Document:-
A/CN.4/3273

Summary record of the 3273rd meeting

Topic:
Immunity of State officials from foreign criminal jurisdiction

Extract from the Yearbook of the International Law Commission:-
2015, **vol. I**

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.[275] 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.

[275] 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.

7. Second, concerning *de facto* officials, it should be recalled that, at the Commission's sixty-sixth session, the majority of Commission members had considered that the link between the individual and the State should not be interpreted so broadly as to cover all *de facto* officials. The Special Rapporteur stated in paragraph 112 of her fourth report that the criteria set out in article 8 (Conduct directed or controlled by a State) and article 9 (Conduct carried out in the absence or default of the official authorities) of the draft articles on the responsibility of States for internationally wrongful acts were unsuitable for the purposes of immunity; furthermore, she indicated in paragraph 114 that the concept of a State official was defined more accurately by excluding those individuals who were usually regarded as *de facto* officials. Yet a careful reading of paragraph 114 suggested that the Special Rapporteur did in fact accept the immunity of some *de facto* officials, since she cited the conclusion reached by the International Court of Justice in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* that direct control was the criterion for deciding whether an act committed by an individual in the absence of an official link with the State should be attributed to that State. Based on the Court's decision, the Special Rapporteur acknowledged that the acts of individuals under the direct control of the State were attributable to the State even if the individuals in question were not *de jure* officials.

8. Consequently, there was an apparent contradiction between paragraphs 112 and 114 of the Special Rapporteur's fourth report. It appeared that her argument in paragraph 112 was based on a broad concept of *de facto* officials, which included both individuals acting under the direct control of the State and those simply acting at the instigation and under instructions of the State; presumably it was for that reason that she deemed articles 8 and 9 of the draft articles on the responsibility of States for internationally wrongful acts to be unsuitable for the purposes of immunity. But, in fact, articles 8 and 9 of the draft articles on the responsibility of States for internationally wrongful acts were based on a restrictive concept of *de facto* officials, since individuals acting at the instigation or under instructions of the State were not always considered to be *de facto* officials in the context of those two articles, as the Commission's commentary to article 8 explained. The Special Rapporteur should therefore clarify her position with regard to *de facto* officials. It would also be useful to know whether she had particular reasons for preferring the term "direct control", reflecting the language of the judgment, rather than the term "effective control" used in the commentary to article 8 of the draft articles on the responsibility of States for internationally wrongful acts.

9. With regard to draft article 2 (*f*) proposed by the Special Rapporteur, he would first like to suggest replacing the words "a crime" with the words "an act" in order to avoid a presumption of criminality, which ran counter to the principle of the presumption of innocence. Second, he proposed replacing the expression "exercising elements of the governmental authority" with "exercising State functions", since the Commission had previously chosen to use the term "State functions" rather than various other suggested terms. Third, he proposed replacing the expression "forum State" by the plural "forum States", since several States might seek to exercise their criminal jurisdiction with respect to a given State official, as in the *Pinochet* case.

10. The content of the proposed draft article 6, paragraph 3, was covered by paragraph 1 of the same draft article and appeared to be self-evident. Its only purpose was to highlight the fact that immunity *ratione materiae* applied to former Heads of State, former Heads of Government and former Ministers for Foreign Affairs.

11. With regard to the future programme of work, he recalled that the topic could be approached from two perspectives. While some Commission members considered that the purpose of immunity was to ensure respect for State sovereignty, others argued that the protection of the values of the international community should be taken into account in applying the immunity regime. If the topic was approached from the first perspective, it went without saying that immunity must be accorded; however, from the second perspective, limitations on immunity could be justified in the event that a given act undermined the values of the international community. That divergence of perspectives would be evident in the Commission's consideration of the issue of limits and exceptions to immunity at its next session; the stance taken by the Special Rapporteur in preparing her fifth report would have a significant impact, particularly given the paucity and inconsistency of relevant practice. The Commission should therefore reflect on what it should do in order to achieve a satisfactory outcome. Maintaining a balance between *lex lata* and *lex ferenda* in its future work would be essential.

