timing of the Commission's session should be reconsidered. If meetings continued into August, States often did not have access to the Commission's report sufficiently in advance of its consideration in the Sixth Committee. Beginning and ending the session earlier in the year, and preferably earlier than the dates proposed for 2012 in paragraph 413 of the report, would obviate that problem in future. Meanwhile, she would encourage States to study the draft report of the Commission, normally available in Geneva in August, in advance of the circulation of the finalized text.

18. The evolution of the Commission's work from draft articles alone to various types of outputs was a welcome development. Her delegation agreed with the Commission's conclusion that the question of the final form to be taken by its work on any particular topic should be considered at an early point, at least on a preliminary basis. The Sixth Committee could make improvements on its side to better its interaction with the Commission. For example, the Committee could consider the possibility of putting questions to the Commission on matters on the Committee's own agenda as a means of obtaining an expert contribution on specific issues arising under broad topics such as universal jurisdiction.

19. Among the topics added by the Commission to its long-term programme of work, her delegation especially supported the proposals on formation and evidence of customary international law and provisional application of treaties. However, it hoped the Commission would also give priority to its existing topics of immunity of State officials from foreign criminal jurisdiction and the obligation to extradite or prosecute, which were of key importance to Ireland.

20. **Mr. Morrill** (Canada) said that the question of possible exceptions to the immunity of State officials from foreign criminal jurisdiction warranted further in-depth study, bearing in mind the need to strike a balance between protecting the principle of State immunity and preventing impunity.

21. Concerning the topic of the most-favoured-nation clause, his delegation welcomed the efforts of the Study Group to produce something that would be of practical utility to those dealing with such clauses in the investment field, as well as to policymakers. The Study Group's endeavours to avoid fragmentation in the law and to provide guidance in understanding why tribunals took different approaches to the interpretation of most-favoured-nation provisions would be very helpful.

22. **Ms. Schonmann** (Israel), commenting on the immunity of State officials from foreign criminal jurisdiction, said that in view of the topic's importance for States, its impact on inter-State relations and the need to prevent politically motivated proceedings, the Commission should focus on the current status of customary international law in the matter. The Special Rapporteur was correct in his view, which concurred with that of the International Court of Justice in the case concerning the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, that immunity *ratione personae* was absolute and that it extended not only to Heads of State and Government and ministers for foreign affairs but also to other senior State officials. Instead of setting out a prescriptive list of formal posts and titles whose holders enjoyed immunity, the Commission should seek to identify general criteria to assist national authorities in determining which were the relevant officials.

23. Her delegation agreed with the view that the imposition of restrictive measures on such officials ran counter to the purpose of immunity, whether the official concerned was at home or abroad, and could also harm international relations. It also agreed that the question of immunity was a preliminary issue that must be considered expeditiously and decided early in the pretrial phase whenever a State contemplated taking criminal proceedings. Failure to consider it could violate the obligation of the forum State under the rules governing immunity. Forum States should immediately notify the State to which the official belonged whenever an immunity issue arose, to enable that State to express its own view. State practice in the matter of immunity should be further studied.

24. Regarding the obligation to extradite or prosecute, her delegation shared the view that it was difficult to establish the existence of a general customary obligation. The legal source of the principle lay in treaty-based obligations, and there was not enough State practice to show that it had attained the status of customary law. It was also going too far to suggest that a customary rule was emerging as a result of the ratification by States of a substantial number of treaties containing an obligation to extradite or prosecute.

25. Israel supported the fight against impunity for perpetrators of serious crimes, an effort that required the cooperation of the international community. However, her delegation noted the doubts expressed by members of the Commission as to the relevance of draft article 2 (Duty to cooperate) and would welcome further clarification of the operative scope of that duty. Draft article 3 (Treaty as a source of the obligation to extradite or prosecute) merely referred States to the treaties which were the source of the obligation and was perhaps unnecessary. Draft article 4 (International custom as the source of the obligation *aut dedere aut judicare*) was not supported by the Special Rapporteur's own analysis, since he himself had identified a lack of established customary law on the subject. The Commission should proceed cautiously with its work on the topic, bearing in mind the distinction between the obligation to extradite or prosecute and the topic of universal jurisdiction.

26. **Mr. Kim** Jaeseob (Republic of Korea), commenting on the topic of immunity of State officials from foreign criminal jurisdiction, said that, considering the importance of the issue, there had been less progress on it than expected. His delegation urged the Commission to adopt specific draft articles on the topic at its next session. It should concentrate on the codification of State practice, rather than progressive development of international law, proceeding in the light of *lex lata* on the basis of the rules of diplomatic immunity, the Statute of the International Criminal Court and judgments of the International Court of Justice, such as those in the *Arrest Warrant* case and the case concerning *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*.

27. The topic of the obligation to extradite or prosecute dealt with one of the key contemporary issues in international law. It seemed, however, that too much time had been spent on research, and his delegation encouraged the Commission to speed up its work on the topic. Of the three draft articles before the Committee, draft articles 2 and 3 both seemed to be self-evident and rather abstract. Draft article 4 was an attempt to reflect existing international legal norms. However, his Government's firm view was that the obligation *aut dedere aut judicare* was a treaty-based obligation, and draft article 4 should not imply that it also arose from international custom. Draft article 4, paragraph 2, mentioned four categories of crimes from which a customary obligation might derive; in that regard the Commission should examine whether States had actually respected the obligation to extradite or prosecute in cases of serious violations of international humanitarian law, genocide, crimes against humanity and war crimes. In draft article 4, paragraph 3, it was not clear whether a correlation was intended between the obligation itself and *jus cogens*, or between the crimes in question and *jus cogens*. The latter term should itself be more clearly defined.

28. **Ms. Aziz** (Singapore), responding to the Commission's question whether the preferred approach to the immunity of State officials from foreign criminal jurisdiction should be from the perspective of *lex lata* or *lex ferenda*, said that the former would be the appropriate point of departure, but an approach based purely on *lex lata* would not be particularly useful, given the many open questions in that field of law. The Commission should seek to systematize the rules of international law on the question, considering it also from the perspective of *lex ferenda*. It should, however, make clear in its reports on the topic which elements it considered to be statements of *lex lata* and of *lex ferenda*, respectively.

29. On the question of immunity *ratione personae* for high-ranking State officials, other than the so-called "troika", there was a plausible view, *de lege ferenda*, that other officials might enjoy such immunity. However, in view of the policy reasons for immunity *ratione personae* and in the light of its broad material scope, any expansion of the list of high-level officials covered must be contingent on the specific functions entrusted to them by the State. Her delegation would welcome the Commission's views on that issue, as a matter of progressive development.

