

Document:-
A/CN.4/3276

Summary record of the 3276th meeting

Topic:
<multiple topics>

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

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language versions. Unfortunately, the same applied to many of the terms under consideration.

82. Looking to the future, he recalled that, from the outset, he had been of the opinion that the Commission should take up the procedural aspects of the topic at an early date. The previous Special Rapporteur, Mr. Kolodkin, had dealt with the matter very well in his third report, resulting in a constructive debate. He suggested that the current Special Rapporteur might wish to use the summary of the contents of that report, set out in paragraph 61 thereof,²⁹⁴ as a basis for her work and the Commission's future debate on the subject.

83. On another matter, he hoped that the Special Rapporteur would not follow up on Mr. Hassouna's suggestion to revert to the issue of diplomatic immunity *ratione materiae*, in the light of the "without prejudice" clause on that subject in draft article 1, paragraph 2, provisionally adopted by the Commission.

84. In conclusion, despite the serious doubts he had raised, he was in favour of referring the two draft articles to the Drafting Committee, on the understanding that the Committee would consider the option of deleting draft article 2 (f).

The meeting rose at 6.05 p.m.

3276th MEETING

Thursday, 23 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. Kitichaisaree, 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 (concluded)*

[Agenda item 13]

STATEMENT BY REPRESENTATIVES OF THE
AFRICAN UNION COMMISSION ON INTERNATIONAL LAW

1. The CHAIRPERSON welcomed the representatives of the African Union Commission on International Law (AUCIL), Mr. Solo, Mr. Appreku and Mr. Ben Dhiab, and invited them to address the Commission.

2. Mr. SOLO (African Union Commission on International Law) thanked the International Law Commission for its invitation to AUCIL to brief the Commission on its work and to exchange views on matters of common interest. Stressing that AUCIL was a young institution, particularly compared to the Commission, he recalled that it had been established in 2009 and had been inspired by the common objectives and principles enshrined in articles 3 and 4 of the Constitutive Act of the African Union, which underscored the importance of accelerating the socio-economic development of the African continent through the promotion of research in all fields. Another goal in establishing AUCIL had been to promote respect for the rules and principles of international law with a view to consolidating peace, security and regional integration in Africa as well as enhancing the continent's contribution to the codification and progressive development of international law. AUCIL, whose headquarters were in Addis Ababa, represented Africa and focused on both international law and the codification and progressive development of the regional law of the African Union. Its mandate was in line with that of the IAJC, but shared many elements with that of the International Law Commission. As the youngest of the bodies, AUCIL sought to draw on the experience gained by similar bodies established before it. In accordance with its statute, the objectives of AUCIL were: (a) to undertake activities relating to the codification and progressive development of international law on the African continent, with particular attention to the laws of the Union as embodied in the treaties of the Union, in the decisions of the policy organs of the Union and in African customary international law arising from the practice of member States; (b) to propose draft framework agreements, model regulations and formulations to facilitate the codification and progressive development of international law; (c) to assist in the revision of existing treaties of the African Union, assist in the identification of areas in which new treaties were required, and prepare drafts thereof; (d) to conduct studies on legal matters of interest to the Union and its member States; and (e) to encourage the teaching, study, publication and dissemination of literature on international law, in particular the laws of the Union with a view to promoting acceptance of and respect for the principles of international law, the peaceful resolution of conflicts, respect for the Union and recourse to its organs, when necessary. AUCIL was composed of 11 members who served in their personal capacity and whose selection was subject to criteria of competence and nationality, bearing in mind the need to respect the principle of equitable geographical representation, representation of the principal legal systems of the continent and equitable gender representation. AUCIL held two ordinary two-week sessions in April and October or November of each year and could also convene extraordinary sessions. It had published the first edition of its *Yearbook* and would publish the second that year. The second edition of its *Journal on International Law* was also in progress, and members of the Commission were invited to make contributions.

3. AUCIL had finalized a number of studies on a variety of topics, such as the juridical basis for reparations for slavery and other related matters inflicted on the African continent and the revision of Organization of African Unity (OAU) and African Union treaties. AUCIL was also

²⁹⁴ *Yearbook ... 2011*, vol. II (Part One), document A/CN.4/646, pp. 242–243.

* Resumed from the 3274th meeting.

working on a range of other issues and was endeavouring, among other things, to prepare a digest of the practice of African States in international law, to draft an African convention on judicial cooperation and mutual assistance, to develop a continental legal framework on piracy and on migration, and to study and codify comparative African environmental law and mining and petroleum law. In addition, it was studying the topic of immunity of State officials from foreign criminal jurisdiction. It also planned to draft a continental convention on avoiding double taxation and to undertake an ongoing study on the elaboration of a draft model law on the incorporation of the African Charter on the Rights and Welfare of the Child into domestic law. AUCIL held an annual Forum directly after its ordinary session in the second semester, the second of which had been on the topic “Law of regional integration in Africa”, while the third, held in Addis Ababa on 11 and 12 December 2014, had dealt with the further codification of international law in Africa in fields where there was already extensive State practice, precedent and legal writings on the African continent. The Forum had considered such topics as the relation of the law of the African Union and the law of the African regional economic communities and the experience of the Commonwealth in the codification and progressive development of international law. The members of the International Law Commission were warmly invited to participate in the fourth AUCIL Forum to take place in Egypt on 19 and 20 October 2015 on the topic of challenges of ratification and implementation of treaties in Africa. A United Nations Regional Course in International Law was held annually by AUCIL; the fifth such course had taken place in Addis Ababa in February 2015.

4. Mr. Solo noted that Mr. Ben Dhiab, as Executive Secretary to AUCIL, was responsible for aspects of the Commission’s mandate involving cooperation with other bodies, as provided for in article 25 of its statute. Strengthening cooperation with the International Law Commission, between the members of the two Commissions and their respective secretariats, would be beneficial. Cooperation between the members could involve the organization of visits, the participation of members of the International Law Commission in the sessions of AUCIL, exchanges of views on topics under consideration by both Commissions—in the form of publications, for example—the organization of joint seminars or the establishment of a permanent framework for periodic exchange on matters of international law that were of mutual interest. Cooperation between the secretariats could involve capacity-building for the AUCIL secretariat and sharing the research databases used by the two Commissions. The agreed areas of cooperation could be set out in a letter of intent between the United Nations and the African Union.