12. He agreed that both proposed draft articles should be submitted to the Drafting Committee.

13. Mr. NOLTE said he agreed with the Special Rapporteur that the distinction between immunity *ratione personae* and immunity *ratione materiae* was important, but that such a distinction did not mean that the two categories of immunity did not have elements in common, especially with respect to the functional dimension of immunity in a broad sense. One of those elements in common was respect for the principle of sovereign equality of States, embodied in the maxim *par in parem non habet imperium*, which the Special Rapporteur called the "teleological criterion". That criterion not only applied to immunity *ratione materiae*, it was the foundation on which all forms of State-related immunity rested. That was not a minor point in terms of the question posed in paragraph 103 of the fourth report, namely, which came first: State immunity as a consequence of functional immunity, or functional immunity as a corollary of State immunity. For the purpose of existing law, the answer to that question was that a State could waive the immunity of a State official, but not vice versa. Moreover, while the distinction between civil and criminal immunity must be taken into account, both forms of immunity derived from common ground.

14. A completely different distinction, which needed to be stressed, was that between international and national law on immunity. When the Supreme Court of the United States ruled in *Samantar v. Yousuf, et al.* that a State official could not be deemed to be included in the

concept of a "foreign State", it was interpreting domestic legislation, namely the Foreign Sovereign Immunities Act, but that Act did not necessarily make or purport to make a statement regarding the customary rules of international law on immunity.

15. Regarding the structure of the fourth report, he said that while he was impressed by the wealth of material that the Special Rapporteur had assimilated, he wondered why national legislative and executive practice of States was largely missing. He would also have expected that international judicial practice and the Commission's previous practice should come first in the analysis of the materials.

16. He did not share the view that it was possible to distinguish clearly between the concept of "State official", as defined in draft article 2 (*e*)[276] by the expression "who exercises State functions", and the concept of an "act performed in an official capacity". Nevertheless, he did endorse the distinction between an "act performed in an official capacity" and an "act performed in a private capacity" and the view that the distinction between them bore no relation whatsoever to the distinction between lawful and unlawful acts.

17. However, like other members, he did not understand the Special Rapporteur's reasoning for the proposition that both official and private acts must be considered, by definition, to be criminally unlawful, for several reasons. First, such a proposition would be tantamount to saying that State officials always committed crimes when they acted in an official capacity. Second, when a person accused of a crime was brought to court, the latter must first establish whether it had jurisdiction. Only thereafter would the court proceed to determine, on the basis of a presumption of innocence, whether a crime had been committed; as a result of those proceedings the accused person might well be acquitted because the acts in question were not found to be criminally unlawful. Third, and most importantly, the whole point of international law on immunity was that a national court must establish, on the basis of neutral criteria, whether a particular official or act came within its jurisdiction. If the lawfulness or unlawfulness of the act was a relevant criterion for establishing jurisdiction or State immunity, including the immunity of public officials *ratione personae* or *ratione materiae*, that entire body of law would be superfluous. Mr. Park's suggestion to replace the word "crime" with "act" in the proposed draft article 2 (*f*) would not provide a solution, since acts performed in an official capacity were still not necessarily acts "in respect of which the forum State could exercise its criminal jurisdiction".

18. He was not convinced by the Special Rapporteur's explanation in paragraphs 96 to 110 of her fourth report of the alleged criminal nature of an act performed in an official capacity. Although it might be true that any criminal act was characterized by its highly personal nature, such acts were only a small fraction of all conceivable acts performed in an official capacity. Moreover, the fact that an act performed in an official capacity could also be a criminal act committed by that official as an individual did not affect the official nature of the act. For that reason, he did not agree with the Special Rapporteur's statement in paragraph 97 of her fourth report that "any criminal act covered by immunity *ratione materiae* is not, strictly speaking, an act of the State itself, but an act of the individual by whom it was committed". In his view, such an act could be both an act of the State, attributable to it, and an act attributable to the individual. The decisive issue was whether the act, as an act performed by the individual in an official capacity, gave rise to immunity *ratione materiae*. He did not dispute the statement quoted in paragraph 99 of the fourth report that "the question of individual responsibility is in principle distinct from the principle of State responsibility", but it did not resolve the decisive question of the relationship between the two forms of responsibility and of their relationship to the international rules on immunity.

