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**Summary record of the 3272nd meeting**

Topic:  
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but the meaning ascribed to them. Her fourth report provided clarification for developing a single interpretation of that phrase, which could be decided on following discussion in the Drafting Committee. If necessary, the terminology could be revisited upon adoption of the text on first or second reading on the basis of comments from Member States.

32. With regard to a working definition of the term “immunity”, she recalled that she had proposed a draft article 3 (Definitions) in her second report<sup>248</sup> that included working definitions for several terms, including immunity. Although the Commission had decided to deal with those definitions at a later stage, she would be happy to revisit the term in a plenary meeting or in the Drafting Committee, and she would welcome any contributions that Commission members might wish to make in that regard.

33. The term *funcionario del Estado* and its translations had been the subject of intense debate in the plenary Commission and the Drafting Committee. Unless the Commission decided otherwise, she did not think the time was right to reopen the debate. In her fourth report, she had touched on the phenomenon of “*de facto* officials”, which the Commission could debate more fully.

34. Mr. CANDIOTI said that the Commission’s progress on the topic could be held back if the three fundamental terms to which he had referred were not clear and did not convey the same meaning to all. Not knowing whether the term “State official” included only government staff or also mercenaries and contractors was problematic, for example. Furthermore, he had doubts about the advisability of relying on a precedent set by the highly debated and unfortunate judgment of the International Court of Justice in the *Arrest Warrant of 11 April 2000* case in order to define the concept of acts performed in an official capacity.

*The meeting rose at 11.20 a.m.*

## 3272nd MEETING

*Tuesday, 21 July 2015, at 10.05 a.m.*

*Chairperson:* Mr. Narinder SINGH

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

## Statement by the United Nations High Commissioner for Human Rights

1. The CHAIRPERSON welcomed the United Nations High Commissioner for Human Rights and invited him to address the Commission.

2. Mr. AL HUSSEIN (United Nations High Commissioner for Human Rights) said that it was an honour for him to address the Commission, whose work over the past six decades had succeeded in laying down strong fundamental rules of international law. The rules of international law were at the core of the activities of the Office of the High Commissioner for Human Rights (OHCHR), which followed the Commission’s work with deep interest.

3. Among the many important topics currently under consideration by the Commission, two stood out from a human rights perspective, namely immunity of State officials from foreign criminal jurisdiction and the drafting of a convention on crimes against humanity. On both topics, the Commission had been called upon to establish rules of law that would have an immense impact on the human rights of millions of people around the world. Combating impunity and strengthening accountability and the rule of law were two of the major challenges facing OHCHR; the Commission’s progress on those topics was thus of major importance for its work.

4. With regard to crimes against humanity, he recalled that the prohibition of such crimes formed part of those peremptory norms that were clearly accepted and recognized by the international community. The non-derogable nature of the obligations at the source of the prohibition of such crimes had been recognized by the Human Rights Committee in its general comment No. 29.<sup>249</sup> However, in the course of their work, OHCHR staff were constantly confronted with the fact that such abominable crimes were a daily reality in many countries in the world. The Commission’s work on drafting an international convention on crimes against humanity was therefore highly significant. The proposed instrument could contribute considerably to preventing such crimes and increasing the efficiency of responses to them. The first four draft articles of the proposed convention, which had been provisionally adopted by the Commission in the first part of its current session, were very promising, and OHCHR looked forward to the Commission’s further work on that crucial topic.

5. Noting that draft articles 2 and 4 of the draft articles on crimes against humanity set out the obligation of States to prevent crimes against humanity, he said that one of the priorities of his Office was to assist States in complying with their obligation to prevent human rights violations, in particular gross violations that might amount to crimes against humanity. OHCHR had repeatedly emphasized that the prevention of such violations required sustained efforts by States to ensure respect for human rights and the rule of law and thus eliminate risk factors. That called for an effective and human-rights-compliant

<sup>248</sup> *Ibid.*, vol. II (Part One), document A/CN.4/661.

<sup>249</sup> Human Rights Committee, general comment No. 29 on article 4 of the International Covenant on Civil and Political Rights on derogations from provisions of the Covenant during a state of emergency, *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 40 (A/56/40 (vol. I)), annex VI.*

legal, administrative and policy framework, legitimate and accountable democratic institutions, equal participation of all in the conduct of public affairs and a diverse ecosystem of strong civil society actors and independent media. He was therefore pleased to note that draft article 4 referred to States' obligation to cooperate with "other organizations", including civil society organizations, in their efforts to prevent crimes against humanity.

6. A convention on crimes against humanity could also contribute to increasing the efficiency of national and international responses to such crimes and to improving accountability, another priority for OHCHR. More States should explicitly criminalize crimes against humanity; a convention could contribute to that by encouraging them to harmonize their national legislation with international norms and standards.

7. As the Commission continued its work on the project, he would welcome its consideration of the possibility of including an explicit obligation on States to prosecute or extradite (*aut dedere aut judicare*) alleged perpetrators of crimes against humanity who were present within their jurisdiction—an obligation arising from the peremptory nature of the prohibition of crimes against humanity and the resulting importance of inter-State cooperation for the investigation of crimes against humanity and the prosecution and punishment of the perpetrators of such crimes. There were also other related obligations—such as the non-applicability of statutes of limitation and of any immunities, including for Heads of State—that must be fulfilled by States, in time of peace and war, and that could not be derogated from during a state of emergency.

8. Turning to the immunity of State officials from foreign criminal jurisdiction, he said that it was a crucial consideration in any discussion of accountability for human rights violations. He recalled that the International Military Tribunal and the International Military Tribunal for the Far East had decisively overturned the notion that State officials might be immune from prosecution. That position had been described as a tectonic shift in the international legal order, breaking through the veil of sovereignty so that criminals serving as State officials could no longer hide behind their functions to escape justice. In subsequent decades, the principle had been reaffirmed in the statutes of the International Tribunal for the Former Yugoslavia and of the International Tribunal for Rwanda and in the Rome Statute of the International Criminal Court, as well as by the Special Court for Sierra Leone. However, that powerful and well-established principle continued to be contested. The debate stemmed in part from the case concerning the *Arrest Warrant of 11 April 2000*, in which the International Court of Justice had found that the issue by Belgium of an arrest warrant against Abdulaye Yerodia Ndombasi had failed to respect the immunity from criminal jurisdiction and the inviolability that he enjoyed under international law as the incumbent Minister for Foreign Affairs of the Democratic Republic of the Congo.

9. However, it was important to recall that the Court had also emphasized that the immunity enjoyed by certain senior State officials did not mean that they enjoyed impunity with respect to any crimes they might have

committed, irrespective of their gravity. The Court had also ruled that "[w]hile jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law. Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility" (para. 60 of the judgment).

10. It should not be forgotten that such cases often involved the commission of terrible crimes and that, in such circumstances, immunity clearly meant impunity. In order to break the culture of impunity that fed so many human rights violations, it was crucial that prosecutions of the perpetrators of such crimes be allowed to proceed. Preventing the prosecution of such individuals would, conversely, not only constitute a profound affront to victims but also, in effect, empty of their meaning vital areas of international human rights law.

