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Summary record of the 3217th meeting

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SUMMARY RECORDS OF THE SECOND PART OF THE SIXTY-SIXTH SESSION

Held at Geneva from 7 July to 8 August 2014

3217th MEETING

Monday, 7 July 2014, at 3.05 p.m.

Chairperson: Mr. Kirill GEVORGIAN

Present: Mr. Candioti, Mr. Comissário Afonso, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Mr. Huang, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Niehaus, 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.

Immunity of State officials from foreign criminal jurisdiction[166] (A/CN.4/666, Part II, sect. B, A/CN.4/673,[167] A/CN.4/L.850[168])

[Agenda item 5]

THIRD REPORT OF THE SPECIAL RAPPORTEUR

1. The CHAIRPERSON invited the Special Rapporteur to present her third report on immunity of State officials from foreign criminal jurisdiction (A/CN.4/673).

2. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that her third report, which was devoted to the concept of "official", fitted into the workplan that had been followed since 2012. The report had been drafted in accordance with the working method proposed in her preliminary report,[169] which consisted in dealing separately with each of the various issues raised by the topic. As the report under consideration formed the first part of the study of immunity *ratione materiae,* which would be completed in the following report, it contained a section that identified the essential characteristics of that immunity and the normative criteria for defining it. There were three such criteria, but only the subjective element of immunity, in other words the notion of "official", was discussed in the third report. The notion of "official" was of special relevance to immunity *ratione materiae*, in that it clarified the personal scope thereof, but it was likewise of relevance to immunity *ratione personae*. A comprehensive analysis was therefore needed in order to provide a definition of the notion that was valid for both categories of immunity. She had adopted that approach owing to the limitation on the number of pages in special rapporteurs' reports and because the notion of "official" called for separate and exclusive treatment. Moreover, that term was scarcely addressed in the Secretariat memorandum on immunity of State officials from foreign criminal jurisdiction,[170] and several States in the Sixth Committee had highlighted the need for a clear definition.

3. The notion of "official" was of particular relevance to the subject of immunity of State officials from foreign criminal jurisdiction, which was why it was expressly mentioned in the topic's title. Any proper analysis of that notion had to rest on four initial premises: (*a*) there was no general definition of the notion of "official" in international law; (*b*) a definition of the term "official" must be formulated in such a way as to cover both persons enjoying immunity *ratione materiae* and those enjoying immunity *ratione personae*; (*c*) the term chosen must cover all the persons concerned while at the same time taking account of the differences between them; and (*d*) the term used must be uniform and comparable in all languages and, as far as possible, consonant with the Commission's established practice. The definition of "official" therefore raised two different, but complementary and interdependent, sets of substantive and linguistic questions, which were dealt with separately in the third report.

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[166] At its sixty-fifth session (2013), the Commission had before it six draft articles proposed by the Special Rapporteur in her second report (see *Yearbook … 2013*, vol. I (Part One), document A/CN.4/661, annex) and provisionally adopted three draft articles and the commentaries thereto (*ibid*., vol. II (Part Two), pp. 39 *et seq.*, paras. 48–49).

[167] Reproduced in *Yearbook … 2014*, vol. II (Part One).

[168] Mimeographed, available from the Commission's website.

[169] *Yearbook … 2012*, vol. II (Part One), document A/CN.4/654, chap. III.

[170] Document A/CN.4/596 and Corr.1, mimeographed; available from the Commission's website, documents of the sixtieth session (2008). The final text will be reproduced in an addendum to *Yearbook … 2008*, vol. II (Part One).