19. He endorsed the Special Rapporteur's position that the fact that a particular act might be an international crime did not exclude the possibility that it might also be an act performed in an official capacity; the same was true for acts alleged to be *ultra vires*. Cases of corruption fell into another category, because they could be characterized not by their illegality but by their ostensibly private character or motivation. For those very reasons, however, he proposed that draft article 2 (*f*), as currently worded, be deleted. His conclusion as to why the Special Rapporteur had made what he deemed the incorrect assertion in the draft article that an act performed in an official capacity by its nature constituted a crime was that she had conflated the question of what constituted an act performed in an official capacity with the much more general question of over which acts a State could exercise criminal jurisdiction.

20. In paragraph 32 of her fourth report, the Special Rapporteur stated that national law was "irrelevant for the purpose of determining whether an act was performed in an official capacity, given the significant differences that [might] exist between the legislation of different States". He agreed with her in the sense that States were not entirely free to determine which acts their officials performed in an official capacity and which in a private capacity. Otherwise States might freely determine the extent of their own immunity, or the immunity of their officials, before foreign courts. On the other hand, it was undeniable that, under national law, some States considered that certain acts, such as air traffic control, were private acts, while others considered the same acts to be official. The question of the extent to which a State could determine the range of activities that it considered to be official was, in his view, the core of the matter under discussion. However, under the circumstances, the Commission should perhaps leave it to be decided on a case-by-case basis, and give some general guidance.

21. The Special Rapporteur also addressed questions of attribution in her fourth report, taking as her point of departure the need for an interpretation of the criteria of attribution which ensured that the institution of immunity did not become a mechanism to evade responsibility. While not disputing the relevance of questions of attribution, he considered that the possibility of evading responsibility was not the right point of departure. In *Jurisdictional Immunities of the State*, the International Court of Justice

[276] *Yearbook … 2014*, vol. II (Part Two) and corrigendum, p. 143.

had stated: "The rules of State immunity are procedural in character and are confined to determining whether or not the courts of one State may exercise jurisdiction in respect of another State. They do not bear upon the question whether or not the conduct in respect of which the proceedings are brought was lawful or unlawful" (para. 93 of the judgment). Thus the nature of the rules on immunity consisted, not in addressing the question of the lawfulness of a particular activity, but in establishing the jurisdiction of different States. A particular act might not be tried by a particular court, but that in itself did not exclude criminal responsibility for the act before another jurisdiction.

22. That said, the rules of attribution under the law of State responsibility might help to ascertain whether an act was indeed performed in an official capacity. The Special Rapporteur's argument in paragraphs 115 and 117 of her fourth report that certain forms of retroactive attribution of acts under articles 9 to 11 of the draft articles on the responsibility of States for internationally wrongful acts might not constitute acts performed in an official capacity for the purpose of determining immunity *ratione materiae* was plausible. However, he doubted whether the same was true for the acts of persons acting on behalf of the State while remaining outside the official structure of the State, as discussed in paragraph 114. Since there was little State practice or pertinent case law in that regard, the Commission should perhaps limit itself to making some general comments.

23. The Special Rapporteur attempted to define the concept of an act performed in an official capacity by using "an additional, teleological criterion". He agreed in principle that, since immunity *ratione materiae* was intended to ensure respect for the principle of sovereign equality of States, the acts covered by such immunity must also have a link to the sovereignty that, ultimately, was intended to be safeguarded. Nonetheless, the Commission should not try to identify the essence of sovereignty; what was important was to distinguish between acts performed in an official capacity in the exercise of a public function or of the sovereign prerogative of a State, and those which merely furthered a private interest. Moreover, the expression "exercise of elements of the governmental authority" was too limiting as it could be construed as meaning "governmental" as distinguished from "administrative".