11. It was therefore crucial that, in its work on the topic, the Commission set clear limits to the immunity of State officials, in two ways. First, it should be clearly established that any immunity was personal and ceased when the person left office, since immunity resulted solely from the need to allow diplomatic relations to function effectively. Recognizing functional immunity for the perpetrators of international crimes would inadvertently signal that such crimes could be legitimate acts of State. That would be contrary to all the human rights obligations of States and, further, would undermine the very system of international law. Second, the categories of individuals who benefited from that limited personal immunity must be as restricted as possible; in other words, immunity should apply only to the officials covered by article 7, paragraph 2 (*a*), of the 1969 Vienna Convention, under the conditions laid down in article 38, paragraph 2, of the 1961 Vienna Convention on Diplomatic Relations.

12. Since it was the first visit by a United Nations High Commissioner for Human Rights to the Commission, he wished to provide a quick introduction to the activities of his Office in order to give an overview of some areas where there were points of connection between its work and that of the Commission. Most relevant to the work of the Commission was the Office's support for the international human rights mechanisms, including for their work in relation to the development of new instruments and their guidance on fundamental aspects of human rights law. OHCHR performed secretariat functions for the United Nations human rights treaty bodies, which were the pillars of the international human rights system. There were now 10 committees of independent experts, which played an important role in establishing human rights norms and giving concrete meaning to individual rights and State obligations. They monitored, questioned and guided compliance with human rights treaties; eight of them also received individual complaints from persons who had sought, in vain, to obtain remedies in national courts. The committees greatly contributed to the development of international human rights law—not only through their jurisprudence, made up of their decisions on many individual cases, but also through their very important general comments.

13. In 2014, for instance, in its general comment No. 35 on article 9 of the International Covenant on Civil and

Political Rights,<sup>250</sup> the Human Rights Committee had codified its work on that issue over the previous three decades to give government officials, legal practitioners, human rights monitors and civil society a full understanding of when and how the Committee considered it justified to deprive a person of their liberty, as well as the nature of States' obligations to prevent unlawful or arbitrary detention. Furthermore, the Committee had recently held a half day of general discussion to prepare a new general comment on article 6 on the right to life.

14. The 55 special procedures mandates of the Human Rights Council, which were similarly supported by OHCHR, also represented a wealth of expertise and contributed important guidance. Recent examples included the Basic Principles and Guidelines on Remedies and Procedures on the Right of Persons Deprived of Their Liberty to Bring Proceedings Before a Court,<sup>251</sup> which had been developed by the Working Group on Arbitrary Detention and would be presented to the Human Rights Council at its thirtieth session in September 2015; a handbook on realizing the human rights to water and sanitation,<sup>252</sup> developed by the Special Rapporteur on the human right to safe drinking water and sanitation; and the Basic principles on the right to an effective remedy for victims of trafficking in persons,<sup>253</sup> drafted by the Special Rapporteur on trafficking in persons, especially women and children.

15. The special procedures mandate holders frequently raised emerging human rights issues. For example, they had recently drawn attention to the use of drones in lethal extraterritorial counter-terrorism operations, the use of remotely piloted aircraft or armed drones, mass digital surveillance for counter-terrorism purposes and the implementation of the right to social security through the universal adoption of social protection floors. They also played a key role in early warning and assessing crises and other situations requiring urgent intervention.

16. In addition, when allegations of massive and complex human rights violations required an urgent full-scale investigation, the Human Rights Council, like the Security Council, often mandated OHCHR to establish commissions of inquiry or fact-finding missions to investigate serious violations of international human rights law and international humanitarian law and to draw up recommendations aimed at promoting accountability for such violations, including by recommending the referral of the case to the International Criminal Court. Several recently established commissions of inquiry and fact-finding missions had identified violations that were strongly suggestive of international crimes.

17. OHCHR also acted as the secretariat for the Human Rights Council, which held three ordinary sessions every year, in addition to special sessions that could be called at any time. In preparing for the Council's discussions, OHCHR produced thematic reports, such as the groundbreaking recent work on data surveillance and the rights of lesbian, gay, bisexual and transgender persons and the

report on the role of prevention in the promotion and protection of human rights, which would be discussed by the Council in September and was of particular relevance to the Commission's work.

18. In its work with the Human Rights Council, OHCHR provided support for the smooth running of the universal periodic review, under which each of the 193 United Nations Member States was required to submit a detailed report on the human rights situation in its territory every four years. Two universal periodic review cycles had already taken place, and there had been detailed follow-up of hundreds of recommendations—many of them made in the light of the work of the treaty bodies and special procedures mandate holders, as well as expert guidance from civil society actors. The universal periodic review also provided OHCHR with the opportunity to present proposals for capacity-building to improve States' performance on specific issues.

19. OHCHR, which was also tasked with ensuring that human rights norms were useful, living concepts that enabled victims to obtain justice and protected the rights of all, had 64 field presences, whose staff spent a significant portion of their time on providing training to government officials, members of the police and security forces and members of civil society groups. Their primary aim was to translate human rights into practical measures to ensure, for example, that no one was tortured during questioning, that public gatherings were managed without excessive use of force and that minorities could have their voices heard and participate fully in the life of the nation.

20. In the longer term, OHCHR worked to strengthen the laws and institutions that should protect rights, including courts, parliaments, regional councils, schools and community groups. It sought to empower human rights defenders and civil society activists of all kinds, including activists for minority rights, so that they could confront prejudice effectively and with confidence. And, of course, OHCHR monitored and reported on the reality of human rights on the ground, advocating, where necessary, for improvements.

21. The work of OHCHR at United Nations Headquarters in New York was focused primarily on ensuring that its concerns were heard throughout the United Nations system. To that end, it facilitated the implementation of the Secretary-General's new Human Rights Up Front initiative by fully informing and advising all relevant actors. The policy, which was based on the knowledge that violations of human rights constituted the clearest early warning signs of instability and violence, sought to ensure that the prevention of human rights violations was a core priority for every United Nations actor. In his view, such a policy must be grounded in work to identify early signs of violations. Alongside the OHCHR field presences, the human rights mechanisms it supported collected a wealth of information on human rights issues, including on gaps in human rights protection, the risks of violations and the patterns, scale and nature of such violations. When analysed, coordinated and channelled, that information guided the development of strategies and responses in partnership with States and helped the United Nations to decide on the best course of action.

<sup>250</sup> Human Rights Committee, general comment No. 35 (2014) on article 9 (Liberty and security of person), CCPR/C/GC/35.

<sup>251</sup> A/HRC/30/37, annex.

<sup>252</sup> A/HRC/27/55/Add.3.

<sup>253</sup> A/HRC/26/18, annex.

22. Although the activities of OHCHR were very diverse, there was a logic to them: they were all aimed at bringing about active change. Acting in accordance with the laws that the Commission helped to write, OHCHR sought to ensure compliance by detecting gaps in human rights protection, advocating for better protection of those rights and establishing programmes to help State and civil society actors develop the capacity to provide that protection.

23. However, he did wonder about the effectiveness of all those measures, which was the crux of the matter. To what extent could OHCHR, in all honesty, claim that its work served to ward off human rights violations and save lives? It counted the death toll of massacres, trained key officials, boosted the skills of activists working for land rights, women's rights and many more, sought to restrain vicious attacks on minorities and advocated changes to laws and institutions to make them more responsive, more accountable and fairer. But was it having an impact?

