

Document:-  
**A/CN.4/3218**

**Summary record of the 3218th meeting**

Topic:  
**<multiple topics>**

Extract from the Yearbook of the International Law Commission:-  
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24. At the request of Mr. Candiotti, Mr. Park and Mr. Saboia and on behalf of the whole Commission, the CHAIRPERSON thanked Mr. Kittichaisaree for his invaluable contribution as Chairperson of the Working Group on the obligation to extradite or prosecute (*aut dedere aut judicare*).

*The meeting rose at 5.35 p.m.*

### 3218th MEETING

*Tuesday, 8 July 2014, at 10.05 a.m.*

*Chairperson:* Mr. Kirill GEVORGIAN

*Present:* Mr. Cafilisch, Mr. Candiotti, Mr. Comisário Afonso, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Mr. Huang, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

#### Cooperation with other bodies

[Agenda item 14]

##### STATEMENT BY THE SECRETARY-GENERAL OF THE ASIAN–AFRICAN LEGAL CONSULTATIVE ORGANIZATION

1. The CHAIRPERSON welcomed Mr. Mohamad, Secretary-General of the Asian–African Legal Consultative Organization (AALCO), and invited him to address the Commission.

2. Mr. MOHAMAD (Secretary-General of the Asian–African Legal Consultative Organization) said that among the contributions to international law that AALCO was mandated to make was the exchange of information and views on the topics under consideration by the Commission. The fulfilment of that mandate over the years had helped to forge a closer relationship between the two organizations, which were also represented at each other's sessions as a matter of customary practice.

3. Among the items on the Commission's agenda, the topic of identification of customary international law was particularly relevant due to difficulties in identifying existing rules of customary international law and in their application by domestic courts and judges, lawyers, arbitrators and legal advisors who might lack formal training in international law. Aspects of the topic that were of particular interest to AALCO members included the question of the hierarchy of sources. The search for evidence of customary international law had traditionally focused on the decisions of international tribunals, yet a truer sense of the position of States might be arrived at through an examination of domestic practice and the decisions of

regional and subregional courts. With respect to the decisions of international tribunals, consideration should also be given to dissenting opinions and separate opinions. Statements by States in international forums and resolutions adopted by international and intergovernmental organizations could also help to establish an accurate picture of their position on particular questions. Lastly, any set of rules for the identification of customary international law should be flexible enough to take account of the constantly evolving nature of custom and practice.

4. At the fifty-second annual session of AALCO, held from 9 to 12 September 2013 in New Delhi, a number of comments and suggestions on the topic had been made by member States. A question had been raised as to whether the Special Rapporteur considered the resolutions of international and regional organizations to be part of customary international law. Two member States had suggested that the concept of *jus cogens* not be included within the scope of the topic. One State had expressed the view that the draft conclusions should reflect the practice of States from all of the principal legal systems of the world and from all regions. It had also been suggested that the relationship of customary international law with treaties and with the general principles of law might be discussed.

5. In November 2013, a two-day workshop had been organized by the AALCO Secretariat, in conjunction with the National University of Malaysia, to consider selected items on the Commission's agenda. Participants had included representatives of member States, academics and students from Malaysian universities. Three members of the Commission had given presentations on the topics of protection of persons in the event of disasters, protection of the atmosphere and immunity of State officials from foreign criminal jurisdiction. Following the success of the workshop, it had been agreed that it should be held annually and that a Working Group on the identification of customary law should be established to facilitate the work of the Special Rapporteur on that topic. The group would be documenting the contributions of Asian and African States to the progressive development of international law and transmitting the recommendations of AALCO member States on issues raised by the Special Rapporteur.

