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Summary record of the 3170th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
2013, **vol. I**

Organization of the work of the session (*continued*)[*]

[Agenda item 1]

22. The CHAIRPERSON said that he took it that the Commission wished to re-establish the Study Group on the most-favoured-nation clause, which had previously been chaired by Mr. McRae.

It was so decided.

23. Mr. FORTEAU, in the absence of Mr. McRae, read out the names of the Commission members who would form the Study Group on the most-favoured-nation clause: Mr. Caflisch, Ms. Escobar Hernández, Mr. Hmoud, Mr. Murase, Mr. Murphy, Mr. Nolte, Mr. Park, Mr. Singh, Mr. Šturma, Mr. Vázquez-Bermúdez and Sir Michael Wood.

The meeting rose at 11.35 a.m.

3170th MEETING

Friday, 24 May 2013, at 10 a.m.

Chairperson: Mr. Bernd H. NIEHAUS

Present: Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Ms. Escobar Hernández, Mr. Forteau, Mr. Gevorgian, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

Immunity of State officials from foreign criminal jurisdiction (*continued*)[**] **(A/CN.4/657, sect. C, A/CN.4/661, A/CN.4/L.814)**

[Agenda item 5]

Second report of the Special Rapporteur (*concluded*)[**]

1. The CHAIRPERSON invited the Commission to resume its consideration of the second report of the Special Rapporteur on the immunity of State officials from foreign criminal jurisdiction (A/CN.4/661).

2. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) thanked the members of the Commission for their comments and expressed her satisfaction at the high level of the debate. In order to adequately summarize the debate and respond to the questions raised by Commission members, she said that she would divide her statement into two parts, dealing first with a number of general matters raised and then with the comments directly related to the draft articles she had submitted to the Commission.

3. Turning first to general matters, she cited three sets of cross-cutting issues that had been brought up in relation to the report as a whole, namely (*a*) methodological aspects; (*b*) the treatment of international crimes in the draft articles and how they related to limits or exceptions to immunity; and (*c*) the definition of "official".

4. In relation to the first issue, she recalled that her methodological approach had been broadly supported by the members of the Commission and in the debates of the Sixth Committee of the General Assembly. She pointed out, in particular, that the members of the Commission had expressed their support for continuing to approach the topic from the dual perspective of *lex lata* and *lege ferenda*, taking into consideration the Commission's dual mandate of progressive development and codification of international law. However, she noted that nuanced views had been expressed with regard to the degree of emphasis that should be placed on the *lex lata* perspective. She herself had concluded that it was not possible to dissociate the two perspectives, given the special nature of the topic.

5. Still on the issue of methodological questions, she also drew attention to the debate that had again arisen at the current session on how the values and principles of international law should be dealt with under the topic of the immunity of State officials from foreign criminal jurisdiction. On that point, she noted that, although no members of the Commission had expressed outright opposition to taking values and principles into account, some had expressed concern that doing so would complicate the Commission's work, or had pointed out that values *per se* could not be taken into consideration, as that would necessitate addressing their inclusion in existing international law. Other members of the Commission, meanwhile, had reiterated that the values and principles of contemporary international law were elements that should be taken into account in order to ensure that the outcome of the Commission's work did not contradict current trends in contemporary international law. That group, representing the majority of Commission members, had pointed out that values and principles were not merely *desiderata* and expressions of will without any legal basis, but rather were reflected in existing norms. The debate had arisen in particular in connection with the question of how international crimes should be addressed under the topic and in respect of the existence of international criminal tribunals. Particular emphasis had been placed on the need to deal with the principle of combating impunity, which was undeniably linked to respect for human rights. Similarly, it had been pointed out that maintaining stable and secure international relations was in itself a value that should be preserved. In any event, the members of the Commission who had participated in the debate on those issues had pointed to the need to approach such values and principles in a balanced manner.

6. Third, she noted that the majority of Commission members had expressed their support for the step-by-step approach based on the successive identification and analysis of sets of issues which, although they were interrelated, needed to be considered separately. In particular, she said that quite a few members of the Commission had expressed the view that such an approach had already yielded tangible

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[*] Resumed from the 3166th meeting.