24. As OHCHR had been established barely more than 20 years previously, perhaps it was not possible to measure social change over such a short period. Or perhaps the work of incorporating human rights into the social fabric—with an emphasis on the rule of law, non-discrimination and inclusion, access to effective judicial or other institutions and participatory democratic governance—was necessarily a never-ending task. In any case, it was certainly the most inspirational and meaningful work possible, and as OHCHR sought to advance human rights in every region of the world, it was glad to be able to count on the work of the Commission, which was so fundamental to maintaining peace, security and the rule of law.

25. Mr. HASSOUNA, recalling that Mr. Al Hussein had played a key role in the establishment of the International Criminal Court and had participated in the drafting of many of the provisions of the Rome Statute of the International Criminal Court, asked him how he viewed the role of the Court and the way in which it tried the crimes under its jurisdiction, particularly crimes against humanity.

26. Drawing attention to the proliferation of armed conflicts that resulted in grave violations of international humanitarian law and international human rights law, he asked the High Commissioner to share his views on how the United Nations could effectively combat the phenomenon. In addition to the measures he had already mentioned, were there any new methods or new mechanisms that could be introduced, possibly at the regional level?

27. Mr. KITTICHAISAREE said that he had had the honour of working with Mr. Al Hussein on the drafting of article 9 of the Rome Statute of the International Criminal Court on elements of crimes and that, at the time, he himself had been hopeful that the establishment of the Court would put an end to impunity. However, the Court had tried only a few cases, most of which had not involved senior officials. He therefore believed that the Rome Statute of the International Criminal Court had not resulted in the introduction of real deterrent or punitive measures. He asked Mr. Al Hussein what changes he believed could be made to reform the international criminal justice system and improve its effectiveness. The High Commissioner was particularly well placed to make

the high hopes shared by all those who had participated in the drafting of the Rome Statute of the International Criminal Court a reality.

28. Mr. MURPHY, noting with satisfaction that OHCHR supported the Commission's work on crimes against humanity, particularly the drafting of a new convention, asked what impact such a convention might have on the treaty body system. The convention might lead to the establishment of a new committee charged with monitoring its implementation, which would raise the issue of resources, as well as overlapping competences, as, in accordance with their mandates, other committees already had competence to consider situations involving the commission of crimes against humanity. Other possibilities would be to draft the convention in such a way that the existing committees would be responsible for monitoring its implementation, or to simply recognize that the existing committees could, in certain situations, rely on other instruments in the course of their work. He would be interested to hear the High Commissioner's views on the matter.

29. Mr. AL HUSSEIN (United Nations High Commissioner for Human Rights), responding to the question on the effectiveness of the International Criminal Court in combating impunity and its deterrent role in relation to crimes against humanity, said that he intended to pursue the prudent approach he had adopted since the entry into force of the Rome Statute of the International Criminal Court. In his view, the feeling of entering a new era that had been expressed by some people at the time had been overly optimistic. Like a number of his colleagues, he had always been aware that the profound societal change they were hoping to bring about through legislation would take at least a generation—the transition period required to move from a universal culture of impunity to a culture based on the observance of international humanitarian law, the Rome Statute of the International Criminal Court and human rights, from which impunity would have been eradicated. He was also conscious that the change process would not be linear and that there would be alternating phases of progress and regression, but that there would be greater public support for change as people witnessed through the media the crimes committed in different regions in the world. Strengthened cooperation of States with the Court was thus only a matter of time. He recalled, in that regard, that he had publicly expressed regret before the Human Rights Council that the Government of South Africa had not waited for the Pretoria High Court's judgment on the merits of the case before authorizing the President of the Sudan to leave South Africa following the African Union summit held there in mid-June 2015. That would have been an opportunity to send a strong signal to the perpetrators of grave international crimes of their obligation to answer for their acts and might have prevented the outbreak of violence currently being experienced in Burundi, which had been building for some time.

30. Regarding efforts to combat violations of human rights and humanitarian law at the regional level, Burundi was again an example, as the African Union and the East African Community had sent human rights monitors to the country. From the perspective of his Office, such measures by regional organizations were all the more

useful because they helped identify and evaluate early signs of alarming developments. In the case of Burundi, it had been noted that some houses had been systematically marked, seeming to suggest that those families had been identified as targets for militias. While he remained cautious, he was nonetheless hopeful that the provisions negotiated prior to the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on the basis of the Commission's draft would ultimately achieve their objectives and he had no doubt that in several decades the current period of transition, marked by a degree of regression, would be forgotten.

31. The possibility of establishing a system to monitor the implementation of a convention on crimes against humanity should be considered in the light of the existing treaty bodies, as the conventions for which they were already responsible covered some of the offences provided for in the first versions of the draft proposed by the Special Rapporteur. However, as the treaty bodies were independent, it was difficult to answer the question without consulting them. Consultations would therefore need to be organized, but it could already be said, with all due caution, that it would indeed be advisable to avoid duplication of work, especially given the limited resources available to the treaty body system.

32. Mr. WAKO, expressing the hope that the High Commissioner's visit would become an annual event, said that cooperation between the Commission and OHCHR should take the form of mutually beneficial ongoing exchanges. He would be interested to hear about the opinion of OHCHR on the role of the International Criminal Court in relation to crimes against humanity and the immunity of State officials from foreign criminal jurisdiction, particularly in the light of the provision of the Rome Statute of the International Criminal Court that appeared to rule out immunity, even for Heads of State, as well as its views on interaction between those elements. With regard to the treaty bodies, he agreed that the question was whether it would be better to create new bodies or whether it might be preferable to ensure the effectiveness of the existing bodies. It was true that matters appeared to be regressing, and it was questionable whether the existence of an additional committee responsible for monitoring the implementation of a convention on crimes against humanity would have had an impact on what had happened in South Africa and Burundi. Furthermore, it was vital to avoid duplication of work and any possible competition between the convention and the International Criminal Court; perhaps the High Commissioner could make some suggestions as to how that could be achieved in the area of crimes against humanity. When discussing human rights, it was important not only to focus on Governments and the executive power, but also to take into consideration the role of national parliaments, which generally had committees to monitor human rights issues, whose activities should be supported. In that regard, he wished to know how OHCHR could help national parliaments play a more concrete role in creating a culture based on combating impunity.

33. Mr. VÁZQUEZ-BERMÚDEZ asked what had been the main challenge the High Commissioner had faced

during his first year in office. In 2014, the Human Rights Council had decided to set up an open-ended working group to draft a legally binding international instrument on human rights and transnational corporations and other business enterprises,<sup>254</sup> although it had already adopted in 2011<sup>255</sup> a set of guiding principles on business and human rights.<sup>256</sup> He would be interested to know the position of OHCHR on the steps made by the Council to developing international law in that area.

34. Mr. NIEHAUS recalled the continued commitment of Costa Rica to the promotion of human rights, as demonstrated by, for example, the fact that the seat of the Inter-American Court of Human Rights was located in that country, and said that he would welcome further information on the links between OHCHR and regional organizations, particularly that Court, as the promotion of human rights at the international level involved strengthening cooperation with such bodies.