24. Unfortunately, the Special Rapporteur did not elaborate on what the "additional, teleological criterion" would entail with respect to different situations, but concentrated on the question of whether international crimes might be acts performed in an official capacity. While he agreed with the statement in paragraph 124 of the fourth report that the argument that an international crime was contrary to international law was not relevant for the characterization of an act performed in an official capacity, he did not agree that the criminal nature of the act was one of the characteristics of any act performed in an official capacity. As a general matter, it might be helpful to refer to case law of the European Court of Justice for a definition of "exercise of official authority".

25. Concerning the future workplan, he questioned the advisability of taking up the issue of limits and exceptions to different forms of immunity until all general matters, including the procedural aspects of immunity, had been clarified. The question of exceptions had overshadowed the Commission's debate on the topic from the outset. While it was important that members were aware of the implications of certain general aspects for the question of possible exceptions, there was the danger that a premature focus on the question would narrow their outlook on important general aspects which had no or little bearing on the question of exceptions. That danger had become a reality in the current discussion on the definition of acts performed in an official capacity. Much more emphasis should have been laid on which kinds of activities were sufficiently expressive of the specific public authority of the State to justify their inclusion within the scope of protected immunity. Focusing on that and other general aspects of international law on immunity need not prejudice the identification of possible exceptions to the otherwise existing immunity of State officials. Possible exceptions should, however, be derived from the generally recognized sources of international law, based in particular on the rules on the identification of customary international law. Alternatively, the Commission should make clear that it was proposing changes to existing law by way of progressive development. Since the Commission was committed to drafting articles that would provide guidance to national courts on the application of existing law, it was important that it should clearly designate its draft articles and commentaries as either *lex lata* or *lex ferenda*.

26. He would appreciate clarification regarding the Special Rapporteur's comment in paragraph 137 of her fourth report that the recent judgment of the Italian Constitutional Court concerning the application in Italy of the International Court of Justice's judgment in *Jurisdictional Immunities of the State* had added complexity to the issue. As he understood it, the Italian Constitutional Court had not called into question the International Court of Justice's judgment or made any pronouncements on international law; it had merely interpreted the Italian Constitution in a way that might prevent the implementation of the judgment in Italy. Perhaps the Special Rapporteur considered that the judgment of the Constitutional Court undermined the authority of the International Court of Justice's judgment regarding the questions dealt with under the topic; however, in its own terms, it clearly did not.

27. In conclusion, he recommended that the proposed draft articles be referred to the Drafting Committee.

28. Mr. ŠTURMA said that the Special Rapporteur had produced a well-documented fourth report and he endorsed the methodology she had followed. The key element in the report was the definition of an "act performed in an official capacity", since immunities *ratione materiae* were functional in nature and related to the exercise of elements of the governmental authority. There were two important theoretical issues underpinning the report. The first was whether a criminal act must be linked to the official capacity of the perpetrator. At first sight, the fourth report seemed to contain some contradictory statements. On the one hand, its analysis of multilateral conventions, in paragraphs 66 and 67, revealed that under certain conventions an act committed by a public official was part of the definition of the crime. On the other hand, as explained in paragraph 57, some national courts considered that crimes

under international law were not part of the functions of the State and, consequently, could not be considered as such for the purpose of immunity. Similarly, according to paragraph 58, in general national courts had denied immunity in various cases involving corruption.

29. However, those statements were not really contradictory; it was important to draw a clear distinction between the prescriptive and descriptive levels of the analysis. On the prescriptive level, there were certain conventions, in particular the Convention against torture and other cruel, inhuman or degrading treatment or punishment, the International Convention for the Protection of All Persons from Enforced Disappearance and the Inter-American Convention on the Forced Disappearance of Persons, under which the official status of perpetrators formed part of the definition or one of the elements of crimes. The official status of a perpetrator could therefore not be denied, although that did not necessarily mean automatic recognition of immunity, since the very purpose of those conventions was to investigate and punish heinous crimes committed by or with the consent of public officials.

30. On the descriptive level, a number of other instruments, including the Convention on the Prevention and Punishment of the Crime of Genocide and the Rome Statute of the International Criminal Court, did not include the official status of the perpetrator as an element of the definition of the crime, although in most cases such crimes were committed by persons in an official capacity.

