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Summary record of the 3271st meeting

Topic:
<multiple topics>

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that the United States used the mechanism of executive agreements to provisionally apply a treaty and to avoid having to request Senate authorization, but GATT was not an example of provisional application in the sense of article 25 of the 1969 Vienna Convention.

68. That had been clearly understood by the Secretary-General in his 1973 report, to which the Special Rapporteur had referred in paragraphs 89 and following,[239] as GATT had not been included in the list of treaties that established international organizations provisionally, either as an application of article 25 of the 1969 Vienna Convention or of its article 24 on entry into force. The point was that if GATT was to be seen as an example of provisional application, then the notion of provisional application was again being extended beyond what was provided for in article 25. The Special Rapporteur had not said that this was what he was doing; he had referred to the "useful abuse" of article 25, but he had not clearly indicated what constituted use and what constituted useful abuse of provisional application. In short, the Special Rapporteur should provide a clearer definition, perhaps in his next report, of what was and was not provisional application. It was not sufficient to say that there was flexibility in the provisional application of treaties unless it was clear what constituted and what did not constitute provisional application. If, as in the example of the Syrian Arab Republic, what was included in provisional application did not meet the requirements of article 25 of the 1969 Vienna Convention, in what sense was it to be regarded as provisional application? Was there a category of provisional application that stood alongside but was separate from article 25?

69. Until the members had a clearer picture of the concept of provisional application, it was difficult to make any assessment of the proposed draft guidelines. Did they refer only to provisional application within the meaning of article 25 or to something beyond that?

70. He agreed with Mr. Forteau that the Special Rapporteur's conclusion in paragraph 85 of his third report, that article 25 of the 1969 Vienna Convention reflected a rule of customary international law, was not substantiated in the report and, certainly in the case of article 25 of the 1986 Vienna Convention, was highly problematic. What did it mean to say that article 25, paragraph 1, of the 1969 Vienna Convention reflected customary international law? That paragraph indicated only that States could agree to provisionally apply a treaty, and provisional application was therefore derived from the *pacta sunt servanda* principle. Further clarification was required on that point.

71. In draft guideline 1, the phrase "provided that the internal law of the States or the rules of the international organizations do not prohibit such provisional application" should be deleted. As Mr. Tladi had pointed out, the Special Rapporteur stressed the fact that domestic law could not be invoked because the issue was one of international law, but the current formulation of the draft guideline suggested that compliance with internal law was a precondition of provisional application, even if that had not been the Special Rapporteur's intention. Again, clarification was required.

72. As currently worded, draft guideline 4 was simply not meaningful: saying that provisional application had legal effects said nothing about the actual effects of such application. It had been stated at the current session that the draft guideline would indicate that provisional application was binding. However, even that was not clear: did it mean that the treaty was to be applied as though it were in force, or did it mean something else? Again, more detail was necessary. Mr. Murphy had said that it was the agreement on provisional application that was legally binding, but it was perhaps not sufficient merely to make such an assertion, as that agreement could allow only for the possibility for States to provisionally apply the treaty, which certain States might not exercise. The Special Rapporteur should therefore provide a more detailed analysis of the precise legal consequences of provisional application. Draft guidelines 5 and 6, but especially 5, indicated some legal consequences, but the legal basis for those consequences should have been established in the third report.

73. The question remained whether the draft guidelines should be sent to the Drafting Committee. The Special Rapporteur himself had indicated that he was not sure that they should be. Given the many specific proposed amendments made during the plenary debate, it was for the Special Rapporteur to decide whether he would be able to incorporate the proposals into the draft guidelines before the Drafting Committee met or whether he would prefer to wait until the Commission's next session to do so.

The meeting rose at 12.45 p.m.

3271st MEETING

Thursday, 16 July 2015, at 10.05 a.m.

Chairperson: Mr. Narinder SINGH

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

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

[Agenda item 1]

1. The CHAIRPERSON drew attention to the programme of work proposed by the Bureau for the third and fourth weeks of the second part of the Commission's sixty-seventh session.