30. Concerning the question of which crimes were or should be excluded from immunity *ratione materiae*, existing sources of international law certainly provided for exceptions. It might be useful to focus on safeguards to ensure that exceptions to immunity

ratione materiae were not applied in a wholly subjective manner. A pragmatic approach to the question might be to consider who was entitled to decide whether the immunity existed in respect of a particular crime; whether the legal basis for such a decision would be custom or a treaty-based exception applicable only to States parties to the Statute of the International Criminal Court; and what evidential threshold was required in order to reach a conclusive finding that an exception existed in respect of a particular crime.

31. With regard to the obligation to extradite or prosecute (*aut dedere aut judicare*), her delegation had serious difficulties with the legal methodology underlying draft article 4. Singapore did not agree that because customary international law prohibited a specific form of conduct or characterized such conduct as a crime it automatically followed that there was a customary international legal obligation on the part of States to extradite or prosecute. In view of the difficulty experienced by the Special Rapporteur in identifying the customary content of the obligation, one way forward might be for the Commission first to consider the topic of the formation and evidence of customary international law. The methodologies developed by the Commission for that topic could then be applied to defining the customary law character of *aut dedere aut judicare*.

32. Commenting on the work of the two Study Groups dealing with treaties over time and the most-favoured-nation clause, she noted that much of the material dealt with by the Commission originated from international trade and investment law. Her delegation welcomed the Commission's efforts to mainstream international economic law in its work. However, his Government had also encountered most-favoured-nation clauses in other fields and would provide examples in writing.

33. With regard to the Commission's relationship with the Sixth Committee, her delegation welcomed the ongoing dialogue between the two and the presence of some Commission members in New York during the Committee's session. It supported the idea of holding one half-session of the Commission in New York each quinquennium.

34. **Mr. Murai** (Japan), in response to the Commission's question about the approach to be taken to the immunity of State officials from foreign criminal jurisdiction, said that it was not easy to distinguish between codification and progressive development in that area of law. Although the International Court of Justice in the *Arrest Warrant* case had found that the immunity of a serving minister for foreign affairs was absolute while he or she was in office and had not recognized an exception even in the case of crimes against humanity, the Court had not explained whether such an official would continue to enjoy immunity after resigning from office. Nor had it analysed the distinction between immunity *ratione personae* and immunity *ratione materiae* or defined the scope of those two types of immunity in relation to certain crimes under international law such as genocide, crimes against humanity and war crimes. The Commission should endeavour to fill the gaps left by the Court through scrutiny of subsequent jurisprudence at the international and national levels, with special emphasis on the scope of immunity *ratione materiae*.

35. As for the question of which holders of high office in States did or should enjoy immunity *ratione personae*, it would be impracticable for the Commission to analyse the scope of the immunity in all cases, given the lack of State practice. It should focus on the so-called "troika", and perhaps include the highest-ranking officials, such as Cabinet members. On the question of which crimes were or should be excluded from either kind of immunity, the Commission would be unable to accomplish its mandate if it had to consider the many acts criminalized under international conventions, such as terrorism, drug trafficking and the hijacking of aircraft. It would be preferable for it to focus on the gravest international crimes, namely genocide, crimes against humanity, and war crimes.

36. Concerning the obligation to extradite or prosecute (*aut dedere aut judicare*) there had been much debate concerning the customary nature of the obligation. The topic called for an in-depth analysis of international norms, and the Commission should, as planned, consider the future of its work on the topic at its next session. In determining the scope and content of the topic, it should bear in mind that the obligation to surrender a suspect or an accused person to an international court or tribunal remained a treaty-based obligation, to be distinguished from the obligation to extradite such a person to another State.

37. On the topic of treaties over time, the report of the Study Group contained a commendable analysis of

the case law that had accumulated under a range of international regimes. The Commission should continue to analyse relevant jurisprudence and practice, bearing the final outcome of the work in mind. In response to the Commission's request, his Government would look for relevant examples of "subsequent agreements" and "subsequent practice".

38. Turning to the most-favoured-nation clause, he noted that such clauses, especially those featured in bilateral or multilateral investment and trade agreements, had a bearing upon significant areas of the international economy, and the Commission could make a major contribution to the subject. Japan would consider the possibility of collecting relevant examples of recent practice or case law in areas other than trade and investment for the Commission's use.

39. With respect to the Guide to Practice on Reservations to Treaties, he noted that the guidelines were based on the assumption that articles 20 and 21 of the Vienna Convention on the Law of Treaties did not apply to impermissible reservations within the meaning of article 19 of the Convention. However, in practice States often declared, in accordance with article 20 of the Vienna Convention, that they objected to a reservation as impermissible under article 19 and either did or did not enter into treaty relations with the reserving State. In such cases a State would typically avoid making a determination as to the validity or invalidity of the reservation in question and instead adjust treaty relations with the reserving State through the objection regime established by the Vienna Convention. Therefore, it seemed that the provisions of the Guidelines stating that impermissible reservations and objections to them had no legal effect were not in conformity with such State practice.

40. Since interpretative declarations had no legal effect, subjecting them to the test of permissibility was rare in State practice and therefore partook more of progressive development than of codification. Where a de facto reservation was made under the name of an interpretative declaration, the prevailing practice of States was to determine its permissibility by treating it as a reservation and then deciding what its legal effect would be in treaty relations with the reserving State. His delegation therefore welcomed the Commission's decision to adopt guideline 1.4, which in paragraph 2 made conditional interpretative declarations subject to the rules applicable to reservations, and to delete all other guidelines concerning conditional interpretative declarations.

41. His delegation supported the idea of establishing a reservations assistance mechanism and an "observatory" on reservations. The mandates and powers of those institutions should be carefully considered, not forgetting their financial implications.

42. The Commission's draft articles on the responsibility of international organizations had tremendous significance for the future development of general international law, in view of the increasing expansion of the roles and mandates of a wide range of international organizations. The draft articles would offer a guide for the use of States and of international organizations themselves, especially where the constituent instrument of an organization, or other relevant instruments, provided no solution to a given question relating to its responsibility. However, some of the draft articles had been severely criticized by both international organizations and States as departing from existing practice. Some of those shortcomings were the result of drawing unnecessarily close parallels with the articles on the responsibility of States for internationally wrongful acts and of failing to give sufficient consideration to the differences in membership, subject matter and powers among international organizations. The Commission would have done well to have taken more time to elaborate specific provisions for international organizations, which had characteristics fundamentally different from those of States.

43. Lastly, his delegation would submit its comments on the draft articles on the effect of armed conflicts on treaties after due consideration.