6. The majority of member States of AALCO, while being mindful of the ongoing political negotiations to address commitments under the climate change regime, believed that the protection of the atmosphere was a matter of growing concern for the international community. With regard to the definition of the atmosphere set out in the Special Rapporteur's first report on the topic (A/CN.4/667), draft guideline 1 could perhaps be supplemented by a detailed description of the atmosphere's various layers and of its other gaseous content. Reference to such issues as transboundary air pollution and climate change was essential for a comprehensive understanding of the topic, but those issues should not be part of a substantive discussion. The principles of international environmental law that had evolved over the years through the judgments of international courts and tribunals and the customary practice of States focused on the precautionary approach, rather than on the principle of prevention. However, there was a pressing need to prevent any harm to the atmosphere, because of the potential wide-ranging impact

of atmospheric pollution. Accordingly, international cooperation and such key principles of international environmental law as equity, sustainable development and common but differentiated responsibilities must be the foundation for further progress on the topic. The AALCO Secretariat supported the Special Rapporteur's view, set forth in draft guideline 3 (a), that the protection of the atmosphere should be accorded the legal status of a common concern of humankind.

7. Turning to the protection of persons in the event of disasters, he said that AALCO member States had welcomed the inclusion in the Special Rapporteur's seventh report (A/CN.4/668 and Add.1) of draft article 14 *bis*, dealing with the protection of relief personnel, equipment and goods. However, concerns had been expressed about the reference in draft article 12<sup>181</sup> to the "intergovernmental organizations" and "non-governmental organizations" that might be involved in disaster relief operations, particularly with respect to their credentials and credibility.

8. AALCO member States welcomed the discussion in the report of the treaties recently adopted in the region: the ASEAN Agreement on Disaster Management and Emergency Response of 2005 and the SAARC [South Asian Association for Regional Cooperation] Agreement on Rapid Response to Natural Disasters of 2011. They were relevant to draft article 17, under which special rules of international law applicable in disaster situations had precedence if other rules conflicted with them, and to draft article 18, which presupposed that the rules of international law remained the governing rules during disaster situations (see A/CN.4/668 and Add.1). Thus, the general principles of international law mandating respect for the sovereignty, territorial integrity and political independence of affected States were to be given primacy. That was something that AALCO member States felt strongly should be the case, even when an affected State sought external assistance, something which, they contended, it was under no obligation to do.

9. With respect to the immunity of State officials from foreign criminal jurisdiction, AALCO member States had commented that the topic must be approached from the twofold perspective of *lex lata* and *lex ferenda* (law as it is and law as it ought to be). The topic should focus on the immunities accorded under international law, in particular customary international law, rather than under domestic law. With regard to draft article 2, one delegate had stated that criminal immunities granted in the context of diplomatic or consular relations, headquarters agreements or similar arrangements should be excluded from the scope of the topic, as they were settled areas of law. With regard to draft article 3, the view had been expressed that all State officials should enjoy immunity and that the word "certain" should be deleted. The point had been made that the case of officials like the President or Prime Minister, who acted as Head of State as well as of Government, should be addressed in draft article 4.<sup>182</sup>

10. The *Arrest Warrant of 11 April 2000* case had been cited in support of the view that immunity *ratione*

*personae* should be extended, not only to the troika of Head of State, Head of Government and Minister for Foreign Affairs, but also to other high-ranking officials, such as ministers of defence and ministers of trade. Caution must also be exercised, however: international law had not advanced to the point where the scope of immunity *ratione personae* could be understood to include the high-ranking officials he had just mentioned. AALCO recognized that times had changed and that international affairs were now conducted by a wide range of State officials. Therefore, close consideration should be given to the issue of extending immunity beyond the troika. For that purpose, the Commission would have to take account of a number of factors, such as current State practice in various parts of the world, judicial opinion expressed in domestic jurisdictions and the opinions of scholars.

11. In closing, he assured the Commission of his organization's continuing cooperation in its work.

12. Mr. KITTICHAISAREE said that there were two subjects to which AALCO might wish to give consideration: issues relating to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction; and, with regard to the immunity of State officials from foreign criminal jurisdiction, how to strike a balance between the concerns of States regarding national reconciliation and regional peace and the need to ensure that there was no impunity for persons responsible for serious crimes, in particular Heads of State and Heads of Government.

13. Mr. HASSOUNA commended AALCO on its contribution to supporting the work of the Commission. In that regard, he said that it would be useful if AALCO could suggest new topics for inclusion on the Commission's programme of work and encourage its member States to respond to the Commission's questionnaires seeking their opinions on the topics under consideration. As the workshop organized by AALCO in conjunction with the National University of Malaysia had been so beneficial for all participants, he urged the organization to undertake similar initiatives with other academic institutions.

