Document:-
A/CN.4/3361

Summary record of the 3361st meeting

Topic:
Immunity of State officials from foreign criminal jurisdiction

Extract from the Yearbook of the International Law Commission:-
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no clear reason. All international crimes universally recognized as such and falling under international jurisdiction should be included in draft article 7, paragraph 1, including apartheid.

83. The crime of aggression had not been included in draft article 7, paragraph 1, for the reasons given in paragraph 222 of the report. The identification of an act of aggression fell within the responsibility and functions of the Security Council under Chapter VII of the Charter of the United Nations and of the General Assembly in the event of a deadlock in the Security Council. Under article 5 of the Rome Statute of the International Criminal Court, provision was made for the Court to exercise jurisdiction with respect to the crime of aggression in accordance with the relevant provisions of the Charter of the United Nations. Furthermore, the crime of aggression was provided for in article 16 of the Commission's 1996 draft code of crimes against the peace and security of mankind.[210] Therefore, the crime of aggression must fall within the scope of international jurisdiction, rather than domestic jurisdiction. Crimes against the peace and security of mankind were crimes under international law and punishable as such, whether they were punishable under national law. Accordingly, in the light of the above, no rule of immunity should apply in national jurisdictions for a crime of aggression committed by State officials. Hence, he would agree with other members who, at the previous session, had proposed the inclusion of that crime in the list of exceptions to immunity.

84. Customary law generally recognized immunity *ratione personae* for Heads of State, Heads of Government and Ministers for Foreign Affairs in all circumstances. Therefore, bearing in mind the need for consistency with paragraph 2, the term "*ratione materiae*" should be inserted after the word "immunity" in paragraph 1 of draft article 7 in order clearly to identify the type of immunity in question. Such mention would also reflect the spirit of international law and the treatment at the national level of crimes committed by foreign State officials, without distinction based on official capacity. The paragraph should provide for the possibility of including new core international crimes that were universally recognized as such and subject to punishment, and to which immunity did not apply. Some national laws, for instance the 2015 Criminal Code of Viet Nam, provided for questions of criminal liability and exceptions to immunity to be settled through diplomatic channels on a case-by-case basis.

85. Among the various forms of international organized crime, draft article 7, paragraph 1 (*b*), referred only to corruption-related crimes. That might be explained by a concern about the threat that such crimes posed to sustainable development and to the stability and security of societies and about the need to give priority to fighting corruption at all levels. Even though 181 States had become parties to the United Nations Convention against Corruption, exceptions to immunity for crimes of corruption should be considered in the light of a series of factors, such as the economic nature of the crimes involved and the capacity—private or official—in which the acts concerned had been performed. The commentary should provide clarification of the relevant circumstances. The explanation provided in paragraphs 230 to 234 of the report to support the inclusion of corruption-related crimes should be further developed. In that connection, the footnote to paragraph 230 did not support the general assessment that the response of national courts had generally been to deny immunity; more proof of national practice was required to substantiate such a claim. It should be further noted that article 4 of the United Nations Convention against Corruption, on protection of sovereignty, included provisions on respect for sovereign equality and non-intervention in the domestic affairs of other States. Accordingly, the reference to corruption-related crimes in the draft article should be accompanied by a requirement not to undermine sovereignty or to interfere in domestic affairs.

86. While supporting the inclusion of the concept of the territorial tort exception in draft article 7, paragraph 1 (*c*), he had doubts about the use of the conjunction "or" in the clause "Crimes that cause harm to persons, including death and serious injury, or to property". Its use might suggest that, even though the crimes in question caused harm only to property, State officials forfeited their right to invoke immunity. In reality, serious crimes caused harm to both persons and property; the level of harm should be specified.

87. In conclusion, he recommended sending draft article 7 to the Drafting Committee.

The meeting rose at 12.30 p.m.

3361st MEETING

Friday, 19 May 2017, at 10.05 a.m.

Chairperson: Mr. Georg NOLTE

Present: Mr. Argüello Gómez, Mr. Cissé, Ms. Escobar Hernández, Ms. Galvão Teles, Mr. Gómez Robledo, Mr. Grossman Guiloff, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Mr. Jalloh, Mr. Kolodkin, Mr. Laraba, Ms. Lehto, Mr. Murase, Mr. Nguyen, Ms. Oral, Mr. Ouazzani Chahdi, Mr. Park, Mr. Peter, Mr. Rajput, Mr. Reinisch, Mr. Ruda Santolaria, Mr. Saboia, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Sir Michael Wood.

Immunity of State officials from foreign criminal jurisdiction (*continued*) (A/CN.4/703, Part II, sect. E, A/CN.4/701, A/CN.4/L.893)

[Agenda item 2]

FIFTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRPERSON invited the Commission to resume its consideration of the fifth report of the Special Rapporteur on the topic of immunity of State officials from foreign criminal jurisdiction (A/CN.4/701).

[210] The draft code adopted by the Commission in 1996 is reproduced in *Yearbook … 1996*, vol. II (Part Two), pp. 17 *et seq.*, para. 50.

2. Mr. TLADI said that he wished to congratulate the Special Rapporteur on her detailed, well-researched report. However, given that the Commission had provisionally adopted draft articles on the definition of immunity and had drawn a distinction between immunity *ratione personae* and immunity *ratione materiae*, chapter III of the report seemed entirely superfluous. The report devoted too much attention to decisions of the International Court of Justice that had already been debated *ad nauseam* in the Commission. Too much of the report had been set aside for marginal issues that were regarded by the Commission as falling outside the scope of the topic. They included immunity from civil jurisdiction, immunity of the State as such and immunity arising from instruments and the jurisprudence of international tribunals. However, he agreed with the Special Rapporteur that the issue of exceptions or limitations was important, and perhaps even crucial, to the topic.

3. Neither the Vienna Convention on Diplomatic Relations nor the Vienna Convention on Consular Relations, discussed in chapter II of the report, was directly relevant to the topic. Draft article 1,[211] already provisionally adopted under the topic, established that the draft articles were without prejudice to special rules that applied to, among others, diplomats and consular officials. Draft article 1 also made it plain that the Commission's project was limited to criminal proceedings, thereby making the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character and the European Convention on State Immunity, cited in paragraph 28 to justify the territorial tort exception, equally irrelevant.