44. **Mr. Dahmane** (Algeria), commenting on the immunity of State officials from foreign criminal jurisdiction, said that there were strong links between that topic and others, such as the obligation to extradite or prosecute (*aut dedere aut judicare*) and the application of the principle of universal jurisdiction, especially in light of the decisions of the African Union calling for an end to the politicization and abuse of the latter principle by courts in third countries when dealing with official representatives of African countries. His delegation agreed with the Special Rapporteur that the immunity of State officials was a firmly established rule of international law, and any exceptions to it must be proved. A restrictive

interpretation of immunity *ratione personae*, confining it to the so-called "troika", would not be in conformity with current international norms or State practice.

45. Nor should the Commission consider the subject in isolation from the question of politicized or selective prosecutions and their negative impact on the stability of inter-State relations, judicial independence and the rules of fair trial. Moreover, even supposing that exceptions to immunity could be invoked, the prosecution of serving State officials by a foreign criminal court raised technical and political problems, especially where the officials were prevented from discharging their functions, and inter-State relations were affected, during the protracted process of establishing the facts of a case. The situation was further complicated if the State official was ultimately found to be innocent. The Commission should pay more attention to those aspects of the question.

46. Regarding the obligation to extradite or prosecute (*aut dedere aut judicare*), although the importance of that obligation had increased in international practice in the light of the effort to combat impunity, the Commission had not established that there was any general obligation in customary international law to extradite or prosecute, except for the category of the most serious international crimes, such as serious violations of international humanitarian law, genocide and crimes against humanity. His delegation strongly supported the addition of terrorism to that category. However, draft article 4 established a customary obligation that remained to be demonstrated in most situations, and the enumeration of serious crimes in its paragraph 2 remained vague.

47. Draft article 3 provided a sound basis for the obligation to extradite or prosecute by deriving it from the existence of an international treaty to which the State concerned was a party. His delegation supported the language of draft article 3, paragraph 2, specifying that internal law established the particular conditions for extradition or prosecution, but urged caution with respect to the additional requirement that the "general principles of international criminal law" should also be followed, because the precise content of such principles remained to be clarified. Full account should also be taken of relevant principles found in certain national legal systems, such as the prohibition against the extradition of nationals.

48. Turning to the most-favoured-nation clause, he noted that the Study Group had drawn attention to the variety of practice and interpretations by tribunals and courts of arbitration when dealing with such clauses in investment disputes, sometimes in order to apply procedural rules and dispute settlement rules derived from another agreement with a third State and more favourable than those in the bilateral investment agreement. His delegation supported the proposal by the Study Group to consider further the question of most-favoured-nation clauses in relation to trade in services and investment agreements, as well as the relationship between such clauses, fair and equitable treatment and national treatment standards. The Commission should consider the possibility of combining its proposed future study of the question of the fair and equitable treatment standard in international investment law with its ongoing study of most-favoured-nation clauses, in order to avoid duplication.

49. With respect to the topic of treaties over time, his delegation wished to stress that the Vienna Convention on the Law of Treaties, specifically article 31 and its *travaux préparatoires*, were the main reference points for the interpretation of treaties, especially with regard to practice followed in applying the treaty which established the agreement of the parties regarding its interpretation.

50. In choosing new topics, the Commission should comply with the criteria it had laid down in 1998, chief among them the needs of member States. The chosen topics must have attained a level of maturity, State practice and rule-making sufficient to justify being placed on the Commission's agenda. Those requirements were met by the proposed topics of protection of the atmosphere, provisional application of treaties, and protection of the environment in relation to armed conflict. On the other hand, the generality of a topic need not be a criterion for its consideration; the Commission had considered many specific issues. His delegation welcomed the inclusion on the Commission's agenda of the topic of formation and evidence of customary international law, given its importance for the codification and progressive development of international law. However, there should be no attempt to codify the topic itself, because of the spontaneous manner in which custom developed. Rather, the aim should be to identify recent trends in the formation of customary law, without attributing normative value to them.

51. **Mr. Wambura** (Kenya) said that the topic of the immunity of State officials from foreign criminal jurisdiction raised complex questions in the legal, political and administrative spheres. The competing concepts of sovereign equality and non-interference, progressive development of international human rights law and the fight against impunity had to be carefully balanced. To achieve that balance, while ensuring stability in international relations and combating impunity for grave crimes under international law, it was necessary to proceed with caution. The functional immunity conferred on State officials enabled them to represent their Governments effectively at the international level. His delegation shared the opinion of the Special Rapporteur that immunity of State officials from foreign criminal jurisdiction should remain the norm and that any exceptions should be provided for in international instruments and would need to be proved. That stance would guard against politically motivated prosecutions, trials in absentia and evidentiary problems stemming from a lack of cooperation on the part of the State concerned.

52. Support had been expressed for the proposition that immunity *ratione personae* should be extended to State officials other than the "troika", such as ministers of trade and ministers of defence, when their duties entailed extensive international travel. His delegation was open to considering the matter and in particular to establishing criteria for determining which high-level officials should enjoy such immunity, bearing in mind the need to maintain a distinction between such officials and the "troika" with respect to the invocation and waiver of immunity.

53. Concerning the issue of waiver, Kenya supported the view that the right to waive immunity of a State official vested in the State itself, and that waiver should always be explicit. The construct of implied waiver of immunity could undermine international relations. That was not, however, the situation where a State was a party to an international treaty that provided for waiver of immunity in respect of certain crimes recognized under that treaty. If the State party had not entered a reservation to the clause relating to waiver, it could be assumed that it had expressly made a standing waiver of immunity *ratione personae* with regard to crimes under that treaty. In that respect, the Commission should consider further the legal implications of Article 98 of the Statute of the International Criminal Court, relating to bilateral immunity agreements.

54. His delegation encouraged Member States to share detailed information on their own practice in the matter, including legislation and court decisions on the issues raised in the second and third reports of the Special Rapporteur. Under article 2 of its new Constitution, adopted in August 2010, Kenya had incorporated into the Constitution the general rules of international law and provisions of treaties to which it was party, also providing, in article 143, for waiver of immunity in respect of crimes under any such treaty.

55. It would be helpful if the Commission's report could be released early enough in future to allow for its consideration before the opening of the General Assembly.

56. *Ms. Kaewpanya (Thailand), Vice-Chair, took the Chair.*

57. **Ms. Noland** (Netherlands) said that the courts of her country were having to deal with an increasing number of cases involving the immunity of State officials in respect of international crimes. Her Government had therefore requested the Independent Advisory Committee on Issues of Public International Law to produce an advisory report on the dilemmas that arose from having to reconcile immunity with the need to combat impunity for international crimes and would send that report to the Commission. As the Advisory Committee had observed in its report, the topic was in a state of flux. In response to the Commission's question about the approach to the topic, therefore, her delegation recommended that the Commission should embark on an exercise of progressive development. If it confined itself to *lex lata*, there was a risk that practice would overtake its findings.