[**] Resumed from the 3168th meeting.

results in the second report, with the presentation of draft articles that had given a strong impetus to the project. However, some members of the Commission had felt that the topic should be viewed as a whole and that its various constituent elements should be analysed as a whole. Those criticisms had been made in relation to two elements: the consideration of international crimes and the need to provide certain additional definitions, especially of "official" and "official act". She had concluded that the Commission supported her method of work based on a step-by-step analysis of the issues, which she would continue to use in the future in order to allow the project to progress and avoid the risk of a circular discussion to which the supposedly more open and more balanced method of considering the issues as a whole might lead and which, in her view, the Commission would like to avoid.

7. Continuing on methodological matters, she drew attention to the fact that all members of the Commission considered an analysis of the practice and, in particular, of case law to be an essential element of the Commission's work on the topic. In addition, she said that some members considered that the second report contained insufficient examples of practice and doctrine to justify the solutions proposed. She herself agreed with members of the Commission about the value of practice, particularly international and national case law, in addressing the issue. She reiterated that an analysis of the relevant national and international case law formed the basis of her second report. Given that the case law had been dealt with extensively in the memorandum of the Secretariat[53] and in the reports of the previous Special Rapporteur[54] and that the members of the Commission were more than familiar with it, she had not considered it necessary to reproduce it in full as part of her second report. The "critical mass" of national practice was sufficiently consolidated in relation to the issues the report dealt with, and she had considered that her current task was to provide new, supplementary arguments that could help advance the work on the issues included in the second report and, on that basis, to formulate draft articles.

8. To conclude on methodological matters, she highlighted the problem of working with multiple language versions and the need to take into account all the official languages. She recalled the statement made by one member in that regard and said she would call on the members of the various language groups for their linguistic expertise.

9. Second, in the context of general matters, she referred to international crimes and their relationship to the limits and exceptions to immunity. In that connection, she said that one member of the Commission had mentioned the need to analyse the opposability of international crimes in the context of immunity from international criminal jurisdiction, recalling that such an approach had been the original objective of the project and the justification for its inclusion in the Commission's programme of work. It was that member's opinion that that was the central issue of the current topic and it could not be ignored. In addressing that member's concern, she read out portions of her prior response to the same member at the sixty-fourth session,[55] in which she had stated that, in her view, only those crimes which were of concern to the international community as a whole, were egregious and were widely acknowledged as such could merit consideration in any discussion of possible exceptions. Such crimes might, at an initial stage of the analysis, include genocide, crimes against humanity and war crimes, as defined in the Rome Statute of the International Criminal Court. Other members of the Commission had stressed the issue of exceptions or limits to immunity and the need to uphold the instruments for combating impunity that had been established by the international community through hard-won battles in recent decades.

10. In responding to those concerns, she said that she fully shared the view expressed by several members of the Commission that the issue of immunity of State officials from foreign criminal jurisdiction could not be addressed without taking into account the progress made in recent decades in international law, particularly the contributions to international criminal law. She also agreed that the consideration of immunities would be incomplete and would not meet the needs of today's international community if it omitted the issue of exceptions to immunity. It was not her intention to avoid debate on a central issue that was possibly the most controversial of those to be dealt with by the Commission under the topic of immunity of State officials from foreign criminal jurisdiction. However, in accordance with the methodological approach accepted by the Commission and the programme of work presented earlier, she would deal with the question of international crimes and whether they formed a limit or exception to immunity at a later date. It was a cross-cutting issue that must be considered in relation to both immunity *ratione personae* and immunity *ratione materiae*, and it therefore seemed advisable for the various normative elements that in general terms defined each of those categories of immunity to have been identified first. That methodological approach could in no way be interpreted as omitting the issue of exceptions or as indicating the role of exceptions or limits in relation to the various normative elements of each of the categories of immunity dealt with in the study.

11. The third general matter she wished to address was the definition of "official". In that connection, she said that a number of members had pointed to the need to define that concept. Several found it advisable to use the term "agent" instead of "official" since it better reflected the category of persons whose immunity was to be described under the topic. The debate had shown that, in addition to the need to define "official", there was another, no less imperative need, namely to distinguish between the two categories of persons who enjoyed immunity from foreign criminal jurisdiction. The first category consisted of the beneficiaries of immunity *ratione personae*, who were more fittingly described as "representatives of the State" in international relations. The second was the beneficiaries of immunity *ratione materiae*, for whom the term "official" was better suited, since the protection afforded

[53] A/CN.4/596 and Corr.1 (mimeographed; available from the Commission's website, documents of the sixtieth session).

[54] *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).