14. Mr. MOHAMAD (Secretary-General of the Asian-African Legal Consultative Organization), responding to Mr. Kittichaisaree's comments, said that AALCO had already started discussing the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction, including during an annual workshop on the law of the sea, and would continue to give consideration to that matter, with the support of various experts. With regard to impunity for serious crimes, he said that there was a duty to ensure respect for international law in that regard and discussions would be held with member States on that matter.

15. In most Asian and African countries, there was little familiarity with the work of the International Law Commission, especially among university law students. For that reason, the AALCO Secretariat would welcome the opportunity for academics and practitioners to meet with Commission members in AALCO member States; regrettably, it did not have the resources to fund Commission members'

<sup>181</sup> *Yearbook ... 2013*, vol. II (Part Two), p. 55 (draft article 12).

<sup>182</sup> See *Yearbook ... 2013*, vol. II (Part One), document A/CN.4/661.

visits. The AALCO website<sup>183</sup> had a page devoted to the International Law Commission, and its Secretariat would continue to remind member States to provide feedback to the Commission on issues of interest to its work.

16. Regarding assistance to the Commission in identifying possible future topics for its programme of work, he said that AALCO planned to produce a study on cybersecurity, an issue that had not been addressed at the multilateral level, and would forward the results to the Commission. Another topic that AALCO considered worthy of the Commission's attention was international investment law.

17. Mr. MURPHY said that he appreciated the measures taken by AALCO to engage with the work of the Commission and volunteered to help in finding ways for Commission members to attend AALCO meetings. With regard to the immunity of State officials from foreign criminal jurisdiction, the Secretary-General seemed to be suggesting that the Commission should reconsider the question whether the persons who enjoyed immunity *ratione personae* should be limited to the troika or constitute a broader set of senior State officials. The African Union Summit had just approved a draft protocol which said that "any serving [African Union] Head of State or Government ... or other senior state officials" could not be the subject of charges before the African Court of Justice and Human and Peoples' Rights.<sup>184</sup> By referring to "other senior State officials", the African Union had implied its support for the notion that immunity *ratione personae* should apply to a broader set of officials than the troika. The draft protocol did not appear to provide for any exceptions to immunity, in relation to particular kinds of crimes, for example; instead, a broad-based immunity, at least in the context of that Court, seemed to be advocated. He asked whether the Secretary-General wished to share any reflections on the matter.

18. Mr. MOHAMAD (Secretary-General of the Asian–African Legal Consultative Organization) said that AALCO was not suggesting that the Commission should review its position on who should enjoy immunity from foreign criminal jurisdiction. There were divergent views among member States on whether such immunity should be afforded only to the troika, and the Secretariat would endeavour to keep the Commission informed of the prevailing position. It would also study the issue raised by the draft protocol concerning the African Court of Justice and Human and Peoples' Rights, and it would keep the Commission abreast of any developments in that regard.

19. Mr. TLADI said that he personally read the draft protocol as creating two specific regimes, one establishing immunity *ratione personae* for Heads of State and Heads of Government, but not for Ministers for Foreign Affairs, and a second, applying to other State officials and giving them immunity solely with respect to conduct in the exercise of their functions, in other words immunity *ratione materiae*. He did not support the expansive reading reportedly adopted by some AALCO members.

<sup>183</sup> www.aalco.int/ilcmatters.

<sup>184</sup> See article 46A *bis* of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights.

20. Ms. JACOBSSON asked whether the agenda of the next annual session of AALCO would include the new topics in the Commission's programme of work. As Special Rapporteur on the protection of the environment in relation to armed conflict, she would find it helpful to have the comments of AALCO member States on that new topic. While AALCO member States should by all means be encouraged to respond to the Commission's questionnaires concerning its reports, they might also consider addressing the more limited list of specific issues on which comments were of particular interest to the Commission that was included in its annual reports. Those issues could also be reflected on the AALCO website, to facilitate comments by AALCO member States.