5. Mr. APPREKU (African Union Commission on International Law), referring to the extraordinary sessions convened by AUCIL, said that one such session had focused on the situation in the Libyan Arab Jamahiriya, as the Peace and Security Council of the African Union had been divided on how to respond to Security Council resolutions 1970 (2011) of 26 February 2011 and 1973 (2011) of 17 March 2011 and had requested an opinion on their legal impact, particularly their validity under international law and whether the bombings being carried out were

consistent with the spirit and letter of those resolutions. AUCIL had also been asked to give a legal opinion on whether the African Charter on the Rights and Welfare of the Child authorized the body responsible for monitoring its application to bring cases before the African Court on Human and Peoples’ Rights. AUCIL had concluded that the African Committee of Experts on the Rights and Welfare of the Child should be able to bring certain cases before the Court. However, in order to clarify the matter, both the text of the African Charter on the Rights and Welfare of the Child and the Committee’s statute needed to be amended, something AUCIL could propose in accordance with its mandate.

6. Article 14 of the African Union Non-Aggression and Common Defence Pact had provided for the establishment of AUCIL as of 2004, but it had taken approximately five years for its statute to be adopted and for it to become operational. In fact, its first cycle of work had begun only in 2010 and had ended in April 2015, followed by the appointment of new members in May 2015. Because there was a degree of overlap between the activities of AUCIL and those of other African Union bodies, they worked together on certain matters, such as the delimitation of borders. The African Union Border Programme had been developed after the adoption of the statute of AUCIL, whose mandate included studying legal matters related to the resolution of border disputes. The drafting of a model law on universal jurisdiction for international crimes had also involved cooperation between African Union bodies.

7. Topics of particular interest being considered by AUCIL included the question of establishing an international constitutional court. AUCIL had concluded that such a project would be premature, as the African Union had the African Charter on Democracy, Elections and Governance, and before proceeding any further, it would be wise to allow time for regional practice in that field to become established. It should also be recalled that there was a co-operation mechanism between AUCIL and the Conference of Constitutional Jurisdictions of Africa in that area.

8. Mr. HASSOUNA welcomed the representatives of AUCIL and said that he hoped that the relationship between AUCIL and the Commission might be institutionalized. The contribution made by Africa to the codification and development of international law was well known, and the establishment in 2009 of AUCIL, which had been very active in a range of fields since then, had been a welcome development. The mandate of AUCIL was much broader than that of the International Law Commission, since AUCIL, which was also tasked with giving legal opinions to the bodies of the African Union, sometimes had to take action at the political level, as in the case of the Libyan Arab Jamahiriya. The International Law Commission, however, endeavoured not to get involved in political issues, even though it was true that all legal issues also had political aspects. He would be interested to know how he could access AUCIL publications, its compilation of practice and its work more generally, many aspects of which were of particular interest to the Commission, especially in fields such as migration, piracy and immunity of State officials. He proposed that the two bodies consider cooperating through the Commission’s new website.

9. He noted with satisfaction that the African Union Forum on International Law and African Union Law, which had traditionally been held in Addis Ababa, would now take place in a different city every year. Noting that the fourth Forum, to be hosted in Cairo, would deal with the challenges of ratification and implementation of treaties in Africa, he said that the topic was particularly important, not only for Africa, but also for the international community as a whole. Thousands of treaties were concluded between States but many were never ratified or implemented.

10. It was generous of AUCIL to have invited all of the members of the Commission to attend the Forum; it might also be useful to invite representatives of AALCO, which was very active in the area of African law. In fact, the Secretary-General of AALCO addressed the Commission every year to discuss the items on its agenda. AUCIL could perhaps also invite the representatives of all the African international law institutions, as it was important to promote the participation of African NGOs in the field of international law. A conference had recently been held in Strasbourg at the initiative of the French Society of International Law, which had invited many international law institutions, including a number of African bodies. In his view, it was useful for such institutions to gather to discuss issues of common interest. As for the Commission, it looked forward to strengthening its links with the African Society of International Law.

11. Mr. FORTEAU inquired about the progress made by AUCIL in preparing a compilation of the practice of African States in the field of international law, which it had mentioned at previous sessions. He wished to know the objectives of the studies on comparative environmental law and mining and petroleum law it was conducting and, in particular, how the studies took account of the codification of international law and whether they had any links to it.

12. Mr. SOLO (African Union Commission on International Law), referring to the situation in Libya, said that AUCIL had not been asked to provide an opinion on a political matter—even though such issues always had a political dimension—but rather on the interpretation of Security Council resolutions 1970 (2011) and 1973 (2011) concerning the situation in the Libyan Arab Jamahiriya. It had been asked to determine whether the use of force in the Libyan Arab Jamahiriya was in compliance with the provisions of those resolutions. Africa wished to play a role in the codification and progressive development of international law, which was why AUCIL had been established.

13. Mr. APPREKU (African Union Commission on International Law) said that AUCIL had been asked to examine the scope and legal impact of Security Council resolutions 1970 (2011) and 1973 (2011), particularly with respect to the obligations on States Members of the United Nations, including African States, under the two resolutions. In parallel, the African Commission on Human and Peoples' Rights, acting on behalf of a group of NGOs, had brought before the African Court on Human and Peoples' Rights a case involving crimes against humanity allegedly committed by the Head of State of the

Libyan Arab Jamahiriya, and the Court had established *prima facie* the merits of the case. However, AUCIL could not rule on a case that was already before a judicial body, so its role had consisted simply of assisting the African Union Peace and Security Council in understanding certain legal aspects of the resolutions, in particular the responsibility of the Libyan authorities to protect the Libyan people and the concept of “necessary measures”. It had also had to clarify the concept of protection of civilians during an armed conflict, a fundamental principle of the resolutions in question, which encompassed the responsibility to protect. The African Union Peace and Security Council had expected a definitive decision from AUCIL, which it had not been able to make, essentially because the case had already been before the African Court on Human and Peoples' Rights.

14. With regard to collaboration with other organizations, AUCIL already worked with AALCO, which participated in the AUCIL forums. The Deputy Secretary-General of AALCO had in fact presented a report on the contribution of AALCO to the development of international law, in which he had reviewed the history of the participation of African and Asian States in the United Nations Conferences on the Law of the Sea and their contribution to the definition of the concept of refugee and the notions of exclusive economic zone and “common heritage of mankind”. AUCIL thus worked with other organizations, although in his view more could be done in that regard.

15. African institutions of international law, such as the African Institute of International Law based in Arusha, United Republic of Tanzania, also contributed to the work of AUCIL. For example, Mr. Abdulqawi Ahmed Yusuf had participated in some deliberations of AUCIL in his capacity as a member of the International Court of Justice and the African Foundation for International Law. AUCIL also worked with the United Nations in holding Regional Courses in International Law, to which it allocated a portion of its budget. Members of the Commission had in fact given seminars during those Regional Courses in Addis Ababa.