4. In paragraph 29 of the report, in an apparent attempt to extend the territorial tort exception to the criminal sphere, the Special Rapporteur referred to paragraph (4) of the Commission's commentary to draft article 12 of the draft articles on the jurisdictional immunities of States and their property.[212] There was, however, nothing in the language of the commentary to justify that extension. All that paragraph (4) did was to recall that, while draft article 12 applied mainly to damage caused by negligence, there was nothing to prevent it from applying to damage caused intentionally. The Special Rapporteur's suggestion that this implied an extension to criminal jurisdiction was based on the incorrect assumption that intentional damage could be addressed only through criminal proceedings.

5. In paragraph 225, the Special Rapporteur stated that the territorial tort exception had been incorporated "into all national laws governing immunity, with the exception of those of Pakistan". First, the instruments referred to in the report all concerned the immunity of the State itself. Second, the statement was inaccurate, as the Diplomatic Immunities and Privileges Act of South Africa, which governed the immunity of officials other than diplomats, did not provide for such an exception.

6. As far as he could tell, a number of the cases cited in the footnote to paragraph 227 concerned civil, not criminal, proceedings. In *Letelier and Others v. The Republic of Chile and Linea Aerea Nacional-Chile*, for example, the only person criminally convicted had been a United States national who had not enjoyed immunity from the jurisdiction of American courts. More importantly, the case concerned the enforcement of a judgment against the property of the Government of Chile, which was a civil matter. *Ferrini v. Federal Republic of Germany*, in which the core legal issue had been State immunity, also concerned civil proceedings. It was not clear that *Jiménez v. Aristeguieta* et al., which was also referred to in the same footnote, supported the existence of an exception to immunity, since the court in that case had held that the appellant had not acted in the capacity of a State official.

7. A case cited in the footnote in question that did appear to be relevant, in that it involved an official and did not concern civil proceedings, was *Khurts Bat*. The case was complicated, but as far as he could tell it did not support the territorial tort exception. It would have been helpful for the Special Rapporteur to provide succinct explanations as to why each, or at least some, of the cases cited corroborated the argument that she was presenting.

8. In paragraph 33 of the report, the Special Rapporteur mentioned a group of treaties that addressed core crimes under international law, citing specific provisions in the treaties. During the debate on the third report on crimes against humanity (A/CN.4/704), however, most members of the Commission had been of the opinion that, in principle, those provisions concerned the issue of responsibility and did not, therefore, remove any procedural immunities that attached to an individual.

9. The Special Rapporteur also mentioned that agents of the State were referred to in the definition of torture in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Nevertheless, pursuant to the Convention, the State with territorial jurisdiction had the primary duty to prosecute acts of torture, including those committed by its own officials, where immunity under international law was not applicable. The mere inclusion of a reference to agents of the State was therefore an inadequate basis for concluding that the Convention removed immunity.

10. In paragraph 37 of the report, the Special Rapporteur seemed to suggest that several anti-corruption conventions removed immunity, which was decidedly not the case. If anything, an honest reading of the conventions revealed that they were consistent with international law on immunities. While it was true that article 16 of the United Nations Convention against Corruption contained a reference to offering or giving to a foreign public official an undue advantage, the provision foresaw the prosecution, not of the "foreign public official", but of the State's own national. Moreover, in article 16, paragraph 2, States parties were urged merely to "consider" criminalizing the solicitation or acceptance of a bribe by a foreign public official, which seemed to suggest that there might be a legal impediment to the prosecution of foreign officials, particularly if they came from States that were not parties to the Convention. At any rate, an interpretative note that accompanied article 16 made it clear that the article did not affect rules of international law related to immunities.

[211] *Yearbook … 2013*, vol. II (Part Two), p. 39 (draft article 1).

[212] *Yearbook … 1991*, vol. II (Part Two), p. 45 (para. (4) of the commentary to draft article 12).

11. Like Sir Michael Wood, he doubted whether the domestic court cases mentioned in the footnote to paragraph 230 substantiated the Special Rapporteur's argument. From a methodological perspective, it might have been better to provide more detailed descriptions of those cases in order to enable the Commission to formulate an opinion, as brief references in a footnote did not facilitate a thorough debate.

12. The only conclusions that could be drawn from the treaty practice referred to in the report were that: it did not reveal any exceptions to the rules governing the immunity of officials from foreign criminal jurisdiction; there was a significant amount of practice pointing to exceptions with regard to the immunity of States themselves, but that did not necessarily affect the immunity of officials; and the exceptions that had been established with respect to the immunity of officials related to civil jurisdiction.

13. Paragraph 44 dealt with national laws regulating jurisdictional immunity, among which the Special Rapporteur included the Foreign States Immunities Act of South Africa. The Act, however, was not about the immunity of officials at all. It was true, as noted in the report, that the Act mentioned Heads of State, but only insofar as they personified the State. A South African legislative enactment that did apply to specific officials was the Diplomatic Immunities and Privileges Act, which, despite its name, covered not only diplomats but also other officials, including Heads of State as such (immunity *ratione personae*). It was noteworthy that the Act did not provide for any exceptions to immunity. With regard to the legislative enactments described by the Special Rapporteur in paragraphs 47 to 53 of the report, as he understood it, the Foreign Sovereign Immunities Act of the United States and the State Immunity Act of Canada both applied principally to the immunity of States themselves and to civil, rather than criminal, proceedings.

14. The section of the report devoted to international judicial practice was unduly long, and much of what it covered, particularly the cases concerning the *Arrest Warrant of 11 April 2000* and *Jurisdictional Immunities of the State*, had already been discussed in the Special Rapporteur's preliminary report.[213] In addition, many of the issues highlighted in paragraphs 61 to 71 with respect to the *Arrest Warrant of 11 April 2000* case were immaterial to the question of exceptions. The relationship between immunity and impunity and the existence of an alternative model for deducing an individual's criminal responsibility, addressed in paragraphs 63 to 67, did not reveal anything about exceptions to immunity. Judge Al-Khasawneh's dissenting opinion, which he himself supported, concerned the question of whether a Minister for Foreign Affairs should enjoy immunity *ratione personae*, an issue that the Commission had disposed of—incorrectly, in his own view—in 2013. For the purposes of the report under consideration, the only conclusion that could be drawn from the *Arrest Warrant of 11 April 2000* case was that there were no exceptions to immunity *ratione personae*; no conclusion could be reached with regard to immunity *ratione materiae*.

