

Document:-
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Summary record of the 3274th meeting

Topic:
<multiple topics>

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

*Downloaded from the web site of the International Law Commission
(<http://legal.un.org/ilc/>)*

responsibility was a matter of international law, while individual responsibility was governed, in principle, by domestic law. Although an individual would bear criminal responsibility, the behaviour giving rise to it might be State-induced and would therefore qualify for immunity *ratione materiae* in a foreign court. In that situation, two types of responsibility would coexist, the individual bearing criminal responsibility and the State that directed the individual bearing international responsibility. While the individual might be shielded by immunity *ratione materiae*, that would not be the case of the State, except to the extent to which it could invoke sovereign immunity before a foreign court. Even in that case, the State's responsibility still existed, even though it could not be considered by the courts of the forum State.

41. There was no reason to shield from foreign criminal jurisdiction persons who could not be characterized as officials, or to protect officials when they had acted, not for the benefit of the State of which they were the servants, but for their own benefit. While "elements of the governmental authority" would be difficult to define in the abstract, it would be helpful if, in the commentary to draft article 2, the Special Rapporteur were to provide as many examples as possible of situations where officials who had engaged in criminal conduct had been found to be "exercising elements of the governmental authority" and examples of situations where that had not been the case.

42. Mr. CANDIOTI said that the debate at the current session had centred on acts performed in an official capacity, whereas the acts of relevance to the topic under consideration were crimes covered by immunity *ratione materiae*, the latter being a procedural exception in favour of an official of one State who was indicted and brought before a competent court of another State.

43. In order to determine when that exception applied, it was necessary to define "crime". The latter was a violation of the criminal law of the State which claimed jurisdiction to punish that breach. In the Spanish version of the text, the notion of "crime" should be rendered as "*delito*" and not "*crimen*". Under Argentinian law, a crime was not characterized as an act, but rather as conduct, behaviour or action which constituted an infringement of criminal law. Immunity was a procedural defence that could be raised when a foreign State claimed jurisdiction to try the official of another State for a crime committed by that person. It was not a privilege, a prerogative or a question of *par in parem non habet imperium*. That idea was antiquated. Every sovereign power and every State was governed by the law of the international community, which was anchored in the Charter of the United Nations. It was also necessary to define "criminal jurisdiction". That was the jurisdiction of criminal courts and other judicial bodies competent to apply criminal law. Criminal law, in turn, was the set of standards that defined criminal breaches of the law, including international treaties. He was worried by the terminological confusion that reigned. The relationship between immunity and responsibility was of prime importance. Immunity could never signify impunity.

The meeting rose at 4.30 p.m.

3274th MEETING

Wednesday, 22 July 2015, at 10.05 a.m.

Chairperson: Mr. Narinder SINGH

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

Cooperation with other bodies (continued)*

[Agenda item 13]

STATEMENT BY THE PRESIDENT
OF THE INTERNATIONAL COURT OF JUSTICE

1. The CHAIRPERSON welcomed Judge Ronny Abraham, President of the International Court of Justice, and invited him to address the Commission.

2. Judge ABRAHAM (President of the International Court of Justice) said that he welcomed his first opportunity to meet with the members of the Commission since taking up office as President of the International Court of Justice. Reviewing the Court's activities over the past year, he said it had dealt with two cases. The first was a series of applications by the Marshall Islands against nuclear Powers or countries alleged to have nuclear weapons, on grounds of their failure to fulfil obligations concerning cessation of the nuclear arms race and nuclear disarmament. Only three applications, those against India, Pakistan and the United Kingdom had been entered in the Court's Registry, because those were the only States that had made declarations of acceptance of the Court's jurisdiction. Since India and Pakistan had challenged the Court's jurisdiction to rule on the dispute, the latter had decided that the question of its jurisdiction had to be resolved first of all, and to that end, it requested each party to file a Memorial on the matter. The United Kingdom had filed an objection to the Court's jurisdiction and the admissibility of the application, with the result that the proceedings on the merits were suspended. The Court had not yet ruled on the question of its jurisdiction.

3. The Court had likewise had before it an application from Somalia against Kenya with regard to a dispute concerning maritime delimitation in the Indian Ocean. Given the time limits set for the preparation of the written pleadings, it was unlikely that the Court would rule on the matter during the year 2016. Three cases, two of which had been joined, were currently under consideration. In the first, on the *Obligation to Negotiate Access to the Pacific Ocean*, Chile had filed an objection to jurisdiction, on which the

* Resumed from the 3268th meeting.

Court was to rule soon. In the two cases in which proceedings had been joined—*Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)* and *Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*—public hearings had been held, and a single judgment was to be delivered in the coming months.

4. One of the outstanding events of the past year had been the Court's rendering in 2015 of its judgment in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, the last in a series of judgments on the conflict in the former Yugoslavia. In those proceedings, instituted on the basis of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, the two States had accused each other of having committed acts constituting the crime of genocide during the first half of the 1990s. It had come as no surprise that the Court had concluded that there had been no acts of genocide, on either side, for the principal reason that the genocidal intent—*dolus specialis*—in other words, the intent to destroy, in whole or in part, a group of human beings as such, had not been proved, either by Croatia in its principal claim, or by Serbia in its counterclaim, both of which were accordingly dismissed.

5. Interesting and noteworthy developments had taken place in relation to two points of law in the judgment. The first was the temporal application of the Convention on the Prevention and Punishment of the Crime of Genocide and the consequences to be drawn with respect to the allegations made by Croatia concerning acts prior to 27 April 1992, the date on which Serbia had come into existence as an independent State. It had already been established in the Court's jurisprudence that Serbia was not the successor State to the Socialist Federal Republic of Yugoslavia, but one of the successor States. However, some of the acts imputed to Serbia by Croatia, and which according to the latter were acts constituting genocide, had taken place before 27 April 1992. Serbia had accordingly entered an objection to jurisdiction *ratione temporis*, on the grounds that at the time of the acts in dispute, it did not exist as an independent State, and could thus not be bound by the Convention on the Prevention and Punishment of the Crime of Genocide. The objection had already been raised in 2008, but in its preliminary judgment, the Court had deferred the matter and decided to revert to it in its judgment on the merits.