[239] Report of the Secretary-General on examples of precedents of provisional application, pending their entry into force, of multilateral treaties, especially treaties which have established international organizations and/or regimes (A/AC.138/88).

* Resumed from the 3269th meeting.

2. Mr. KITTICHAISAREE, supported by Ms. JACOBSSON, Sir Michael WOOD, Mr. TLADI and Mr. CANDIOTI, proposed that, when allotting meeting time, priority should be given to the Drafting Committee's deliberations rather than to informal consultations.

3. The CHAIRPERSON suggested that the Drafting Committee should meet as soon as the speakers' list for a given topic had been exhausted and that informal consultations should be held thereafter, if time permitted. He took it that the Commission wished to approve the programme of work as proposed by the Bureau.

It was so decided.

4. Mr. LLEWELLYN (Secretary to the Commission) announced that Ms. Escobar Hernández, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kittichaisaree, Mr. Kolodkin, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Nolte, Mr. Park, Mr. Saboia, Mr. Šturma, Sir Michael Wood, Mr. Tladi (Special Rapporteur) and Mr. Forteau (Chairperson of the Drafting Committee) had expressed a wish to participate in the informal consultations on *jus cogens*.

Immunity of State officials from foreign criminal jurisdiction[240] (A/CN.4/678, Part II, sect. D,[241] A/CN.4/686,[242] A/CN.4/L.865[243])

[Agenda item 3]

Fourth report of the Special Rapporteur

5. The CHAIRPERSON invited Ms. Escobar Hernández, Special Rapporteur, to present her fourth report on the immunity of State officials from foreign criminal jurisdiction (A/CN.4/686).

6. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that her fourth report focused on and concluded the examination of the normative elements of immunity *ratione materiae*, namely the concept of an "act performed in an official capacity" (the material element) and the temporal element. The limits and exceptions to immunity *ratione materiae* would be investigated in her fifth report.

7. When writing her fourth report, she had followed the same methodology as that employed in her third report, in that she had mainly drawn on judicial and treaty practice, the Commission's previous work and States' replies to the Commission's requests for information in 2013 and 2014. Although she had received 22 written replies, she had unfortunately been unable to take account of those from two States, as they had been received after the completion of the fourth report. Those two late submissions had nonetheless been made available to the members of the Commission.

8. The report was divided into two chapters. Chapter I, section B, which examined the notion of an "act performed in an official capacity", constituted the nucleus of the fourth report and concluded with a draft article defining that category of acts. As the temporal element of immunity *ratione materiae* was undisputed, less space had been devoted to it. The fourth report also contained a draft article on the scope of immunity *ratione materiae*. The fourth report formed a whole with her three previous reports[244] and should be read in conjunction with them and with the Commission's earlier decisions. She had asked the Secretariat to issue corrigenda in languages other than Spanish in order to rectify errors in those versions of her report.

9. With regard to the concept of "an act performed in an official capacity", she said that previous work on the topic, including that done by the previous Special Rapporteur, Mr. Kolodkin,[245] had shown that the notion of an "act performed in an official capacity" was of special relevance in the context of immunity *ratione materiae*: an analysis of the notion was therefore crucial to the topic. Although her fourth report mentioned a variety of terms used to refer to that category of act, she had opted for the aforementioned expression in order to ensure terminological continuity with language already agreed by the Commission.

10. The concept of an "act performed in an official capacity" took on its full meaning when contrasted with an "act performed in a private capacity", yet neither concept had been defined in contemporary international law. Therefore, in order to clarify the meaning of "act performed in an official capacity", it was first necessary to analyse the international and national judicial practice, treaty practice and any of the Commission's earlier work which was of relevance to the topic under consideration.