4. As far as substantive matters were concerned, the third report focused on determining criteria for identifying the categories of persons who might enjoy immunity from foreign criminal jurisdiction. In that connection, it was vital to note that the notion of "official" must be addressed horizontally in order to ensure that its characteristics were valid for both persons enjoying immunity *ratione materiae* and those enjoying immunity *ratione personae*. While the Commission had identified persons enjoying immunity *rationae personae eo nomine* (Head of State, Head of Government and Minister for Foreign Affairs[171]), when it came to immunity *ratione mataeriae*, it was impossible to list all the office or post holders who could be classified as a "State official" for the purposes of the topic under consideration, owing to the widely differing ways in which States were organized. As international law supplied no general definition of the notion of "official", it was used in the various legal systems of States to describe persons with very disparate functions. Persons enjoying immunity *ratione materiae* could therefore be determined only on a case-by-case basis by using "identifying criteria". She had resorted to national and international case law, treaty practice and the Commission's earlier work in order to pinpoint those criteria. The analysis of national and international case law had encompassed all judicial decisions related to immunity from jurisdiction, even including those that did not strictly concern the field of criminal jurisdiction. For that reason, decisions with regard to immunity from civil jurisdiction had been taken into consideration, because they were of relevance when determining the characteristics of the notion of "official". The examination of treaty practice and the Commission's earlier work had covered instruments that did not fall within the scope of the topic, but that were useful in establishing the criteria for determining who was a State official for the purposes of the draft articles under consideration. On the basis of the study of practice, the Special Rapporteur, in paragraph 111 of her third report, drew the following conclusions with respect to the criteria which clarified the notion of "official": (*a*) the official must have a connection with the State, which might take several forms and which might be permanent or temporary; (*b*) the official must act as a representative of the State or perform official functions on its behalf; and (*c*) the official must exercise elements of governmental authority and act in the name and on behalf of the State. In order to establish whether a person was an "official", in particular for the purposes of immunity *ratione materiae*, it was necessary to determine on a case-by-case basis whether all those criteria were met.

5. As far as questions of terminology were concerned, in her third report, the Special Rapporteur drew attention to the fact that the term "official" had been chosen by the previous Special Rapporteur, Mr. Kolodkin, in preference to "organ", although he had left open the possibility of revisiting that choice.[172] Account had likewise been taken of the fact that various members of the Commission had considered that it was possible to use the words "representatives" in the English text or *agents* in the French text. The terms *funcionario*, "official" or *représentant* might not be the most appropriate ones to cover all the categories of persons who enjoyed immunity from foreign criminal jurisdiction and they meant something different in Spanish, English and French. It would be helpful to know if that was also true of the Arabic, Chinese and Russian versions. In any event, as stated in footnote 237 of the report of the Commission on the work of its sixty-fifth session,[173] the use of the term "officials" would be subject to further consideration which, according to the workplan, had to take place at the current session. To that end, the third report comprised both an individual and a comparative analysis of the terms *funcionario, représentant* and "official" in order to determine whether they were a suitable description of persons who enjoyed immunity from foreign criminal jurisdiction.

6. Apart from the clear and uniform usage of expressions such as "Head of State", "Head of Government" and "Minister for Foreign Affairs", the case law and conventions that had been studied, and even legal writings, used different terms to describe the category of persons to which the Special Rapporteur referred in her third report. It was essential to adopt a term that could be used interchangeably in all the various language versions of the draft articles and, to that end, three criteria were proposed in paragraph 113 of the third report, namely: (*a*) the term must be broad enough to encompass all the persons who enjoyed immunity; (*b*) the term must follow the Commission's established practice; and (*c*) the term chosen must not mislead national officials responsible for applying the rules on immunity from criminal jurisdiction. It was therefore necessary to avoid the use of terms with a precise and different meaning in various countries.

7. In view of the foregoing, in her third report the Special Rapporteur concluded that, for the sake of the requisite clarity and legal certainty, it would be wise to select a single term in all the language versions to designate persons who enjoyed immunity from foreign criminal jurisdiction. It was plain from the comparative examination of the terms currently used by the Commission that only the word "official" could be used in a broad sense to cover all the categories of persons who enjoyed immunity from criminal jurisdiction. Strictly speaking, the terms *funcionario* and *fonctionnaire* designated persons who had a link with the administrative system, but who did not engage in any political activity. They could not therefore be used to designate the Head of State, Head of Government or ministers. The term "representative", which emphasized the representative capacity of the persons whom it designated, was not suitable when referring to all the categories of persons who might enjoy immunity and who, apart from the Head of State, Head of Government and Minister for Foreign Affairs, did not all perform that type of function *per se* under the rules of international law. It would therefore be preferable to employ the expressions "agent of the State" or "organ of the State" and their equivalents in all the language versions. Those two terms had the advantage of being frequently used in international practice to designate any person with a link to the State and who acted in its name and on its behalf. Furthermore, as they were generally construed broadly, they could be used to designate persons who represented the State internationally

[171] See *Yearbook … 2013*, vol. II (Part Two), p. 39 (draft article 3).