15. Although, in paragraph 86 of the report, the Special Rapporteur asserted that it was not her intention to analyse in detail the case concerning *Jurisdictional Immunities of the State*, that was precisely what she did in paragraphs 73 to 86. In paragraph 74, it was stated that the case was being examined with regard to "the nature of immunity and its relationship with jurisdiction and the regime of the international responsibility of the State". However, those issues were peripheral to the focus of the report, which was exceptions. In fact, of the paragraphs in the fifth report devoted to the case concerning *Jurisdictional Immunities of the State*, only paragraphs 79, 80, 83 and 85 were relevant to the issue of exceptions. The message to take away from those paragraphs was that, according to the Court, there were no exceptions to immunity for grave crimes and no territorial tort exception under customary international law.

16. The section of the report concerning international criminal tribunals was too long, particularly as immunity from foreign criminal jurisdiction and immunity from the jurisdiction of international tribunals were two completely different matters. In paragraph 108, the Special Rapporteur stated that the decisions of international criminal tribunals that she had analysed "lead to the conclusion that international criminal courts or tribunals, including the International Criminal Court, have unequivocally rejected the possibility of the immunity of State officials, both *ratione personae* and *ratione materiae*, being invoked in said courts". That statement, however, did not capture all the nuances of the jurisprudence of international tribunals. The jurisprudence of the International Criminal Court, for instance, had been at best confused and confusing with regard to immunity. In the cases concerning the failure by Chad and Malawi to cooperate in the arrest of President Omar Al Bashir, the Court's Pre-Trial Chamber had unequivocally rejected the possibility of the immunity of State officials from the Court's jurisdiction. In its ruling on the obligation of the Democratic Republic of the Congo to cooperate, however, it had decided—incorrectly, in his view—that article 27 of the Rome Statute of the International Criminal Court did not affect States that were not parties, and that their Heads of State therefore retained their immunities, even before the Court.

17. In paragraph 113 of the report, the Special Rapporteur mentioned the judgments of South African courts concerning the non-arrest of President Al Bashir during his participation in the African Union Summit in Johannesburg in 2015. Contrary to popular belief, the Supreme Court of Appeal of South Africa had found that, under customary international law, there was absolute immunity from jurisdiction, and that there were no exceptions to that rule under international law.[214] It had also found that there had been an obligation to arrest President Al Bashir, but solely on the basis of domestic legislation, not of international law. The Court's decision might well constitute an important piece of practice that could, under the right circumstances, create an impetus for the development of law. Ultimately, however, it had to be assessed in connection with the practice of the executive and even

[213] *Yearbook … 2012*, vol. II (Part One), document A/CN.4/654 (preliminary report).

[214] See the judgment of 15 March 2016 of the South Africa Supreme Court of Appeal in *Minister of Justice and Constitutional Development and Others v. Southern Africa Litigation Centre and Others*.

the legislature in South Africa, which was currently considering repealing or amending the legislation on which the decision of the Supreme Court had been based. On 7 April 2017, the Government of South Africa had asserted before the Pre-Trial Chamber of the International Criminal Court that, in its view, Heads of State had absolute immunity before national courts. Its submissions were an important element of practice that should be taken into account when assessing the state of international law on the issue of immunity, as should the previous cases of non-arrest of President Al Bashir and the subsequent ones in Djibouti, Jordan and Uganda. In any event, the conclusion drawn by the Special Rapporteur in paragraph 121 of the report was probably correct and provided the essence of what the Commission should include in draft article 7.

18. As it was, he saw no basis, in the report, for draft article 7, paragraph 1 (*b*) or (*c*). The anti-corruption conventions that presumably formed the basis for draft article 7, paragraph 1 (*b*), could not justify the conclusion that, under existing international law, there was an exception to the rule relating to immunity *ratione materiae*. Although some officials had been prosecuted for acts of corruption, the fact that those acts had not been deemed official meant that there would have been no question of immunity in the first place. Similarly, there was no support for the territorial tort exception reflected in draft article 7, paragraph 1 (*c*). The practice referred to in the report related, in principle, to civil, rather than criminal, proceedings, and could thus not form the basis of a draft article.

19. While he agreed with the thrust of draft article 7, paragraph 1 (*a*), he believed that it should cover the four crimes under the Rome Statute of the International Criminal Court and, possibly, torture. The crime of aggression should be included. He agreed that there was general support from States for exceptions to immunity *ratione materiae* for core crimes. As long as the Commission avoided the terms "progressive development" and "*lex ferenda*" in the commentary, he was sure that ways could be found to reflect the fact that relevant law was in a state of flux.

20. He agreed with draft article 7, paragraph 2, but would also be in favour of accepting Sir Michael's proposal to delete the paragraph and to specify simply that the draft article applied only to immunity *ratione materiae*.

21. That proposal would resolve the problem that he had with draft article 7, paragraph 3, which, though crafted as a "without prejudice" clause, was wholly prejudicial. Everything that the Commission had done had been without prejudice to other treaty regimes. Why, therefore, should a "without prejudice" clause be included in draft article 7, paragraph 3? If there was going to be a "without prejudice" clause, it should be drafted to apply to the draft articles as a whole, not to just one provision.

22. Mr. KOLODKIN said that the fifth report on immunity of State officials from foreign criminal jurisdiction pursued a specific objective: to place strict limitations on immunity from foreign criminal jurisdiction, since such immunity, in the eyes of the Special Rapporteur and like-minded people, made it difficult to bring to justice perpetrators of international crimes and, accordingly, jeopardized the exercise and defence of human rights. Immunity, in her view, was diametrically opposed to human rights and responsibility for their violation.

23. At the end of every speech, Cato the Elder used to say *Cathago delenda est*—"Carthage must be destroyed". Slightly modified to become "Immunity must be destroyed", the phrase could be used to end or begin not only the fifth report of the Special Rapporteur, but all of them. The fifth report was entirely predicated upon the destruction of immunity, which the Special Rapporteur used as justification for limitations or exceptions to immunity. Citing paragraphs 179 to 181, 184, 189 and 190 of the fifth report, he noted the skill with which the Special Rapporteur challenged all, or nearly all, of the arguments in favour of immunity, including those contained in the rulings of the International Court of Justice. She cast doubt on the procedural nature of immunity in the context of criminal jurisdiction. She did not agree that the immunity *ratione materiae* of State officials was equivalent to the immunity of the State. Pursuing that line of reasoning, she asserted that immunity from criminal jurisdiction and the rules of *jus cogens* that prohibited certain acts lay on the same plane of substantive law and that the peremptory norms prevailed over the rules on immunity. It was a strong case against immunity *ratione materiae*, cleverly constructed by a Grand Master of the law.