[55] See *Yearbook … 2012*, vol. I, 3157th meeting, para. 3.

to them was granted by virtue of the functions they performed pursuant to the law of the State, irrespective of their involvement in international relations. With regard to the second category of persons, the "official act" was a key concept. She pointed out that, as she had announced previously, the concepts of "official" and "official act" would be central elements of her next report, in the context of the analysis of immunity *ratione materiae*.

12. She then turned her attention to the debates on each of the draft articles contained in her second report.

13. With respect to draft article 1, she said that, in general, it had been well received by the members of the Commission. However, some members had noted that several elements should be revised. For instance, it was suggested that the word "certain", referring to State officials who enjoyed immunity, should be deleted, as it could be misleading. In addition, it had been suggested that the expression "[w]ithout prejudice" at the beginning of the draft article should be deleted. In both cases, she pointed out that the Drafting Committee could decide in the course of its work on the draft article whether those expressions should be deleted. With regard to the warning by one member that the term "jurisdiction" should not be used simultaneously to refer to the competence of the State and to judicial institutions, she pointed out that that observation could be taken up in relation to draft article 3, subparagraphs (*a*) and (*b*).

14. Finally, she pointed out that during the debate on the scope, as defined in draft article 1, reference had been made from various perspectives to the relationship between national criminal courts and international criminal courts, which should be taken into account even though the application of international criminal jurisdiction was not included in the scope of the draft articles. In that regard, one member had questioned whether it could be stated unequivocally that the draft articles would never apply to international criminal courts, bearing in mind the obligation of States to cooperate with those courts, for example in detaining accused persons with a view to bringing them before the international criminal courts. Another member had referred to the need to examine the nature of hybrid or internationalized courts in relation to that topic.

15. With respect to draft article 2, she pointed out that most of the members of the Commission had accepted it. However, some members of the Commission had expressed doubts about whether its content should be presented as an independent draft article, suggesting that it might be preferable to incorporate it as a second paragraph in draft article 1. Others had noted that the draft article could be deleted and its content transposed to the commentary to draft article 1. The two options would have to be considered by the Drafting Committee.

16. Although the statements made by the members of the Commission reflected a broad consensus on the content of the draft article, some members had raised the question of whether there should be an express mention of the issue of the immunity of the armed forces, given that such immunity was also subject to well-established practices. She pointed out that that category of immunity was covered under subparagraph (*c*) of the draft article, which included "Immunities established under other *ad hoc* international treaties". However, if the Commission deemed it appropriate, given the relevance of the issue, express mention could be made in that subparagraph to the immunity specifically applicable to military personnel. In any case, it would be necessary to differentiate sufficiently between the immunity granted to military personnel by virtue of status-of-forces agreements and that granted by virtue of specific agreements concluded by States for the realization of joint military exercises, for example, which more closely resembled headquarters agreements. With regard to the status granted to the military forces of a State when they were part of the military apparatus of an international organization, she pointed out that that fell into the category of a headquarters agreement with an international organization under which its officials and agents were granted privileges and immunities, which was already covered in draft article 2, subparagraph (*b*). Finally, she drew attention to the fact that if the immunity granted to military personnel was going to be treated individually, then the scenario of permanent military bases of a State in the territory of another State, which was normally regulated in military cooperation treaties, would also have to be taken into account. The Drafting Committee might consider it of interest to discuss the various possible options for referring to the specific scenario of the immunity from foreign criminal jurisdiction enjoyed by military personnel.

17. Responding to the request by some members of the Commission for clarification of the meaning of the expression "other *ad hoc* international treaties", she said that the phrase referred to the international treaties that established specific immunity rules that could not be included under the special categories listed in subparagraphs (*a*) and (*b*) of draft article 2. One of the most important examples of such "*ad hoc* international treaties" related to military personnel, but that was not the only example in practice. For example, reference could be made to certain cooperation agreements that provided for the establishment of cultural centres, or for economic and technical cooperation, which were neither headquarters agreements nor agreements related to the establishment of diplomatic relations, yet they recognized certain privileges and immunities for some foreign officials assigned to such centres. In any case, the Drafting Committee could consider alternative wording to refer to that scenario.