21. Mr. HUANG said that AALCO deserved to receive more attention from the Commission, given the large number of member States it represented and the large share of the world population for which they accounted. The Asia and Pacific region had made enormous progress in terms of political, economic and social development, and its role in international legal affairs had become increasingly important. The comments and recommendations of AALCO member States concerning the topics on the Commission's agenda were a valuable reference. The Commission should strengthen its cooperation and exchanges with regional and international organizations on legal affairs, including AALCO, in joint efforts to promote the progressive development and codification of international law.

22. Mr. MOHAMAD (Secretary-General of the Asian–African Legal Consultative Organization) invited Commission members to attend the fifty-third annual session of AALCO, to be held in Tehran. Included in the agenda for that meeting were the four topics of the International Law Commission to which he had referred in his statement. Additional meeting time could easily be allocated if a special rapporteur from the Commission wished to participate in the meeting. In addition, meetings might be organized for Commission members to educate law school students and even governmental officials in various parts of Asia and Africa on the work of the International Law Commission.

23. Mr. EL-MURTADI SULEIMAN GOUIDER said that AALCO played a significant role in the legal affairs of a large group of Asian and African countries, and the input it provided to the Commission was therefore very valuable.

24. Mr. WAKO said that he found the reports produced by AALCO on its annual sessions to be very useful, and he hoped that AALCO would consider allowing the Commission access to them in a timely manner, thereby enabling the Commission to take better account of the organization's input.

25. Given that the identification of customary international law required an assessment of general practice and an acceptance of that practice as law, it was important for AALCO member States to respond to the relevant questionnaire. The issue of immunity, which was so closely related with that of impunity, was a topical and dynamic issue on which the Commission would also like to have

input from AALCO member States. He looked forward to closer cooperation with that organization.

26. Mr. MOHAMAD (Secretary-General of the Asian–African Legal Consultative Organization) said that the topic of subsequent agreements and subsequent practice in relation to the interpretation of treaties would not be removed from the programme of work of AALCO. The Secretariat would transmit to the Commission the outcome of AALCO member States’ deliberations on the topic of immunity of State officials from foreign criminal jurisdiction.

27. The CHAIRPERSON thanked the Secretary-General of AALCO for the valuable information he had provided on the work of his organization.

**Immunity of State officials from foreign criminal jurisdiction (continued) (A/CN.4/666, Part II, sect. B, A/CN.4/673, A/CN.4/L.850)**

[Agenda item 5]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (continued)

28. The CHAIRPERSON invited the Commission to resume its consideration of the third report of the Special Rapporteur on the topic of immunity of State officials from foreign criminal jurisdiction (A/CN.4/673).

29. Mr. TLADI said that the third report comprehensively traced the domestic jurisprudence, treaty practice and practice of the Commission on the topic and gave a general sense of the direction that the Special Rapporteur wished to take in future reports. Of the two draft articles she had proposed, he was largely in agreement with draft article 2 (e), but took issue with the substance of draft article 5.

30. The first two of the three important characteristics of immunity *ratione materiae* listed by the Special Rapporteur in paragraph 12 of her report provided the substance for the identification of that form of immunity. They were: that it was granted to all State officials; and that it was granted only with respect to acts that could be characterized as “acts performed in an official capacity”. Those two requirements, though related, were separate and independent; the former related to the actor—the “who”—while the latter was directed at the nature of the act—the “what”. In various places in the report, the Special Rapporteur seemed to conflate the two elements; nevertheless, it was important to clarify the conceptual distinction between the two.

31. In paragraph 34 of her third report, the Special Rapporteur quoted several cases, purportedly with the intent of distilling the requirements for the use of the term “official”. In several instances, the emphasis appeared to fall, not so much on the “who”, as on the “what”—on the fact that the acts under consideration were attributable to the State. Descriptions of acts “performed as part of his [or her] functions” or acts “under the control of the State” described not the official, but rather the nature of the act. Those were not, to borrow language from paragraph 18 of the third report, “identifying criteria” which provided

sufficient reason to conclude that a given person was an “official” for the purposes of the draft articles. Instead, they appeared to speak to the second requirement, since they seemed to be directed to the question whether the conduct of a particular individual could be characterized as “acts performed in an official capacity”.