16. AUCIL had also offered to contribute to the ordinary budget of the United Nations Programme of Assistance in the Teaching, Study, Dissemination and Wider Appreciation of International Law. In that regard, he suggested that, insofar as possible, the Commission might wish to include in its long-term programme of work a discussion on the fiftieth anniversary of the Programme of Assistance.

17. He had been appointed Special Rapporteur responsible for putting together the digest of the practice of African States in the field of international law. In preparing the digest, which had been his initiative, AUCIL had sent a questionnaire to member States to enable it to establish their practice, particularly when it came to court rulings and the statements of Heads of State and Ministers for Foreign Affairs. He would contribute by reporting on the practice of Ghana, with which he was familiar; he planned to mention, among other examples, the “*ARA Libertad*” case, in which the Supreme Court of Ghana had found that the order to impound the frigate

constituted a violation of international law, under which warships enjoyed immunity. That decision in fact reproduced a good deal of the Commission's work on the jurisdictional immunities of States and their property.²⁹⁵ In the aftermath of the ruling, AUCIL had referred an opinion to the Parliament, recommending ratification of the United Nations Convention on Jurisdictional Immunities of States and Their Property. The Convention had not yet been ratified, owing to administrative delays, but it undoubtedly would be.

18. Certain member States had been requested to submit their responses to the questionnaire by 31 January 2015, but many had not yet done so. AUCIL would not rely solely on the responses submitted by States, but would also conduct its own research on the basis of various databases. The digest was intended to be a reference document that would enable African States to participate more actively, both individually and collectively, in the work of the Commission. AUCIL hoped that States' responses would relate mainly to topics on which it worked.

19. Mr. TLADI, referring to the revision of African Union treaties, said that he would welcome details on AUCIL practice when it came to drafting instruments. He also wished to know whether AUCIL intended to examine all of the treaties or only those that had entered into force, and particularly whether it planned to review the 2014 Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, which had not entered into force but of which there had been a good deal of criticism in recent months because of its use of terms.

20. Mr. KITTICHAISAREE commended the African Union on having ensured that the former President of Chad, Hissène Habré, had been tried in Africa. He noted with satisfaction that, when African States did not wish to involve the International Court of Justice or another foreign judicial body, they brought cases before their own courts.

21. On the issue of migration, he said that, in his view, Mr. Kamto's reports on the expulsion of aliens would be of interest to AUCIL in its work on that topic. He wished to know the position of the African Union as compared to that of the European Union on the issue of the use of armed forces to destroy the boats used by human traffickers. Had the African Union adopted a legal position on that matter?

22. Noting that many non-State armed groups were active in Africa and that there had been a number of cross-border attacks, he asked whether the African Union had taken a position on the issue of the right to use force against such groups. He wondered if States that had been the victims of attacks by such groups could decide to use force by asserting their right to self-defence, as provided for in Article 51 of the Charter of the United Nations, or whether they preferred to use other legal instruments as their basis for use of armed force. Moreover, it would be interesting to know if the practice was to request prior authorization from territorial States.

23. Sir Michael WOOD, noting with satisfaction that AUCIL had undertaken to prepare a digest of the practice of African States in the field of international law, stressed the importance of that initiative. While it was true that it would be difficult for it to obtain the relevant information, AUCIL was right to conduct its own research and not simply rely on the responses from States. The digest would be a valuable contribution by Africa to customary international law.

24. With regard to African customary international law, he recalled that the identification of customary international law was one of the topics on the Commission's agenda, and that earlier in the current session the Commission had considered the topic of particular custom, which differed from "general" customary international law. Since particular custom encompassed regional customary law, it would be very interesting to obtain comprehensive information on African customary international law or the customary law applicable to different subregions. It would be useful for the Commission to have a contact person in AUCIL who could provide it with information on the issue, as the AUCIL website contained very little on the subject.

25. He noted with satisfaction that AALCO had added the topic of identification of customary international law to its agenda and had set up a dedicated Study Group, which had already drafted an extremely interesting report. It would be helpful if AUCIL were also to make a contribution in that area.

26. Mr. SOLO (African Union Commission on International Law), referring to access to AUCIL publications and the website, said that certain documents were posted on the website and those that were not were in the AUCIL *Yearbook*, which contained all of its work in a given year. Regarding the holding of the African Union Forum on International Law and African Union Law in a different city each year, AUCIL did intend to introduce a rotation system, subject to the necessary funding. AUCIL had invited representatives of AALCO to the fourth Forum. He had taken note of the suggestion to invite representatives of all African institutions of international law and other international law institutions.

27. Mr. APPREKU (African Union Commission on International Law) said that the website was being updated and that it would soon be possible to consult all AUCIL documents online. The website already contained an electronic version of the first issue of the *Journal on International Law*, as well as the AUCIL *Yearbook*. The second issue of the *Journal*, to which he invited Commission members to make contributions, was currently being prepared.

28. With regard to the studies on comparative environmental law and comparative mining and petroleum law, the former had not yet begun because the Rapporteur had had to step down; however, a new Rapporteur had since been appointed. The latter study, the objective of which was to harmonize laws on the matter so that investors could not play States off against one another, and to improve security guarantees, was being carried out by the former Chairperson of AUCIL, Mr. Kilangi.

²⁹⁵ See *Yearbook ... 1991*, vol. II (Part Two), chap. II.

29. It should be recalled that AALCO did not represent all of the countries of Africa. When AUCIL worked together with AALCO, it could not take it for granted that proposals made by the latter would be accepted by African States that were not members, even though that was often the case.

30. With regard to the revision of the treaties of the OAU and the African Union, the idea had been put forward by South Africa, which did not wish to be a party to treaties drafted prior to its membership in those organizations and had therefore proposed that the oldest treaties should be reviewed. The proposal had been to review six or seven treaties, including the Organization of African Unity Convention for the elimination of mercenarism in Africa, the African Convention on the Conservation of Nature and Natural Resources and the African Charter on the Rights and Welfare of the Child. The review of the African Charter on the Rights and Welfare of the Child in the light of the judgments of the African Court on Human and Peoples' Rights had not yet begun but was expected to be completed by the end of the year. With regard to the Organization of African Unity Convention for the elimination of mercenarism in Africa, the initial plan had been to draft an addendum, but AUCIL had become aware of difficulties being experienced by the Human Rights Council's Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the rights of peoples to self-determination: the fact that its mandate also involved monitoring the activities of private military and security companies had prompted a violent backlash by those companies, which did not wish to be regarded as the same as mercenaries. In order to avoid that, AUCIL had decided to draft a separate treaty dealing specifically with such companies.