[172] See *Yearbook … 2008*, vol. II (Part One), document A/CN.4/601, p. 186, para. 108.

[173] *Yearbook … 2013*, vol. II (Part Two), p. 39.

and persons who exercised elements of governmental authority. The term "organ" might be the most appropriate; the Commission had already used it in its work on two subjects connected with immunity from foreign criminal jurisdiction, namely jurisdictional immunities of States and their property[174] and responsibility of States for internationally wrongful acts.[175] Of course, in those cases, that term referred to persons and entities, but there was nothing to prevent its being used in the topic under consideration to refer exclusively to natural persons. Moreover, it would be a more suitable designation for the Head of State and Head of Government, who were rarely called "agents" in legal and diplomatic practice.

8. Moving on to the draft articles, she explained that, in former draft article 3 (Definitions), which was contained in her second report[176] and which would become draft article 2, she proposed the addition of a subparagraph (*e*) which provided a general definition of the notion of "State official" (or "organ of the State") that would apply to any natural person who might enjoy immunity from foreign criminal jurisdiction. It also reflected the distinction drawn between those officials depending on whether their immunity was *ratione personae* or *ratione materiae*— the former were members of the "troika" and the second were identified on the basis of the criteria set out in paragraph 108 of the third report. Each category formed the subject of a separate subclause. Subclause (i) referred to the Head of State, Head of Government and Minister for Foreign Affairs. Subclause (ii) referred to the remaining representatives or organs of the State. The source of the wording of that new subparagraph (*e*) (ii) was to be found in draft articles 4 and 5 on responsibility of States for internationally wrongful acts and therefore included any person who, or entity which, exercised elements of governmental authority, even though that person or entity might not represent the State. The exercise of governmental authority was therefore a crucial feature of a representative (or organ) of the State.

9. Draft article 5, which was devoted to the definition of the subjective scope of immunity *ratione materiae*, was calqued on draft article 4, which had been provisionally adopted by the Commission in 2013.[177] The reference to the troika had been replaced with "State officials who exercise elements of governmental authority". That draft article therefore incorporated the criterion of the exercise of elements of governmental authority as a means of defining the subjective scope of immunity *ratione materiae*. The exercise of elements of governmental authority, combined with the essential criterion of the existence of a link with the State delegating that exercise, justified recognition of immunity from criminal jurisdiction, in the interests of the State, in order to protect its sovereign prerogatives. There was a link between the State and the person enjoying immunity *ratione materiae* as soon as the latter had the capacity to perform acts presupposing the exercise of elements of governmental authority. That link between the official and the State could not be confused with the acts protected by immunity, which constituted the second normative element of immunity *ratione materiae*. A specific act would have such immunity if it could be termed "an act performed in an official capacity" and if the act was performed by a person while he or she was a State official. Since State officials had immunity from foreign criminal jurisdiction in order to safeguard State sovereignty, that immunity could be granted only to those officials who had the capacity to exercise sovereign prerogatives, in other words, governmental authority. Consequently, immunity was granted to State officials within the meaning of the draft articles, but not to all State officials in the broad sense, "as a general rule" [*con carácter general* or *d'une manière générale*].

10. Determining instances involving the genuine exercise of governmental authority required a case-by-case analysis that took account of judicial practice. The latter showed that, generally speaking, immunity *ratione materiae* was most often invoked in favour of senior or mid-ranking officials. In any event, it could not be concluded that any person holding a permanent link with a State which could entitle that person to be called an official in the broad sense, necessarily enjoyed immunity *ratione materiae*, or, conversely, that only senior officials could claim it. Lastly, it was necessary to remember that a former Head of State, Head of Government or Minister for Foreign Affairs might enjoy immunity *ratione materiae* if they met the normative criteria therefor. For that reason, the troika might in some circumstances come within the subjective scope of that immunity as defined in draft article 5.