58. With regard to the scope of immunity *ratione personae*, her Government's view was that it was and should be limited to incumbent Heads of State and Government and ministers for foreign affairs, by virtue of their office and their role in the conduct of international relations. The Dutch International Crimes Act, which created national jurisdiction for crimes punishable under the Statute of the International Criminal Court, was not applicable to that "troika" of individuals. The Netherlands was not in favour of extending personal immunity to other serving officials, because of the changing balance between immunity

and the growing desire to prevent impunity for international crimes. The Advisory Committee had, however, concluded that full immunity could also be extended, on the basis of customary international law, to members of "special" or "official" missions for the duration of their stay on the territory concerned. The practical implications of that conclusion were unclear, and the Netherlands would be interested in the practice of other States in that regard.

59. While immunity *ratione personae* was absolute, immunity *ratione materiae* should not be granted for serious international crimes such as those mentioned in the Statute of the International Criminal Court. The Commission should investigate that issue thoroughly, since international law in the matter was insufficiently clear.

60. Concerning the topic of the obligation to extradite or prosecute, the general orientation of the future reports of the Special Rapporteur should be towards presenting draft articles, based on the general framework agreed in 2009. As for the current draft articles, the duty to extradite or prosecute was known to result from treaty law or customary international law, and that point need not be reiterated. The Commission's work on the topic could make a significant contribution to the development of an effective international criminal justice system. The apparent lack of progress since its inclusion on the Commission's programme of work was regrettable, and the topic should be given priority treatment.

61. On the topic of treaties over time, she noted with interest the progress made by the reconstituted Study Group. The interpretation of treaties was an important area of international law, and it was rare that a dispute did not touch on the topic. The application of article 31, paragraph 3, of the Vienna Convention on the Law of Treaties was a relatively neglected subject, and her delegation welcomed the Commission's efforts to address it. Clearly, it would be difficult to isolate the application of paragraph 3 from the other means of interpretation mentioned in article 31. The identification of the different approaches to treaty interpretation contained in the preliminary conclusions by the Chairman of the Study Group would be helpful in the Commission's further work. In response to the Commission's request, her Government would provide some examples of subsequent practice and subsequent agreements that had not been the subject of a judicial or quasi-judicial pronouncement to assist the Commission in its difficult but much appreciated task.

62. With regard to the most-favoured-nation clause, her delegation concurred with the finding of the Study Group that the general point of departure when interpreting such clauses was the Vienna Convention on the Law of Treaties. It would welcome future work on the relationship between most-favoured-nation clauses and fair and equitable treatment in international investment law.

63. Concerning the Commission's new topics for future work, the formation and evidence of customary law were key questions that were raised in many situations. The provisional application of treaties was essentially a question of domestic and indeed constitutional law. Given the diversity of domestic rules on the provisional application of treaties, there seemed little scope for substantive work on it by the Commission, except in collecting the various rules. It might however be helpful to examine the implications of lengthy periods of provisional application and their legal consequences, especially when the instruments concerned did not actually enter into force.

64. The two suggested environmental topics were not ripe for study. The question of protection of the atmosphere seemed more suited for discussion among specialists. As for protection of the environment in relation to armed conflicts, States had not responded favourably to a consultation process on the subject organized by the International Committee of the Red Cross (ICRC). In any event, the topic bore upon issues of humanitarian law, and since ICRC had decided not to embark on it, it would not be appropriate for the Commission to do so. On the other hand, the fair and equitable treatment standard in international investment law had considerable potential relevance for legal practice.

65. **Ms. Mezdrea** (Romania) said that the Special Rapporteur was correct in concluding that the immunity of State officials from foreign criminal jurisdiction must be based on the premise of sovereignty. There was, however, a basis in State practice for exceptions to the immunity rule, which derived from the need to prevent impunity for grave crimes under international law. It was necessary to strive for a balance between the two concepts; if done with care, the task could be accomplished without endangering the stability of international relations. Her

delegation fully supported the idea of the Commission focusing on the extent to which exceptions should apply, particularly with respect to grave crimes under international law, and hoped that it would examine the immunity *ratione personae* of high-level State officials other than the "troika".

66. The procedural aspects addressed in the Special Rapporteur's third report (A/CN.4/646) were essential in determining how immunity was to be handled in practice. The invocation of immunity was the crucial element. Romania shared the view expressed in the report that the official concerned could play a part in invoking immunity by notifying the authorities of the State exercising jurisdiction that he or she was immune from prosecution. Non-invocation of immunity could not, however, automatically be construed as a waiver.

67. On the topic of treaties over time, and the preliminary conclusions of the Chairman of the Study Group, she might suggest including the European Court of Justice among the examples chosen to illustrate approaches to interpretation. More information from Governments on State practice in the matter, apart from judicial and quasi-judicial proceedings, would be especially useful.

68. With regard to the obligation to extradite or prosecute, the complexity of the topic and its links with other related subjects might necessitate expanding the topic. The divergent views expressed on some of the most important issues was reflected in the very cautious formulation of the draft articles. Although there was a need to include a reference to the duty to cooperate, the current wording of draft article 2 was vague and ambiguous. Draft article 3 appeared merely to restate the principle *pacta sunt servanda*. Draft article 4 should identify the crimes giving rise to the obligation to extradite or prosecute.

69. Concerning the most-favoured-nation clause, her delegation thanked the Study Group for its contribution and looked forward to the draft report on the subject. With regard to the new topics in the Commission's long-term programme of work, her delegation particularly welcomed the inclusion of the topics of formation and evidence of customary international law and the fair and equitable treatment standard in international investment law.

70. *Ms. Noland (Netherlands), Vice-Chair, resumed the Chair.*

71. **Mr. Galicki** (Special Rapporteur, on the obligation to extradite or prosecute (*aut dedere aut judicare*)), responding to the debate, agreed that the topic was difficult and complex, calling for in-depth analysis of international treaty and customary norms, as well as national regulations, which had been changing significantly in recent years. The Committee evidently felt that work on the topic should continue. When in his preliminary report (A/CN.4/571) he had originally suggested that the topic could be considered in conjunction with the question of universal jurisdiction, the idea had not received sufficient support in either the Commission or the Sixth Committee. Now that the question of universal jurisdiction was on the agenda of other United Nations bodies, it seemed inevitable that the Commission must consider whether, and to what extent, the two topics should be studied together.

72. Most members of the Committee had received favourably the new draft articles proposed in his fourth report (A/CN.4/648) on the duty to cooperate, treaty as a source of the obligation to extradite or prosecute and international custom as a source of the obligation. Many speakers had referred to draft article 2 (Duty to cooperate), and the majority had agreed that States did have a duty to cooperate in the fight against impunity, although they had differed on whether such a provision should be contained in a draft article or in the preamble. While he would choose to retain the draft article in a leading position, he agreed with the suggestion that the text of draft article 2 could be improved by dividing paragraph 1 into two parts, dealing respectively with inter-State cooperation and cooperation with international courts and tribunals. The obligation to cooperate with the United Nations, on the basis of Article 89 of the Charter, could also be mentioned.

