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Summary record of the 3275th meeting

Topic:
Immunity of State officials from foreign criminal jurisdiction

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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. Candioti, 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

the basis of the attribution criteria used in the law of State responsibility, since the law of immunity and the law of responsibility pursued markedly different aims. The Commission should not be afraid to create asymmetry between them, as it would not be the first time that the criteria of attribution had varied from one branch of international law to another.

7. The distinction between the concepts "acts performed in an official capacity" and "acts performed in a private capacity" was sufficiently clear, and there was no need to supplement it with additional criteria. The task of classifying an act as having been performed in an official capacity should be left to the discretion of judges. It was noteworthy that States had never considered it necessary to define the notion of "official acts" in treaties that prescribed rules on immunity *ratione materiae*; domestic courts appeared content to apply the general standard of an official act without any further specification. The Commission should do the same.

8. Similarly, the Special Rapporteur's attempted definition of the phrase "exercise of elements of the governmental authority" in paragraph 119 of her fourth report was obscure, ill-founded and impractical. There were certain indeterminate concepts that did not lend themselves to definition, such as "public order" and "threat to peace"; in his view, the phrases "governmental authority", "State functions" and "acts performed in an official capacity" also belonged in that category, as their meaning was context-driven and difficult to express in abstract terms. If, however, the Commission considered a definition to be necessary, it would suffice to use a formulation often found in contemporary treaties and national case law, to the effect that an act carried out in an official capacity was an act performed by a State official "in the exercise of his or her functions". Although somewhat circular, that definition had the merit of corresponding to contemporary practice and case law.

9. It was neither useful nor even accurate to say, as the Special Rapporteur had done in draft article 2 (*f*), that an act performed in an official capacity by its nature constituted a crime with respect to which the forum State could exercise its criminal jurisdiction. As the International Court of Justice had stated in its judgment in *Jurisdictional Immunities of the State*, immunity preceded the consideration of the merits of the case and therefore precluded the determination of whether, specifically, the act of the State official did or did not constitute a criminal offence. Furthermore, the principle of the presumption of innocence prohibited presupposing that a crime had been committed when considering eligibility for immunity. The proposal to insert the word "may", so that the relevant phrase would read "may constitute a crime", deserved further consideration. However, that element did not properly belong in the definition of "acts performed in an official capacity" but rather related to the procedural rules on immunity or to the issue of jurisdiction. Care should thus be taken not to confuse the notions of official acts and criminality.

10. It would be more appropriate to deal with acts not likely to give rise to immunity as exceptions to immunity rather than as not constituting official acts. It was difficult to see how *ultra vires* acts, acts *jure gestionis* or alleged serious international crimes could be classified as private acts; they must therefore fall into the category of official acts. The only grey area in which a different solution might be needed was that of acts performed in an official capacity but for exclusively private motives, as in the case of corruption or embezzlement. Such cases could be dealt with in the commentary to draft article 2 (*f*) by considering the acts in question to have been committed "under the cover" of State functions and not, strictly speaking, as acts performed "in the exercise of" such functions. Alternatively, they could be placed in the category of exceptions to the principle of immunity *ratione materiae*. National judicial practice allowed for either of those solutions.

11. The second argument for considering acts not covered by immunity as exceptions to immunity, rather than as not constituting official acts, was that, in the case of civil immunity, the prevailing method was to apply broad attribution criteria and then to allow for exceptions to it. The same method should be applied with regard to the type of immunity considered under the current topic.

12. Lastly, a decision to consider official acts not covered by immunity as exceptions would allow the Commission to accompany such exceptions with a set of rules providing procedural safeguards for State officials who were subject to prosecution. For example, in the case of an allegation of genocide, crimes against humanity or war crimes, which were official acts, it could be stated that a State official would not benefit from immunity, but that immunity could not be ruled out unless there was serious and consistent evidence that such crimes had been committed and unless appropriate procedural safeguards were in place to avoid abusive claims and ensure respect for officials of foreign States. Such rules could be developed if the acts in question were considered as exceptions to immunity but not if the intent was to reduce the scope of the definition of "acts performed in an official capacity", which represented an "either/or" solution: if the act was not deemed to have been carried out in an official capacity, then ordinary law applied, without any particular safeguards. In draft article 2 (*f*), he would propose either deleting the definition entirely or providing a general definition that stated simply: "An 'act performed in an official capacity' means an act performed by a State official in the exercise of his or her functions" [*Un "acte accompli à titre officiel" s'entend de tout acte d'un représentant de l'État accompli dans l'exercice de ses fonctions*]. In draft article 6, he was in favour of reversing the order of the first two paragraphs, which would rightly place the emphasis on the acts in question and thus differentiate immunity *ratione materiae* more clearly from immunity *ratione personae*. He recommended referring both draft articles to the Drafting Committee.