6. Croatia had advanced two arguments against the objection to jurisdiction *ratione temporis* put forward by Serbia. The first relied on article 10, paragraph 2, of the International Law Commission's draft articles on the responsibility of States for internationally wrongful acts,²⁷⁷ according to which an act of an insurrectional or other movement that gave rise to a new State was to be considered an act of the new State. According to Croatia, that principle was part of customary international law, and the crimes committed against Croats before 27 April 1992 were attributable, at least in part, to Serbian militias or

armed groups which, although non-State, could be assimilated to insurrectional movements, within the meaning of the aforementioned article 10, paragraph 2, and accordingly entailed the responsibility of Serbia. The Court had rejected that argument on the grounds that, even if article 10, paragraph 2, could be regarded as declaratory of customary international law—a point on which it had nevertheless not given an opinion—and even if the acts of the Serbian militias could be assimilated to those of an insurrectional or other movement within the meaning of article 10, that article was concerned only with the attribution of acts to a new State; it did not create obligations binding upon Serbia. Since Serbia had come into existence as an independent State only on 27 April 1992, the Court had held that it had not been, and could not have been, bound by the Convention on the Prevention and Punishment of the Crime of Genocide at the time of the alleged acts, and that even if those acts had been attributable to Serbia, its responsibility for a violation of the Convention could not have been engaged.

7. The second argument advanced by Croatia against the objection raised by Serbia to jurisdiction *ratione temporis* was drawn from the theory of the succession of States to responsibility. Croatia had contended that even if acts prior to 27 April 1992 were attributable to the Socialist Federal Republic of Yugoslavia, and not to Serbia, nevertheless, Serbia could incur responsibility through the operation of succession. The Court had neither confirmed nor rejected the viability of that theory, it had simply noted that it raised serious issues in fact and law; that Serbia's succession to the responsibility that fell upon the Socialist Federal Republic of Yugoslavia was not *a priori* to be excluded, but that there was no need to resolve those issues in determining whether the Court had jurisdiction to consider acts prior to 27 April 1992. The Court had consequently rejected the objection to jurisdiction *ratione temporis*, although it might be pointed out that the judges had not been unanimous on that point.

8. The other interesting aspect of the judgment regarding the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)* related to the interplay between international humanitarian law and the Convention on the Prevention and Punishment of the Crime of Genocide with respect to the claim by Serbia that the shelling by the Croatian army of villages in Krajina constituted acts of genocide within the meaning of the Convention. In the first instance, the Court had had to determine whether the shelling was indiscriminate, in other words, whether it was aimed both at military targets and at the civilian population, or whether it was specifically directed at military targets.

9. On the latter point, the Court had referred to the judgment handed down by the International Tribunal for the Former Yugoslavia in *Prosecutor v. Ante Gotovina et al.*, in which the Tribunal had concluded that, even though there had been civilian victims, the contention that the shelling of villages in Krajina by the Croatian army had been indiscriminate had not been proved. The Court had thus held to the reasoning it had adopted in 2007, in its judgment on the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, by

²⁷⁷ 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.

again according due weight to findings of fact made by the Tribunal. It had not considered itself in a position to adduce facts of that nature and, still less, to go against the findings of fact made by the Tribunal, which the Court was obliged to regard as reflecting the actual facts, save in exceptional circumstances in which it might have serious cause for doubt. It was true that the Trial Chamber and the Appeals Chamber of the International Tribunal for the Former Yugoslavia had come to mutually contradictory conclusions, and there had been vigorous debate on the subject, both between the judges in the two chambers and within the Appeals Chamber. Nevertheless, the decision by the Appeals Chamber represented the Tribunal's last word on the case, and the Court was bound to accord it the greatest weight.

10. Having established that the shelling had not been indiscriminate, the Court next had to resolve the question of whether the shelling could be regarded as "killing" within the meaning of article II of the Convention on the Prevention and Punishment of the Crime of Genocide. Serbia had contended, in a subsidiary argument, that even if the Court held that the artillery attacks on Serbian villages had not been indiscriminate, it must conclude that they were part of a genocidal operation within the meaning of article II of the Convention on the Prevention and Punishment of the Crime of Genocide. Croatia, on the other hand, had argued that since such military acts had been committed in accordance with international humanitarian law, they could not be characterized as genocide, the genocidal intent not having been proved.

11. The Court had refrained from ruling, in abstract terms and in general, on the relationship between the Convention on the Prevention and Punishment of the Crime of Genocide and international humanitarian law, and in particular, on whether a military operation conducted in accordance with international humanitarian law could or could not constitute an offence under the Convention; it had merely noted that, as a general rule, when two separate bodies of legal rules coexisted, a particular act might be perfectly lawful under one body of rules and unlawful under another. Concerning the military operations conducted against Serbian villages, it had simply concluded that the *actus reus* of genocide had not been proven, since "killing" had to be intentional, within the meaning of article II of the Convention on the Prevention and Punishment of the Crime of Genocide; the attacks on the Krajina villages could thus not be considered as such, since they had not been indiscriminate and the resulting civilian casualties had not been caused deliberately. The fact that the terms *meurtre* and "killing", used in the French and English versions, respectively, of the Convention on the Prevention and Punishment of the Crime of Genocide, were not precise equivalents could lead to a certain ambiguity. The French term *meurtre* designated the act of wilfully causing the death of another person, whereas the English term "killing" did not necessarily imply the intent to kill. However, the Court had resolved the problem in 2007, in concluding that *meurtre*, within the meaning of the Convention on the Prevention and Punishment of the Crime of Genocide, was always intentional, and that this interpretation held true for all the language versions of the Convention and, consequently, for the English term "killing".