11. Some of the main findings of that analysis, which was contained in chapter I, section B, were that immunity *ratione materiae* had been invoked in domestic courts in connection with a small number of crimes of the kinds listed in paragraph 50, many of which constituted crimes under international law. Claims of immunity had also been made with respect to acts committed by members of the armed forces or security services and acts linked to corruption and drug trafficking. A number of multilateral treaties linked the commission of some of those acts to the official status of the persons who carried them out (State officials). Generally speaking, acts "performed in an official capacity" were acts carried out while representing the State and exercising elements of the governmental authority. Accordingly, they must be acts that could be attributable to the State. Some courts had held that immunity could not be extended to acts that had been performed in connection with official duties where the official had acted *ultra vires*, for example, the assassination of a political opponent, violations of human rights and

[240] At its sixty-fifth session (2013), the Commission provisionally adopted draft articles 1, 3 and 4 and commentaries thereto (*Yearbook … 2013*, vol. II (Part Two), p. 39 *et seq*., para. 49). At its sixty-sixth session (2014), the Commission provisionally adopted draft article 2 (*e*) and draft article 5 and commentaries thereto (*Yearbook … 2014*, vol. II (Part Two) and corrigendum, pp. 143 *et seq*., para. 132).

[241] Mimeographed; available from the Commission's website, documents of the sixty-seventh session.

[242] Reproduced in *Yearbook … 2015*, vol. II (Part One).

[243] Mimeographed; available from the Commission's website, documents of the sixty-seventh session.

[244] *Yearbook … 2012*, vol. II (Part One), document A/CN.4/654 (preliminary report); *Yearbook … 2013*, vol. II (Part One), document A/CN.4/661 (second report); and *Yearbook … 2014*, vol. II (Part One), document A/CN.4/673 (third report).

[245] *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).

torture. Other courts had taken the opposite view, namely that such acts could be covered by immunity, even when they were manifestly contrary to international law. National courts had generally refused to grant immunity in cases involving any form of corruption, or when a State official's acts were linked to a private activity for the official's personal enrichment.

12. The notion of an "act performed in an official capacity" was not synonymous with an act *jure imperii,* since it could sometimes transcend the limits of such an act and also refer to acts *jure gestionis* performed by a State official in discharge of his or her mandate while exercising functions of the State. However, acts performed in an official capacity and acts *jure imperii* had some common elements, and some national courts had referred to acts *jure imperii* in order to identify the nucleus of acts covered by the immunity of State officials, as they constituted a manifestation of the exercise of elements of the governmental authority or of the exercise of sovereignty.

13. The idea of the act performed in an official capacity was unrelated to the lawful or unlawful nature of the act in question; in the context of immunity of State officials, it meant an unlawful act which could give rise to the exercise of criminal jurisdiction. Lastly, it was necessary to determine on a case-by-case basis whether an act performed in an official capacity was covered by immunity.

14. In view of the foregoing, it was possible to infer that the act performed in an official capacity to which she was referring was of a criminal nature, was performed on behalf of the State and entailed the exercise of sovereignty and of elements of the governmental authority.

15. The criminal nature of the act had consequences with respect to immunity. Accordingly, she recalled that responsibility for a criminal act performed in an official capacity was strictly individual, even if a separate (independent or subsidiary) legal obligation could be imposed on a third party, namely a State, with respect to the same act. Such an obligation would derive from, but could never be confused with, the primary criminal responsibility of the individual. Hence the attribution to the State of criminal acts committed by its officials was significantly limited and could be understood only as a legal fiction grounded in the traditional model of attributing acts to the State for the purposes of ascribing responsibility for internationally wrongful acts. Nevertheless, any criminal act covered by immunity *ratione materiae* was not, strictly speaking, an act of the State itself, but an act of the individual who committed it.