31. Regarding the procedure used in drafting treaties, AUCIL generally followed well-established working methods. It could decide to examine an issue on its own initiative or be requested to do so by the Assembly of the African Union. Its reports were then submitted to the Assembly for approval. Once a report had been approved, questionnaires were sent to member States, if necessary. In terms of drafting legal texts, AUCIL had provided support in the drafting of the African Union model national law on universal jurisdiction over international crimes.

32. There had not been a consensus on the draft articles on the expulsion of aliens²⁹⁶ developed by the International Law Commission when they had been discussed in the Sixth Committee and some States had been opposed to them being used as the basis for a universal convention. Nonetheless, AUCIL intended to use those draft articles in order to draft a regional African Union instrument, which could in turn be used to draft an African convention on migration.

33. Although ethnic cleansing was not included among the grave circumstances with respect to which the African Union was entitled to intervene in a member State under article 4, paragraph (h), of its Constitutive Act, if such acts were to be committed, the African Union would be justified in intervening on the basis of paragraph (j) of that

article, which provided that member States could request its intervention in order to restore peace and security.

34. Mr. SOLO (African Union Commission on International Law) said that the grave circumstances provided for in article 4, paragraph (h), in which the African Union was authorized to intervene in a member State were war crimes, genocide and crimes against humanity. The principles underpinning the functioning of the African Union, as set out in that article, included the peaceful resolution of conflicts among member States of the Union through such appropriate means as might be decided upon by the Assembly and the prohibition of the use or threat of force among member States of the Union.

35. Mr. PETER, noting that the promotion of the rule of law was one of the objectives of the African Union, said that he would be interested to hear the opinion of AUCIL on the practice of Heads of State amending the Constitution in order to remain in power indefinitely, a growing tendency on the African continent, and what it intended to do in that regard. He also wondered whether AUCIL had addressed the issue of the position of Africa, 34 of whose 54 States had ratified the Rome Statute of the International Criminal Court, in the International Criminal Court, as well as the consequences of a potential withdrawal of the African States from the Court, as strongly supported by certain sectors of the African Union. He asked about the time frame for completion of the updating of the AUCIL website.

36. Ms. ESCOBAR HERNÁNDEZ thanked the AUCIL representatives for their presentation of the functions and recent activities of their organization. Noting that the Rapporteur working on the issue of immunity of State officials from criminal jurisdiction had been assigned to other functions, she asked whether AUCIL intended to pursue its work on that topic once a new Rapporteur had been appointed and, if so, whether the project, which to date had covered only immunity from international jurisdiction, would also deal with immunity from foreign national jurisdiction, a topic currently under consideration by the International Law Commission and for which she was Special Rapporteur. As such, she would appreciate information on the past and future work of AUCIL on the practice of African States in terms of immunity, and believed that it would be mutually beneficial for AUCIL and the Commission to work together regularly on such issues. As the Commission had not received any responses from African States to its requests for information in relation to its work on the topic of immunity of State officials from foreign criminal jurisdiction, she would be grateful if the AUCIL representatives could encourage the member States of the African Union to provide the Commission with such information so that their views and practice could be duly taken into consideration.

37. Mr. SOLO (African Union Commission on International Law) said that, in accordance with its mandate, the African Union condemned anti-constitutional changes of Government, as expressly provided for in article 4, paragraph (p), of its Constitutive Act.

38. Mr. APPREKU (African Union Commission on International Law) said that, as Special Rapporteur on

²⁹⁶ *Yearbook ... 2014*, vol. II (Part Two) and corrigendum, pp. 22 *et seq.*, paras. 44–45.

the revision of the treaties of the OAU and the African Union, he had recommended that a global convention on the rule of law, democracy and good governance be drafted to codify provisions on those issues, which were currently dealt with in different instruments, including the African Charter on Democracy, Elections and Governance, as well as the many relevant decisions and declarations adopted by the African Union. The African Union had taken a clear stand against unconstitutional change of Government and against extending a presidential mandate by amending the Constitution; taking such positions constituted an important step forward, by sending a clear message to the international community that the African Union no longer intended to tolerate such practices. AUCIL should be able to undertake the drafting of the aforementioned global convention as part of its medium-term programme of work. It had also completed the work it had been tasked with on the specific issue of unconstitutional changes of Government, the outcome of which it had submitted to the decision-making bodies of the African Union for consideration. The report could not, in principle, be made public while it was still under consideration.

39. The update of the AUCIL website was in progress and was expected to be completed by the end of 2015.

40. Replying to Ms. Escobar Hernández, he said that the decisions and declarations adopted by the African Union at its annual summits could be a source of information on the practice of its member States. For example, at its most recent summit, held in Johannesburg, South Africa, the African Union had adopted a decision in which it had reaffirmed its previous positions with regard to the International Criminal Court, and Botswana had dissociated itself from the decision, as it had always done in the past. That could be considered an example of the practice of that State.

41. AUCIL also had difficulties in obtaining responses from States to its requests for information. It had decided no longer to wait for Governments to provide it with information but to gather it itself based on available resources. An examination of the case law, for example, could bring up interesting elements for the identification of State practice. The research and analysis AUCIL carried out in that area was currently being compiled for inclusion in the digest on State practice in the field of international law.

42. AUCIL had not yet designated a new Rapporteur on the topic of immunity, as the number of members was limited and other projects were already under way. However, it did not intend to forego consideration of the topic, which was still being actively discussed, particularly during its annual forums. The original topic for the October 2015 Forum had been international criminal justice, and one of the discussion points had been intended to be ways to promote ratification of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, which gave the Court international criminal jurisdiction, in order to expedite entry into force. Unfortunately, the topic had had to be dropped after several States had threatened to withdraw funding for the organization of the Forum if that topic remained on the agenda.

43. Although African States might not have responded to the Commission's requests for information on the immunity of State officials from foreign criminal jurisdiction, a number of them had contributed to the debates on the topic in the Sixth Committee of the United Nations General Assembly. Their position had been that, since there was an International Criminal Court with universal jurisdiction for the crime of genocide, crimes against humanity and war crimes, whether States could exercise universal jurisdiction with respect to such crimes was a moot point. African States that had ratified the Rome Statute of the International Criminal Court had believed that the establishment of the International Criminal Court would guarantee that the perpetrators of international crimes would not be able to find refuge in any other country. However, in order for that to be true, the Rome Statute of the International Criminal Court would have to be universally ratified, which unfortunately was not the case.