11. Mr. MURASE said that he regretted the lack of consensus on the purpose of the draft articles. Did the Commission intend to establish the principle that high-ranking State officials enjoyed immunity at the risk of fostering impunity or, on the contrary, was it trying to draw up rules to restrict the scope of immunity in order to bar the impunity of the perpetrators of serious international crimes? From a legal perspective those were two quite separate matters. Open-ended recognition of immunity would lead to the impunity of those perpetrators. It was regrettable that the Commission, by adopting draft article 3 at the previous session, seemed to be heading in that direction. It was also going against the *lex lata* embodied in article 27 of the Rome Statute of the International Criminal Court and the international community's normative demand that impunity be countered. Even if the jurisdiction of national courts varied from one legal system to another and could not be equated with the mandate of international criminal courts and tribunals, domestic and international regimes, far from being diametrically opposed, should be mutually supportive. In addition, the Commission should be faithful to its earlier work, in particular article 7 of the 1966 draft code of crimes against the peace and security of mankind.[178] It would therefore be desirable to add a

[174] The draft articles on jurisdictional immunites of States and their property and the commentaries thereto are reproduced in *Yearbook … 1991*, vol. II (Part Two), pp. 13 *et seq.*, para. 28.

[175] General Assembly resolution 56/83 of 12 December 2001, annex. See the draft articles on responsibility of States for internationally wrongful acts adopted by the Commission at its fifty-third session and the commentaries thereto in *Yearbook … 2001*, vol. II (Part Two) and corrigendum, pp. 26 *et seq.*, paras. 76–77.

[176] See *Yearbook … 2013*, vol. II (Part One), document A/CN.4/661, annex.

[177] *Ibid.*, vol. II (Part Two), p. 39.

[178] *Yearbook … 1996*, vol. II (Part Two), pp. 17 *et seq.*, in particular pp. 26–27 (draft article 7).

third paragraph to draft article 1, in the form of a "without prejudice" clause worded either:

> "The present draft articles are without prejudice to the crimes specified in draft article X [on the 'exceptions']."

or

> "Nothing in the present draft articles shall affect individual criminal responsibility for genocide, crimes against humanity and serious war crimes [or any other crimes specified in draft article X [on the 'exceptions']."

Such a clause would make it clear that the draft articles addressed only those crimes for which the principal leaders of a State would enjoy immunity from foreign criminal jurisdiction under domestic law and would lay the foundations for "exceptions" to immunity *ratione personae* and immunity *ratione materiae*. The Special Rapporteur should define those exceptions and give them the requisite scope.

12. The normative content of the concept of immunity *ratione materiae* remained unclear. If it was mainly predicated on the concept of "acts performed in an official capacity", it might be a useful tool for effectively precluding the immunity of perpetrators of serious international crimes for, as Judges Higgins, Kooijmans and Buergenthal had found in paragraph 85 of their joint separate opinion in the case concerning the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium)*, it was increasingly claimed in the literature that serious international crimes could not be regarded as official acts because they were neither normal State functions, nor functions that a State alone could perform. It was regrettable that the members of the Commission had been unable to agree on the relationship between immunity *ratione personae* and immunity *ratione materiae*. Yet, on the basis of that separate opinion, it might have been assumed that immunity *ratione materiae,* as *lex specialis,* would limit the scope of the immunity *ratione personae* granted to some State officials in draft article 3 and would constitute the general rule. The wording of draft article 5 stood in the way of that logic, for immunity *ratione materiae* was presented there not as a restrictive principle, but as the stand-alone basis for additional immunity. The explanations provided in the second and third reports with respect to immunity *ratione personae* and immunity *ratione materiae* overlapped to some extent.

13. The use of the term "official", which was associated with the status of perpetrators, ought to have been discussed in relation to draft article 1, for draft article 5 focused on the nature of acts which might give rise to immunity. In the commentary, it would be necessary to consider the acts of local officials who might exercise elements of governmental authority, while at the same time bearing in mind the fact that the draft articles were concerned with "State officials", to the exclusion of other officials.