32. The two phases of determining the applicability of immunity *ratione materiae* were implicit in the decision of the International Court of Justice in the case concerning *Certain Questions Of Mutual Assistance In Criminal Matters (Djibouti v. France)*. It was clear from the wording of paragraphs 35 and 194 of the judgment that the Court had accepted as a matter of fact that the *procureur de la République* and the Head of National Security were officials, and that it had devoted the most attention to the second element, namely the “what”, or the “act”. It had found that there had been no breach of immunity, because Djibouti had failed to claim “ownership” of the acts of those individuals. However, that judgment had linked the two elements, the “who” and the “what”, in a way that made them difficult to separate. Although the words “organs”, “agencies” and “instrumentalities” appeared to refer to the “who”, in the context of paragraph 196 of the judgment, they described the act. He therefore disagreed with the Special Rapporteur’s conclusion in paragraph 41 of her third report that in the Court’s decision the term “organ” referred to the “actor”.

33. Moreover, a closer reading of paragraphs 38 and 44 of the judgment of 29 October 1997 handed down by the Appeals Chamber of the International Tribunal for the Former Yugoslavia in *Prosecutor v. Blaškić* (cited in paragraphs 48 and 49 of the report) showed that the phrases “mere instruments of the State”, “instrumentalities of the State” or “acting on behalf of” a State were connected not, as the Special Rapporteur suggested, to the “who”, but to the “what”. That became especially clear in paragraph 51 of the judgment, where the Court envisaged a case when the State official (the first element) was not acting as an instrumentality of his or her State (the second element).

34. At various places in the report, the Special Rapporteur made much of the distinction, in both treaty law and court practice, between the troika and other officials. His own reservations concerning the treatment of the troika in the previous report<sup>185</sup> still stood.<sup>186</sup> While the Commission’s approach to immunity *ratione personae* necessitated the drawing of a distinction between the different rules applicable to immunity *ratione personae* and immunity *ratione materiae*, there was no clear need to distinguish between the troika and other officials for the purpose of defining “official”. The various conventions studied by the Special Rapporteur might be relevant, but they had their limitations, since they were concerned with specific categories of officials and hence were likely to reflect subsets of the “who” that the Commission intended to cover. It might be helpful to consider the definition of “public official” contained in the African Union Convention on Preventing and Combating Corruption, which was more concise than the one to be

<sup>185</sup> *Yearbook ... 2013*, vol. II (Part One), document A/CN.4/661.

<sup>186</sup> See *Yearbook ... 2013*, vol. I, 3164th meeting, pp. 21–22, paras. 20–27.

found in the United Nations Convention against Corruption, mentioned in paragraph 86.

35. As for the proposal to change the title of the topic to “immunity of State organs”, it appeared from the report that the main problem lay in the lack of an exact translation into French and Spanish of the English term “official”. However, the International Court of Justice seemed to have no difficulty in using *fonctionnaires* as the equivalent of “officials” in the context of the immunity of State officials. Moreover, irrespective of the term ultimately chosen, the very purpose of a clause on the use of terms was to resolve the types of inconsistencies pinpointed by the Special Rapporteur in her introductory remarks. Although the word “organ” would tie the type of immunity under consideration in more closely with the immunity of the State, he was concerned that the notion was understood to refer primarily to an entity and only supplementarily to a person. For that reason, the Special Rapporteur’s proposal in paragraph 141 of her third report to use the term “organ” to refer exclusively to persons would be at variance with its meaning and was likely to lead to some confusion.

36. Although he largely supported the definition of the term “official” proposed in draft article 2 (e), he questioned the need for an explicit reference to the troika, whose members, as officials, were certainly entitled to immunity *ratione materiae* for the official acts which they performed. In light of the three elements identified in subparagraph (ii), namely “acts on behalf of the State”, “represents the State” and “exercises ... governmental authority”, it was difficult to see how the troika could fail to be covered by the definition. He feared, however, that the phrase “acts on” might result in the conflation he had mentioned earlier. The Special Rapporteur should propose alternative drafting to make it plain that the definition of “official” centred on the person performing the act and not the act itself.