24. He congratulated her on her report, but he could agree neither with her approach to the topic and much of her argumentation, particularly in paragraphs 190 to 217, nor with draft article 7. On the other hand, he agreed with practically everything that Sir Michael had said at the current session, and with what Mr. Huang and Mr. Singh had said at the previous session.

25. In the six years since he had presented his third report, the practice and *opinio juris* of States, the positions taken by the International Court of Justice and the European Court of Human Rights, the Commission's discussion of the topic and the literature gave no grounds whatsoever for revising the main points made in his three reports.[215] His second report had dealt with exceptions to immunity and had been based on the 2002 judgment of the International Court of Justice in the case concerning the *Arrest Warrant of 11 April 2000*. Although that judgment had been opposed by three judges and criticized in the literature, he himself had maintained that the Court was not only right but also consistent in its position on immunity, as could be seen from its 2008 judgment in *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*. In 2012, the Court had adopted a ruling in the case concerning *Jurisdictional Immunities of the State* which confirmed its position in the *Arrest Warrant of 11 April 2000* case and, consequently, the conclusions advanced in his own reports. The fact that the ruling concerned the immunity of the State from civil, not criminal, jurisdiction, changed nothing. The ruling demonstrated that the decisions adopted by Italian courts violated the international legal obligations of Italy that

[215] Reports of the first Special Rapporteur, Mr. Kolodkin: *Yearbook … 2008*, vol. II (Part One), document A/CN.4/601 (preliminary report); *Yearbook … 2010*, vol. II (Part One), document A/CN.4/631 (second report); and *Yearbook … 2011*, vol. II (Part One), document A/CN.4/646 (third report).

flowed from the rules on State immunity. In 2014, the Constitutional Court of Italy had declared that the ruling of the International Court of Justice was contrary to the Constitution of Italy and that a 1957 law on compliance with the Charter of the United Nations, particularly Article 94 thereof, was unconstitutional.[216]

26. With all due respect for Italian jurisprudence, he had to say that this ruling by the Constitutional Court was far from incontrovertible. Nevertheless, it occupied a large place in the current Special Rapporteur's fifth report. In paragraph 122, she spoke of the "significance" of the ruling; it became clear to the reader that she was using it to support her own position. She said nothing about the fact that the ruling directly contradicted the judgment of the International Court of Justice in *Jurisdictional Immunities of the State* or that carrying out the ruling might bring into play the responsibility of Italy under international law, including for a breach of Article 94 of the Charter of the United Nations. Italian courts had subsequently adopted a number of decisions that went against the position of the International Court of Justice. In his view, national judicial practice like that of Italy could not form the basis for the Commission's conclusions.

27. As other members of the Commission had repeatedly stated, each case drawn from practice must be thoroughly analysed and accurately assessed. The circumstances surrounding the consideration of immunity in each specific case must be understood: was the immunity of the official invoked by the Government? Were the official's acts declared to have been performed in an official capacity? At what stage was the question of immunity raised? How did the Government react to the court's decision?

28. In that context, it would be interesting to know whether the question of immunity had been invoked, and if so, by whom, when a Spanish court had issued orders for the arrest of the former President of the People's Republic of China and a number of former Chinese officials in 2013 and 2014 and for the arrest of the Prime Minister of Israel and seven former and serving Israeli officials in 2015. No one had been arrested following those orders, China and Israel had reacted with strong dissatisfaction and the question arose as to what purpose had been served by those court decisions, other than to cause harm to intergovernmental relations. In what way had the decisions advanced the struggle for human rights?

29. In nearly all court cases, statements in the Sixth Committee and the Commission and in the literature, references were made both to civil and to criminal cases, although the need to take into account the difference between immunity from civil proceedings and immunity from criminal proceedings was often emphasized. Everyone understood that the two situations were different, but it was also clear that they had much in common. What were their common points, and where did they differ? As he saw it, the International Court of Justice had provided the key to the answer. In its judgments in *Arrest Warrant of 11 April 2000* and *Jurisdictional Immunities of the State*, the Court described the law of immunity from foreign jurisdiction as an institution of international law and as essentially procedural in nature. The law of immunity regulated the exercise of jurisdiction in respect of particular conduct and was thus entirely distinct from the substantive law that determined whether that conduct was lawful or unlawful.

30. Based on the Court's rulings, elements common to various subcategories of immunity could be deduced. In all cases, immunity was a rule of customary international law. It was procedural, not substantive, in nature. The rules of law on immunity were confined to determining whether the jurisdiction of one State could be exercised in respect of another State. The fact that immunity might bar the exercise of jurisdiction in a particular case did not alter the applicability of the substantive rules of law. The unlawfulness of an act and the gravity of the unlawfulness in no way affected the official character of the act, and vice versa: the act's official character did not make it lawful. The question of immunity must be resolved by a national court as a matter of international law before it could hear the merits of the case and before the facts could be established. Lastly, one general rule flowed from the rules just listed: the absence of exceptions to immunity from foreign jurisdiction.

31. Conversely, there were some aspects of the law of immunity that were characteristic either of immunity from criminal jurisdiction or of immunity from civil jurisdiction. The former was often invoked at the pretrial stage, meaning at an earlier stage than in civil proceedings. Indeed, the question of immunity was often resolved by prosecutors before reaching the courts, and, consequently, the general public was often not aware of the many cases when immunity from foreign jurisdiction had been successfully invoked. Moreover, the question of immunity had to be resolved at a stage when it was still too early to speak of the commission of a crime, guilt or the responsibility of the person whose immunity was being considered, in view of the presumption of innocence at that stage.