44. An examination of the practice of African States, for example in the trials of Mengistu Haile Mariam or Hissène Habré, showed that practice was developing with respect to prosecuting former Heads of State, but it concerned only persons who were no longer in power at the time of the proceedings. Under such a practice, "presidents for life" could never be brought to trial. Speaking in his personal capacity and not on behalf of AUCIL, he said that it was therefore necessary to work on progressive development so as to make it possible to try incumbent Heads of State who there was reason to believe might commit additional crimes of genocide.

45. Mr. KAMTO said that AUCIL was to be commended on its efforts and achievements in the short time since its establishment in 2009. As Special Rapporteur on the topic of the expulsion of aliens, on which the Commission had completed its work at its sixty-sixth session, he was particularly interested to note that AUCIL had decided to use the Commission's draft articles on the topic for the purposes of its ongoing codification work on migration in Africa. It was regrettable that, as was often the case in the Sixth Committee, political rather than legal considerations had prevailed during the debates on the topic, but he respected the States' decision. The revision of the regional African legal instruments was also a welcome initiative. Perhaps AUCIL might consider, in the context of that work, reviewing the OAU Convention on the Prevention and Combating of Terrorism, whose definition of terrorism, and more generally the spirit of which, were incompatible with the freedoms guaranteed by a number of regional and universal human rights instruments, including the African Charter on Human and Peoples' Rights and the International Covenant on Civil and Political Rights.

46. Mr. SOLO (African Union Commission on International Law) said that the topic of migration was on the AUCIL programme of work for 2016 and that a Special Rapporteur on the topic had been appointed. How the Commission's draft articles on the expulsion of aliens would be used in that project would depend on the issues the Special Rapporteur would choose to deal with under the topic. In any case, AUCIL was not yet ready to disclose its position or that of the States of the African Union on the matter.

47. Mr. APPREKU (African Union Commission on International Law) said that the Special Rapporteur on the topic of migration, Mr. Cheikh Tidiane Thiam, had undertaken to begin work in early 2016. The project would address such issues as trafficking in persons and trafficking of migrants, as well as relevant aspects of the Commission's work on the expulsion of aliens. The Assembly of the African Union had considered it necessary to undertake codification or progressive development work in order to establish a continental visa waiver regime based on the principle of reciprocity and promote free movement within the various regional economic communities. With regard to terrorism, Algeria had proposed that the issue of payment of ransoms to terrorist groups be taken up at the United Nations General Assembly. Little progress had been made on the topic, as opinion had been divided in the African States Group, with some considering that criminalizing the payment of ransoms in exchange for the release of hostages, as recommended by Algeria, would amount to abandoning hostages to their fate, which was unacceptable. The definition set out in the OAU Convention on the Prevention and Combating of Terrorism could certainly benefit from being updated; that possibility could be examined during the revision of treaties that was currently under way. It was to be hoped that a way out of the current impasse in the international discussions would be found so that a United Nations convention on terrorism could be developed.

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*)

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

49. Mr. KAMTO said that, overall, he supported the approach taken by the Special Rapporteur and agreed with her that the acts performed in an official capacity being considered under the topic must be criminal in nature. He had difficulty in understanding the logic behind the position of some members who considered that immunity applied because the act had been performed in an official capacity and not because it was criminal in nature. As noted by the Special Rapporteur in paragraph 96 of her fourth report, the scope of the topic, as defined by the Commission, was immunity from foreign criminal jurisdiction and provisionally adopted draft articles 3 and 5 expressly provided that State officials “enjoy immunity *ratione personae* from the exercise of foreign criminal jurisdiction”.²⁹⁷ That was undoubtedly the case, particularly when it came to immunity *ratione materiae*. In fact, it was the criminal nature of the act and the prospect of criminal prosecution for the commission of the act that made it possible to invoke immunity. If the act was not criminal in nature, it could not be classified as such under the law of the forum State, and there was no reason to

invoke the immunity from criminal jurisdiction of the State official who allegedly committed the act.

50. The examples cited by some members on the matter were hardly convincing: if, as suggested in one example, a State official participated in criminal activities undertaken by his or her political party, such as acts of genocide, he or she was not acting in an official capacity and thus could not benefit from immunity *ratione materiae*. The term “crime” could be replaced with the word “act” in draft article 2 without dissociating the act performed in an official capacity from the concept of an offence. The act for which immunity *ratione materiae* was invoked could certainly not be dissociated from the criminal nature of the relevant jurisdiction; however, referring a case to a criminal court *ipso facto* determined the nature of the act or how it was likely to be classified.

51. Second, the fourth report confirmed the relevance of the distinction between personal immunity—*ratione personae*—and functional immunity—*ratione materiae*—which had been made from the outset when the topic had begun to be considered by successive Special Rapporteurs and approved by the Commission. However, was it true, as had been claimed, that immunity *ratione materiae* could be stronger than immunity *ratione personae*? There would appear to be a contradiction in the logic behind immunities, as the members of the so-called “troika”—Heads of State, Heads of Government and Ministers for Foreign Affairs—were indisputably the State officials who enjoyed the most extensive immunity. That was why the predominant case law and many stakeholders considered immunity *ratione personae* to be absolute. It did not exclude immunity *ratione materiae* from its scope but encompassed it, as it covered both acts performed in an official capacity and those performed in a private capacity. In the context of immunity *ratione personae*, immunity *ratione materiae* was an *a fortiori* argument. That was the logic underpinning draft article 6.

52. Third, in paragraph 105 of the fourth report, the Special Rapporteur recalled that the immunity of State officials from foreign criminal jurisdiction *ratione materiae* was distinct from the immunity of the State. While recognizing the validity of that distinction, he noted that the Special Rapporteur did not indicate anywhere in that paragraph the basis for the distinction. On the contrary, she added somewhat to the reader's confusion by stating that “[i]mmunity *ratione materiae* is recognized in the interest of the State, which has sovereignty, but it directly benefits the official when he or she acts in expression of such sovereignty”. In his view, the immunity of State officials from criminal jurisdiction *ratione materiae* was understood under international law only as the immunity of the State, as it did not exist for the benefit of the officials themselves but because they represented the State and their acts were attributable to the State. The State performed acts only through the intervention of its bodies or officials and its immunity from criminal jurisdiction could be invoked only when proceedings were initiated against State officials for acts they had performed in an official capacity. Therefore, if the distinction between the immunity of the State and the immunity *ratione materiae* of State officials was indeed relevant, the Special Rapporteur should clarify the point in her subsequent reports.