31. For the topic under consideration, however, the crimes in question were relevant only if they involved acts performed by State officials acting as such, since those were the only circumstances in which immunity *ratione materiae* could be invoked.

32. The second theoretical issue related to attribution. He welcomed the fact that the Special Rapporteur had framed the issue in the broader context of the Commission's earlier work on international criminal law and the responsibility of States and international organizations for internationally wrongful acts. Clearly, any act performed in an official capacity by a State official was attributable to both the person (for the assertion of individual criminal responsibility) and the State (for the assertion of State responsibility). He therefore supported the Special Rapporteur's model of a single act entailing dual responsibility.

33. He concurred with the Special Rapporteur that not all the criteria for attribution set out in articles 4 to 11 of the draft articles on the responsibility of States for internationally wrongful acts were relevant to the topic of immunity. The notion of acts performed in an official capacity clearly covered the conduct of organs of a State (art. 4), the conduct of persons or entities exercising elements of the governmental authority (art. 5) and the conduct of organs placed at the disposal of a State by another State (art. 6). He likewise concurred with her nuanced analysis of the applicability of the criterion contained in article 9; since immunity for conduct carried out in the absence or default of the official authorities had never been invoked in practice, that scenario was theoretical. On the other hand, the conduct of persons attributed in some circumstances to the State under articles 8, 10 and 11 did not constitute acts performed in an official capacity for which the persons engaging in them would enjoy immunity.

34. The Special Rapporteur was right in thinking that the motives of the perpetrators of *ultra vires* acts (art. 7) had to be taken into account. When such acts were committed for private benefit, such as trafficking in drugs, private enrichment, corruption and the like, courts were unlikely to deem them official acts covered by immunity *ratione materiae*, whereas crimes under international law might be regarded as official acts when the persons who had committed them believed that they had acted in the exercise of their official duties, but had exceeded their legal authority or instructions. However, for the reasons explained by previous speakers, such crimes might equally well fall into the category of exceptions not covered by immunity.

35. For all the above reasons, he supported the key provision in draft article 6, paragraph 2, according to which immunity *ratione materiae* covered only acts performed in an official capacity by State officials during their term of office, although the English language version might require a little adjustment, on the understanding that the Special Rapporteur was going to address exceptions to immunity in her next report. However, it seemed unnecessary in draft article 2 (*f*) to include a reference to "crime" in the definition of an act performed in an official capacity. Moreover, an act was a crime not on account of its nature, but because it had been criminalized by national or international law.

36. He recommended the referral of both draft articles to the Drafting Committee.

37. Mr. CAFLISCH commended the Special Rapporteur on her impressive fourth report. He wondered whether it might not be wiser to refer to the "conduct" or "behaviour" rather than the "acts" of State officials, since inaction could also be criminal.

38. Draft article 6, paragraph 1, made the essential point that, although immunity *ratione materiae* applied only to the conduct of the presumed perpetrator during his or her term of office, that immunity continued indefinitely in order to protect that person from sanctions even after he or she had ceased to be an official. In principle, that immunity was a consequence of the immunity of the State at whose direction the official had acted. In paragraph 2, the word "exclusively" could be deleted. Paragraph 3 apparently meant that, even after the immunity *ratione personae* of former Heads of State, Heads of Government and Ministers for Foreign Affairs expired, they would still enjoy immunity *ratione materiae* for acts which they had performed in an official capacity.

39. The issue of immunity *ratione materiae* would be raised *in limine litis*, in other words at the beginning of criminal proceedings against a State official, before any determination of the substance or criminal nature of the case. For that reason, in draft article 2 (*f*), "constitutes" should be replaced with "may constitute".