37. In draft article 5, the phrase “exercise governmental authority” would be superfluous if the current wording and positioning of draft article 2 were retained. If, as suggested in paragraph 148 of the third report, “governmental authority” included “legislative, judicial and executive prerogatives”, then the scope of the topic would be restricted, since officials employed by the State, in other words, persons linked permanently to the administrative bureaucracy, did not generally exercise such prerogatives. For that reason, he suggested replacing “governmental authority” with “public function”. Limiting the beneficiaries of immunity *ratione materiae* to those State officials who exercised governmental authority—a subset of State officials—would exclude a large section of State officials. While that would achieve the desirable objective of limiting the immunity of State officials to the greatest extent possible, he wondered if it was wise to protect the decision makers but not the poor souls who carried out the decisions and State policies. He agreed with Mr. Murphy that an indicative list of persons who might be covered by the term “official” would help the Commission to formulate an appropriate definition.

38. He was in favour of submitting the draft articles to the Drafting Committee.

39. Sir Michael WOOD said that he agreed with the main conclusion drawn by the Special Rapporteur in her third report, namely that the topic should cover all individuals acting on behalf of the State, regardless of their official position (if any), and that they might enjoy immunity *ratione materiae* with respect to certain acts. While it might be advisable to review the title of the topic, he disagreed with the suggestion that “official” be replaced with “organ”. If the focus was on acts with respect to which immunity might arise, rather than on the person, then it would be superfluous to define the category or categories of persons who enjoyed immunity. Persons might enjoy immunity when they acted on behalf of the State, whoever they were and whatever position they held: they did not need to be *fonctionnaires*/officials or civil servants, however those terms were defined in domestic law.

40. While in theory it might be possible to limit the scope of the topic to certain categories of persons, it would hardly be satisfactory to do so, because the Commission would then be dealing only with part of the question of immunity *ratione materiae* and would have to specify that its approach was without prejudice to the enjoyment of immunity *ratione materiae* by other persons. That step would be unnecessary if the Commission ensured that the scope of the topic covered all individuals who might enjoy immunity *ratione materiae*, in other words, all individuals who carried out acts on behalf of the State.

41. In her third report, the Special Rapporteur examined in some detail the possible alternatives to the term “State official”. Even if the latter term was retained, however, it was doubtful whether there was any need to define or delimit it. As indicated in paragraph 166 of the Secretariat memorandum,<sup>187</sup> there was wide doctrinal support for the proposition that immunity *ratione materiae* was enjoyed by State officials in general, irrespective of their position in the hierarchy of the State. The Special Rapporteur rightly stated, in paragraph 17 of her third report, that the term “official” in the title of the topic referred to all persons who might be covered by immunity, but she then wrongly concluded (para. 18) that the persons covered by immunity *ratione materiae* could only be determined by using “identifying criteria”. A better conclusion, foreshadowed in the report of the Commission to the General Assembly on the work of its sixty-fourth session,<sup>188</sup> was that instead of attempting to establish a list of officials for the purposes of immunity *ratione materiae*, attention should be given to the act itself: the “what”, not the “who”.

42. Of the various materials examined in chapter II, section B of the third report, the most interesting for present purposes were the articles on responsibility of States for internationally wrongful acts,<sup>189</sup> which carefully explained when acts, including the acts of

<sup>187</sup> Document A/CN.4/596 and Corr.1, mimeographed; available from the Commission’s website, documents of the sixtieth session (2008). The final text will be reproduced in an addendum to *Yearbook ... 2008*, vol. II (Part One).

<sup>188</sup> See *Yearbook ... 2012*, vol. II (Part Two), p. 63, para. 119.

<sup>189</sup> General Assembly resolution 56/83 of 12 December 2001, annex. See the draft articles on responsibility of States for internationally wrongful acts adopted by the Commission at its fifty-third session and the commentaries thereto in *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 26 *et seq.*, paras. 76–77.

individuals, were attributable to the State. They might provide a useful indication of which acts might be subject to immunity *ratione materiae*, although they would have to be examined carefully before transposing the attribution tests wholesale to the field of immunity *ratione materiae*. The conclusion drawn in paragraph 38 of the report was consistent with the fact that what mattered was not so much who the person was, but rather which acts were involved.