12. Mr. PETRIĆ said that Judge Abraham had centred his very interesting account of the Court's activities over the past year on the judgment in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, a case in which the two States had accused each other of genocide. Given the complexity of the case, he asked Judge Abraham to permit him to simplify matters in the interests of brevity and to make a general preliminary remark about the desirable purpose of the administration of justice in that case, namely, to help to restore the peace after the International Tribunal for the Former Yugoslavia had handed down its two decisions in *Prosecutor v. Ante Gotovina, et al.*, in 2011 and 2012. The trial court's sentencing of Ante Gotovina to 24 years in prison, followed by his acquittal a few months later on appeal, had been quite unsettling for countries in the region. It was regrettable that the Tribunal had not foreseen the disastrous effects, for both parties, of its radical reversal of position.

13. Turning to *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, he said that the International Court of Justice had rightly devoted a great deal of time to examining the factual elements, particularly whether the shelling of villages in Krajina had been indiscriminate. It seemed to him logical, and perhaps inevitable, that the Court's answer to that question had been the same as in its 2007 judgment in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*. But even so, what of the three years during which Sarajevo had been subjected to indiscriminate shelling without any military objectives in view? If, in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, the Court had ruled that the shelling of Croatia had been carried out indiscriminately, with the intention of destroying the Serbian population of the villages in Krajina, the Court should likewise have concluded that genocide had been committed in Sarajevo, Bosnia and Herzegovina. But that had not been the case: in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, the Court had concluded that the three years of indiscriminate shelling of Sarajevo could not be characterized as genocide. It was therefore surprising that the Court had accorded so much attention to the factual element in its judgment in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, and he would like to hear Judge Abraham's views on that point.

14. A second point: following the break-up of Yugoslavia in 1991, and until the fall of President Milošević in 2000, Serbia had constantly insisted that it continued the legal personality of the Socialist Federal Republic of Yugoslavia, something that was disputed by other States that had been part of the former Yugoslavia. Various factors demonstrated that, within the United Nations, Serbia had been considered the successor State to the Socialist Federal Republic of Yugoslavia, at least until the Federal Republic of Yugoslavia (Serbia and Montenegro) had been admitted to the United Nations as a new Member State on 1 November 2000. He therefore wished to know whether the International Court of Justice had taken the

position of Serbia into account when it had discussed procedural matters and had concluded that Serbia was not responsible for events that occurred after the fall of Vukovar in November 1991: for example, the killing of sick and wounded persons. If not Serbia, then who was it that might have been responsible for those horrendous crimes?

15. Judge ABRAHAM (President of the International Court of Justice), responding to the first point made by Mr. Petrić, said that even if the shelling of villages in Krajina had been indiscriminate, he suspected that it would not have been qualified as genocide, because elsewhere in its judgment, the Court had found that the intentional element, the *dolus specialis*, was absent. Nevertheless, Mr. Petrić's question highlighted the approach taken by the Court to the case, namely its decision to examine the *actus reus* first, and then to consider the genocidal intent. Genocide presupposed, on the one hand, the commission of certain acts enumerated in article II of the Convention on the Prevention and Punishment of the Crime of Genocide, first among which was killing, and on the other hand, the existence of genocidal intent, or *dolus specialis*. Accordingly, the Court had first analysed each of the acts cited by the two parties in order to determine whether the *actus reus* of genocide could be identified. Once the *actus reus* had been identified, the Court had then looked into whether the acts were indicative of *dolus specialis*, and had concluded that they were not. The Court could have proceeded directly to look for genocidal intent, and finding it lacking, it could have avoided its analysis of the acts, something that would have made the judgment shorter and easier to read. However, for psychological reasons relating to the administration of justice, to which Mr. Petrić had alluded, the Court had not taken the shortest route: it had considered it preferable, for the parties to the case at hand, for it to state, if only in the reasoning behind its decision, that grave crimes that had caused victims on both sides had been committed by both parties in the territory of Croatia. One could perhaps say that there, the Court had been making "legal policy", namely exercising the discretionary power available to the judge to choose the most appropriate grounds on which to base a decision—those that best corresponded to the way he or she viewed the responsibilities incumbent upon the judge.

16. As to the position of Serbia as the successor State to the Socialist Federal Republic of Yugoslavia, the Court had already taken a stance in 2004, in its judgments on the *Legality of Use of Force*. It had constantly maintained, on the one hand, that Serbia was not the successor State to the former Yugoslavia, but one of the successor States, and on the other hand, that it had become a member of the United Nations only in 2000, when it had been admitted as a new State. The Court's jurisprudence on that point had been reaffirmed in 2007 and again in 2008. The 2015 judgment was thus of a piece with what was now well-established legal precedent, even though at the time it had elicited controversy, both within the Court itself and beyond it, within the United Nations system.

17. Mr. FORTEAU said that Judge Abraham had given a very interesting interpretation of the term *meurtre* in article II of the Convention on the Prevention and Punishment of the Crime of Genocide and its English equivalent, "killing". Since the definition of the term adopted by the

Commission in its work on crimes against humanity at the current session was intended to conform to the definition used by the International Criminal Court, he wished to know whether the terminology of the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)* judgment conformed precisely to that Court's interpretation of such terms. In article 6 of the Rome Statute of the International Criminal Court, on the crime of genocide, the term *meurtre* was translated as "killing", whereas in article 7, on crimes against humanity, it was translated as "murder"; however, in the *Elements of Crimes*,²⁷⁸ the two concepts were simply construed to mean to cause death, with the intentional element attached to *meurtre* no longer in evidence. He wished to know whether the parties to *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)* had raised that issue.

18. Judge ABRAHAM (President of the International Court of Justice) said he had no recollection of the parties having invoked the Rome Statute of the International Criminal Court or, more generally, the other texts applicable in that context. The Court had therefore not had occasion to consider the matter, either in the case in question or in others. The issue had not been raised in the 2015 judgment, moreover, because the Court had simply referred to what it had said in 2007, in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, namely that within the meaning of article II of the Convention on the Prevention and Punishment of the Crime of Genocide, the French term *meurtre*, "killing" in English, presupposed the intentional element, namely the will to cause death.