73. In his fourth report he had concentrated on two principal sources of the obligation, international treaties and international custom. His review had confirmed that treaties were the legal basis of the obligation most frequently applied and invoked. He had also, in recent years, noticed increasing support for the existence of a customary international law obligation to extradite or prosecute, although it might be difficult to prove. A more promising avenue might be to identify the particular categories of crimes that might give rise to such a customary obligation, limited as to its scope and substance but recognized as binding

by the international community of States. The fourth report contained many examples. However, the list of such crimes and offences was still open to further consideration and discussion. It would be of crucial importance for the Commission in developing the topic to have answers from States to the questions concerning crimes in the legislation of States or in the case law of their courts in respect of which the obligation had been implemented, and whether national courts or tribunals had ever relied, in that respect, on customary international law.

Agenda item 109: Measures to eliminate international terrorism (*continued*) (A/66/37 and A/66/96 and Add.1)

74. **Mr. Perera** (Sri Lanka), Chair of the Working Group on measures to eliminate international terrorism, recalled that, on the recommendation of the Ad Hoc Committee established by General Assembly resolution 5l/210, the Sixth Committee had decided, at its 1st meeting, on 3 October 2011, to establish a working group under his chairmanship with a view to finalizing the draft comprehensive convention on international terrorism and to continue to discuss the item included in its agenda by the Assembly in its resolution 54/110 of 9 December 1999, in which the Assembly addressed the question of convening a high-level conference under the auspices of the United Nations.

75. In keeping with its established practice, the Working Group had decided that members of the Bureau of the Ad Hoc Committee would continue to act as Friends of the Chair during the meetings of the Working Group. The Working Group had had before it the report of the Ad Hoc Committee on its fifteenth session (A/66/37), together with the report of the Working Group at the sixty-fifth session (A/C.6/65/L.10). It had also had before it the letter dated 1 September 2005 from the Permanent Representative of Egypt to the United Nations addressed to the Secretary-General (A/60/329), and the letter dated 30 September 2005 from the Permanent Representative of Egypt to the United Nations addressed to the Chair of the Sixth Committee (A/C.6/60/2).

76. The Working Group had held four meetings, on 17 and 19 October and 1 November 2011. It had also held informal consultations on 17 and 19 October. At its first meeting, on 17 October, the Working Group had adopted its work programme and had decided to proceed with discussions on the outstanding issues relating to the draft comprehensive convention on international terrorism and, thereafter, to consider the question of convening a high-level conference under the auspices of the United Nations to formulate a joint organized response of the international community to terrorism in all its forms and manifestations. The Chair, together with the Coordinator of the draft comprehensive convention, Ms. Maria Telalian (Greece), had also held several rounds of bilateral contacts with interested delegations on the outstanding issues relating to the draft comprehensive convention. At its final meeting, on 1 November, the Working Group had heard an oral report on the results of the bilateral contacts held during the current session.

77. Presenting an informal summary of the exchange of views in the Working Group on the draft comprehensive convention, he said that delegations had reiterated the importance that they attached to the early conclusion of the draft convention. Some delegations had expressed their conviction that, with the necessary political will, the remaining outstanding issues could be resolved. Several delegations had stressed the need to conclude work at the current session and had indicated that they were ready to proceed on the basis of the Coordinator's 2007 proposal (A/62/37), observing that it had not yet been rejected by anyone. Indeed, it had been noted that support for the proposal had grown over the years. However, the point had also been made that it would not be beneficial to proceed hastily in the negotiations. Some delegations had also emphasized that the negotiations had been going on for many years and that the 2007 proposal put forward by the Coordinator as a compromise text had been on the table for four years without generating a clear advance in the negotiating process. Recalling that many delegations had expressed support for the Coordinator's proposal, and in order to allow for a substantive debate, those delegations still experiencing difficulties with the text were strongly urged to provide more concrete feedback on the proposal rather than to reiterate well-known positions. While several delegations emphasized that work on the draft convention should be guided by the principle of consensus, the view was also expressed that consensus should not be an end in itself.

78. Concerning the outstanding issues surrounding the draft convention, several delegations had reaffirmed their full support for the Coordinator's 2007 proposal and considered that it constituted a viable, legally sound compromise solution. They had further stressed

that, as a compromise package, the proposal should not be reopened; the proposal, albeit not perfect, constituted a carefully balanced compromise text that effectively sought to address the various concerns raised throughout the negotiations, leaving room for constructive ambiguity. The draft convention should be viewed as a criminal law instrument, dealing with individual criminal responsibility. The proposal properly respected the integrity of international humanitarian law and allayed any concerns regarding impunity. Moreover, attention had been drawn to the fact that terrorist acts during armed conflict would constitute a war crime under international humanitarian law and, as such, perpetrators would be accountable under that regime as well. While some other delegations had reiterated their preference for the proposal made by the former Coordinator in 2002, they had stated their willingness to accept the 2007 proposal as it stood in a spirit of compromise, if that could lead to the adoption of the draft convention.

79. While some delegations had reiterated their preference for the 2002 proposal put forward by the Organization of the Islamic Conference (now the Organization of Islamic Cooperation) they had stated their willingness to continue to consider the Coordinator's 2007 proposal. They had nevertheless stressed that it was essential to address the pending substantive issues, which, in their view, the proposal did not deal with in a satisfactory manner. It had also been stated that constructive ambiguity in the text did not resolve the remaining concerns and would result in conflicting interpretations. In that context, the need for a clear legal definition of terrorism, which distinguished terrorism from the legitimate struggle of peoples fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right to self-determination, as enshrined in the Charter of the United Nations, had been emphasized. The view had also been expressed that the draft convention should also cover acts by individuals that effectively controlled armed groups, whether during armed conflict or in peacetime, when those acts were not covered by international humanitarian law. It had further been pointed out that issues related to international humanitarian law should be addressed in terms appropriate for that legal regime. In view of the comprehensive nature of the draft convention, which should not be seen only as a law-enforcement instrument regulating cooperation and coordination among States, the necessity of including activities undertaken by military forces of a State in peacetime, as well as the need to address the issue of State terrorism, had been underlined. While some delegations had expressed the view that the 2007 proposal merited serious consideration and should constitute the basis for further negotiation, they had pointed out that it was important to remember that all other proposals remained on the table, including those relating to draft article 2 (in A/C.6/65/L.10, annex II), and that nothing was agreed until everything was agreed.