14. In view of the controversy which it aroused and its various connotations, the expression "immunity *ratione materiae*" should be replaced in draft article 5 with "immunity based on the exercise of official functions". The wording of that draft article, which was too broad since it encompassed all State officials, should therefore be amended to read along the lines of draft article 4. In draft article 2 (*e*) (i), it would be wise to make it clear that *de facto* officials were not covered by the proposed definition. Lastly, the expression "exercise (elements of) governmental authority", employed in draft articles 5 and 2 (*e*) (ii), might prove confusing, since draft article 2 defined State officials as any person who represented the State or exercised elements of governmental authority, whereas draft article 5 stipulated that immunity *ratione materiae* could be granted only to State officials who exercised governmental authority. In other words, officials who represented the State but who did not exercise governmental authority would not be entitled to immunity *ratione materiae*. If that were indeed the case, the Special Rapporteur should explain why those State officials were mentioned in draft article 2.

15. Mr. MURPHY, after drawing attention to some problematic passages in the English translation of the Special Rapporteur's third report, said that decisions on immunity in civil cases did not necessarily support propositions relating to immunity from foreign criminal jurisdiction and must therefore be analysed with care. For many years, when the authorities of the United States appeared as *amicus curiae* in a civil case where the defendant was a State official or former State official, they systematically included in their brief wording to the effect that their stance in the civil context did not prejudge their position in a criminal case. Two decisions in criminal cases, which had been omitted from the Special Rapporteur's third report, but which had been addressed in the Commission's earlier work, were relevant to the topic under consideration: those in *United States of America* v. *Noriega* and *In re Doe*.

16. It would be undesirable to replace "official" with "organ" in English, because that term hardly ever referred solely to natural persons, but to organizational units of a government or of an international organization. The most recent case law of the United States Supreme Court (*Samantur* v. *Yousuf*) confirmed that position and had invalidated some lower courts' decisions cited in the third report. The Special Rapporteur seemed to have used the articles on responsibility of States for internationally wrongful acts as the basis for her suggestion, yet caution was needed when making that kind of transposition. For example, the idea that a State official's motivation had no bearing on the attribution of his or her conduct to the State, so long as he or she had been acting as an organ of the State, could not be transposed to immunity *ratione materiae*, for the State official's motivation was indeed pertinent to the question of whether he or she had acted on behalf of the State. The term "State official" was commonly used in that context and it covered any person who represented the State or acted in an official capacity on its behalf, which broadly squared with the purposes of the draft articles. It was therefore not desirable to abandon it at the current stage.

17. There were two possible ways of approaching the definition of "State officials". The first would consist

in ascertaining the classes of persons who enjoyed immunity *ratione materiae* without defining them, as had been done for the troika in the case of immunity *ratione personae*, by consistently referring to them as "persons who represent the State or perform an act on behalf of a State". The second route, that chosen by the Special Rapporteur, consisted in defining State officials. The definition proposed in draft article 2 seemed to be sufficiently broad, but a more thorough discussion of its various elements seemed necessary and the commentary should provide an indicative list of the types of persons covered, or not covered, by that definition, accompanied by the reasons therefor. It was curious that this draft article mentioned two categories of State officials, the troika and others, thereby merging the status-based notion of immunity *ratione personae,* which was predicated on the capacity of the persons enjoying it, and the function-based concept of immunity *ratione materiae,* which was unrelated to the question of whether or not the persons in question were still in office. It would therefore be preferable to roll subparagraphs (i) and (ii) into one. The use of the present tense in draft articles 2 (*e*) (ii) and 5 ("who acts" and "who exercise") might be confusing, for the idea behind those provisions was to recognize that immunity *ratione materiae* continued even after the State official left office. The wording of the final phrase "whatever position the person holds in the organization of the State", which was designed to widen the definition, in fact had the opposite effect, since the person in question might not actually have a position in the Government.