32. Also of special significance in the context of immunity from foreign criminal jurisdiction was which acts of the State exercising jurisdiction were precluded by immunity. Did immunity obstruct the investigation or prosecution of a foreign official? A related question, about the interplay between immunity and inviolability, had been raised by Sir Michael Wood. Unfortunately, the Special Rapporteur had not considered such matters, even though they were important for the formulation of provisions on the scope or limitation of immunity. For the work on the topic, it was necessary to have a clear picture of which rules applied to all types of immunity, and which only to immunity from foreign jurisdiction.

33. Although international law admitted of no exceptions to immunity, there was nothing to prevent States from making such exceptions in their relations among themselves—for example, by concluding treaties. However, he wondered whether that would be the kind of development of international law that would improve life for the international community. Did the Commission really think that a world in which States sought to prosecute the officials of other States, as Spain had recently tried to do to those of China and Israel, would

[216] See *Judgment No. 238/2014* of the Constitutional Court of Italy.

be a better world? Did it really see that as the correct way to fight for human rights and against impunity? Did it not think that, on the contrary, it might set off new conflicts among States?

34. Would it not be better to take the position that under existing international law, immunity *ratione materiae* protected State officials who were acting in that capacity from foreign criminal jurisdiction, irrespective of the gravity of the incriminating acts, but did not prevent investigation, prosecution and other measures? In order for immunity *ratione materiae* to preclude the exercise of foreign criminal jurisdiction over an official, it had to be invoked by the official's State, meaning that the State had to acknowledge the acts in question as its own. The State that had suffered harm because of the official's acts would then be justified in raising the issue of the responsibility under international law of the official's State. It could then be suggested that the official's State should revoke his or her immunity or receive the evidence collected for a criminal trial. If the State did not invoke the official's immunity, that would amount to its tacit revocation.

35. Before taking such a position, however, the Commission would have to consider matters it had not yet dealt with, foremost among them being the procedural aspects of immunity. It could also propose to States a draft article on exceptions to immunity, separating it from the others that had already been proposed by designating it as optional. He would not condone the presentation of such a draft article as a progressive or desirable development of international law, however.

36. As to the content of draft article 7, he agreed with the criticisms advanced by Sir Michael and Mr. Tladi and was not in favour of referring it to the Drafting Committee, at least, not until agreement had been reached about how its status, as part of existing international law or as a new law, was to be presented to States.

37. Ms. GALVÃO TELES said that current practice in relation to immunity was not clear enough to enable approaches applicable to all aspects of the limitations and exceptions to immunity, particularly immunity *ratione materiae*, to be identified. The Commission must therefore decide whether to pursue progressive development in those areas where the practice was unclear but there were also other principles and values of international law that had to be taken into account. Citing paragraphs 71, 72 and 75 of the joint separate opinion of Judges Higgins, Kooijmans and Buergenthal in the *Arrest Warrant of 11 April 2000* case, she said that a balance had to be struck between the principles of sovereign equality, stability in the conduct of international relations and immunity, on the one hand, and combating impunity for the most serious international crimes, on the other.

38. An approach that favoured codification and *lex lata* could certainly be adopted with respect to immunity *ratione personae*. With respect to immunity *ratione materiae*, however, she believed that the Commission should opt for progressive development and *lex ferenda*, taking into account the trends in the development of the values and principles of international law.

39. She agreed with the conclusion reached in paragraph 240 of the report that it was not possible, on the basis of practice, to determine the existence of a customary rule allowing the application of limitations or exceptions to immunity *ratione personae* or to identify a trend towards such a rule. That had been very clearly demonstrated in the *Arrest Warrant of 11 April 2000* case, which was perhaps the most important piece of case law in that area. However, the same clarity was not to be found in the context of immunity *ratione materiae*. Practice was not unequivocal, but seemed to reveal a trend towards excluding the application of immunity *ratione materiae* to State officials in cases of international crimes, as the three judges had noted in their separate opinion in the *Arrest Warrant of 11 April 2000* case. Several arguments were cited in the report to support that conclusion: international crimes could not be considered "acts performed in an official capacity"; an exception to immunity was warranted because of the heinous and serious nature of the crimes; immunity could undermine the values and principles recognized by the international community as a whole; and immunity was contrary to *jus cogens* in the case of international crimes.

40. The main source for the principle of immunity of State officials from foreign criminal jurisdiction was customary international law. However, immunity *ratione materiae* must be reconciled with several recent treaties that imposed obligations on States to prosecute or extradite for certain international crimes, such as genocide, crimes against humanity and war crimes. In her view, torture and enforced disappearance should be added to that group, as their regimes shared some similarities, including the obligation to prosecute perpetrators at the national level. The Special Rapporteur provided examples of national jurisprudence to illustrate that trend with respect to torture and, to a lesser degree, enforced disappearance. Those two crimes, together with the aforementioned three, constituted the basic elements for which there existed State practice and clear provisions in international instruments.

41. Other categories to be included among the exceptions to the application of immunity *ratione materiae* were corruption and the "territorial tort exception". With regard to corruption, which was generally defined as abuse of power for personal gain, the reason for making an exception to immunity *ratione materiae* should be because crimes of corruption could not be considered "acts performed in an official capacity". Official capacity was merely instrumental in the commission of such crimes, since the person abused his or her special position for private purposes. While draft article 6[217] on the scope of immunity *ratione materiae* might be sufficient to exclude corruption-related crimes from the application of immunity, for the sake of clarity they should be mentioned in draft article 7.

42. The proposal to include in the draft articles a territorial tort exception, on the basis of article 12 of the United Nations Convention on Jurisdictional Immunities of States and Their Property, was an interesting one from a practical perspective, but it could be argued that article 12 was formulated too generally, and a more

[217] *Yearbook … 2016*, vol. II (Part Two), p. 216 (draft article 6).

restrictive formulation might be more appropriate in the context of immunity of State officials as opposed to immunity of States.

43. With regard to the title of draft article 7 and the *chapeau* of the first paragraph, she agreed with the Special Rapporteur that the distinction between limitations and exceptions was of no practical importance because both terms had the same consequences, namely the non-application of the legal regime of immunity of State officials from foreign criminal jurisdiction. Consequently, she supported the proposal that, for the purposes of the draft articles, the phrase "immunity shall not apply" should include both limitations and exceptions.