16. The initial consequence of the criminal nature of the act was that the latter might entail two different types of responsibility. The first, of a criminal nature, was incurred by the perpetrator. The second, of a civil nature, was incurred by either the perpetrator or a third party. That meant that an act performed by a State official might give rise to criminal responsibility attributable solely to the official and to a subsidiary civil responsibility attributable to both the official and the State. That "single act, dual responsibility" model had already been expressly recognized by the Commission in a number of its texts. Yet the criminal nature of the acts with respect to which immunity was claimed made it impossible mechanically to apply the criteria for attribution defined by the Commission in its draft articles on the responsibility of States for internationally wrongful acts.[246] Indeed, some of those criteria were particularly unsuitable for the purposes of immunity (especially articles 7–11). That was of particular importance in relation to *ultra vires* acts and acts performed by individuals regarded as "*de facto* officials".

17. In the light of those considerations, it was possible to offer a three-level model for attributing responsibility: exclusive responsibility of the State when the act could not be attributed to its physical or intellectual perpetrator; simultaneous responsibility of the State and of the individual when the act could be attributed to both; and exclusive responsibility of the individual when the act was solely attributable to the individual, regardless of the fact that he or she had acted as a State official. Those three levels of responsibility gave rise to two conclusions that could be used to determine which type of immunity applied to which type of acts. The first scenario, when the act could be attributed only to the State and the State alone bore responsibility for it, was a classic case of State immunity. The second scenario was when the act could be attributed simultaneously to the State and to the official, both bore responsibility, and two distinct types of immunity might be invoked—that of the State and that of the official. The differentiation between immunity of the State and immunity of State officials was clearest with regard to the immunity of State officials from foreign criminal jurisdiction.

18. That classification in no way changed the functional nature of immunity *ratione materiae*. The characterization of immunity from foreign criminal jurisdiction as an autonomous category of immunity could not be interpreted as recognition of an intrinsic, exclusive immunity to be held by State officials. Rather, State officials were the direct beneficiaries of immunity from foreign criminal jurisdiction, but such immunity was granted in the State's interest, with the chief aim of protecting its sovereignty.

19. Such an aim of immunity was thus another characteristic element of an act performed in an official capacity. Since that aim was to ensure respect for the sovereign equality of the State, in keeping with the aphorism *par in parem non habet imperium*, acts that were covered by immunity also needed to be somehow linked to sovereignty. That link, which must not be merely a formal one, was reflected in the requirement that an act performed in an official capacity must not only be attributable to the State and performed on its behalf, but must also be a manifestation of sovereignty, constituting a form of the exercise of governmental authority in the strict sense of the term. That requirement also reflected the distinct nature of the conditions governing the responsibility of the State, on the one hand, and the institution of immunity, on the other, thereby serving to preclude the automatic application to immunity of all the legal categories and criteria that had been defined for State responsibility.

[246] The draft articles adopted by the Commission and commentaries thereto are reproduced in *Yearbook … 2001*, vol. II (Part Two) and corrigendum, pp. 26 *et seq*., paras. 76–77. See also General Assembly resolution 56/83 of 12 December 2001, annex.

20. Although demonstrating the existence of the link just described was not easy, an analysis of practice showed that it could be done on the basis of two types of activities: those which, by their very nature, were considered to be inherent expressions of sovereignty, such as law enforcement, the administration of justice, law-making or foreign relations; and those carried out in keeping with State policies and decisions that entailed an exercise of sovereignty and were thus linked to it in functional terms. Such criteria must be applied on a case-by-case basis in order to determine whether a given act could be characterized as having been carried out through the exercise of governmental authority and therefore as constituting an expression of sovereignty.

21. That technique allowed for a strict interpretation of the notion of an "act performed in an official capacity" that placed immunity in the right spot, namely, at the heart of contemporary international law, as an instrument for protecting State sovereignty, leaving no room for any misuse of that instrument.

22. International crimes, she recalled, generally belonged in the category of "acts performed in an official capacity" since, in most cases, they could not be committed without the cooperation of the State and they involved State activities and policies from which the corresponding responsibility of the State could be derived. However, the characterization of international crimes as acts performed in an official capacity could not and should not be equated with the automatic recognition of immunity from foreign criminal jurisdiction with respect to that category of acts. It would be best to take up the issue of international crimes in the course of the discussion on issues relating to exceptions to immunity, with which she would deal in her fifth report.