18. Furthermore, in the English version of draft article 5, it might be advisable to replace the expression "elements of governmental authority" with "elements of sovereign authority". In the English version, the heading of that draft article could be aligned with that of draft article 3 and would then read "Persons enjoying immunity *ratione materiae*" and its text would read: ["A [State official] enjoys immunity *ratione materiae* from the exercise of foreign criminal jurisdiction." [The term "State official" could be replaced, if the Commission chose not to define such persons, with an expression describing the class of persons covered.]] Another draft article could be devoted to the scope of immunity *ratione materiae* along the lines of draft article 4. He was in favour of referring draft articles 2 and 5 to the Drafting Committee.

19. Mr. CANDIOTI said he believed that Mr. Murase was exaggerating when he considered that the Commission was tending to replace the principle of immunity with the principle of impunity. Immunity was an exception to the jurisdiction of national and international judicial bodies and, as such, must be narrowly construed in accordance with the universally accepted rules of international law.

20. Mr. PETRIČ said that he shared Mr. Candioti's viewpoint. When the Commission had embarked upon its work on the topic under consideration, it had indeed intended to establish the principle that immunity was the exception; it seemed that impunity was tending to become the exception.

The obligation to extradite or prosecute (*aut dedere aut judicare*)[179] (A/CN.4/666, Part II, sect. G, A/CN.4/L.844[180])

[Agenda item 3]

Report of the Working Group

21. Mr. KITTICHAISAREE (Chairperson of the Working Group on the obligation to extradite or prosecute (*aut dedere aut judicare*)) said that, at the current session, the Commission had reconstituted the Working Group, which had met on 6 May and 4 June 2014. In its report, contained in document A/CN.4/L.844, the Working Group summarized its conclusions and recommendations on the topic under consideration and examined several issues raised by delegations to the Sixth Committee that had not been covered in its 2013 report, namely: (*a*) the status of the obligation to extradite or prosecute in customary international law; (*b*) gaps in the existing treaty regime; (*c*) the transfer of a suspect to an international or special court or tribunal as a potential third alternative to extradition or prosecution; (*d*) the relationship between the obligation to extradite or prosecute and *erga omnes* obligations or *jus cogens* norms; and (*e*) the continued relevance of the 2009 general framework.

22. All the questions requiring investigation had been considered and the report, together with that of 2013, concluded the Working Group's deliberations. It therefore recommended that the Commission: (*a*) adopt the 2013 report and the current final report of the Working Group which, in the Commission's view, would provide useful guidance for States; and (*b*) conclude its consideration of the topic "Obligation to extradite or prosecute (*aut dedere aut judicare*)".

23. The CHAIRPERSON said he took it that the Commission wished to take note of the Working Group's final report contained in document A/CN.4/L.844, on the understanding that it would be combined with that of 2013, and adopted by the Commission when it considered its draft annual report at a subsequent meeting.

It was so decided.

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[179] Between 2006 and 2011, the Commission considered four reports of the Special Rapporteur, Mr. Zdzislaw Galicki (*Yearbook … 2006*, vol. II (Part One), document A/CN.4/571 (preliminary report); *Yearbook … 2007*, vol. II (Part One), document A/CN.4/585 (second report); *Yearbook … 2008*, vol. II (Part One), document A/CN.4/603 (third report); and *Yearbook … 2011*, vol. II (Part One), document A/CN.4/648 (fourth report)). At its sixty-first session (2009), the Commission established an open-ended Working Group on the topic under the chairpersonship of Mr. Alain Pellet, which defined a general framework for consideraton of the topic (*Yearbook … 2009*, vol. II (Part Two), p. 143, para. 204). At its sixty-second session (2010), the Working Group was reconstituted and, in the absence of its Chairperson, was chaired by Mr. Enrique Candioti (*Yearbook … 2010*, vol. II (Part Two), pp. 191–192, paras. 337–340). At its sixty-fourth (2012) and sixty-fifth (2013) sessions, the Commission reconstituted the open-ended Working Group on the topic, chaired by Mr. Kriangsak Kittichaisaree (*Yearbook … 2012*, vol. II (Part Two), pp. 74–76, paras. 208–221, and *Yearbook … 2013*, vol. II (Part Two), p. 74, paras. 148–149). At its sixty-fifth session, the Commission took note of the Working Group's report (*Yearbook … 2013*, vol. II (Part Two), annex I, pp. 84–92).