44. With regard to draft article 7, paragraph (1) (*a*), for the reasons outlined earlier, she supported the inclusion of specific references to genocide, crimes against humanity, war crimes, torture and enforced disappearance as international crimes in respect of which immunity should not apply. Other crimes could be added, but she considered the current formulation to be sufficiently balanced, reflecting the evolution of international law in terms of the fight against impunity for the most serious international crimes. With the exception of enforced disappearance, the formulation corresponded to the 2009 resolution of the Institute of International Law on the immunity from jurisdiction of the State and of persons who act on behalf of the State in case of international crimes, which specified that "[n]o immunity from jurisdiction other than personal immunity in accordance with international law applies with regard to international crimes".[218]

45. With regard to "corruption-related crimes" mentioned in paragraph 1 (*b*), she supported the Special Rapporteur's proposal, since acts of corruption were not "acts performed in an official capacity" and should therefore not fall under the scope of immunity *ratione materiae*. However, in the light of draft article 6, another possibility would be to explain explicitly in the commentary that "[c]orruption-related crimes" were not "acts performed in an official capacity" and to specify which crimes came under that category. In that case, it would not be necessary to keep that category in the draft article itself.

46. Regarding the crimes listed in subparagraph (*c*), the territorial tort exception was perhaps more relevant in the context of the immunity of the State, and the subparagraph was perhaps drafted in overly absolute terms; it might be taken to cover all kinds of activities undertaken by State officials in the forum State. Another possibility had been put forward by the previous Special Rapporteur in his second report, the final paragraph of which stated: "A situation where criminal jurisdiction is exercised by a State in whose territory an alleged crime has taken place, and this State has not given its consent to the performance in its territory of the activity which led to the crime and to the presence in its territory of the foreign official who committed this alleged crime, stands alone in this regard as a special case. It would appear that in such a situation there are sufficient grounds to talk of an absence of immunity."[219] It would also be useful to illustrate, perhaps in the commentary, the types of acts covered by the exception, such as political assassinations, spying, sabotage and abduction.

47. As for paragraph 2 of draft article 7, the Special Rapporteur's proposal seemed sufficiently clear and uncontroversial, as it reflected long and consistent State practice and the principle of sovereign equality of States. However, it would be necessary to clarify in the commentary that it was without prejudice to the principle of individual criminal responsibility for international crimes and the need to guarantee the existence of effective mechanisms to combat impunity for such crimes. The procedural nature of immunity could not exonerate a State official of his or her individual criminal responsibility, nor could it be equated to impunity. In that regard, a reference to paragraph 60 of the judgment of the International Court of Justice in the *Arrest Warrant of 11 April 2000* case should be added to the commentary. She supported the important "without prejudice" clause in paragraph 3; perhaps, as Mr. Tladi had proposed, the "without prejudice" clause should be applied to the whole set of draft articles.

48. In conclusion, she was in favour of sending draft article 7 to the Drafting Committee. She expressed the hope that the new Commission would remain on the side of progressive development, and that its work on such an important topic would not interrupt the trend discernible in international law towards limiting exceptions to the immunity *ratione materiae* of State officials from foreign criminal jurisdiction, at least in respect of international crimes. With regard to the future workplan proposed by the Special Rapporteur, she looked forward with great interest to the sixth report, which would deal with procedural aspects of immunity, as well as to the adoption of the draft articles on first reading.

49. Mr. HASSOUNA said that, although the Special Rapporteur's fifth report exceeded the recommended length, its interesting and detailed analysis would contribute to a better understanding of the issues at stake. Given that the subject matter was politically sensitive and important to States, it should be approached cautiously so as to ensure a general consensus on the outcome. To that end, the Commission should attempt to strike a balance between preserving the basic norms of the existing immunity regime, while responding to the international community's current efforts to combat impunity. Such an approach should focus on the harmonization of *lex ferenda* and *lex lata* in accordance with the Commission's mandate.

50. He appreciated the Special Rapporteur's thorough study of State and judicial practice on the issue of exceptions and limitations to the immunity of State officials. Such practice should be the foundation for drafting articles on the topic. As some members had noted, however, the Special Rapporteur's study of practice was somewhat unusual. She drew on a number of sources to establish the existence of a trend in international law to recognize exceptions to immunity *ratione materiae*, and based

[218] Institute of International Law, *Yearbook*, vol. 73, Parts I and II, Session of Naples (2009), pp. 226–227; available from: www.idi-iil.org, *Resolutions*.

[219] *Yearbook … 2010*, vol. II (Part One), document A/CN.4/631, p. 426, para. 94 (*p*).

draft article 7 on those sources. Several problems arose, including the fact that she did not distinguish between exceptions and limitations or establish a time frame for how rapidly the trend had evolved, and she emphasized different sources of law depending on the exception she was attempting to establish. Therefore, although a trend was shown to exist for some exceptions, it did not exist for all of the exceptions listed in the proposed draft article.

51. The Special Rapporteur's analysis of the legal nature of immunity and its relationship with jurisdiction, responsibility and national and international levels of jurisdiction was helpful, although as some members had noted, it was a complex matter. On the one hand, the quest for accountability should not be regarded as a mechanism for meddling in a State's internal affairs or serve as an excuse to politically prosecute a high-ranking official. On the other hand, the effective implementation of *jus cogens* norms throughout the world was paramount. There were numerous possible measures to prosecute a perpetrator of international crimes, such as domestic prosecution, waiver of immunity, prosecution after termination of term of office and prosecution before the international criminal justice system. However, those alternatives were not always sufficient. Both of those perspectives must be kept in mind when reading through the exceptions, so as to help draft a well-balanced text that addressed all of those issues. Of course, the principle of sovereign equality was not the only fundamental principle that the international system of law recognized. The protection of human rights, the pursuit of justice and compliance with obligations arising from sources of international law were indispensable to the functioning of the international legal system.

52. Paragraph 2 of draft article 7 was uncontroversial and its content was established in customary international law. However, because it did not cover "[c]rimes in respect of which immunity does not apply", as the title of the draft article indicated, the Commission might wish to reword it. Some members had felt that the reference to the absolute nature of immunity *ratione personae* should be deleted, but he believed that it was important to keep exceptions to both immunity *ratione personae* and *ratione materiae* in the same provision so that the difference between the two was explicit. The "without prejudice" clause in paragraph 3 was similarly uncontroversial, although the Commission might wish to identify in the commentary the international tribunal to which the provision referred. The concept of waiver should be included in draft article 7, paragraph 3, to clarify that, although immunity *ratione personae* applied in cases involving the crimes set forth in draft article 7, paragraph 1, immunity was nonetheless not always assured.