80. Concerning future work, some delegations had been of the view that, if the current impasse in the negotiations continued, it might be time to reconsider the working methods and the overall negotiation process. In that context, the proposal put forward during the general debate in the Sixth Committee that the agenda item on measures to eliminate international terrorism should be considered on a biennial basis, alternating with a biennial review of the United Nations Counter-Terrorism Strategy, had been referred to. It had also been suggested that possible meetings outside the framework of the Working Group or the Ad Hoc Committee might allow for a more constructive dialogue. The proposal put forward in the Working Group the previous year (A/C.6/65/L.10, annex III, para. 14) to link the two items on the agenda of the Ad Hoc Committee in order to move the process forward, taking a two-step approach consisting of first adopting the draft convention while also agreeing definitively on the convening of a high-level conference, had also been reiterated. The view had also been expressed that a clear plan of action on how to move forward was necessary at the current stage.

81. Summarizing the clarifications made by the Coordinator, he said that during the informal meetings on 17 October 2011, the Coordinator had recalled the rationale behind the elements of the overall package she had presented in 2007 during the eleventh session of the Ad Hoc Committee (A/62/37). In particular, the Coordinator had observed that during the negotiations on the draft convention, three main concerns had been expressed by delegations, namely, (a) the need to safeguard in the draft convention the right of peoples to self-determination as reflected in the Charter of the United Nations and under international humanitarian law; (b) the need to address activities undertaken by armed forces during an armed conflict, as those terms were understood in international humanitarian law, which continued to govern in that respect; and (c) the

need to address the activities of military forces of States in peacetime, taking into account the notion of State terrorism. The elements of the overall package, consisting of an additional preambular paragraph, an addition to paragraph 4 and a new paragraph 5 of draft article 3 (former draft article 18), had been the outcome of intensive deliberations spanning several years among delegations in an effort to find consensus, at a time when there had been essentially two competing positions. They thus represented an attempt at a compromise solution, and it was not in the spirit of the proposal nor in its underlying motivation to reopen the text for amendments. Many delegations might not be fully satisfied with the text; that, however, constituted the essence of compromise.

82. The Coordinator had asked delegations to bear in mind that, while it was true that the proposal contained some constructive ambiguity, the interpretation of the convention was the primary responsibility of the States parties of the eventual instrument, and one should not attempt to interpret its terms in the abstract. It was essential to apply its provisions, setting out agreed principles, to the specific circumstances surrounding a particular situation.

83. The Coordinator had further reminded delegations that draft article 3 had to be read as a whole and in conjunction with the other provisions of the convention, in particular draft article 2. Moving draft article 3 closer to draft article 2 had indeed been important in providing a better understanding of the relationship between the two articles.

84. As to the scope *ratione personae*, the Coordinator had reiterated that the draft convention was a law enforcement instrument, ensuring individual criminal responsibility based on the obligation to extradite or prosecute (*aut dedere aut judicare*). The individual and not the State was thus at the centre of the draft convention, an approach followed consistently in the sectoral counter-terrorism instruments. The Coordinator had nevertheless noted that other fields of law, including the Charter of the United Nations, international humanitarian law and the law of the responsibility of States for internationally wrongful acts, addressed the obligations of States. Moreover, the draft convention itself contained some provisions concerning the obligations of States. The Coordinator had also pointed out that paragraph 1 of draft article 2 was concerned with any person who committed an offence unlawfully and intentionally. The phrase “any person”, together with the term “unlawfully”, was key to the understanding of the scope *ratione personae* of the draft convention.

85. Turning to draft article 3, the Coordinator had recalled that it was aimed at excising certain activities from the scope of the draft convention essentially because they were already regulated in other fields of law. It was a safeguard clause framed as an applicable law clause. The Coordinator had emphasized that the convention would not operate in a vacuum but would be implemented in the context of an overall legal framework. It was thus essential to respect the integrity of those other fields of law. Paragraph 1 constituted, in her view, one of the most important provisions since it set out the principles underpinning what was safeguarded and unaffected by the draft convention, namely other rights, obligations and responsibilities of States, peoples and individuals under international law, including the principle of equal rights and self-determination of peoples, as enshrined in the Charter of the United Nations. In response to a question as to why those principles had not been drafted in more familiar language, such as that set out in the Charter of the United Nations or in international humanitarian law instruments, the Coordinator had explained that the provision was intended to make it clear, without any doubt, that there were certain activities that should be treated the same way under the convention as under international humanitarian law, without going beyond, or redrafting, existing obligations under that legal regime. The aim was simply to provide *renvoi*; in particular, existing international humanitarian law principles continued to apply in respect of an entire category of activities. That point was further accentuated when the draft article as a whole was read together with the new paragraph 5.

86. Addressing paragraph 2 of draft article 3, the Coordinator had recalled that the terms in that provision were terms employed in international humanitarian law and had taken on a very specific meaning over the years in the development of that law. Excluding the activities of armed forces during armed conflict did not in any way signify a carte blanche. On the contrary, the paragraph made it clear that international humanitarian law governed such activities and used the term “armed conflict” as it was understood in that field of law. The exclusionary elements had been framed as applicable law clauses because the convention would operate against the

background of an already existing legal framework in which a panoply of rules already applied and would continue to apply. If the activities involved were prohibited under international humanitarian law, they would be punishable under such laws. She had drawn attention to several principles under international humanitarian law that guided States' actions during an armed conflict, such as the requirement to distinguish between civilians and combatants, the principle of proportionality and the principle prohibiting infliction of unnecessary suffering. The Coordinator had also recalled the undisputed principle that civilians would under no circumstances constitute a legitimate target, either in armed conflict or in peacetime.

87. The Coordinator had recalled that paragraph 3, to be read in conjunction with paragraph 4, concerned activities of military forces of a State in peacetime. Such activities were subject to military law, under which jurisdiction followed the soldier; moreover, when such forces were engaged in peacekeeping operations, different rules of engagement applied. It had always been understood that the paragraph was intended to address both procedural and substantive aspects. In order to accentuate that no impunity was intended and to remove any doubt as to the scope of paragraph 3, an addition had been made to paragraph 4 and a new preambular paragraph had been added. Those new elements stressed that there were some crimes that should remain punishable irrespective of the regime that would apply.

88. Turning to the new paragraph 5 of draft article 3, which was framed as a "without prejudice" clause, the Coordinator had explained that paragraph 5 sought to draw the line between the activities governed by the convention and the activities governed by international humanitarian law. The term "lawful" employed in the paragraph should, from an international humanitarian law perspective, properly be understood with its double negative connotation of "not unlawful acts", since international humanitarian law did not actually define which acts were "lawful", but rather which acts were prohibited. However, in view of the need to distinguish the acts referred to from acts that were "unlawful" under paragraph 1 of draft article 2, the term "lawful" had been used in paragraph 5 as being more appropriate in the circumstances. The Coordinator had further stressed that the draft article did not purport to modify existing obligations under international humanitarian law or introduce additional obligations under that law.