35. Mr. AL HUSSEIN (United Nations High Commissioner for Human Rights) recalled that article 27 of the Rome Statute of the International Criminal Court was inspired by the Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal<sup>257</sup> and the trials in the International Military Tribunal for the Far East, and expressed the hope that the Commission would adopt the most restrictive view of functional immunity, because a system designed to rid humanity of the worst excesses of organized violence directed against groups of people could obviously not be dependent, for the purposes of investigation and prosecution, on legal channels that could be closed off on the grounds that the alleged perpetrators of the crimes in question were State officials who enjoyed immunity. While the work of the International Criminal Court had shown that it would take time for political actors to become aware of how the law had developed, OHCHR, through its field presences, its work with NGOs representing groups of victims and its commissions of inquiry, was too close to the victims not to be eager to see the many criminals who had so far escaped justice finally held to account for their appalling crimes, and, of course, it called for greater cooperation by States parties with the International Criminal Court. As the current prosecutor of the Court and her predecessor had said, it was important always to be on the side of the victims. The Court and the human rights mechanisms had not been designed to protect the powerful, who did not need them, but rather to protect the weakest and most vulnerable in society from abuse and violations of all kinds. The debates on those issues must therefore be focused on victims and not on the highest authorities of the State, who often found some way to protect themselves from accusations or credible evidence that was regarded by the international community as establishing their involvement in the commission of crimes against humanity.

<sup>254</sup> Human Rights Council resolution 26/9 of 26 June 2014, para. 1.

<sup>255</sup> Human Rights Council resolution 17/4 of 16 June 2011, para. 1.

<sup>256</sup> Human Rights Council, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, HR/PUB/11/04, 2011.

<sup>257</sup> The text of the Principles is reproduced in *Yearbook ... 1950*, vol. II, document A/1316, pp. 374–378, paras. 97–127.

36. The issue of an emerging unhealthy competition among the treaty bodies was very relevant and a constant dialogue between the Commission and OHCHR would certainly be useful, provided it was kept in mind that the committees were independent and that OHCHR had to exercise its role as intermediary with caution.

37. With regard to the work undertaken by a group of States with a view to drafting a binding instrument on human rights and transnational corporations, it was important that the existing guiding principles not be compromised by the ongoing negotiations and that work be pursued under both tracks, which were not to be seen as being mutually exclusive.

38. Concerning activities at the regional level, OHCHR sought to coordinate its efforts with those of the regional commissions and followed with interest the decisions of the regional courts, which performed very important work, even though positions had emerged in certain regions that had prompted his Office to react. While it was true that Governments did not always comply with the decisions of regional courts, that did not prevent them from appreciating the fact that such courts did exist. For its part, OHCHR took such decisions into consideration in the positions it expressed during bilateral meetings with the Governments of the States concerned.

39. There was deep anxiety among the general public about the state of the world and the violations of international law, humanitarian law and international human rights law that went unpunished: that was why the work of the Commission, the Sixth Committee, the General Assembly, the Security Council and the Human Rights Council was so important.

40. Ms. ESCOBAR HERNÁNDEZ thanked the High Commissioner for sharing his views, particularly his reference to how the Commission's work contributed to maintaining the rule of law. She fully agreed with the idea that seemed to underlie the High Commissioner's comments, namely that there was a set of common values and principles shared by the international community and all the bodies and institutions working in the United Nations system that must systematically be taken into account by all the actors in the system so as not to undermine their respective work. As Special Rapporteur on the topic "Immunity of State officials from foreign criminal jurisdiction", she had listened with great interest to the High Commissioner's views concerning the restrictions that should be applied to ensure that such immunity was not a factor that contributed to impunity. She wondered whether OHCHR considered that there was effective cooperation between international courts and national courts in combating impunity for the most serious international crimes, or whether, on the contrary, such courts operated according to different rules that prevented them from taking coordinated action. She also wished to know whether, during their investigation and monitoring activities, the monitoring bodies to which OHCHR provided technical assistance, be they treaty bodies or special procedures, had faced difficulties as a result of States invoking rules on immunity.

41. Mr. SABOIA expressed the hope that the High Commissioner's visit would mark the beginning of

fruitful cooperation between OHCHR and the Commission, and said that, although the previous speakers had drawn ample attention to the shortcomings of the International Criminal Court, they had said little about the lack of cooperation by States. However, in the absence of such cooperation, the International Criminal Court was not in a position to fulfil its mission. Moreover, the States that had created the Court had undertaken to cooperate with it. He was of the view that, if a convention on crimes against humanity were to come into being, it would have to provide for a treaty body to monitor its implementation, on the understanding that due account should be taken of problems of resources and duplication of work.

42. Mr. PETRIČ said that human rights had been at the centre of the upheaval that had taken place in the aftermath of the Second World War, when humanity had realized that human beings and their dignity must be at the heart of its concerns if people were to live in peace and prosperity, and that the establishment of the International Criminal Court had represented a new turning point in that process. He had greatly appreciated the High Commissioner's comments concerning impunity and the need for the law to protect the weakest in society; he would add that the fight against impunity should become the rule and not the exception, as should the suppression of the most despicable crimes. He also wished to draw the High Commissioner's attention to the issue of collective rights—the rights of minorities and the right to self-determination—and asked how the Human Rights Council addressed them in its work. In conclusion, he invited OHCHR to propose topics that it considered of particular interest for future study by the Commission.

43. Mr. AL HUSSEIN (United Nations High Commissioner for Human Rights) said that he agreed with Mr. Wako about the importance of cooperation with national parliaments. OHCHR currently cooperated actively with the delegations of the Inter-Parliamentary Union and intended to forge links with the parliamentary human rights committees with which it had not yet established contacts. With regard to the relationship between international courts and national courts, he did not believe that the fact that they operated differently was necessarily an obstacle to the establishment of effective cooperation between them, especially as they were both pursuing the same aims. Contrary to the common wisdom that publicly commenting on the failings of States could be counterproductive because it prompted the States in question to refuse to communicate and cooperate, he had noted since he had taken office that States were, on the contrary, open to criticism, even if they disliked it, and eager to engage in dialogue. That was reflected in the largest-ever participation of delegations in the March 2015 session of the Human Rights Council, even though uncompromising reports condemning violations committed by many States had been due to be considered. There was therefore no need to shy away from being critical and strict with States when it came to their failure to comply with their international obligations, because that was a path to real substantive dialogue, as the members of the Commission had no doubt also observed from the reaction of States to their work.

44. The general lack of cooperation by States with the International Criminal Court was deeply regrettable and must be remedied. If the twenty-first century was not to

become the setting for deadly violence that could have been prevented, States must be made to understand that they needed to do more in that area. Given the very strong opinions within OHCHR as to the appropriateness of establishing a body to monitor implementation of the future convention on crimes against humanity, he would rather not comment further on the issue until there had been an in-depth discussion on the matter. It was true that collective rights did not receive the attention they deserved in the area of human rights, but they were not alone in that: the same was also true of economic, social and cultural rights, for example. How was it, for example, that every year 6 million young children died from preventable causes amidst widespread indifference, yet if ISIL were to kill the same number every year, it would become an absolute priority for the international community? With regard to future topics for the Commission that might be of particular interest to OHCHR in its work, he could certainly make some proposals to the Commission after consultation with his colleagues, particularly the Special Procedures Branch.

45. Mr. PARK asked whether the Human Rights Committee was considering ways of encouraging States to implement its views on individual communications submitted under the Optional Protocol to the International Covenant on Civil and Political Rights, as certain States paid them no regard, as shown by the example of the Republic of Korea, which continued to criminalize conscientious objection to military service on religious grounds despite the Committee's recommendations.