19. Mr. ŠTURMA cited paragraph 115 of the judgment in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, in which it was stated that "[t]he Court considers that the rules on succession that may come into play in the present case fall into the same category as those on treaty interpretation and responsibility of States referred to in the passage just quoted". He asked whether the Court had thereby intended to give implicit recognition to the existence of a body of rules of general international law concerning the succession of States to responsibility, and suggested that it might be useful, in terms of judicial practice, for the Commission to study the matter and seek to discern the content of such rules.

20. Judge ABRAHAM (President of the International Court of Justice) said that the Court's judgment must not be interpreted as recognizing a doctrine, theory or body of rules on the succession of States to responsibility. The Court had not needed to resolve that question and had taken no position on it. It had simply said that if such a body of rules existed, it would fall under general international law, as did the rules on State responsibility. As to the work of the Commission, although he agreed that any issue of general international law was worthy of study, he would defer to the judgment of States and the Commission itself.

²⁷⁸ International Criminal Court, *Elements of Crimes*, The Hague, 2013. Available from the Court's website: www.icc-cpi.int/resource-library/Documents/ElementsOfCrimesEng.pdf.

21. Mr. KAMTO said that he wished only to make two comments. The first concerned the disputes between the Marshall Islands and the nuclear Powers: as he understood it, India and Pakistan had not formally entered an objection to the Court's jurisdiction or advanced the procedural argument that the application was inadmissible; they had simply made statements to that effect during a meeting with the President of the Court. If that was true, it attested to some flexibility in the application by the Court of the Rules of Court, and he would be interested to learn whether that was a regular practice. The second comment was on the discrepancy between the French and English versions of article II of the Convention on the Prevention and Punishment of the Crime of Genocide: he wished to know which version the Court had used in preparing its interpretation.

22. Judge ABRAHAM (President of the International Court of Justice), replying first to the second question, said he did not think it could be said that the Court had chosen one of the two language versions. The problem was that the French version clearly indicated that the intentional element had to be present, whereas the more ambiguous English version left room for interpretation: the term "killing" did not necessarily presuppose the presence of the intentional element, but neither did it exclude it. The other language versions of the Convention on the Prevention and Punishment of the Crime of Genocide also incorporated the intentional element, and the very purpose of the Convention, which was the punishment of a grave crime entailing the will to destroy a group of human beings as such, was inconceivable without the intentional element. As to the procedure followed in the disputes between the Marshall Islands and India and Pakistan, while it was true that the respondents had challenged the Court's jurisdiction in a manner other than the usual one of an objection to jurisdiction, which the United Kingdom had used, they had nevertheless not contented themselves with making an oral statement. They had also reacted by diplomatic note when the claim was transmitted to them, stating at the outset that it did not fall within the Court's jurisdiction. In conformity with article 79, paragraph 2, of the Rules of Court, where it was not formally in receipt of an objection to jurisdiction or to the admissibility of an application, but foresaw difficulties in dealing with such questions, a decision could be taken by the Court, following consultations with the parties during a meeting with the President, that any such questions would be determined separately, before further proceedings on the merits. That was a rarely used exception to the procedure set out in paragraph 1 of the same article of the Rules of Court.

23. Mr. NOLTE pointed out that, although the extremely important provisions on interpretation in the 1969 Vienna Convention were cited quite frequently, so far the Court had expressly recognized only article 33, paragraph 1, as having customary status. It might be good legal policy, if the occasion arose, for the Court to state that the article in its entirety had customary status. In his view, it was desirable for the interpreters of international instruments to keep in mind that there were generally several language versions that needed to be taken into consideration.

24. Judge ABRAHAM (President of the International Court of Justice) said that when a particular provision

of the 1969 Vienna Convention was invoked before it, the Court was not in principle required to take a position on whether the other provisions of the Convention had customary status, save where the exigencies of the case so required. It was true that *obiter dicta* were to be found in the Court's judgments, since nothing prevented it from going a bit beyond the strict minimum. However, the Court was disinclined to declare any provisions that were found in treaties or which had been adopted by the International Law Commission to be customary rules. In general, it avoided taking positions on matters of international law that were not strictly and directly at issue in a given case, tending to defer such pronouncements. By virtue of its judicial function, the Court was called upon to explicate the law on the basis of the arguments raised by the parties in a given case, but not in general. The phrase "legal policy" as used by Mr. Nolte did not cover the same territory that had emerged in the judgment in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*. The point in that case has been to explain the methodology chosen by the Court in setting out the grounds for the judgment, whereas what Mr. Nolte was suggesting was that the Court should enunciate the law above and beyond what was required for a given case.

25. Ms. ESCOBAR HERNÁNDEZ said that she wished to respond to Mr. Forteau's earlier remarks about the term "murder". She did not agree with his view that the *Elements of Crimes* under the Rome Statute of the International Criminal Court did not address the intentional nature of murder. True, that aspect was not covered in the part of the *Elements of Crimes* devoted to the article in the Rome Statute of the International Criminal Court that dealt with murder [art. 7, para. 1 (a)], but it was mentioned several times in the general introduction to the *Elements of Crimes*, which was all too often passed over in the literature and by practitioners of law, although it was an integral part of the text and must be taken into account. She drew attention to paragraph 2 of the introduction, according to which "a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge". Paragraph 3, which stated that the "[e]xistence of intent and knowledge can be inferred from relevant facts and circumstances" seemed to her to be of particular importance in that regard. She asked Judge Abraham whether the painstaking analysis in which the Court had engaged in the judgments he had mentioned was intended precisely to facilitate taking into account the intentional element, in particular *dolus specialis*, inherent in genocide.