23. The temporal element of immunity *ratione materiae* was analysed in chapter I, section C, of the fourth report. Very little space had been devoted to it chiefly because a broad consensus had arisen on it, both in practice and in the literature. She had analysed the temporal element in terms of whether it was a condition or a limit and in order to identify the critical dates in determining whether the temporal dimension had been met. The distinction between the moment when the act that could give rise to immunity was committed and the moment when immunity was invoked was a characteristic element of immunity *ratione materiae*. In chapter I, section C, some of the particular problems relating to the immunity of former Heads of State, former Heads of Government and former Ministers for Foreign Affairs were discussed.

24. The two draft articles contained in the fourth report referred to the definition of an act performed in an official capacity and to the scope of immunity *ratione materiae*, respectively. They were closely interrelated, given that the material scope of that category of immunity could only be understood in terms of the definition of an act performed in an official capacity. However, because of their content and functionality, they had been separated. Thus, the definition of an act performed in an official capacity had been placed in draft article 2 on definitions, whereas the scope of immunity *ratione materiae* was given separate treatment, in keeping with the model for immunity *ratione personae* that had already been adopted by the Commission.

25. Draft article 2 (*f*) brought together the characteristic elements of an act performed in an official capacity, namely, the criminal nature of the act, on the one hand, and its attribution to the State and its connection to sovereignty, on the other. To that was added a reference to the jurisdiction of the forum State, which was considered necessary in order to define the act more precisely.

26. Draft article 6 followed the same structure as that of draft article 4,[247] the parallel provision on immunity *ratione personae*: it included a paragraph on the temporal element, followed by a second paragraph on the material element. The purpose of the third paragraph was to ensure that immunity *ratione materiae* applied to former Heads of State, former Heads of Government and former Ministers for Foreign Affairs with respect to the acts that they had performed in an official capacity during their term of office, in the same way that it did to all other State officials.

27. Regarding the future plan of work, she said that her fifth report would be devoted to the crucial and highly controversial topic of limits and exceptions to the immunity of State officials from foreign criminal jurisdiction.

28. Mr. KITTICHAISAREE asked the Special Rapporteur to state her position on the application of immunity to *ultra vires* acts that were committed by State officials.

29. Mr. CANDIOTI said that he had doubts about whether the phrase "acts performed in an official capacity" was an accurate translation of its Spanish counterpart, *actos realizados a título oficial*, which referred to offences or crimes committed in the exercise of governmental authority. It would be useful for the Commission to establish a working definition of immunity, and he did not find the term *funcionario del Estado* to be a particularly suitable expression: he agreed with the Member States in the Sixth Committee that had pointed out that it failed to indicate that the individual in question was a government staff member.

30. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that she had addressed the subject of *ultra vires* acts in her fourth report, in which she noted that *ultra vires* acts were not, in principle, "acts performed in an official capacity" for the purposes of immunity. Acts of terrorism and crimes under international law could not necessarily be classified as *ultra vires* acts simply because such activities could not be regarded as functions of the State. Nonetheless, the relationship between those crimes and immunity would be analysed in the context of her fifth report, on the limits and exceptions to immunity, which was the most appropriate heading under which to deal with the offence of terrorism and other international crimes.

31. She had always considered the phrase "acts performed in an official capacity" to be a rather infelicitous, compared to the corresponding Spanish. However, the phrase was drawn from the judgment of the International Court of Justice in *Arrest Warrant of 11 April 2000*. Ultimately, what mattered most was not the terms themselves

[247] *Yearbook … 2013*, vol. II (Part Two), p. 47.

but the meaning ascribed to them. Her fourth report provided clarification for developing a single interpretation of that phrase, which could be decided on following discussion in the Drafting Committee. If necessary, the terminology could be revisited upon adoption of the text on first or second reading on the basis of comments from Member States.