89. Looking at the next steps to be taken, the Coordinator had recalled that, in the Working Group during the sixty-fifth session, she had stressed that as the negotiating process approached its conclusion it might be necessary, as a way of managing expectations, to capture a number of the issues that remained and seemed intractable in a draft resolution that would accompany the instrument to be adopted. Some delegations had in fact commented on the need to translate those elements into resolution language. Recalling the various points that she had raised on that occasion (A/C.6/65/L.10, annex III, para. 23), she had proposed a draft text, which read as follows:

The General Assembly,

Recalling its resolution 49/60 of 9 December 1994, by which it adopted the Declaration on Measures to Eliminate International Terrorism, and resolutions 51/210 of 17 December 1996 and 53/108 of 8 December 1998,

Recalling also the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, annexed to General Assembly resolution 2625 (XXV) of 24 October 1970,

Reaffirming the duty of every State to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when these acts involve a threat or use of force, and noting that it constitutes an obligation under customary international law,

Reaffirming, in the context of combating international terrorism, the importance of maintaining the integrity of international humanitarian law,

Reaffirming also that States must ensure that any measure taken to combat terrorism complies with all their obligations under international law and must adopt such measures in accordance with international law, in particular international human rights, refugee and humanitarian law,

Having considered the text of the draft United Nations Convention for International Cooperation in the Prevention and Suppression of International Terrorism prepared by the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996 and the Working Group of the Sixth Committee,

1. *Adopts* the United Nations Convention for International Cooperation in the Prevention and Suppression of International Terrorism annexed to the present resolution, and requests the Secretary-General to open it for signature at United Nations Headquarters in New York from ... to ...;

2. *Urges* all States to sign and ratify, accept, approve or accede to the Convention;

3. *Decides* that the question of convening a high-level conference under the auspices of the United Nations to formulate a joint organized response of the international community to terrorism in all its forms and manifestations shall continue to be discussed in the context of the agenda item on measures to eliminate international terrorism.

The Coordinator had emphasized that the draft accompanying resolution should be considered part of the overall compromise package and was presented in order to provide a better overview of where matters stood.

90. Giving an informal summary of the comments of delegations, he said that some delegations had considered it premature to consider the text of the draft accompanying resolution. From a procedural point of view, the discussions on the draft resolution should not take place prior to an agreement on the text of the draft convention. Such a process would in their view lead to two parallel negotiation processes, complicating the discussions on the outstanding issues. It had also been observed that the outstanding issues surrounding the draft convention were of a legally substantive nature that could not be resolved through an accompanying resolution. In particular, the view had been expressed that any accompanying resolution needed to address the issue of State terrorism, the right of peoples to self-determination as well as the root causes of terrorism. In addition, reference should be made to all General Assembly resolutions on international terrorism since 1972, when the Assembly first begun its consideration of the agenda item. The point had also been made that the resolution should expressly set forth the understandings that draft article 3, paragraph 1, signified that the convention would not prejudice the right to self-determination and that paragraph 2 of the same article covered acts that were not governed by international humanitarian law.

91. Some delegations, while reserving their position on the content of the draft resolution, had expressed support for the initiative and considered it a genuine and welcomed attempt to overcome the current impasse. It had been recalled that the Sixth Committee, as well as other legal bodies, had adopted similar approaches on several occasions in the past in order to resolve difficult outstanding issues, and any understanding formed an integral part of the substantive provisions. It was important not to discard the potential of such a resolution as a tool to move the negotiations forward, irrespective of any perceived difference in legal status between the convention and the resolution. It had also been pointed out that in view of the proposal to proceed further with a two-step approach, paragraph 3 of the draft resolution could be redrafted to express a definitive decision to convene a high-level conference. It had also been observed that the draft resolution appropriately drew attention to the need to respect the integrity of international humanitarian law.

92. The view had also been expressed that the debate in the Working Group at the current session had demonstrated the different views that existed as to the scope of the draft convention, and it had become clear that there was no consensus that seemed to be coalescing towards conclusion of the negotiations. The outstanding issues concerned the understanding of basic concepts and could not be resolved through competing interpretations. Notwithstanding the value of an accompanying resolution, it would not resolve these underlying differences.

93. In response to the comments made by delegations, the Coordinator had reiterated that the draft accompanying resolution was not intended to detract from the outstanding issues, but should be seen as one of the elements of the overall package proposal. She had recalled that, when explaining the rationale behind the 2007 proposal, she had sought to clarify how the elements addressed the outstanding issues and what could and could not be resolved in the text of the draft convention. The draft accompanying resolution was a true reflection of the issues covered in the elements of

the package proposal and was meant to supplement those elements to the extent that lingering concerns could be assuaged. She had urged delegations not to look at the draft resolution from a procedural perspective but as an attempt to reach consensus, employing tested methods that had been employed in the context of previous negotiations of the Sixth Committee, and as an interpretative tool for understanding the provisions of the draft convention. In her view, that was the only way out of the impasse.

94. Summarizing the Coordinator's statement on bilateral contacts concerning the draft comprehensive convention on international terrorism given during the final meeting of the Working Group, held on 1 November 2011, he said that the Coordinator had reported that, since the Working Group had commenced its meetings, she had had an opportunity to discuss with delegations in informal contacts the issues surrounding the draft comprehensive convention. While delegations remained keen to conclude the draft convention, there was also a sense of growing frustration about the way forward. The Coordinator had recalled that she had once more taken the opportunity to explain the rationale of the elements of the 2007 package, in the hope that it would be possible for delegations to have a better understanding of the proposed text. She had also sought to explain that the draft accompanying resolution was to be seen as part of the overall picture as delegations sought to conclude negotiations. In the Coordinator's view, the differences that existed, in legal terms, were not so far apart as would justify the protracted nature of the engagement; it was only a matter of summoning the necessary political will to overcome the difficulties.

95. With respect to draft article 3 (formerly draft article 18), she had pointed out that the text presented by the former Coordinator and the text presented by the Organization of the Islamic Conference (now the Organization of Islamic Cooperation), both in 2002 (A/57/37, annex IV), employed corresponding language in their paragraphs 1 and 4. Those two texts differed only in the terms used in paragraphs 2 and 3. In paragraph 2, the phrase "the activities of armed forces during an armed conflict" was used in the first of those versions while in the second the phrase read "the activities of the parties during an armed conflict, including in situations of foreign occupation". In the past, the Coordinator had analysed how these terms were to be understood, namely from the perspective of international humanitarian law, the law which, as both versions provided, was supposed to govern. Moreover, the terms used were intended to be interpreted by recourse to that law. In paragraph 3, the phrase "inasmuch as they are governed by other rules of international law" in the first version corresponded to "inasmuch as they are in conformity with international law" in the second. It was the differences in paragraphs 2 and 3 that the elements of the overall package had chiefly sought to address.