46. Mr. HMOUD said that cooperation between OHCHR and the Commission could only be beneficial for their respective work and he welcomed the High Commissioner's willingness to forge closer ties between the two bodies. He also welcomed the leading role played by OHCHR in the promotion and protection of human rights by issuing strong reminders to States that were not fulfilling their obligations in that field, but he wondered what courses of action were open to it in the event of grave and systematic violations committed by non-State actors. He also wished to know whether the existing remedies available before regional and international bodies provided victims of violations with sufficient useful remedies to assert their rights or whether it might be necessary to consider introducing other mechanisms for that purpose.

47. Mr. TLADI said that he was optimistic about the future of international criminal justice, provided that the limitations placed on the framework for its application were respected. He disputed the link established by the High Commissioner between the fact that the President of the Sudan had been able to leave South Africa and recent events in Burundi. He also considered that, as the investigation into the circumstances surrounding the President's departure was still ongoing, it would be preferable not to draw any conclusions as to the role of the Government of South Africa in the matter, which, moreover, raised extremely complex legal issues. It was interesting to note that the High Court order barring the President from leaving the country did not require his arrest or call into question the immunity he enjoyed in his capacity as Head of State. Therefore, it was not clear how the South African authorities could have prevented

the President from leaving the country without violating his immunity. The High Commissioner had rightly stressed the importance of States cooperating with the International Criminal Court. However, in order to guarantee such cooperation, it would also be necessary, in cases referred to the Prosecutor of the Court by the Security Council acting under Chapter VII of the Charter of the United Nations, for the Security Council in the corresponding resolution not merely to call on all States concerned to cooperate fully with the Court, but to set out an express obligation in that regard, which might read: "The Security Council decides that all States concerned shall cooperate fully ...". That would prevent a State from invoking obligations relating to immunity to escape its obligation to cooperate with the Court.

48. Mr. AL HUSSEIN (United Nations High Commissioner for Human Rights) said that he and the special procedures mandate holders could help promote the implementation by States of the views adopted by the treaty bodies on individual communications in the context of their country visits, which provided the opportunity to engage in discussions with various representatives of authorities as well as civil society on human-rights-related issues, including communications. For example, he had raised the issue of conscientious objectors during his visit to the Republic of Korea. It was difficult to measure the impact of such action, but OHCHR was convinced of the importance of passing on concerns expressed by the treaty bodies and other actors in the human rights protection system to the parties concerned. The position of OHCHR with respect to non-State actors was very clear: if they exercised effective control over a territory, they were subject to the obligation not to commit human rights violations, particularly towards the people living in the territory. With regard to the case of the President of the Sudan, OHCHR would, of course, wait until the ongoing proceedings were completed before drawing any definitive conclusions. As to the events in Burundi, he recalled that many observers had anticipated the violence that had broken out in the country in recent weeks and had tried to prevent it by interceding with the President, but without success. If South Africa had held the President of the Sudan in the country until the High Court had made its final judgment, the message that would have been sent might have encouraged the Government of Burundi to take a stronger stance against the pro-Government Imbonerakure militia, who were currently wreaking havoc with impunity; that might have prevented the outbreak of violence in recent months, which, there was every reason to believe, would last for some time.

**Immunity of State officials from foreign criminal jurisdiction (*continued*)** (A/CN.4/678, Part II, sect. D, A/CN.4/686, A/CN.4/L.865)

[Agenda item 3]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

49. The CHAIRPERSON invited the members of the Commission to resume their consideration of the Special Rapporteur's fourth report on immunity of State officials from foreign criminal jurisdiction (A/CN.4/686).



50. Mr. TLADI said that, although the Special Rapporteur's fourth report presented a full picture of the elements to be taken into consideration in determining which acts should qualify as an "act performed in an official capacity" as well as the scope of immunity *ratione materiae*, it did have a methodological flaw, namely the assertion, in paragraph 32, that "national law is irrelevant for the purposes of this discussion". From the context, it appeared that "national law" referred in that instance to national legislation, yet, in the course of its work on the identification of customary international law, the Commission had made it very clear that national legislation was an important element of State practice. In South Africa, for example, the rules relating to immunities were set out in the Diplomatic Immunities and Privileges Act, which did not deal only with diplomatic immunities. Immunity *ratione personae*, which applied only to Heads of State, was provided for in article 4, paragraph 1, of that Act, which referred expressly to customary international law, while other provisions of the Act dealt with immunity *ratione materiae*. How could such provisions not be relevant to the Commission's work on the topic? The exclusion of national legislation was all the more curious since, in her fourth report, the Special Rapporteur considered domestic case law, which very often applied the very domestic legislation that was said to be irrelevant. With regard to case law, he was of the view that the examples given were very unbalanced in favour of the case law of the United States of America and, to a lesser extent, certain European cases. The decisions considered were no doubt good decisions, but it should be possible to find others. Domestic legislation was therefore relevant. That said, however, the research that had gone into preparing the report was of a high quality and the Special Rapporteur was to be commended on her work. The very clear connection between the analysis and the draft articles proposed was also worthy of note. Nonetheless, he did not agree with some of the substantive conclusions contained in the fourth report.

51. Since the Special Rapporteur's preliminary report,<sup>258</sup> there had been a constant flirtation with the main issue—exceptions—but it had never been directly addressed. The same was true in the report under consideration: very often, the Special Rapporteur's analysis led the reader in the direction of the main issue, but then she stated that it was a matter to be taken up the following year. The clearest, but by no means the only, example of that tendency could be found in paragraph 126, in which the Special Rapporteur stated that "the characterization of international crimes as 'acts performed in an official capacity' does not mean that a State official can automatically benefit from immunity *ratione materiae*" but then quickly reversed course to declare that "an analysis of the effects of international crimes in respect of immunity could be explored more fully in the context of exceptions", which would be addressed in the fifth report. Of course, many of the members of the Commission were looking forward to that report on exceptions.

52. He did not have any great difficulties with respect to the temporal and material scope of immunity *ratione materiae*. Draft article 6 and the portion of the report on which it was based were correct. With regard

to paragraph 3 of that article, the Special Rapporteur had proposed a text with similar underlying objectives to draft article 2, subparagraph (e), which she had proposed the year before, namely that Heads of State, Heads of Government and Ministers for Foreign Affairs were State officials for the purposes of immunity *ratione materiae* and thus enjoyed immunity *ratione materiae* after their tenure in office. The Commission had decided not to refer to the members of the troika in subparagraph (e) because it was considered to go without saying that they were State officials for the purposes of immunities. Paragraph 3 of draft article 6 appeared to have the same aim—to put beyond doubt that after the end of their tenure in office, the members of the troika enjoyed immunity *ratione materiae*. In his view, paragraph 3 was not necessary, for the same reason that including a specific reference to the troika in the definition of the term "State officials" was not necessary. Paragraph 3 did not add anything to what was already provided for in the draft articles. That aspect was covered in draft article 4, paragraph 3, and the commentary thereto.<sup>259</sup> He believed that the matter should be taken up in the commentaries.