40. The relationship between the responsibility of the State and that of the individual required elucidation. State

responsibility was a matter of international law, while individual responsibility was governed, in principle, by domestic law. Although an individual would bear criminal responsibility, the behaviour giving rise to it might be State-induced and would therefore qualify for immunity *ratione materiae* in a foreign court. In that situation, two types of responsibility would coexist, the individual bearing criminal responsibility and the State that directed the individual bearing international responsibility. While the individual might be shielded by immunity *ratione materiae*, that would not be the case of the State, except to the extent to which it could invoke sovereign immunity before a foreign court. Even in that case, the State's responsibility still existed, even though it could not be considered by the courts of the forum State.

41. There was no reason to shield from foreign criminal jurisdiction persons who could not be characterized as officials, or to protect officials when they had acted, not for the benefit of the State of which they were the servants, but for their own benefit. While "elements of the governmental authority" would be difficult to define in the abstract, it would be helpful if, in the commentary to draft article 2, the Special Rapporteur were to provide as many examples as possible of situations where officials who had engaged in criminal conduct had been found to be "exercising elements of the governmental authority" and examples of situations where that had not been the case.

42. Mr. CANDIOTI said that the debate at the current session had centred on acts performed in an official capacity, whereas the acts of relevance to the topic under consideration were crimes covered by immunity *ratione materiae*, the latter being a procedural exception in favour of an official of one State who was indicted and brought before a competent court of another State.

43. In order to determine when that exception applied, it was necessary to define "crime". The latter was a violation of the criminal law of the State which claimed jurisdiction to punish that breach. In the Spanish version of the text, the notion of "crime" should be rendered as "*delito*" and not "*crimen*". Under Argentinian law, a crime was not characterized as an act, but rather as conduct, behaviour or action which constituted an infringement of criminal law. Immunity was a procedural defence that could be raised when a foreign State claimed jurisdiction to try the official of another State for a crime committed by that person. It was not a privilege, a prerogative or a question of *par in parem non habet imperium*. That idea was antiquated. Every sovereign power and every State was governed by the law of the international community, which was anchored in the Charter of the United Nations. It was also necessary to define "criminal jurisdiction". That was the jurisdiction of criminal courts and other judicial bodies competent to apply criminal law. Criminal law, in turn, was the set of standards that defined criminal breaches of the law, including international treaties. He was worried by the terminological confusion that reigned. The relationship between immunity and responsibility was of prime importance. Immunity could never signify impunity.

The meeting rose at 4.30 p.m.

3274th MEETING

Wednesday, 22 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. Gómez Robledo, 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. Petrič, Mr. Saboia, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

Cooperation with other bodies (*continued*)*

[Agenda item 13]

STATEMENT BY THE PRESIDENT OF THE INTERNATIONAL COURT OF JUSTICE

1. The CHAIRPERSON welcomed Judge Ronny Abraham, President of the International Court of Justice, and invited him to address the Commission.

2. Judge ABRAHAM (President of the International Court of Justice) said that he welcomed his first opportunity to meet with the members of the Commission since taking up office as President of the International Court of Justice. Reviewing the Court's activities over the past year, he said it had dealt with two cases. The first was a series of applications by the Marshall Islands against nuclear Powers or countries alleged to have nuclear weapons, on grounds of their failure to fulfil obligations concerning cessation of the nuclear arms race and nuclear disarmament. Only three applications, those against India, Pakistan and the United Kingdom had been entered in the Court's Registry, because those were the only States that had made declarations of acceptance of the Court's jurisdiction. Since India and Pakistan had challenged the Court's jurisdiction to rule on the dispute, the latter had decided that the question of its jurisdiction had to be resolved first of all, and to that end, it requested each party to file a Memorial on the matter. The United Kingdom had filed an objection to the Court's jurisdiction and the admissibility of the application, with the result that the proceedings on the merits were suspended. The Court had not yet ruled on the question of its jurisdiction.

3. The Court had likewise had before it an application from Somalia against Kenya with regard to a dispute concerning maritime delimitation in the Indian Ocean. Given the time limits set for the preparation of the written pleadings, it was unlikely that the Court would rule on the matter during the year 2016. Three cases, two of which had been joined, were currently under consideration. In the first, on the *Obligation to Negotiate Access to the Pacific Ocean*, Chile had filed an objection to jurisdiction, on which the

* Resumed from the 3268th meeting.