96. The Coordinator had expressed her hope that as delegations reflected further on the elements she had proposed in 2007, particular attention would be paid to the differences that delegations had been trying to overcome, bearing in mind, in particular, the principled position, which all seemed to agree upon, that the integrity of international humanitarian law ought to be preserved.

97. The Coordinator had also reported that one of the central issues in the conversations with delegations had been the question of where the negotiations should lead. She had sensed that there was a clear majority that would support the adoption of a convention on the basis of the elements of the package proposed in 2007. At the same time, she had noted a general wish to proceed on the basis of general agreement; that was why delegations had been seeking to explore all avenues that would enable them to proceed with everyone on board. There were some delegations which saw the whole effort as an exercise in futility unless those that continued to wish for consensus demonstrated the necessary political will to advance further. It had been suggested to the Coordinator that it might be opportune for delegations to be allowed some space for reflection so that when they met once more it would be possible for all to take the necessary decisions on the way forward. The question of the frequency of meetings had been raised; it had been noted in particular that a meeting early in 2012 did not offer any greater prospects for making progress. It had thus been questioned whether meeting twice a year remained a viable alternative, particularly when the prospects of a different outcome being reached in a few months' time appeared remote. Moreover, some delegations had emphasized the need to consider seriously the possibility of convening a working group of the Sixth Committee on a biennial basis. Such a possibility would allow delegations additional time to build the necessary momentum, politically, for a positive

outcome that would lead to the conclusion of the draft convention.

98. Lastly, the Coordinator had stressed that it would be crucial for delegations to continue to be engaged with the issues until they reconvened, in order to better their grasp of the legal issues they were seeking to address. It might be worth pursuing the idea broached by some delegations of having some interaction on the outstanding issues in the margins of the Sixth Committee next year.

99. Summarizing the comments of delegations during the fourth meeting of the Working Group, he said that the discussions had focused mainly on the procedural questions that the Coordinator had brought to their attention regarding the steps to be taken in order to move the process forward, in relation to both working methods and the frequency and format of meetings. While some delegations had recalled that States generally considered the early conclusion of the convention a priority, they had also reiterated their positions concerning the proposals for draft article 3 and recognized that the negotiations had reached an impasse.

100. Concerning the frequency of future meetings, some delegations had opposed the idea of suspending the negotiating process and had been of the view that negotiations should continue in the Ad Hoc Committee early in 2012. In that context, they had noted the progress achieved during the past few years and the priority the international community had placed on the early conclusion of the convention. They had stressed the risk of throwing away 10 years of work if negotiations were suspended and had raised the question of where and on what terms the negotiations would resume. Some other delegations had been of the view that the time had indeed come to take a break in the negotiations in order to provide some space for reflection and had suggested that a biennial consideration might be both appropriate and beneficial for the process. Such a step should not be considered an abandonment of the goal of reaching agreement on the draft convention but would provide an opportunity to consider how best to move forward. It had also been observed that the current status of the negotiations was duly reflected in the relevant reports and that the progress already achieved would thus not be lost.

101. The view had also been expressed that it might be useful to consider an open-ended meeting outside the established framework of the Sixth Committee and the Ad Hoc Committee. While other delegations had been agreeable to the idea of meeting less frequently, they had nevertheless considered that negotiations should continue on an annual basis in the context of a working group of the Sixth Committee. Some delegations had been flexible concerning the frequency of meetings but had emphasized that any negotiations on the draft convention must remain within the framework of the Sixth Committee to ensure transparency and openness in the negotiations; they had rejected any suggestion of continuing the negotiations in an outside forum. The point had also been made, however, that any outside intersessional consultations would be intended to facilitate and complement discussions on the outstanding issues and not to replace the existing process.

102. Some delegations had been of the view that it was not the time frame of the negotiations that needed to be addressed but the working methods. In that regard, they had underlined the need for a substantive, interactive and transparent debate that would leave room for an exchange of views on existing texts, as well as on new ideas.

103. The Coordinator had noted the flexibility shown by delegations and agreed that, in the light of the current impasse, it would be useful to reconsider both the frequency of meetings and the working methods. She had nevertheless underlined the importance of not losing sight of the progress already made and of the many important understandings that had been reached over the past few years. In her view, the discussions should continue on the basis of the 2007 proposal together with the clarifications she had provided.

104. At the conclusion of the discussion, the Chair had observed that the various procedural issues raised would require further reflection and consideration in the context of the negotiations on the draft resolution on measures to eliminate international terrorism.

105. With regard to the question of convening a high-level conference, he said that during the informal consultations of the Working Group held on 19 October 2011, the Egyptian delegation had recalled the origins and reasons behind its proposal, put forward in 1999, concerning the convening of a high-level conference under the auspices of the United Nations. It had explained that a plan of action was needed in order to address effectively all aspects of terrorism in a joint

and coordinated manner. Such a conference would provide a forum to address all the issues related to the fight against terrorism and could contribute to the discussion on the definition of terrorism. The proposal to convene a conference should be considered on its own merits and should not be linked to the conclusion of the draft comprehensive convention. The sponsor delegation further recalled that the proposal had been endorsed by the Movement of Non-Aligned Countries, the Organization of the Islamic Conference (now the Organization of Islamic Cooperation), the African Union and the League of Arab States and that both the 2005 World Summit Outcome and the United Nations Global Counter-Terrorism Strategy had acknowledged the necessity of convening a high-level conference.

106. Some delegations had reiterated their support for the proposal and had expressed the view that such a conference could facilitate negotiations on the draft convention and mobilize the necessary political will to finalize it. A conference could provide an opportunity to address issues broader than the outstanding questions regarding the draft comprehensive convention, including the definition of terrorism. Some delegations had reiterated that the proposal to convene a conference should be considered on its own merits and not in connection with the draft comprehensive convention. A number of delegations had noted that the time was ripe to agree on definitive dates and had called for the convening of a conference in 2012 or 2013. Other delegations, while supporting the convening of a conference in principle, questioned the timing and the usefulness of a conference in resolving the outstanding issues in connection with the draft convention. They had stressed that the Working Group of the Sixth Committee and the Ad Hoc Committee established pursuant to General Assembly resolution 5l/210 were the appropriate forums for continuing negotiations on the draft convention and had suggested that the convening of a high-level conference should be discussed only after the conclusion of the draft comprehensive convention.

The meeting rose at 1.05 p.m.