53. He had some difficulties with regard to draft article 2, subparagraph (f), and the part of the fourth report on which it was based. In paragraph 22 of the report, the Special Rapporteur stated that the Commission had not taken up the idea that "the only relevant consideration in determining the applicability of immunity *ratione materiae*" was whether an act had been performed in an official capacity, and that whether the individual was an official was not relevant. However, the Commission's conclusion on that point was unsatisfactorily ambiguous, and the Commission would probably have to revisit it at a later stage.

54. He agreed with the Special Rapporteur that "an act performed in an official capacity" should be seen in contrast to "an act performed in a private capacity". With respect to terminology, he also shared the Special Rapporteur's view, expressed in paragraph 29, that the "act of State" doctrine was completely separate from the concept of the jurisdictional immunity of the State and should not be confused with it.

55. His difficulties began with paragraph 31 of the fourth report. The Special Rapporteur first stated that the distinction between an "act performed in an official capacity" and an "act performed in a private capacity" had "no relation whatsoever to the distinction between lawful and unlawful acts", which was correct, but she added that "[o]n the contrary, when used in the context of immunity of State officials from foreign criminal jurisdiction ... [both categories are] considered, by definition, to be criminally unlawful". The notion that an "act performed in an official capacity" was, by definition, unlawful—which meant that in order to determine whether an act had been performed in an official capacity and consequently whether immunity applied to such an act, it was necessary to show its unlawfulness—was a theme running throughout the fourth report. More specifically, the "criminal nature of the act" as an element of an "act performed in an official capacity" was discussed in detail in paragraphs 96 to 110. In those paragraphs, much of the

<sup>258</sup> Yearbook ... 2012, vol. II (Part One), document A/CN.4/654.

<sup>259</sup> Yearbook ... 2013, vol. II Part Two), pp. 47 et seq.

Special Rapporteur's analysis related to the "single act, dual responsibility" idea, which found expression in the Commission's previous work, including the draft code of crimes against the peace and security of mankind<sup>260</sup> and the draft articles on the responsibility of States for internationally wrongful acts.<sup>261</sup> The fourth report also referred to the 2007 judgment of the International Court of Justice in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, and one could also refer to article 25, paragraph 4, of the Rome Statute of the International Criminal Court, which also reflected the idea. "Single act, dual responsibility" was thus well established in international law, but it was not clear how it followed that an "act performed in an official capacity" was necessarily criminal in nature.

56. In paragraphs 102 to 109, the Special Rapporteur considered whether the immunity of State officials was the same as the immunity of the State and seemed to be of the view, as he was himself, that, while the former derived from the latter, they were not the same. But again, he did not understand the jump from that otherwise correct proposition to the proposition that an official act, or an act performed in an official capacity, must be criminal in nature. If the intention was to emphasize the fact that the project was concerned with immunity from criminal jurisdiction, that should be a matter for the scope and had been adequately captured. It was one thing to say that the project covered only immunity from criminal jurisdiction, but quite another to say that acts performed in an official capacity were criminal in nature. The latter proposition did not have any basis in case law, customary international law or treaty law. It was not based on State practice either and, as far as he could tell from the fourth report, it did not find support in the literature.

57. In addition to the fact that the notion had no basis in law, it served to confuse the question of jurisdiction, and immunity therefrom, and that of criminal responsibility, although the International Court of Justice had, in paragraph 60 of its judgment in the *Arrest Warrant of 11 April 2000* case, emphasized that a distinction should be made between the two. If the Special Rapporteur's approach were followed, a State official accused in criminal proceedings would have to admit to having committed a crime before being able to benefit from immunity.

58. The primary problem with the approach adopted in the fourth report was the Special Rapporteur's search for specific acts that qualified for immunity. However, it was not the nature of the act that was the determining factor, but rather the capacity in which it had been performed. Take the example of murder, which was criminalized in all jurisdictions: if a State official killed a person and another State wished to lay charges of murder against that official, whether the latter was covered by immunity *ratione materiae* depended not on whether the act was criminalized, but on whether it had been committed in the exercise of an official function. If, for example, the official caused a

person's death during a brawl in a bar, immunity did not apply because the act had not occurred in the performance of official functions. If, however, the victim had been killed while the official was performing security functions for his Government, immunity did apply. The variable was not the nature of the act but whether official functions were being performed.

59. The Special Rapporteur's pursuit of acts that constituted "State functions" and thus benefited from immunity led her to conclude, for example, that crimes against humanity and other international crimes were official acts. However, in a non-international conflict, crimes against humanity committed by rebel groups could not be considered official acts but they still constituted crimes against humanity. To use an example referred to in the fourth report, a State official who moonlighted as a mob enforcer for purposes unrelated to his function as a State official could commit acts of torture that could not be regarded as official acts.

60. That observation about international crimes was independent of the question of whether exceptions to immunity should be recognized for those crimes. In his view, it should be asked in each given case whether the State official was acting in the performance of official functions, as it was not possible to generalize, and say that, in all cases, certain acts should be deemed official acts or not.

61. As several members had noted, trying to identify what constituted an official act without addressing the question of exceptions could produce unsatisfactory results. The Special Rapporteur's argument that crimes against humanity were necessarily official acts required deeper analysis than that given in the fourth report. The full implications of the *Arrest Warrant of 11 April 2000* judgment should be taken into account, for example. That case involved crimes against humanity, yet the Court's judgment could be read as suggesting that once the person enjoying immunity *ratione personae* was no longer in office he or she could be prosecuted, or at least it left open an avenue for prosecution. How was that position to be reconciled with the proposition that, as it was an official act, immunity should continue to apply after the person's term of office had ended, as provided for in draft article 6, paragraph 3? Those were important questions that should be examined carefully.

62. In conclusion, he said that draft article 6, including paragraph 3, should be sent to the Drafting Committee, as should draft article 2, subparagraph (f), on the understanding that this provision would be redrafted to remove the requirement that the act should constitute a criminal act and that the Commission would not adopt commentaries that would prejudice the discussion about exceptions to immunity in relation to international crimes.

63. Mr. MURPHY said, by way of a general comment, that the report under consideration was primarily focused on the definition of an "act performed in an official capacity" and that the analysis of that issue relied heavily on cases relating to the exercise of civil jurisdiction, even though the topic concerned immunity from criminal jurisdiction. In that respect, the methodology used in the fourth report was the same as that used in the third report, which

<sup>260</sup> *Yearbook ... 1996*, vol. II (Part Two), pp. 17 *et seq.*, para. 50.

<sup>261</sup> The draft articles adopted by the Commission and commentaries thereto are reproduced in *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 26 *et seq.*, paras. 76–77. See also General Assembly resolution 56/83 of 12 December 2001, annex.

viewed practice in civil proceedings as relevant “when it comes to identifying persons whom States deem to be covered by some form of immunity from jurisdiction”.<sup>262</sup> The same logic was being used in the current report, on the assumption that it made no difference whether civil or criminal jurisdiction was being exercised when determining what constituted an “official act”. While that was probably true, it should be kept in mind that for a given act or transaction, it was possible that, within a particular national system, immunity would differ depending on whether the case was against a foreign sovereign, against a person in a civil context or against a person in a criminal context. As such, the Commission should be careful in its use of the case law and keep a close eye on the context in which immunity was being granted or denied. It went without saying that he supported the inclusion of references to the case law of the United States of America.