18. With regard to the request by some members of the Commission for clarification of the subject of draft article 2, subparagraph (*d*), she said that it was a residual clause intended to refer to situations in which a State unilaterally and freely granted some form of immunity from foreign criminal jurisdiction to the officials of a third State present on its territory and which were not among the situations listed in subparagraphs (*a*), (*b*) and (*c*). Although such situations were not common, there were some examples in practice, namely the establishment of cultural centres or the hosting of international meetings in the territory of a State, where immunity was granted through a *note verbale* or a simple letter. Given that the practice was not widespread or standardized and that the

granting of immunity was the result of the free will of the State and not of the application of specific rules of international law, the Drafting Committee could decide whether it should be mentioned explicitly.

19. With respect to draft article 3, she said that it had elicited many comments, both of a general nature and in relation to each of the paragraphs of the draft article.

20. On a general level, the debate had centred on both the necessity and utility of a draft article containing definitions of the basic concepts that would be used throughout the text and on the time when the draft article should be adopted. Quite a few members of the Commission had expressed certain reservations on whether there was any need to have a draft article containing definitions of the concepts and terms used, particularly with regard to "immunity" and "criminal jurisdiction". Some members of the Commission had noted that those concepts had not been defined in instruments that regulated immunity, such as the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations, but that had not impeded their proper functioning. Other members of the Commission, meanwhile, had argued that the definitions in question were of interest and that the Commission should not decline to define concepts that were essential to the subject. She had concluded that the definitions of "criminal jurisdiction" and "immunity from jurisdiction" remained of interest given that, as the debates had shown, those definitions raised important questions that needed to be addressed at an early stage of the project, such as the different meanings of the term "jurisdiction" (competence and court), the identification of the types of acts of the State for which immunity could be claimed and the related question of whether a situation could be characterized as immunity from jurisdiction or alternatively, also included elements characteristic of immunity from execution. All of those points warranted an in-depth debate by the Commission that was only possible by proposing definitions of the two basic elements at the core of the topic: criminal jurisdiction and immunity from criminal jurisdiction. That appeared to be the understanding of quite a few members of the Commission, their specific comments in relation to certain aspects of the proposed definitions notwithstanding.

21. On the other hand, she noted that, based on the statements of the members of the Commission, there did not appear to be any opposition to the inclusion in draft article 3 of a definition of immunity *ratione personae* and of immunity *ratione materiae*, irrespective of the content of each of the definitions. Some members of the Commission had suggested that new definitions should be added, particularly of the terms "official" and "official act".

22. Consequently, she had concluded that it was useful to retain a draft article containing definitions of the terms used. Moreover, that was standard practice in similar texts prepared by the Commission and there did not appear to be any arguments in favour of breaking with a well-established practice. The draft article in question should be considered an open-ended text that would have to be revised as work on the topic progressed, in the light of future debates, and, in any case, on first reading of the draft articles as a whole.

23. With regard to the time when draft article 3 should be adopted, some members of the Commission had said that it would be preferable to do so at a later stage, once the Commission had had the opportunity to analyse the remaining draft articles that were going to be proposed. Other members of the Commission, however, thought that it would be of interest to consider the definitions even at that early stage of work on the topic. She pointed out that in reality, the two approaches were complementary. While it would be useful to propose definitions at the start of the work and thus to spark a debate that would shed light on future work and discussions, as draft article 3 was currently designed to do, it was also true that each of the definitions could be enriched with new definitions and the various comments and discussions, and would take on its full meaning following consideration of the draft articles as a whole.

24. She went on to refer to the comments made by some members of the Commission on each of the definitions contained in the four subparagraphs of draft article 3.

25. With respect to the definition of "criminal jurisdiction" (subparagraph (*a*)), some members had pointed out the need to avoid any confusion between the references to "competence" and "court". Other members of the Commission had highlighted the need to make it sufficiently clear that the term "criminal jurisdiction" was to be understood in a broad sense, to include not only judicial procedures and acts in the strict sense, but also coercive acts that were of a related but non-judicial nature. One member of the Commission had referred to the need to incorporate the concept of inviolability into the draft article, while another had suggested that immunity should apply only to judicial acts and not to other measures that—in accordance with the internal law of the State—were solely administrative in nature.

26. In relation to criminal jurisdiction, there had also been a debate on whether to retain the term "competence" in the definition, which some members of the Commission felt was unnecessary, considering it sufficient to refer to procedures and acts that could be adopted by the State in the exercise of its criminal jurisdiction. In addition, some members considered that, for the purposes of draft article 3, the basis of the State's competence was irrelevant, while others considered that the basis of the State's competence to exercise its jurisdiction should be taken into account.