²⁹⁷ See *Yearbook ... 2013*, vol. II (Part Two), p. 43, and *Yearbook ... 2014*, vol. II (Part Two) and corrigendum, p. 146.

53. Fourth, in the light of the reference to the fundamental difference between immunity *ratione personae* and immunity *ratione materiae* and the prospect of future discussions on possible exemptions to immunity from criminal jurisdiction for State officials, it should be recalled that the Commission had not yet fully resolved the issue of beneficiaries of immunity *ratione personae*, although it had said that it intended to restrict it to members of the troika. Not only did the consistent case law of the International Court of Justice suggest that the three designated members of the troika were not the only ones, as indicated by the words “such as” prior to listing them, but within the troika itself the question remained of whether or not the vice-president or deputy prime minister of a republic, for example, were included among the beneficiaries of immunity *ratione personae*, in other words whether they enjoyed only immunity *ratione materiae*. It was clear from both State practice and the case law of national courts that immunity *ratione personae* was not restricted to the members of the troika. The first Special Rapporteur on the topic, Mr. Kolodkin, had cited, in paragraph 118 of his preliminary report on the topic, two judgments handed down in 2004 and 2005 by courts in the United Kingdom recognizing that the Minister of Defence and the Minister of International Trade enjoyed personal immunity.²⁹⁸

54. Fifth, it was regrettable that the Special Rapporteur had not analysed the abundant case law she cited in her fourth report, in particular national case law, but had merely made reference to it. Such an approach meant that the facts in each case were not known, nor what each request for immunity was based on or why the court in question had granted or denied immunity. It would be useful in future reports if the Special Rapporteur took a more analytical approach to both international and national case law, as the key element was the way in which a court expressed itself, particularly when it came to the grounds given for a decision on a point of law in the light of the facts of the case. That was the only way of knowing whether a decision was of relevance to the topic under consideration, namely the immunity of State officials from criminal jurisdiction.

55. With regard to the draft articles presented in the report under consideration, he supported the proposal made by the members who had taken the floor before him in relation to draft article 2, for the same reasons they had outlined, to replace the word “crime” with a word that did not imply that the classification of the nature of the act was predetermined. In draft article 6, it was not necessary to retain paragraph 3. The clarification intended to be provided in that paragraph could be given in the commentary to the article. However, if the Commission decided to keep that paragraph, he would propose rewording it to read: “The beneficiaries of immunity *ratione personae* enjoy immunity *ratione materiae* after their term of office has ended, under the conditions set out in paragraphs 1 and 2 of this article.”

56. In conclusion, he said that he was in favour of referring the two draft articles to the Drafting Committee.

57. Mr. McRAE said that the perhaps surprising conclusion that could be drawn from the extensive analysis of decisions and treaties undertaken by the Special Rapporteur in her fourth report was that there was no definition of an “act performed in an official capacity” and little that helped in establishing it. That expression was frequently used, in different formulations, and in a broad way generally understood, but not defined; the extensive practice referred to confirmed that. Various expressions were used to express the idea but they were sometimes used inconsistently, they often overlapped and they generally did not provide much clarity. In the end, one wondered if the search to define the expression was worth the effort invested, even though, like in all research, proof that something was lacking was a valuable outcome in itself. The Special Rapporteur was aware of that and her proposed draft articles did not pretend that there was an accepted definition where none existed. However, she did indicate where guidance could be obtained on the matter. For example, she showed the relevance of considering whether an act would be attributable to a State under the laws of State responsibility and which of the draft articles on the responsibility of States for internationally wrongful acts²⁹⁹ were helpful in that regard. In his view, that was a particularly useful part of the analysis, even though there was some disagreement over the assistance that notions of attribution could provide.

58. The report under consideration was also valuable in other respects; the analysis of *ultra vires* acts, for example, showed clearly that the fact that an act was *ultra vires* did not cause it to cease to be an official act. He also agreed with the Special Rapporteur that a single act could give rise to two forms of responsibility: the criminal responsibility of the State official and the international responsibility of the State, which were separate but not mutually exclusive. The discussion of issues related to corruption and acts committed for private gain also gave insight into the notion of acts performed in an official capacity.

59. As had already been noted by some members, the Special Rapporteur had a tendency to make categorical statements that appeared to go much further than was needed or justified. For example, in paragraph 31 of the report, she stated that “it should be noted that the distinction between ‘act performed in an official capacity’ and ‘act performed in a private capacity’ has no relation whatsoever to the distinction between lawful and unlawful acts”. Yet she then included in the definition of acts performed in an official capacity the fact that they must be criminal in nature. Similarly, in paragraph 65, it was stated that “the underlying distinction between *acta jure imperii* and *acta jure gestionis* is not comparable to the distinction between ‘acts performed in an official capacity’ and ‘acts performed in a private capacity’”, a point that was repeated several times in the fourth report. Again, while the terms were not identical and referred to different concepts, the statement seemed too absolute, as demonstrated by the statement of the Special Rapporteur herself, in paragraph 120, that “the legal constructs that have gradually developed in respect of the basic characteristics

²⁹⁸ See *Yearbook ... 2008*, vol. II (Part One), document A/CN.4/601, pp. 188–189.

²⁹⁹ 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.

of *acta jure imperii* offer some useful elements that may be taken into account by legal actors in the context of characterizing an act for the purposes of the present report”. Thus, *jure imperii* acts, which seemed to have been excluded, reappeared as a useful concept. Those points were worth mentioning because it was not always clear in the fourth report what was relevant to the definition of an act performed in an official capacity; such points would have to be clarified in the commentaries.

60. Furthermore, the mention of sovereignty was not particularly useful. Although that notion was only a small part of the Special Rapporteur’s analysis, in paragraphs 118 and 119, it was critical to her definition of an act performed in an official capacity. The Special Rapporteur argued that since sovereign equality was at the foundation of immunity, “the acts covered by such immunity must also have a link to the sovereignty that, ultimately, is intended to be safeguarded”. She added, as a corollary, that “the act performed in an official capacity cannot be only an act attributable to the State and performed on behalf of the State, but must also be a manifestation of sovereignty”. That led to the requirement in draft article 2, subparagraph (f), that the manifestation of sovereignty should be found in the exercise of elements of the governmental authority.