[180] Mimeographed, available from the Commission's website.

24. At the request of Mr. Candioti, Mr. Park and Mr. Saboia and on behalf of the whole Commission, the CHAIRPERSON thanked Mr. Kittichaisaree for his invaluable contribution as Chairperson of the Working Group on the obligation to extradite or prosecute (*aut dedere aut judicare*).

The meeting rose at 5.35 p.m.

3218th MEETING

Tuesday, 8 July 2014, at 10.05 a.m.

Chairperson: Mr. Kirill GEVORGIAN

Present: Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Mr. Huang, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Niehaus, 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.

Cooperation with other bodies

[Agenda item 14]

Statement by the Secretary-General of the Asian–African Legal Consultative Organization

1. The CHAIRPERSON welcomed Mr. Mohamad, Secretary-General of the Asian–African Legal Consultative Organization (AALCO), and invited him to address the Commission.

2. Mr. MOHAMAD (Secretary-General of the Asian–African Legal Consultative Organization) said that among the contributions to international law that AALCO was mandated to make was the exchange of information and views on the topics under consideration by the Commission. The fulfilment of that mandate over the years had helped to forge a closer relationship between the two organizations, which were also represented at each other's sessions as a matter of customary practice.

3. Among the items on the Commission's agenda, the topic of identification of customary international law was particularly relevant due to difficulties in identifying existing rules of customary international law and in their application by domestic courts and judges, lawyers, arbitrators and legal advisors who might lack formal training in international law. Aspects of the topic that were of particular interest to AALCO members included the question of the hierarchy of sources. The search for evidence of customary international law had traditionally focused on the decisions of international tribunals, yet a truer sense of the position of States might be arrived at through an examination of domestic practice and the decisions of regional and subregional courts. With respect to the decisions of international tribunals, consideration should also be given to dissenting opinions and separate opinions. Statements by States in international forums and resolutions adopted by international and intergovernmental organizations could also help to establish an accurate picture of their position on particular questions. Lastly, any set of rules for the identification of customary international law should be flexible enough to take account of the constantly evolving nature of custom and practice.

4. At the fifty-second annual session of AALCO, held from 9 to 12 September 2013 in New Delhi, a number of comments and suggestions on the topic had been made by member States. A question had been raised as to whether the Special Rapporteur considered the resolutions of international and regional organizations to be part of customary international law. Two member States had suggested that the concept of *jus cogens* not be included within the scope of the topic. One State had expressed the view that the draft conclusions should reflect the practice of States from all of the principal legal systems of the world and from all regions. It had also been suggested that the relationship of customary international law with treaties and with the general principles of law might be discussed.

5. In November 2013, a two-day workshop had been organized by the AALCO Secretariat, in conjunction with the National University of Malaysia, to consider selected items on the Commission's agenda. Participants had included representatives of member States, academics and students from Malaysian universities. Three members of the Commission had given presentations on the topics of protection of persons in the event of disasters, protection of the atmosphere and immunity of State officials from foreign criminal jurisdiction. Following the success of the workshop, it had been agreed that it should be held annually and that a Working Group on the identification of customary law should be established to facilitate the work of the Special Rapporteur on that topic. The group would be documenting the contributions of Asian and African States to the progressive development of international law and transmitting the recommendations of AALCO member States on issues raised by the Special Rapporteur.

6. The majority of member States of AALCO, while being mindful of the ongoing political negotiations to address commitments under the climate change regime, believed that the protection of the atmosphere was a matter of growing concern for the international community. With regard to the definition of the atmosphere set out in the Special Rapporteur's first report on the topic (A/CN.4/667), draft guideline 1 could perhaps be supplemented by a detailed description of the atmosphere's various layers and of its other gaseous content. Reference to such issues as transboundary air pollution and climate change was essential for a comprehensive understanding of the topic, but those issues should not be part of a substantive discussion. The principles of international environmental law that had evolved over the years through the judgments of international courts and tribunals and the customary practice of States focused on the precautionary approach, rather than on the principle of prevention. However, there was a pressing need to prevent any harm to the atmosphere, because of the potential wide-ranging impact