64. With regard to draft article 2, subparagraph (f), which contained a definition of the expression “act performed in an official capacity”, the fourth report analysed three characteristics considered important for the purposes of that definition: first, the act must be attributable to the State; second, it must be criminal in nature; and third, it must be “a manifestation of sovereignty, constituting a form of exercise of elements of the governmental authority”. The first characteristic, concerning attribution, was not included in the definition, and it appeared that the Special Rapporteur had correctly decided that attribution of the act to the State was not a helpful characteristic when determining what constituted an official act.

65. According to the second characteristic, in order to be an official act, the conduct must by its nature constitute a crime. In his view, that argument was problematic, as it led to an absurd outcome, namely defining all acts performed in an official capacity as crimes.

66. Furthermore, at the point when immunity was being granted or denied, it was not known whether the act in question was criminal. Take the following imaginary situation: the Government of the United States of America established a school in a country where it had a significant diplomatic, consular, military and economic presence and where the children of employees of the United States Government needed instruction in English. The school was owned and funded by the United States Government. One of the teachers at the school, in a class on civics, criticized the Prime Minister of the host country for failing to allow equal opportunities for girls to receive an education. Having heard about the teacher’s statement, a local prosecutor decided to charge the teacher with the crime of criticizing the Government and wished to arrest him. Did the teacher enjoy immunity? In determining whether his criticism constituted an “act performed in an official capacity”, it did not seem useful to ask whether the act was, by its nature, criminal. It was not known whether the act was a crime and it would be known only at a later point in the proceedings, when the judge or jury made a decision. All that could be done at the outset was to consider whether the person in question was a State official and whether he had been representing the State or exercising State functions when he had criticized the Prime Minister, in which case he might

be entitled to immunity. Consequently, he was of the view that the second portion of the draft definition should be deleted, so as to eliminate the idea that an “act performed in an official capacity” must be criminal in nature.

67. As for the third element, the definition proposed using the formulation “act performed by a State official exercising elements of the governmental authority”. In his view, the word “elements” was unclear, and the word “governmental” seemed to evade the question. In other words, the definition did not indicate what constituted “governmental authority” and did not clarify anything. It would be better to refer to an “act performed by a State official when representing the State or when exercising State functions”, which would be more in line with the definition of the term “State official” in draft article 2, subparagraph (e). Indeed, when the Commission had adopted that definition, it had deliberately avoided the expression “elements of the governmental authority”,<sup>263</sup> and he therefore did not understand why the Special Rapporteur was attempting to reintroduce it in the subparagraph under consideration. If a definition was considered necessary, draft article 2 (f) should read:

“An ‘act performed in an official capacity’ means an act performed by a State official when representing the State or when exercising State functions.”

68. With regard to draft article 6 on the scope of immunity *ratione materiae*, the analysis of that provision in the fourth report was brief, consisting of just a few paragraphs. Although he was in general agreement with the substance of the draft article, he wished to make a few comments about the way it was drafted.

69. Draft article 6, paragraph 1, provided that State officials enjoyed immunity *ratione materiae* “while they are in office and after their term of office has ended”. While references to being “in office” and to a “term of office” might work well in Spanish and the other languages, those words had a narrower meaning in English and generally applied only to senior officials and sometimes only to elected officials. Thus, it would be normal to refer to the “term of office” of the Secretary of Transportation of the United States of America, but not to the “term of office” of lower-level officials, such as members of the Secretary’s security detail. Although the words “office” and “term of office” were used in draft article 4, they referred there to a specific group of high-level officials—the members of the troika. Clarifications could be provided in the commentary, but he would rather find wording for the English version of the text that did not have such a narrow connotation. For example, the latter part of draft article 6, paragraph 1, might read: “while they are representing the State or exercising State functions, and thereafter”. A similar change could be made to paragraph 2 of the draft article.

70. Turning to draft article 6, paragraph 3, he said that, in his view, the word “former” was not correct in that instance, as it suggested that immunity *ratione materiae* did not apply to the members of the troika while they were in office. However, they did enjoy such immunity because they were “State officials” and, as such, fell within the scope of draft article 6, paragraph 1. It was not sufficient

<sup>262</sup> *Yearbook ... 2014*, vol. II (Part One), document A/CN.4/673, p. 87, para. 29.

<sup>263</sup> *Ibid.*, vol. II (Part Two) and corrigendum, p. 145, para. (11) of the commentary to draft article 2.

to say that the members of the troika did not need such immunity because they benefited from immunity *ratione personae*. Immunity *ratione personae* was in some respects more powerful than immunity *ratione materiae*, as the latter served as a complete defence to a criminal charge or civil complaint while the person remained in office, as it resulted in the dismissal of the action and not just its temporary suspension. He therefore proposed that the three references to the word “former” in paragraph 3 be deleted, or, if Mr. Tladi’s observation that paragraph 3 was not necessary was taken up, that the paragraph be deleted and the matter addressed in the commentary.

71. Chapter II of the fourth report, on the future work-plan, indicated that the fifth report would address the issue of limits and exceptions to immunity from criminal jurisdiction and that the sixth report would consider issues of a procedural nature. He would encourage the Special Rapporteur to address both the issue of exceptions and procedural issues in her fifth report, as the two were obviously connected. For example, it was probably generally accepted that waiver by the State resulted in an exception to immunity. Yet there were important procedural issues associated with waiver, such as whether the waiver must be express or could be implicit, and who was authorized to issue the waiver. No doubt those were complex issues, but the Commission had the benefit of the excellent prior reports by Mr. Kolodkin<sup>264</sup> and the Secretariat’s memorandum.<sup>265</sup>

72. In writing her next report, the Special Rapporteur would no doubt take account of the views expressed and information provided by States. At the sixty-ninth session of the General Assembly, 38 States had spoken on the topic of immunity of State officials from foreign criminal jurisdiction in the Sixth Committee, and 8 of them had mentioned the issue of exceptions. For example, Cuba had urged a cautious approach, stating that the Commission “should seek to codify existing rules of international law and avoid the dangerous inclusion in customary law of exceptions to immunity”.<sup>266</sup> Thailand had asserted that “there should be no exceptions to the immunity of a Head of State”.<sup>267</sup> The United States of America had stated that “waiver might be the only exception for immunity *ratione personae*”.<sup>268</sup> China had indicated that “although the international community had identified genocide, ethnic cleansing and crimes against humanity as serious international crimes, it had not developed rules of customary international law relating to disregard for the immunity of State officials in such crimes”.<sup>269</sup> The United Kingdom of Great Britain and Northern Ireland had stated that, with respect to immunity *ratione personae*, “the current

state of international law required a highly restrictive approach” and had stressed the “importance of analysing relevant State practice and case law with great care”.<sup>270</sup>

73. In addition to the comments made in the Sixth Committee, about 10 States had also made written submissions to the Commission. Many of them were very interesting and merited close attention, as they revealed considerable nuances. For example, the Netherlands had asserted that there were no exceptions to immunity *ratione personae* in international law, declaring that: “Personal immunity is absolute, under the prevailing views of international law, since in this respect good relations between States and international stability take precedence over securing punishment for international crimes.”<sup>271</sup> Furthermore, it had asserted that, even if State officials were alleged to have committed a serious international crime, they continued to enjoy immunity pursuant to any treaty in force in the Netherlands, as did participants in official missions on the basis of customary international law. At the same time, other State officials charged with serious crimes might not enjoy immunity *ratione materiae*. Specifically, the Netherlands had maintained that “there is a marked trend towards giving prosecution for international crimes precedence over functional immunity”, and that this trend “is strong but not yet fully settled”.<sup>272</sup> Consequently, the Netherlands had noted that “[t]he functional immunity that those concerned enjoy after they have left office will probably not constitute an obstacle to the exercise of jurisdiction by a Dutch court, if a reasonable suspicion exists that they have committed international crimes. Any final decision on this point must be made by the courts”.<sup>273</sup>