27. Some members of the Commission had expressed concern about the fact that the definition included the phrase "crime or misdemeanour", which implied that minor offences would be taken into account, something that had not been the Commission's intention when it had decided to address the topic. Conversely, another member of the Commission had declared that all types of criminal offences should be taken into consideration. She herself had pointed out that the confusion was probably simply the result of the difficulty of working on a text in various languages. In Spanish, the original language of the second report, the terms "*crímenes o delitos*" were reserved for the most serious criminal offences and by no means included minor criminal offences or infractions. With that caveat, she pointed out that the topic could be addressed more appropriately by the Drafting Committee.

28. With regard to the potential inconsistency that some members of the Commission saw in the use of the expressions "criminal jurisdiction" in subparagraph (*a*) and "foreign criminal jurisdiction" in subparagraph (*b*), she explained that "criminal jurisdiction" was an abstract category that only evoked the idea of immunity when qualified by the word "foreign". Consequently, the qualifier "foreign" was only necessary with reference to the definition of immunity. That was the reason for the difference between the two paragraphs. The distinction was also justified by the fact that jurisdiction came into play prior to immunity. Although that assertion had been called into question by some members of the Commission, she had concluded that it was an irrefutable principle, given that—as stated by the International Court of Justice itself—the possibility of immunity could only be entertained when a State had jurisdiction, in other words, when it had competence in general and abstract terms to engage in acts that would lead to the determination of whether a given individual bore criminal responsibility. Furthermore, that logical *prius* had nothing to do either with the form in which the issue of immunity had to be approached in procedural terms (for example, claimed or not? Raised *ex officio*?) or with the consequences for the exercise of competence (such as limitation, suspension or loss of competence).

29. In response to the question about the origin of the definitions, she said that they were based on the documents used in the work on the topic to date, such as the memorandum by the Secretariat[56] and the reports of the former Special Rapporteur.[57]

30. In relation to the definition of "immunity" (subparagraph (*b*)), she noted that the members of the Commission had stressed the need to delete the word "certain" with reference to officials who enjoyed immunity. However, she drew particular attention to the fact that some members had noted a lack of consistency between the wording of draft article 1 ("exercise of criminal jurisdiction by another State") and the wording of draft article 3, subparagraph (*b*) ("exercise of criminal jurisdiction by the judges and courts of another State"). In relation to that comment, she said that the divergence in the wording should be rectified by the Drafting Committee, favouring the version in draft article 1. Finally, she said that the Drafting Committee could also work on finding adequate wording to replace the word "protection" in that text, which some members of the Commission considered unclear.

31. With respect to the term "[i]mmunity *ratione personae*" (subparagraph (*c*)), she said that there had been no general objections to the definition, although two criticisms had been voiced. First, throughout the debate the members of the Commission had expressed the general view that the link to nationality was irrelevant in defining the persons who enjoyed immunity. Accordingly, she had concluded that, while it was true that the persons who were granted that type of immunity were generally nationals of the State they served (and in some cases had to be), it was also true that the essential element was the function they carried out, which the State could assign to persons who did not hold its nationality. Consequently, the reference to nationality in the draft article should be deleted. Second, some members of the Commission had pointed out that the definition should emphasize the fact, not that the persons who enjoyed such immunity carried out the function of representing the State automatically in its international relations, but instead, that the immunity of such persons was derived from the position that they occupied within the State structure. However, the debate on that point had not been conclusive. Some members of the Commission had maintained that the functional approach should be reserved for immunity *ratione materiae*, while quite a few members had been in favour of including the description of those who enjoyed immunity *ratione personae* in the definition of immunity *ratione personae*, as that would differentiate it more clearly from immunity *ratione materiae*. Finally, she said that a few members of the Commission had considered the definition of immunity *ratione personae* to be superfluous in the light of draft article 4, while others thought that it should be retained, but in a simpler and more descriptive form that did not refer to the legal elements intrinsic to that category of immunity.

32. In relation to the definition of immunity *ratione materiae*, she said that some members of the Commission had noted that it might be useful to discuss it again in the light of the next report, in which the normative elements of that category of immunity would be analysed. In any case, some of the members of the Commission who spoke on that paragraph had expressed reservations about the use of the term "official acts" which, in their view, gave rise to the problem of how to deal with *ultra vires* and unlawful acts. Other members had suggested that the word "act" should be replaced with "conduct" to more adequately reflect the diversity of acts that could give rise to immunity, including omissions.