61. The Special Rapporteur mentioned equality as the foundation of immunity, but then focused on sovereignty and not, as one might have expected, on sovereign equality. To say that the acts of State officials must be a manifestation of that sovereignty in order to be considered as performed in an official capacity did not seem to correspond to the way in which they were perceived: many of them were routine or day-to-day acts that would not be considered manifestations of sovereignty. Sovereignty was too abstract a concept to be useful for the purposes of defining acts performed in an official capacity. However, the idea that such acts involved the exercise of governmental authority did enable a distinction to be made between them and acts performed in a private capacity, which was no doubt why the Special Rapporteur had included it in draft article 2, subparagraph (f).

62. In that draft article, the reference to elements of the governmental authority was at the core of the definition proposed by the Special Rapporteur. Accordingly, a State official was performing an act in an official capacity when he or she was exercising elements of the governmental authority. While the Special Rapporteur’s meaning was clear, it was questionable whether the reference was sufficient. The definition simply changed the focus: instead of establishing what constituted an act performed in an official capacity, it was now necessary to establish what constituted an act involving elements of the governmental authority—an exercise that was not necessarily any easier.

63. As other members had pointed out, a State official, in accordance with the definition the Commission had already provided in draft article 2, subparagraph (e), was an individual who represented the State or exercised State functions. Was an element of the governmental authority any different to a State function? In other words, was not the definition of an act performed in an official capacity already implicitly contained in the exercise

of a State function in draft article 2, subparagraph (e)? In fact, representation of the State, the second element of the definition in that subparagraph, was in itself a State function. The Commission seemed to have implicitly accepted that logic in draft article 5 provisionally adopted at the sixty-sixth session, because it provided that a State official “acting as such” was entitled to immunity *ratione materiae*. Surely that was simply another way of saying that when performing an act in an official capacity, State officials were entitled to immunity *ratione materiae*. Thus, either there was no need to define the expression “act performed in an official capacity” because the essence of it, exercising State functions, had already been expressed at the previous session, or there needed to be some reconciliation between exercising State functions, the definition of a “State official” adopted at the previous session³⁰⁰ and exercising elements of the governmental authority, a concept that had been introduced at the current session. An “act performed in an official capacity” might be defined as an act performed by a State official while exercising State functions, as Mr. Murphy had suggested. Of course, the question of what constituted a State function remained. If, instead, the definition proposed at the current session were adopted, a State official, who by definition was someone who exercised State functions, would be acting in an official capacity when exercising elements of the governmental authority, and the question remained as to what constituted elements of the governmental authority. The Special Rapporteur’s attempt, in paragraph 119 of her fourth report, to answer that question was not very helpful. As mentioned earlier, she relied on notions of sovereignty that were not specific enough to be effective in practice. Ultimately, it did not matter which definition was chosen; neither provided an obvious answer to any particular case. In that regard, it might be helpful for the Special Rapporteur to include in the commentary as many illustrative examples as possible, as suggested by Mr. Caflisch. Indeed, a comprehensive list of examples was probably the only way to provide guidance on the meaning of “act performed in an official capacity”.

64. With respect to the criminal nature of the act as an element of the definition, he agreed with other members who had argued for its deletion. In the context of criminal responsibility, an act performed in an official capacity was of course an act that was at least potentially criminal in nature, and it was understandable that the Special Rapporteur wished to make that clear; however, it was confusing to define an act performed in an official capacity as a criminal act, and the draft articles were liable to be misunderstood as a result. Perhaps the approach proposed by Mr. Caflisch and supported by Mr. Hmoud of stating that the act “may” constitute a crime would remedy that problem, but he would prefer to treat the criminal nature of the act separately, where it was necessary, rather than incorporating it as an essential part of the definition. As Mr. Kolodkin had said, the criminality of an act concerned jurisdiction, not the nature of the act on the basis of which immunity was invoked. Immunity was invoked because the act had been performed in an official capacity, not because it was criminal; that only provided the necessary context.

³⁰⁰ See *Yearbook ... 2014*, vol. II (Part Two) and corrigendum, p. 143 (draft article 2 (e)).

65. He had no specific comments to make on draft article 6; it had already been pointed out that different formulations were used in paragraphs 1 and 2 to refer to acts performed in an official capacity, but that problem could be resolved by the Drafting Committee. He also agreed with those who had pointed out that paragraph 3 did not belong in that draft article. If it was considered necessary, it should be placed near the provision on the treatment of the members of the troika with respect to immunity *ratione personae*. Mr. Kamto's suggestions in that regard were very useful. Taking those points into account, he would endorse referring the two draft articles to the Drafting Committee.

66. Much had been said about the Special Rapporteur's next report because of the anticipation surrounding the topic of exceptions to immunity. He would not comment on exceptions, as others had, but considered that dealing with procedural aspects first or even at the same time as exceptions would provide a much better basis for a debate in the Commission on the latter. The Special Rapporteur would have to determine whether she wished the Commission to consider the issue of exceptions at its sixty-eighth session or would prefer the issue to be examined by the new, perhaps much-changed, Commission the following year, a possibility mentioned by Mr. Peter.

67. Mr. SABOIA said that the main purpose of the report under consideration was to continue with the analysis of the normative elements of immunity *ratione materiae* by determining its substantive and temporal aspects. The third report had considered the subjective element, namely who could benefit from immunity, and the current report focused on the material and temporal aspects.

68. The determination of what constituted an "act performed in an official capacity" was of crucial importance for that purpose because, as indicated in paragraph 21 of the fourth report, "a situation may arise where, although an individual is a State official in the sense of the present draft articles and performs an act during his or her term of office, the act cannot be deemed to be 'an act performed in an official capacity', in which case, the possibility of immunity from foreign criminal jurisdiction cannot be entertained". In section B of chapter I of her fourth report, the Special Rapporteur examined the concept of an "act performed in an official capacity", as contrasted with an "act performed in a private capacity". That distinction was unrelated, the Special Rapporteur warned, to the distinction between *acta jure imperii* and *acta jure gestionis* and to the one between lawful and unlawful acts. The Special Rapporteur concluded that distinguishing acts performed in an official capacity simply by contrasting them with acts performed in a private capacity, while useful, did not allow for the identification of sufficiently clear and objective elements for defining the scope and material element of immunity *ratione materiae*. It was more important to determine the criteria for identifying an "act performed in an official capacity". To do so, the Special Rapporteur undertook an examination of international and national case law and treaty practice. In the first category, she mentioned cases before the International Court of Justice, the European Court of Human Rights and the International Tribunal for the Former Yugoslavia.