43. The only decision of an international court of any potential relevance to the identification of persons who enjoyed immunity was that delivered by the Appeals Chamber of the International Tribunal for the Former Yugoslavia in *Prosecutor v. Blaškić*. However, it was concerned, not with immunity from criminal jurisdiction, but with immunity from the execution of a subpoena for the production of State papers. The *Arrest Warrant of 11 April 2000* case had been concerned with the position of a Minister for Foreign Affairs and referred only to persons enjoying immunity *ratione personae*. The passages cited from the case concerning *Certain Questions of Mutual Assistance in Criminal Matters* dealt with the nature of the acts performed by individuals, not with the question whether those individuals were “officials” for the purposes of immunity *ratione materiae*. None of the cases heard by the European Court of Human Rights and cited in the third report shed light on the meaning of “official”. It was also unclear how the special regime under the Vienna Convention on Diplomatic Relations assisted in identifying the meaning of “State official” for other purposes. The same was true of all the other conventions discussed and of the “other work of the Commission” examined in chapter II, section B of the report.

44. The Special Rapporteur was right to conclude that all officials, all persons who acted on behalf of the State, could enjoy immunity *ratione materiae* from foreign criminal jurisdiction. Whether they did depended on their acts or omissions, not on their position or relationship to the State. However, her emphasis on two separate criteria, a “relationship with the State” and “acting on behalf of the State”, was hard to understand. The first was subsumed in the second: it was sufficient to show that the acts in question had been done on behalf of the State.

45. While to a degree he shared the Special Rapporteur’s wish to review the title of the topic, the alternatives that she suggested, particularly the word “organ”, did not work. “Organ of a State” would be an unusual way to refer to an individual official. It might therefore be better to retain “official” and its equivalent in other languages.

46. Turning to the two draft articles proposed in the third report, he said that if a definition like the one put forward in draft article 2 (e) was required, although he did not believe that it was, then subparagraph (ii) would have to be greatly simplified, as it contained qualifications or restrictions of dubious relevance. The inclusion of the words “and represents the State or exercises elements of governmental authority, whether the person exercises legislative, executive or judicial functions, whatever position the person holds in the organization of the State”, might unduly restrict the circle of persons who enjoyed immunity *ratione materiae*. He therefore suggested that

draft article 2 (e) simply read “(ii) any other person who acts on behalf of the State”.

47. The phrase in draft article 5, “who exercise governmental authority”, seemed to confuse the persons who might potentially enjoy immunity *ratione materiae* with the acts with respect to which immunity was enjoyed. He was unconvinced that draft article 5 should be adopted at the current stage of deliberations, but even if it were to be adopted, it should be modelled on draft article 3 and should read “State officials enjoy immunity *ratione materiae* from the exercise of foreign criminal jurisdiction”.

48. Lastly, he drew attention to some imperfections in the English translation of the report, where terminological corrections made the previous year had been ignored.

49. He was in favour of referring the two draft articles to the Drafting Committee.

#### Organization of the work of the session (continued)\*

[Agenda item 1]

50. The CHAIRPERSON explained that, in the absence of Mr. McRae, Mr. Forteau had offered to chair the Study Group on the most-favoured-nation clause. Mr. McRae had sent a voluminous draft report for the Study Group’s consideration and finalization. If he heard no objection, he would take it that the Commission wished to reconstitute the Study Group.

*It was so decided.*

51. Mr. FORTEAU said that the other members of the Study Group were Mr. Caffisch, Ms. Escobar Hernández, Mr. Hmoud, Mr. Kamto, Mr. Murase, Mr. Murphy, Mr. Park, Mr. Singh, Mr. Šturma, Mr. Vázquez-Bermúdez, Sir Michael Wood and, *ex officio*, Mr. Tladi.

*The meeting rose at 12.55 p.m.*

### 3219th MEETING

*Wednesday, 9 July 2014, at 10.05 a.m.*

*Chairperson:* Mr. Kirill GEVORGIAN

*Present:* Mr. Caffisch, Mr. Candioti, Mr. Comisário Afonso, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Mr. Huang, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrić, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

\* Resumed from the 3216th meeting.