53. With regard to draft article 7, paragraph 1 (*a*), while the Special Rapporteur had convincingly established in the report that there was a trend towards recognizing an exception to immunity with respect to certain international crimes, it was unclear why she had chosen only the crimes mentioned in that subparagraph. She had included crimes that, as stated in paragraph 219 of the report, "undermine the fundamental legal values of the international community as a whole" and were typically regarded as *jus cogens* norms. However, her list omitted slavery, apartheid and the crime of aggression. The crime of aggression had been omitted, she had stated, because it could have too many political implications for the stability of relations between States.

54. The domestic cases cited in the first footnote to paragraph 114 showed a general trend towards recognizing an exception to immunity *ratione materiae* for international crimes such as crimes against humanity. Draft article 7, paragraph 1 (*a*), should therefore be reworded to be flexible enough to cover future *jus cogens* norms. To that end, it should include a list of crimes, with a clarification that the list was not exhaustive but illustrative of *jus cogens* norms in respect of which immunity *ratione materiae* could not apply. That illustrative list should include the crimes of aggression, apartheid and slavery, including modern forms of slavery. Aggression was a clear cause of crimes against humanity and war crimes, and it made no sense to include the latter but not the crime of aggression. Its inclusion in the Rome Statute of the International Criminal Court through the Amendments on the crime of aggression adopted in Kampala, even though they had not yet taken effect, proved that States saw it as a serious international crime for which individuals should be prosecuted.

55. With regard to the crime of apartheid, article 3 of the International Convention on the Suppression and Punishment of the Crime of Apartheid provided that international criminal responsibility applied to individuals and representatives of the State regardless of where they resided and where the acts were perpetrated. The Convention essentially set forth a *prima facie* exception to functional immunity from foreign criminal jurisdiction and stipulated that apartheid was a crime against humanity. Article 7, paragraph 1 (*j*), of the Rome Statute of the International Criminal Court recognized it as a crime when committed in the context of a crime against humanity. However, as it might not always be possible to prove the requisite contextual elements to establish a crime against humanity, apartheid should be listed separately in draft article 7, paragraph 1 (*a*).

56. Slavery, including modern forms of slavery such as forced labour and human trafficking, should also be listed separately in the proposed draft article. It was typically included among crimes against humanity and war crimes, but it should be listed separately because, again, it might not always be possible to establish the requisite contextual elements to prove a crime against humanity, or the requisite nexus to an armed conflict to establish it as a war crime. The prohibition of slavery, like the prohibition of torture and enforced disappearance, was included in several international instruments, including the International Covenant on Civil and Political Rights, and numerous regional instruments, including the African Charter on Human and Peoples' Rights. Moreover, the 1926 Slavery Convention had specifically been concluded not only to address slavery, but also to prevent "compulsory or forced labour from developing into conditions analogous to slavery" (art. 5). The International Labour Organization's 1957 Convention (No. 105) concerning the Abolition of Forced Labour and its 1999 Convention (No. 182) concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour were also relevant in addressing modern forms of slavery.

57. For the sake of clarity, the commentary to the draft article could usefully specify the legal source to be used for determining whether an individual's conduct came under one of the listed international crimes for the purpose of precluding the application of his or her functional immunity, since various international and regional conventions had adopted different definitions of some of those crimes. The Special Rapporteur should also consider adding appropriate language to draft article 7, paragraph 1, to make clear the link between the crimes set forth therein and the State official whose immunity was in question.

58. "Corruption-related crimes" should be removed from the list of crimes to which immunity did not apply, as there was insufficient State practice or treaty law to support their inclusion, and the Special Rapporteur did not convincingly demonstrate that a trend was emerging in international law to recognize an exception. Neither the United Nations Convention against Corruption, the Council of Europe's Criminal Law Convention on Corruption nor the Inter-American Convention against Corruption contained any general provisions referring to the immunity of State officials, though they did explicitly recognize that such officials could practise corruption. The only corruption-related conventions that did refer to immunity had provisions that were highly deferential towards domestic legislation or simply had a "without prejudice" clause. Moreover, the Special Rapporteur did not cite any relevant international judicial practice or national legislation to establish a corruption exception to either immunity *ratione personae* or immunity *ratione materiae*.

59. With regard to State practice regarding corruption, the Special Rapporteur cited only three domestic cases in which the existence of limitations or exceptions to immunity in cases of corruption had been accepted, as compared to the 13 she cited for the commission of international crimes. Of the three cases, two were from Europe and one was from Chile, which hardly constituted "widespread" or "representative" practice in the context of customary international law. The Special Rapporteur seemed to acknowledge that the basis for including corruption was somewhat tenuous by stating that it "might" be appropriate to include a provision that expressly defined corruption as a limitation or exception to immunity *ratione materiae*.

60. In addition, it was possible to view corruption-related offences as *ultra vires* acts falling outside the scope of a State representative's "official capacity", and thus as acts not covered by functional immunity as a matter of law. Indeed, the Special Rapporteur noted that, in the light of the criteria established in the fourth report,[220] corruption-related offences could be considered to be outside the scope of a representative's official capacity. She consequently concluded that there appeared to be "no need at present to analyse them from the perspective of limitations or exceptions". However, she further noted that, in practice, distinguishing between official acts and private acts with respect to corruption-related offences was not always clear-cut. Thus, whether corruption-related offences fell outside the scope of functional immunity should be determined on a case-by-case basis at the national level.

61. "Crimes that cause harm to persons" should be retained in the draft article, but the exception should be defined more narrowly. The Commission seemed to agree that such an exception existed, mainly because of the importance of the principle of territoriality, and in the light of the caveat introduced by Mr. Kolodkin in his second report that a crime had to have been committed by a foreign official who had been present in the territory of the forum State without the State's express consent for the discharge of his or her official functions.[221] The main problem with the broader exception in the current report was that the Special Rapporteur deduced the existence of such an exception from the context of civil jurisdiction and placed it in the context of criminal jurisdiction. Most treaties on State immunity and most national legislation on the subject included a "territorial tort" exception in the context of civil jurisdiction, which the Special Rapporteur used to support immunity in the context of criminal jurisdiction. However, the same treaties and national laws did not contain exceptions for genocide, crimes against humanity, war crimes and so on. If the Special Rapporteur was to rely on national law to establish exceptions in customary international law, then she must also acknowledge the absence of such exceptions in the same legislation. The exception proposed could expose a foreign State official to prosecution for crimes such as defamation, failure to pay parking tickets and the like, since the analogous exception to immunity from criminal jurisdiction was so broad.