26. Lastly, she would like to know Judge Abraham's view on the Court's practice with regard to the recognition of the customary nature of the rules of attribution set out in chapter II of the Commission's draft articles on the responsibility of States for internationally wrongful acts, given that, in the cases on genocide that he had described, the Court had sometimes chosen to take a position and sometimes had not done so. It would be interesting to know if that fluctuation was due to the very nature of the rules or to the legal policy adopted by the Court, which was not to enunciate a point of law unless the nature of the case before it so required.

27. Mr. HASSOUNA, recalling that the International Court of Justice was the principal judicial organ of the United Nations, asked whether Judge Abraham considered it to be the supreme arbiter of decisions handed down by other international or regional courts, and whether he thought that having former members of the International Law Commission on the Court was an advantage that could help to reinforce the ties between the two bodies.

28. Judge ABRAHAM (President of the International Court of Justice) said he thought it more accurate to say that the detailed analysis of the facts in which the Court had engaged in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)* had been useful or desirable, rather than necessary. The Court could have refrained from examining each situation in detail, but it had deemed it desirable, in order to satisfy the parties, for its judgment to be seen to be based on the most thorough and painstaking analysis possible, of fact and of law. As to whether the text on the responsibility of States for internationally wrongful acts was part of custom, although the Court had had occasion to speak to that point concerning individual articles, it had not taken a position in general, and had avoided doing so when there was any doubt. Its approach might therefore appear inconsistent to attentive observers. As for its relationship to other international or regional courts, it must be recalled that the Court was not in a position, from the institutional standpoint, to play the role of supreme arbiter of the decisions of such institutions. However, it was quite pleased that its work was instrumental in consolidating jurisprudence under general international law. It took the view that other international courts and tribunals should refer to its judgments when they ruled on issues of general international law, but not on issues in specific areas that fell more directly into their particular field of competence, and that was indeed how it worked in practice. The judges of the Court also had connections with judges from other international tribunals that helped to promote the coherence in jurisprudence that was essential at the international level. In conclusion, he said that the presence of former members of the Commission among the judges of the Court made an invaluable contribution to the Court's work.

Programme, procedures and working methods of the Commission and its documentation (continued)*
(A/CN.4/678, Part II, sect. I, A/CN.4/L.868)

[Agenda item 11]

29. The CHAIRPERSON announced that the Commission's new website had recently been put online. In addition to its updated look, it now satisfied the relevant United Nations criteria with respect to accessibility for disabled persons. Depending on the time available, it might be possible to arrange for an introduction to the site during the current session. The website's development represented nearly a year of work for the Commission's secretariat and the Codification Division, work for which he expressed gratitude on the Commission's behalf.

* Resumed from the 3257th meeting.

Immunity of State officials from foreign criminal jurisdiction (continued) (A/CN.4/678, Part II, sect. D, A/CN.4/686, A/CN.4/L.865)

[Agenda item 3]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR (continued)

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

31. Mr. KOLODKIN congratulated the Special Rapporteur on her fourth report on the immunity of State officials from foreign criminal jurisdiction, which was the result of a serious effort and would help the Commission to make progress in its work on the topic. Before beginning his in-depth discussion of the document, he wished to address certain aspects of the methodology used to prepare it. First, he found that the practice and legislation of States were not sufficiently well canvassed in the report. An overview was given of the practice of national courts, and considerable weight was accorded to such practice: more space was devoted to it than to the decisions of international courts and tribunals, which was surprising since national judicial practice was not always consistent, contrary to the practice of international courts and tribunals such as the International Court of Justice and the European Court of Human Rights. Even though *Arrest Warrant of 11 April 2000* and *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)* dealt with the question of the immunity from criminal jurisdiction of State officials, while *Jurisdictional Immunities of the State* concerned immunity from civil jurisdiction, the decisions handed down in those cases were consistent in many respects. The judgment of the International Court of Justice in *Jurisdictional Immunities of the State* contained many references to its two judgments on the immunity from criminal jurisdiction of State officials. The same consistency was shown by the European Court of Human Rights in its approach to the question of immunity of the State and of its representatives: in *Jones and Others v. the United Kingdom*, that Court had referred to its previous judgments on immunity and to the aforementioned decisions of the International Court of Justice, arriving at the same conclusions as had the latter.

32. If one viewed jurisprudence as a way of defining rules of customary international law and proving the existence or absence of such rules, including with respect to immunity, then greater weight should be accorded to the decisions of international courts and tribunals than to those of national courts. The issue of immunity from foreign jurisdiction was within the purview of inter-State relations: it was above all a matter of the interpretation and application of international law, not of domestic law. Consequently, international courts and tribunals played a crucial role in the identification of the applicable rules of law, although the decisions of national courts were also of importance.

33. When consulting the decisions handed down by national courts in matters relating to immunity *ratione materiae*, it was important to know whether the official's State had invoked his or her immunity or had withdrawn

it; it was not enough to know whether the court had recognized the official's immunity or not. In that connection, the procedural aspects of immunity took on particular importance. The analysis in the report of rulings on immunity from criminal jurisdiction as well as of decisions on immunity from civil jurisdiction was perfectly acceptable: although there were some differences between the two types of jurisdiction, they also shared many common features. The same held true for immunity from those two forms of jurisdiction, as the aforementioned judgments by international courts and tribunals confirmed. Lastly, the fourth report contained a detailed analysis of the attribution to the State of an act of an official, but he had doubts that the analysis, however correct it might be, was actually worth undertaking.

34. Turning to the substance of the fourth report, he said that he endorsed many of the conclusions reached by the Special Rapporteur, in particular the idea that one and the same act might be attributed to both a State official and to the State itself. Similarly, he subscribed to the idea of recognizing dual responsibility—the criminal responsibility of the official and the responsibility under international law or civil law of the State. However, he was not convinced that those conclusions had a direct relationship with the designation of an act of a State official as an act performed in an official capacity. On the other hand, he agreed with the Special Rapporteur that the fact that an act performed by an official was an abuse of power generally had no impact on its official nature. He also agreed with the Special Rapporteur that the actual or alleged criminal nature of an act carried out by an official had no relationship whatsoever to the official character of the act, and that *acta jure gestionis* could be performed by State officials in the discharge of their functions and could then be attributed to the State concerned.