69. Citing the *Arrest Warrant of 11 April 2000* case, in particular paragraphs 53 and 56 of the judgment of the

International Court of Justice, the Special Rapporteur affirmed that one of the criteria for identifying an "act performed in an official capacity" was the exercise of "elements of the governmental authority". Among the cases before the European Court of Human Rights, she cited the statement contained in paragraph 205 of the judgment in *Jones and Others v. the United Kingdom*, in which the Court stated that "individuals only benefit from State immunity *ratione materiae* where the impugned acts were carried out in the course of their official duties".

70. Regarding national case law, the Special Rapporteur carried out similar analyses. Although the decisions of national courts regarding immunity did not allow for the identification of a consistent practice, she had nonetheless been able to bring useful examples drawn from her work in that area to illustrate the fourth report. The list of crimes for which immunity had most often been invoked, which comprised a number of important international crimes, contained in paragraph 50, was worthy of mention. Despite the apparent diversity of opinions taken on the subject by domestic courts, the Special Rapporteur noted that some courts were increasingly hesitant in granting immunity *ratione materiae* in cases of torture and other international crimes. On the other hand, a clear trend had been found towards denying immunity in cases of corruption, misappropriation of public funds and other financial crimes.

71. In order to determine the applicable criteria, the Special Rapporteur carried out a thorough analysis of treaty practice. The first instrument she considered was the Vienna Convention on Diplomatic Relations, mentioning the nature of official acts performed in the exercise of his or her function by diplomatic agents as an element of the definition of an "act performed in an official capacity". While that Convention did not expressly define the functions of the members of a diplomatic mission, it did define in detail the functions of the mission. Drawing on the list of functions, the Special Rapporteur concluded, in paragraph 63 of her fourth report, that while the list included a number of specific acts that were very distinct in nature in the category of acts performed in an official capacity, "there is no doubt that ... they must be unequivocally public and official in nature, and, in the case of diplomatic agents, that they must be closely linked to the concept of sovereignty and the exercise of elements of the governmental authority".

72. Paragraph 95 of the report thus defined the characteristics of the "act performed in an official capacity": (a) the act was of a criminal nature; (b) the act was performed on behalf of the State; (c) the act involved the exercise of sovereignty and elements of the governmental authority. During the debate, several members had raised questions or criticized the assertion that the act must be criminal in nature. In his view, that assertion was justifiable simply on the basis that the topic under consideration was immunity from criminal jurisdiction. Therefore, the act must be defined as a crime in the law of the forum State.

73. The study also shed light on the differences that existed between the criteria for attribution set out in the draft articles on the responsibility of States for internationally wrongful acts and the criteria with regard to responsibility of individuals for criminal acts defined in

international law. It was recalled, in particular, that in the context of attribution of acts to a State for establishing responsibility for internationally wrongful acts, the Commission had aimed to prevent the State from using indirect forms of action in order to disguise its responsibility and had therefore taken a broad approach to the definition of the elements for establishing responsibility. In the context of the current topic, paragraph 112 of the fourth report stated that “the criminal nature of the acts to which the criteria for attribution are to be applied, as well as the nature of immunity, which itself constitutes an exception to the general rule on the exercise of jurisdiction by the forum State, should be taken into account ... which ensures that the institution of immunity does not become a mechanism to evade responsibility”.

74. Based on a study of those works and of the judgments of the International Court of Justice, it was clear that a single act could give rise to two forms of responsibility: the criminal responsibility of the individual and the civil or international responsibility of the State he or she represented. Those two forms of responsibility, accepted by the Court, most notably 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)*, were clearly explained in paragraphs 109 and 110 of the fourth report.

75. At the end of section B of the first chapter of her fourth report, the Special Rapporteur discussed issues related to the exercise of governmental authority and their relation to the question of whether international crimes could be regarded as “acts performed in an official capacity”. She argued that considering such crimes not as acts performed in an official capacity was at odds with the evidence, as more often than not serious crimes were committed by the State apparatus and supported by State officials. Moreover, the participation of State officials in the commission of some of those crimes, like torture, was a constituent element of the crimes. On the other hand, putting the emphasis on State officials could give the impression that the act was not attributable to the State, thus exonerating it from international responsibility.

76. In the last paragraph of chapter I, section B, before proposing draft article 2, subparagraph (f), the Special Rapporteur observed that the characterization of international crimes as “acts performed in an official capacity” did not mean that the State official guilty of the crime automatically benefited from immunity. Given the particular gravity of such crimes under international law, they must be taken into account in defining the scope of immunity from foreign criminal jurisdiction. However, the examination must take place in the context of the treatment of exceptions to immunity, which would be dealt with in the Special Rapporteur’s next report.

77. Turning to the future workplan, he considered the Special Rapporteur’s proposal to be realistic. In conclusion, he recommended that the two draft articles be referred to the Drafting Committee.

The meeting rose at 1 p.m.

3277th MEETING

Thursday, 23 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. For-teau, Mr. Gómez Robledo, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Kolod-kin, 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. The CHAIRPERSON invited the members of the Commission to continue with the consideration of the fourth report by the Special Rapporteur on the topic of immunity of State officials from foreign criminal jurisdiction (A/CN.4/686).

2. Ms. JACOBSSON said that the Special Rapporteur’s thorough analysis of the practice of domestic courts was valuable: it revealed the inconsistencies in that practice. She was pleased to see the in-depth analysis of the draft articles on the responsibility of States for internationally wrongful acts and of “single act, dual responsibility”, but she agreed with Mr. Nolte that the Commission should not be delving into the substance of sovereignty. She welcomed the intended focus of future work on the limits and exceptions to immunity: now that the Commission had concluded the early stages of its work, it needed to discuss the most sensitive issues. There was an important link between exceptions to immunity and procedural rules that also needed to be addressed.

3. For the definition of an act performed in an official capacity, the Special Rapporteur appeared to start from the assumption that only acts over which criminal jurisdiction could be exercised by a foreign court were relevant. She clearly described the chief characteristics of criminal acts and the direct link between such acts and the person who committed them. However, the phrase “by its nature constitutes a crime”, in draft article 2 (f), was potentially ambiguous.

4. Draft article 6, paragraph 3, which emphasized the fact that immunity *ratione materiae* applied to former Heads of State, former Heads of Government and former Ministers for Foreign Affairs, appeared superfluous, since the same point was made in paragraph (7) of the commentary to draft article 4.³⁰¹

³⁰¹ See *Yearbook ... 2013*, vol. II (Part Two), p. 50.