74. Similarly, Poland had indicated that immunity *ratione personae* was absolute. With respect to immunity *ratione materiae*, it had indicated that: “When it comes to exceptions based on customary law, the only clearly established exception is waiver of immunity by the State on behalf of which an official is acting. There is no doubt that a tendency to exclude the immunity *ratione materiae* in case of committing international crimes, such as genocide, crimes against humanity, war crimes, torture, enjoys increasing support. It is based on the belief that the perpetrators of the most serious international crimes cannot go unpunished. ... However, currently, the exemption referred to herein cannot be considered to be based on a well-established norm of international customary law. The works of the [International Law Commission] clearly note the existing differences of opinion and practice of States. The case law of national courts is not uniform, and the [International Court of Justice] is temperate.”<sup>274</sup>

75. The responses being provided by Governments to the Commission were thus very interesting, not only with

<sup>264</sup> *Yearbook ... 2008*, vol. II (Part One), document A/CN.4/601 (preliminary report); *Yearbook ... 2010*, vol. II (Part One), document A/CN.4/631 (second report); and *Yearbook ... 2011*, vol. II (Part One), document A/CN.4/646 (third report).

<sup>265</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>266</sup> *Official Records of the General Assembly, Sixty-ninth Session, Sixth Committee*, 23rd meeting (A/C.6/69/SR.23), para. 80.

<sup>267</sup> *Ibid.*, 24th meeting (A/C.6/69/SR.24), para. 58.

<sup>268</sup> *Ibid.*, para. 67.

<sup>269</sup> *Ibid.*, 23rd meeting (A/C.6/69/SR.23), para. 53.

<sup>270</sup> *Ibid.*, para. 36.

<sup>271</sup> Observations by the Netherlands, p. 2, mimeographed; available from the Commission’s website, on the page of the Analytical Guide dedicated to the immunity of State officials from foreign criminal jurisdiction, under *Comments by Governments*.

<sup>272</sup> *Ibid.*, p. 3.

<sup>273</sup> *Ibid.*

<sup>274</sup> Observations by Poland, pp. 13–14, mimeographed; available from the Commission’s website, on the page of the Analytical Guide dedicated to the immunity of State officials from foreign criminal jurisdiction, under *Comments by Governments*.

respect to their own national practice, but also to their opinions on the state of international law. The Special Rapporteur would no doubt wish to take into account such statements in preparing her next report.

*The meeting rose at 12.55 p.m.*

### 3273rd MEETING

*Tuesday, 21 July 2015, at 3.05 p.m.*

*Chairperson:* Mr. Narinder SINGH

*Present:* Mr. Caflisch, Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Mr. Hmoud, Mr. Kamto, Mr. Kittichaisaree, Mr. Kolodkin, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

#### **Immunity of State officials from foreign criminal jurisdiction (*continued*) (A/CN.4/678, Part II, sect. D, A/CN.4/686, A/CN.4/L.865)**

[Agenda item 3]

#### **FOURTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)**

1. Mr. PARK said that the late translation of reports in the current session had created problems. Although the Commission members had received the Spanish version of the Special Rapporteur's fourth report on the immunity of State officials from foreign criminal jurisdiction (A/CN.4/686) on 18 June 2015, he did not read Spanish and had had to wait until July for the English or French version to be distributed. He would like to be given sufficient time the following year to read the Special Rapporteur's report and reflect on it, particularly since the fifth report would address the highly politically sensitive issue of limits and exceptions to immunity.

2. Turning to the substance of the Special Rapporteur's fourth report, he said that the methodological approach followed was generally appropriate in view of the purpose of the report; however, it would be helpful if the Special Rapporteur could clarify her position regarding the value of domestic legislation for identifying an "act performed in an official capacity". While she stated, in paragraph 32 of her fourth report, that "domestic legislation should not be a determining factor in defining the scope and meaning of the expression", she had perhaps underestimated the importance of such legislation, bearing in mind that, as she herself pointed out in paragraph 49, it was national courts, working on the basis of domestic law, that decided cases relating to the immunity of State officials from foreign criminal jurisdiction.

3. In paragraph 21 of her fourth report, the Special Rapporteur laid out three conditions for immunity *ratione materiae*: the individual could be considered a State official; as such, the individual performed an act in an official capacity; and the act was carried out during the individual's term of office. She thereafter devoted much effort to determining the criteria for identifying an "act performed in an official capacity". The most difficult aspect of such a study was likely to be the examination and categorization of State practice. Moreover, there was limited international judicial practice that directly addressed immunity *ratione materiae*, particularly with regard to the meaning of an "act performed in an official capacity", although some elements of international case law were indirectly relevant to the question. Furthermore, as shown in paragraphs 50 to 58 of the fourth report, national judicial practice was not uniform. Such difficulties were likely to hinder the identification of an "act performed in an official capacity".

4. He shared the concerns of other Commission members that the Special Rapporteur, in paragraph 95 of her fourth report, concluded that for the purposes of the topic, one of the characteristics of an "act performed in an official capacity" was the criminal nature of that act. In so doing, she seemed to suggest that the "act performed in an official capacity" in question was necessarily an unlawful act, which was contrary to the principle of the presumption of innocence.

5. With regard to the issue of attribution of the act to the State, the crux of the matter was to determine whether there was a link between the State and the act of its official that would make it possible to characterize the act as an act performed in an official capacity. He agreed with the Special Rapporteur's approach, based on the rules of attribution of conduct to a State contained in the draft articles on the responsibility of States for internationally wrongful acts.<sup>275</sup> However, he had several questions about her statement in paragraph 112 that the criteria of attribution set out in articles 7, 8, 9, 10 and 11 of the draft articles were unsuitable for purposes of the immunity of State officials.

6. First of all, with respect to *ultra vires* acts, discussed in article 7 (Excess of authority or contravention of instructions) of the draft articles on the responsibility of States for internationally wrongful acts, in the first part of paragraph 113 of the report the Special Rapporteur seemed to suggest that *ultra vires* acts included acts performed by officials for their own benefit. On the other hand, in paragraph 55 of her report, by referring to acts which exceeded the limits of official functions, or functions of the State, she appeared to be adhering to the same sense of an *ultra vires* act to be found in article 7 of the draft articles on the responsibility of States for internationally wrongful acts. One might question whether all acts performed in a private capacity could be regarded as *ultra vires* acts. In that regard, the Special Rapporteur should clarify the scope of *ultra vires* acts relative to that of article 7 of the draft articles on the responsibility of States for internationally wrongful acts.

<sup>275</sup> The draft articles adopted by the Commission and commentaries thereto are reproduced in *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 26 *et seq.*, paras. 76–77. See also General Assembly resolution 56/83 of 12 December 2001, annex.