35. That said, he did not agree with the thesis that the immunity of the official from foreign criminal jurisdiction could not be assimilated to the immunity of the State itself. Although there were some differences in scope, nevertheless it was always the immunity of the State, or one of the variants thereof, that was involved. A number of arguments had already been advanced against the Special Rapporteur's thesis, indicating that his own viewpoint was shared, not only by other members of the Commission, but also by States in the Sixth Committee; it was also borne out by the jurisprudence of the International Court of Justice and a great many works in the literature. The immunity of an official was precisely that of the State; the official was merely the beneficiary of immunity and depended for it on the forbearance of the State. One must not be misled by the expression "immunity of a State official": it was simply a term derived from a provision of international law governing relations among States. From a legal standpoint, the immunity of an official referred to the relations between the official's State and the State exercising its jurisdiction over the official. It was the first State, and not its official, that had the right to enjoy immunity, the second State bearing obligations towards the first that flowed from that right. Criminal jurisdiction was exercised with respect to an individual—the official—but it was indirectly the State that was affected. During criminal proceedings against the official, matters of great importance for his or her State might be brought up. That

was why he did not share the view of the Special Rapporteur who, in paragraph 104 of her fourth report, affirmed that any consequences of the outcome of the criminal proceedings were individual and strictly personal. Those consequences, and the proceedings themselves, affected the official's State, and the State armed itself against them by granting immunity to its official. Thus, immunity derived from the principle of State sovereignty and non-interference in internal affairs. As the judgment delivered in 2004 by a court in the United Kingdom in the case of *Jones v. Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya*, "criminal proceedings against an alleged torturer may be said indirectly to implead the foreign [S]tate. It is not easy to see why civil proceedings against an alleged individual torturer should be regarded as involving any greater interference in or a more objectionable form of adjudication upon the internal affairs of a foreign [S]tate" (para. 75 of the judgment).

36. He was likewise not convinced that the act of an official had to be attributed to his or her State in order for the act to be considered to have been performed in an official capacity. As he saw it, the Commission usually adopted the opposite line of reasoning: if an act was performed by a person in an official capacity, it could be attributed to the State. In any event, the criteria for attribution of an act to a State official were not reflected in draft article 2 (f), at least not directly. However, that text contained another criterion that the Special Rapporteur had proposed for inclusion in the definition of an act as having been performed in an official capacity, namely the fact that the act constituted a crime. Many objections, with which he agreed, had been raised on that subject. Although the actual or alleged criminal nature of an act of an official had no impact on the official nature of that act, that in no way implied that only a criminal offence could be considered to be an act performed in an official capacity. He understood the Special Rapporteur to have adopted the following line of reasoning: the question of the immunity of an official in connection with his or her acts arose only when the act was assumed to constitute an offence; the criminal nature of the act raised, not the issue of its official character, but the issue of jurisdiction. Like other members had previously done, therefore, he proposed the deletion of the criterion of crime in draft article 2 (f). In passing, he noted that the phrase "acts performed in an official capacity" was included, not in draft article 5, already adopted by the Commission, which spoke of "State officials acting as such",²⁷⁹ but in draft article 4, concerning immunity *ratione personae*.²⁸⁰ As he understood it, the reference in draft article 4 to acts performed in an official capacity was primarily intended to specify the acts for which an official enjoyed immunity *ratione materiae*, covered in draft article 5, but the phrase was not used there. If "acts performed in an official capacity" was synonymous with "acts performed by State officials acting as such", and a definition of the former expression was provided, one might ask why it was not contained in draft article 5; perhaps it should be incorporated there, unless a definition would be superfluous. If no definition was to be given, then the words "acts performed in an official capacity", in draft article 6, paragraph 2, could be

²⁷⁹ *Yearbook ... 2014*, vol. II (Part Two) and corrigendum, p. 146.

²⁸⁰ *Yearbook ... 2013*, vol. II (Part Two), p. 47.

replaced by “acts performed by State officials acting as such”. If the Commission decided to retain the definition of “act performed in an official capacity”, then for consistency’s sake it should make a corresponding amendment to draft article 5. Similarly, it might be useful if the draft articles, or at least the relevant commentary, took into account two important factors, namely that when an act of an official constituted an act *ultra vires*, that had no impact on the official nature of the act, and that the actual or alleged criminal nature of the official’s act likewise had no impact on its official nature. Lastly, subject to the objections raised earlier about the inclusion of a definition of “act performed in an official capacity”, he saw no reason why the two draft articles contained in the fourth report should not be sent to the Drafting Committee.

37. As to the Commission’s future work on the topic, he did not agree with the view expressed at a previous meeting that immunity was diametrically opposed to human rights and accountability for crimes, and that it could be equated with impunity. It was an extremely simplistic viewpoint that diverged from the position taken by the International Court of Justice and the European Court of Human Rights, and most importantly, was not in line with contemporary international law; however, it did correspond to some extent to the case law of the Italian Court of Cassation and the stance taken by some authors. He did not think the Commission should follow the recommendations made on that score. In the course of its future work, it should examine the procedural aspects of immunity, determining precisely which acts of the State were covered by immunity, and only afterwards should it begin to discuss exceptions to immunity.