32. With regard to a working definition of the term "immunity", she recalled that she had proposed a draft article 3 (Definitions) in her second report[248] that included working definitions for several terms, including immunity. Although the Commission had decided to deal with those definitions at a later stage, she would be happy to revisit the term in a plenary meeting or in the Drafting Committee, and she would welcome any contributions that Commission members might wish to make in that regard.

33. The term *funcionario del Estado* and its translations had been the subject of intense debate in the plenary Commission and the Drafting Committee. Unless the Commission decided otherwise, she did not think the time was right to reopen the debate. In her fourth report, she had touched on the phenomenon of "*de facto* officials", which the Commission could debate more fully.

34. Mr. CANDIOTI said that the Commission's progress on the topic could be held back if the three fundamental terms to which he had referred were not clear and did not convey the same meaning to all. Not knowing whether the term "State official" included only government staff or also mercenaries and contractors was problematic, for example. Furthermore, he had doubts about the advisability of relying on a precedent set by the highly debated and unfortunate judgment of the International Court of Justice in the *Arrest Warrant of 11 April 2000* case in order to define the concept of acts performed in an official capacity.

The meeting rose at 11.20 a.m.

3272nd MEETING

Tuesday, 21 July 2015, at 10.05 a.m.

Chairperson: Mr. Narinder SINGH

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

Statement by the United Nations High Commissioner for Human Rights

1. The CHAIRPERSON welcomed the United Nations High Commissioner for Human Rights and invited him to address the Commission.

2. Mr. AL HUSSEIN (United Nations High Commissioner for Human Rights) said that it was an honour for him to address the Commission, whose work over the past six decades had succeeded in laying down strong fundamental rules of international law. The rules of international law were at the core of the activities of the Office of the High Commissioner for Human Rights (OHCHR), which followed the Commission's work with deep interest.

3. Among the many important topics currently under consideration by the Commission, two stood out from a human rights perspective, namely immunity of State officials from foreign criminal jurisdiction and the drafting of a convention on crimes against humanity. On both topics, the Commission had been called upon to establish rules of law that would have an immense impact on the human rights of millions of people around the world. Combating impunity and strengthening accountability and the rule of law were two of the major challenges facing OHCHR; the Commission's progress on those topics was thus of major importance for its work.

4. With regard to crimes against humanity, he recalled that the prohibition of such crimes formed part of those peremptory norms that were clearly accepted and recognized by the international community. The non-derogable nature of the obligations at the source of the prohibition of such crimes had been recognized by the Human Rights Committee in its general comment No. 29.[249] However, in the course of their work, OHCHR staff were constantly confronted with the fact that such abominable crimes were a daily reality in many countries in the world. The Commission's work on drafting an international convention on crimes against humanity was therefore highly significant. The proposed instrument could contribute considerably to preventing such crimes and increasing the efficiency of responses to them. The first four draft articles of the proposed convention, which had been provisionally adopted by the Commission in the first part of its current session, were very promising, and OHCHR looked forward to the Commission's further work on that crucial topic.

5. Noting that draft articles 2 and 4 of the draft articles on crimes against humanity set out the obligation of States to prevent crimes against humanity, he said that one of the priorities of his Office was to assist States in complying with their obligation to prevent human rights violations, in particular gross violations that might amount to crimes against humanity. OHCHR had repeatedly emphasized that the prevention of such violations required sustained efforts by States to ensure respect for human rights and the rule of law and thus eliminate risk factors. That called for an effective and human-rights-compliant

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[248] *Ibid.*, vol. II (Part One), document A/CN.4/661.

[249] Human Rights Committee, general comment No. 29 on article 4 of the International Covenant on Civil and Political Rights on derogations from provisions of the Covenant during a state of emergency, *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 40* (A/56/40 (vol. I)), annex VI.