33. In relation to draft article 4 on persons who enjoyed immunity *ratione personae*, she said that there had been an intense and enlightening debate in which some progress could be discerned compared with the debate on the issue in previous years.

34. Most members had been in favour of including the Head of State, Head of Government and Minister for Foreign Affairs in the list of persons who enjoyed immunity *ratione personae*. The majority of members were of the view that that option reflected well-established practice and customary international law. In addition, for some members of the Commission it was the best, or least problematic, solution, and at all events, a balanced one. In that context, some members raised the possibility of taking into account the situation of *de facto* Heads of State or persons who performed such functions under a different title.

35. However, a few members of the Commission had expressed reservations about the draft article on the grounds that the list of persons who enjoyed immunity was excessively broad. In particular, it had been argued

[56] See footnote 53 above.

[57] See footnote 54 above.

that it could not be claimed that there was well-established practice, let alone customary law, that recognized immunity *ratione personae* for Ministers for Foreign Affairs. One member of the Commission had noted that the recognition of such immunity for Ministers for Foreign Affairs was founded more on policy considerations than on consolidated practice. However, it was argued that there was an emerging rule on the immunity of Ministers for Foreign Affairs which would make it possible to include them in the list of persons who enjoyed such immunity by way of progressive development.

36. Some members of the Commission thought that there should be an analysis of whether, in addition to the troika, a small group of high-ranking officials who were also involved in international relations and travelled frequently should also enjoy immunity *ratione personae*. In their opinion, there was no reason whatsoever for such officials to be treated differently from the Minister for Foreign Affairs. Furthermore, some members of the Commission had expressed an interest in the reference in her second report to the special missions regime, which might be of some assistance in protecting the acts of other high-ranking officials of the State who were called upon to travel abroad frequently and to participate in international relations.

37. On the latter point, she responded to a question by a member of the Commission on the reference in paragraph 68 to "the new territorial element" and to the concept of the "official visit" in the event that the Commission decided to extend immunity *ratione personae* to persons beyond the so-called troika. She said that this was a particular reference to the need to take into account the fact that the prerequisite for recognizing any form of immunity for other high-ranking officials should be official travel and their presence in the territory of a third State in that capacity.

38. Concerning draft article 5 on the acts covered by immunity *ratione personae*, she said that some members of the Commission had expressed reservations about presenting such immunity as "full" or "absolute", arguing that the inclusion in the first paragraph of the draft article of all acts performed by the Head of State, Head of Government and Minister for Foreign Affairs, both private and official, raised questions about the compatibility of the draft article with current trends in contemporary international law in relation to the fight against impunity. Those members felt that international crimes should play a role in limiting the material scope of immunity *ratione personae*.

39. However, she pointed out that the majority of members of the Commission had stated that the inclusion of those categories of acts was in keeping with international law and well-established international practice. In addition, some members had noted that draft article 5, paragraph 1, as worded, did not preclude the possibility of assessing the role of exceptions to immunity at a later stage. She fully agreed with that approach to the topic.

40. Some members of the Commission had expressed doubts and concerns about the inclusion in the draft article of a reference to acts committed by the persons who enjoyed immunity "prior to … their term of office". In their view, that phrase opened the door to impunity, as it did not take due account of the fact that the perpetrators of heinous crimes could absolve themselves of criminal responsibility simply by obtaining an appointment as Head of State, Head of Government or Minister for Foreign Affairs. Although she shared that concern, she said that immunity did not imply exemption from responsibility or a loss of competence. It was merely the temporary suspension of the exercise of jurisdiction while the person concerned held high office as Head of State, Head of Government or Minister for Foreign Affairs. Consequently, the reference to "prior" acts could in no case be interpreted as an open door to impunity. That view had been supported by a number of members of the Commission during the debate.

41. Concerning paragraph 2 of draft article 5, she said that some members of the Commission had considered it redundant, as it seemed to refer to the same situation that was covered in draft article 6, paragraph 1, and they had therefore proposed that it should be deleted or merged with draft article 6. She explained that the two provisions referred to different situations, but that the relationship between the two could be considered by the Drafting Committee in order to find wording that would avoid confusion. In any case, she said that the issue should at least be mentioned in the commentary to the draft article.