38. Mr. HMOUD said that the fourth report by the Special Rapporteur was an important one, in that it would decide the direction that the Commission would take on a topic with major legal and political implications: the material scope of immunity *ratione materiae* and the definition of acts performed in an official capacity. It was worth mentioning that, in her fourth report, the Special Rapporteur had explored every possible alternative and conclusion that could be reached based on the jurisprudence of international courts and tribunals, State practice and the relevant instruments. Her conclusions were clear: that acts by State officials, including international crimes—and he wished to emphasize the latter point—could be performed in an official capacity. That conceptual approach, as opposed to the automatic exclusion of international crimes from acts in an official capacity, opened the door to the proposition that limitations or exceptions to immunity *ratione materiae* could exist under general international law. Nevertheless, one should recall the joint separate opinion of Judges Higgins, Kooijmans and Buergethal in *Arrest Warrant of 11 April 2000*, in which they questioned whether “serious international crimes [can] be regarded as official acts because they are neither normal State functions nor functions that a State alone (in contrast to an individual) can perform” (para. 85). That opinion, and those of other judges in national and international courts and tribunals, attested to the nuanced nature of the proposition that international crimes could be acts performed in an official capacity. The matter had to be examined on a case-by-case basis, leaving the door open to the presumption, with regard to the criminal prosecution of a

State official in a foreign court, that international crimes could go beyond the functions of the State. The issue could nevertheless also be tackled from the perspective of limitations to the immunity *ratione materiae* that the official enjoyed.

39. Another point to be made was that, in the *Arrest Warrant of 11 April 2000* case, the International Court of Justice had not addressed the distinction between immunity *ratione materiae* and immunity *ratione personae*. However, when it announced, in paragraph 58 of its judgment, that it was “unable to deduce from this practice that there exists under customary international law any form of exception [for international crimes] to the rule according immunity [from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs]”, it was clear that it was referring exclusively to immunity *ratione personae*. There did not seem to be a comparable customary rule in relation to the lack of limitations or exceptions for immunity *ratione materiae*. In fact, practice was mixed in relation to immunity *ratione materiae* from foreign criminal jurisdiction for State officials, as demonstrated by contradictory rulings in the national courts of different States, and sometimes of the same State, owing to a confusion between immunity of the State and immunity of the official *ratione materiae*, which were not one and the same thing.

40. It had been argued that the immunity of the State official for acts performed in an official capacity stemmed from the equality of States, whereby a State could not subject another State to its jurisdiction. However, that argument failed to explain why international law recognized the right of the State to exercise jurisdiction over the commercial activities of another State and other non-public acts by other States. The restrictive approach to the immunity of the State, as opposed to the absolute approach, would not have prevailed if the underlying basis for jurisdictional immunity had been the sovereign equality of States. That was all the more the case in relation to the immunity *ratione materiae* of the State official for acts performed in an official capacity, where the grounds for immunity were to enable the State to exercise its functions effectively.

41. In addition, if one assumed that the official committed a crime in the exercise of the State’s functions, then there was nothing to prevent the affected State from refusing to recognize the immunity of the official, by adopting countermeasures to induce the official’s State to comply with its obligations under international law, particularly when an official committed an international crime on behalf of the State that he or she represented.

42. With reference to specific points in the report under consideration, he said that he agreed with the approach of separating the subjective scope of immunity *ratione materiae* from the material scope. While it was true that the definition of State official and of acts performed in an official capacity could overlap in certain situations, the nature of immunity made it necessary to draw such a distinction. Even when representing the State or exercising its functions, an individual could act outside the scope of his or her official capacity. As such, immunity *ratione materiae* might or might not exist, depending on

the nature of the act performed, and not only on the individual who performed it. The question then was how to determine whether an act had been performed in an official capacity. It was not an easy exercise, given the lack of any tests and the incoherence in practice at both the national and international levels, as demonstrated in the fourth report. In that regard, while it was conceptually possible to develop a test for the performance of an act in an official capacity, as other members of the Commission had pointed out, the commentary would need to provide examples pertinent to that test and to the definition that the Commission would eventually adopt. While, in paragraph 32 of her fourth report, the Special Rapporteur dismissed the possibility of identifying an act performed in an official capacity on the basis of national laws, she recognized the need to examine national and international practice in relation to the definition of the term. Indeed, the fourth report contained several examples of how national courts described acts performed in an official capacity. What was not clear, however, was how to connect such examples, whether drawn from national or international jurisprudence, to the definition. To describe an act as being performed in the exercise of elements of the governmental authority, as the Special Rapporteur proposed in draft article 2 (f), or as being an expression of sovereignty or the exercise of State or public functions, gave no clear direction about how to put the definition to use in practice. While there were some clear-cut cases, such as when an official delivered a statement in a conference on behalf of the State, other cases were more nuanced, like when an official destroyed public property in the forum State or was in an accident on the way to the airport after performing an official function. Needless to say, no analogy could be drawn with the performance of duties under the Vienna Convention on Diplomatic Relations. To return to the earlier example, an administrative staff member who was in an accident en route to attend a meeting would be granted immunity in the forum State under the Convention, but the same State might decline to grant such immunity to a foreign official who was in its territory on an official visit. As had already been pointed out, State practice in that regard was inconsistent.

43. Another point that had to be discussed in that context was whether the test should be objective or subjective—in other words, should the State of the official have the prerogative to determine whether he or she was acting in a public or private capacity? The answer was not straightforward, considering that the invocation of immunity took place before or at the beginning of the criminal proceedings, when the judge or prosecutor did not have a chance to examine the nature of the act and the circumstances surrounding the case. It was also necessary to ensure that the exercise of immunity *ratione materiae* did not bar the forum State from exercising its criminal jurisdiction. Should that State suspend or terminate any investigation or prosecution of a case that involved a foreign official acting in an official capacity, even when other individuals had participated in the perpetration of the crime? While it was easy to say that the forum State was only required to suspend the exercise of jurisdiction against the official, the continuation of the proceedings against the other individuals could implicate the official, directly or indirectly. That created a situation where the exercise of immunity *ratione materiae* obstructed the lawful exercise by the

forum State of its criminal jurisdiction and was in fact an unjustified limitation on its sovereign rights. That could be a matter to be discussed by the Commission in the context of the procedural aspects of immunity, but it was also directly related to the definition of acts performed in an official capacity.