62. The draft article therefore needed to be reformulated, taking the above arguments into account, and perhaps using language from Mr. Kolodkin's second report. In addition, all sources of law should be treated equally: the Special Rapporteur downplayed the significance of national legislation omitting exceptions to immunity for international crimes such as crimes against humanity, but emphasized national legislation in her treatment of the "territorial tort" exception.

63. As to her future programme of work, the Special Rapporteur could consider focusing on the relationship between immunity of State officials and statutes of limitations for crimes that were not included in the present draft articles. It was important to make sure that the statute of limitations for crimes for which there was no exception or limitation to immunity did not run out before a State official's immunity *ratione personae* expired. The Special Rapporteur might also like to further explain the distinction between a limitation and an exception with regard to the procedural aspects of immunity.

64. In conclusion, he recommended that draft article 7 be referred to the Drafting Committee, together with the relevant proposals put forward during the debate.

65. Mr. VALENCIA-OSPINA said that, for reasons outside the control of the Special Rapporteur, her fifth report had now been introduced for the second time to the

[220] *Yearbook … 2015*, vol. II (Part One), document A/CN.4/686 (fourth report).

[221] See *Yearbook … 2010*, vol. II (Part One), document A/CN.4/631, p. 423, para. 82.

Commission. That gave the Commission the advantage of knowing in advance the opinions on the topic expressed by members of the Sixth Committee at the seventy-first session of the General Assembly.

66. With regard to the question whether the fifth report actually dealt with exceptions or limitations to immunity, he said that all the Commission's work on the topic so far had been based on the explicit or implicit understanding that the immunity of State officials was generally applicable unless there were exceptional circumstances, an approach that could be described as "immunity by default". The fifth report concerned cases in which immunity by default was not applicable.

67. The temporal scope of immunity *ratione materiae* was covered in draft article 6, provisionally adopted by the Commission at its sixty-eighth session. Such immunity applied to acts performed in an official capacity by State officials during their term of office; while it could be invoked when that term had ended, the important thing was to determine whether the author enjoyed such immunity at the time of perpetrating the act. Draft article 6, paragraph 3, clarified that individuals who enjoyed immunity *ratione personae* at the time of perpetrating the act could invoke immunity *ratione materiae* after their term of office had come to an end, provided that the relevant criteria were met. While the Special Rapporteur explained in paragraph 241 of her fifth report that immunity *ratione personae* ended the moment the person's term of office came to an end, the point she was making was rather obscured by the scattered references to the temporal scope of immunity in draft articles 4,[222] 6 and 7. That problem could be alleviated by bringing together in a single draft article all the references to the temporal scope of immunity, or, at least, by rewording draft article 7, paragraph 2, so as to remove all ambiguity. Moreover, while such a broad and unrestrictive view of immunity *ratione personae* perhaps represented the views of the vast majority of States, a number of States had spoken at the Sixth Committee in favour of limiting it, at least in respect of the most serious international crimes such as genocide.

68. The conclusive list of crimes in respect of which immunity did not apply, contained in the first paragraph of draft article 7, was a matter of deep concern. Experience had shown that if the Commission was to propose such a list, the result might be another half-century of absolute immunity for the international crimes not included in the list of exceptions. If the Commission were to decide to produce such a list, the choice of what to include and what to exclude must be made with the greatest possible care. He concurred with the arguments put forward at the Commission's previous session that the crime of aggression should be included in the list of crimes in respect of which immunity did not apply. Wars of aggression, after all, were the first international crime listed in the Commission's 1950 formulation of the Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal.[223]

69. While torture was rightly included in the list in draft article 7, paragraph 1, the report was not consistent in its approach to that subject. On the one hand, it mentioned the implicit waiver of immunity by States that had ratified instruments such as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, while on the other, it referred to the premise that a rejection of jurisdiction could lead to impunity. It also overlooked the definition of torture in the Convention, which specified that, for an act to be defined as torture, the pain or suffering it caused must be "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity" (art. 1). That requirement meant that in the vast majority of cases, "immunity by default" would be the norm.

70. One question that had been frequently raised in debates in both the Commission and the Sixth Committee was whether international crimes could be committed in the exercise, in an official capacity, of State authority. In view of the structure of the draft articles, the Special Rapporteur appeared to have already made her mind up on that question. If the perpetration of such crimes could never constitute an "act performed in an official capacity", there could be no *ab initio* immunity for such acts and therefore the current discussion on the crimes in respect of which immunity did not apply would be superfluous.

71. Unlike some colleagues, he was not convinced that there was no relationship of any kind between immunity from foreign criminal jurisdiction and immunity from the jurisdiction of the International Criminal Court. It was stated in both the preamble to and article 1 of the Rome Statute of the International Criminal Court that the International Criminal Court was to be "complementary to national criminal jurisdictions". Clearly, the Court did not have the resources to investigate and try all cases of genocide, crimes against humanity, war crimes and crimes of aggression. That complementarity and the Court's limited resources carried the seeds of possible impunity as long as there were no sufficiently vigorous national criminal courts to conduct trials in the majority of cases. Therefore, immunities in the context of the International Criminal Court and foreign criminal jurisdictions must be congruent.

72. In that connection, it was instructive to recall a concept elaborated by a distinguished former member of the Commission, Georges Scelle, that of *dédoublement fonctionnel*, or role-splitting, whereby national institutions performed the tasks of the international legal system. If national criminal courts were to effectively try international crimes, they would require a jurisdiction with a reach comparable to that of the International Criminal Court.

73. Lastly, he was in favour of sending draft article 7 to the Drafting Committee for its consideration in the light of the views expressed during the present debate.

The meeting rose at 12.45 p.m.

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[222] *Yearbook … 2013*, vol. II (Part Two), p. 47 (draft article 4).

[223] *Yearbook … 1950*, vol. II, document A/1316, pp. 374–378, paras. 97–127.