42. Still referring to the second paragraph of draft article 5, she responded to a question raised by some members of the Commission about the meaning of the expression "other forms of immunity". She said that the expression should be read in conjunction with the phrase "in a different capacity" at the end of the paragraph, which referred to any new status acquired by a former Head of State, former Head of Government or former Minister for Foreign Affairs that enabled them to enjoy immunity *ratione materiae* based on the general regime provided for in that draft article or on one of the special regimes mentioned in draft article 2.

43. Finally, she recalled that various views had been expressed about the appropriateness of merging the two aspects (material and temporal) dealt with in draft articles 5 and 6, respectively.

44. Concerning draft article 6, she said that its content had been generally well received, the debate on its possible merger with draft article 5 notwithstanding. Only a few members of the Commission had drawn attention to the need to explicitly state what was understood by the beginning and the expiry of the term of office of the Head of State, Head of Government and Minister for Foreign Affairs and to the need to consider the special role of the monarch as Head of State. She said that such matters could be dealt with by the Drafting Committee.

45. In conclusion, she recommended that all the draft articles should be referred to the Drafting Committee, on the understanding that the Committee would have to take into consideration all the comments and opinions expressed during the debate in the plenary.

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

[Agenda item 1]

46. Mr. FORTEAU (Rapporteur), speaking on behalf of the Chairperson of the Drafting Committee, read out the list of members of the Drafting Committee on immunity of State officials from foreign criminal jurisdiction.

The meeting rose at 11.20 a.m.

3171st MEETING

Tuesday, 28 May 2013, at 10 a.m.

Chairperson: Mr. Bernd H. NIEHAUS

Present: Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Forteau, Mr. Gevorgian, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kittichaisaree, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

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

[Agenda item 1]

1. The CHAIRPERSON said that, after consultations concerning the possibility of including a new topic on the Commission's programme of work and the appointment of a new special rapporteur for that topic, he had noted that there was a consensus in favour of the topic "Protection of the environment in relation to armed conflicts". He therefore suggested that the topic should be included in the Commission's programme of work and that Ms. Jacobsson should be appointed Special Rapporteur. The topic would also be placed on the agenda.

It was so decided.

2. Ms. JACOBSSON thanked the members of the Commission for the trust which they had shown in appointing her Special Rapporteur and said that the following week she would present an informal document prior to drafting a preliminary report on the topic.

3. Mr. CANDIOTI drew attention to the fact that a decision had still to be taken on whether to include the topic "Protection of the atmosphere" in the programme of work, as had been proposed at the sixty-fourth session.

4 The CHAIRPERSON said that he would hold consultations on that matter and inform the Commission of their outcome.

The meeting rose at 10.10 a.m.

3172nd MEETING

Friday, 31 May 2013, at 10 a.m.

Chairperson: Mr. Bernd H. NIEHAUS

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

Subsequent agreements and subsequent practice in relation to the interpretation of treaties (*concluded*)[*] (A/CN.4/660, A/CN.4/L.813)

[Agenda item 6]

REPORT OF THE DRAFTING COMMITTEE

1. Mr. TLADI (Chairperson of the Drafting Committee) said that the Drafting Committee had devoted nine meetings to its consideration of the draft conclusions relating to the topic under consideration and had provisionally adopted five draft conclusions, contained in document A/CN.4/L.813, which read as follows:

Draft conclusion 1. General rule and means of treaty interpretation

1. Articles 31 and 32 of the Vienna Convention on the Law of Treaties set forth, respectively, the general rule of interpretation and the rule on supplementary means of interpretation. These rules also apply as customary international law.

2. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose.

3. Article 31, paragraph 3, provides, *inter alia*, that there shall be taken into account, together with the context, (*a*) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; and (*b*) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.

4. Recourse may be had to other subsequent practice in the application of the treaty as a supplementary means of interpretation under article 32.

5. The interpretation of a treaty consists of a single combined operation, which places appropriate emphasis on the various means of interpretation indicated, respectively, in articles 31 and 32.

Draft conclusion 2. Subsequent agreements and subsequent practice as authentic means of interpretation

Subsequent agreements and subsequent practice under article 31 (3) (*a*) and (*b*), being objective evidence of the understanding of the parties as to the meaning of the treaty, are authentic means of interpretation, in the application of the general rule of treaty interpretation reflected in article 31.

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[*] Resumed from the 3163rd meeting.