44. Turning to the criminal nature of the act, he noted that doubts had been raised by other members of the Commission about the prudence of its inclusion in the definition of an act performed in an official capacity. It was not always the case that an act of an official was in itself a crime—when a government official was requested to testify in criminal proceedings, the situation was obvious and could be dealt with separately from the definition of the act performed in an official capacity. But even then, as the proceedings and the investigation developed, the act itself might prove not to be criminal, while immunity was invoked before or in the early stages of the investigation. The definition was being proposed for the purposes of the draft articles, however, and not all acts performed in an official capacity would be relevant. He was therefore in favour of retaining in the definition a reference to the criminal nature of the act as something that “may” constitute a crime in the forum State, as Mr. Cafisch had suggested. That might also be important in order to distinguish between the criminal responsibility of the individual and the international responsibility of the official’s State.

45. With regard to attribution, he agreed with the Special Rapporteur that there were three separate scenarios: acts that were solely attributable to the official; acts that triggered dual attribution and involved both the criminal responsibility of the individual and the international responsibility of his or her State; and acts that were solely attributable to the State, and which were outside the confines of the topic. The first two scenarios stemmed from the definition of “acts performed in an official capacity” and required an examination of the nature of the acts and whether they could be attributed to the State by applying the articles on attribution in the text on the responsibility of States for internationally wrongful acts. Obviously, those articles had to be applied to the extent that this was necessary to establish State responsibility for an internationally wrongful act. But the issue at hand was to determine whether a State official enjoyed immunity, and for such purposes, a nuanced approach needed to be used, on a case-by-case basis, and taking into account the policy considerations underlying some of the provisions on attribution contained in the draft articles on the responsibility of States for internationally wrongful acts, including for acts *ultra vires*.

46. It had been argued that the issue of dual attribution was irrelevant or non-existent, since an act of an official could only be attributed to a State that had immunity under international law: in other words, the only issue was State immunity. But as had been clearly demonstrated in the fourth report, including in references to pronouncements of the International Court of Justice and other international tribunals as well as to provisions in multilateral treaties on the distinction between individual criminal responsibility and State responsibility, dual attribution for a single act existed in international law. That entailed

legal consequences for the immunity of the official and for the treatment of attribution for acts performed in an official capacity. While attribution to the State of the act of an official performed in such a capacity was reflected by the words “exercising elements of the governmental authority”, as used in article 5 of the text on the responsibility of States for internationally wrongful acts, he agreed with the Special Rapporteur that for the purposes of the immunity *ratione materiae* of the State official, the criteria set out in articles 7, 8, 9, 10 and 11 of the text on the responsibility of States for internationally wrongful acts were not suitable. The situations covered in those articles, including those involving acts *ultra vires*, had to be examined within the context of limitations to immunity *ratione materiae*, or from the perspective of the lack thereof, when the act was not in the exercise of governmental authority or the performance of State functions. In that regard, the word “in” should be inserted before “exercising” in draft article 2 (f), to avoid confusing the definition of the official with that of the act performed in an official capacity.

47. Lastly, given the lack of consistency in practice in the treatment of acts performed in an official capacity and the invocation of immunity *ratione materiae*, there was a need for a categorization or a list of acts or examples which the Commission considered as not falling within the scope of such immunity. As mentioned earlier, there were situations in which it was obvious that immunity existed, and others where the opposite was true, but in the vast majority of cases, the situation was blurred, even when the definition and the test of attribution were applied. Again, the underlying objective should be to determine whether the invocation of immunity benefited the sovereign and was necessary for the effective functioning of the official’s State, assuming that such a situation was covered by immunity *ratione materiae* under customary international law.

48. In conclusion, he said that, like other members of the Commission, he thought that draft article 6, paragraph 3, was unnecessary and should be deleted, and that the draft articles should be sent to the Drafting Committee.

The meeting rose at 1 p.m.

3275th MEETING

Wednesday, 22 July 2015, at 3.05 p.m.

Chairperson: Mr. Narinder SINGH

Present: Mr. Caflisch, Mr. Candiotti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gómez Robledo, 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. Wisnumurti, Sir Michael Wood.

Immunity of State officials from foreign criminal jurisdiction (*continued*) (A/CN.4/678, Part II, sect. D, A/CN.4/686, A/CN.4/L.865)

[Agenda item 3]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

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

2. Mr. FORTEAU said that the question of immunity *ratione materiae* addressed by the Special Rapporteur in her fourth report was assuredly the most complex part of the topic for two reasons: the importance of the issues at stake and the difficulty of deducing *lex lata* from confusing State practice. For that very reason, choices in codification and progressive development must be made, not only to advance international law in terms of values, but also to put an end to existing uncertainties.

3. There were four basic questions to be answered in relation to the rules on immunity *ratione materiae*. The first was whether it was necessary to define the concept “acts performed in an official capacity”. The second was whether such a definition, if deemed necessary, should be a positive one that identified abstract criteria characterizing such acts, or a negative one that enumerated the kinds of acts that did not fall into that category. The third question was whether to address limits to immunity *ratione materiae* in the definition, or to consider them as exceptions to immunity. The fourth entailed identifying acts which, even though they had not been performed in a private capacity, did not give rise to immunity, either because they did not qualify as official acts or because they were considered exceptions to immunity.

4. On the basis of the fourth report, he had identified five types of acts that might possibly be considered ineligible for immunity *ratione materiae*: the most serious international crimes; *ultra vires* acts; acts *jure gestionis*; acts performed in the context of official functions but for exclusively personal reasons (such as misappropriation or corruption); and acts in the exercise of the governmental authority performed in the territory of the forum State without the latter’s consent (such as espionage).

5. The Special Rapporteur appeared to take a mixed approach: she intended to consider various types of acts as exceptions to immunity, but she also thought it desirable to limit the notion of an act performed in an official capacity by proposing a positive definition in draft article 2 (f), in which an official act was distinguished by two cumulative criteria. First, the act must have been “performed by a State official”, in other words, a person exercising State functions—but not just any functions; second, and more restrictively, the official must have been “exercising elements of the governmental authority”. In his view, the extra criterion risked creating confusion and was not grounded in practice.

6. With regard to methodology, there was no rationale for defining an act performed in an official capacity on