13. Mr. KAMTO asked whether, in Mr. Forteau's opinion, an act that had ostensibly been carried out in an official capacity but that had involved personal motives, such as hatred or vengeance, gave rise to immunity.

14. Mr. FORTEAU said that Mr. Kamto's question should be examined by the Commission and an explanation perhaps provided in the commentaries. He was

inclined to think that, if the motive for an act such as the one described by Mr. Kamto was exclusively personal, then the act did not come under the category of acts performed in an official capacity.

15. Mr. HASSOUNA said that the small number of written replies from States on their practice in relation to the immunity of State officials might be an indication of the sensitivity attributed to that matter by many States. He would nevertheless have preferred to see the substance of the few individual replies that the Commission had received, instead of the overview that the Special Rapporteur had provided in her fourth report.

16. Given that the expression "acts performed in an official capacity" was at the core of the concept of immunity *ratione materiae*, care should be taken when using concepts and terms often used interchangeably with it, such as "official act", "public act", "act in representation of a State" and so forth. It would be useful for the Special Rapporteur to highlight some of the distinguishing features of those terms. In his view, national law was very relevant for defining the notion and identifying the elements of acts performed in an official capacity. In fact, both national legislation and the case law of national courts should be considered main sources of interpretation of that term and its equivalents, particularly in view of the ambiguity and lack of definition of the concept in international law.

17. As to the Special Rapporteur's attempt at defining the phrase "exercise of elements of the governmental authority" in paragraph 119 of her fourth report, the criterion of "activities linked to sovereignty in functional terms" required some clarification in terms of its content and practical implementation, which could be accomplished by providing relevant examples in the commentary.

18. One important aspect of the fourth report related to the concept of oversight and the question of who was responsible for determining whether an act could be classified as "official" or "private". To some degree, it made sense for that responsibility to fall primarily on the domestic law and judicial system of the official's State, as the fourth report seemed to suggest. If a State adopted an official's conduct as its own, it could be held internationally responsible for it. Yet, it remained unclear who, in particular, should have responsibility for determining whether conduct was official or private. Was it the prosecution in the courts of the official's State? In some limited instances, often as part of an interpretation of a treaty's mandate, the International Court of Justice had served as a check on the exercise of broad State authority to impose its criminal jurisdiction on another State's official. However, it was problematic that, without the Court's intervention, interpretative authority would be left either to States themselves or to regional bodies.

19. He supported the Special Rapporteur's view that international crimes could be regarded as "acts performed in an official capacity" for the purpose of immunity. She presented two convincing arguments: first, that the notion, held by some courts and legal scholars, that an international crime could not be an act performed in an official capacity was contrary to the definitions of many of those crimes in treaty instruments; and, second, that not to consider such crimes official acts could result in the acts not being attributable to the State, thus allowing it to evade its international responsibility for such acts. He also welcomed her intention to explore the effects of international crimes with respect to immunity in the context of exceptions to immunity, which she would address in her fifth report.

20. Another question to be considered was that of diplomatic immunity *ratione materiae*, and in particular whether the position of former diplomats was the same in that respect as that of other State officials. Unlike the immunity of other State officials, the immunity *ratione materiae* of diplomats was treaty-based. While some scholars argued that diplomatic immunity was a reflection of the general immunity *ratione materiae* available to other State officials, others considered it to be broader. One question that arose was whether any exception to immunity *ratione materiae* that applied to State officials also applied to former diplomats. Another was whether the immunity *ratione materiae* of former diplomats applied *erga omnes* in relation to States other than the State to which the diplomat was accredited. Although the second report on the topic[281] indicated that the current project specifically excluded treaties on diplomatic relations, in the light of its importance, the issue of diplomatic immunity *ratione materiae* deserved some consideration by the Special Rapporteur, if only in the commentaries.

21. He agreed with previous speakers that there was a problem with qualifying an "act performed in an official capacity" as criminal in nature, as doing so could lead to the unlikely conclusion that all acts performed in an official capacity were crimes. The criminality element should therefore be deleted from draft article 2 (*f*), and a reference to it possibly included in the draft article on scope.

22. On the issue of *ultra vires* acts, and the question of whether they should be considered acts performed in an official capacity, domestic legislation and case law varied widely. However, under international law, article 7 of the draft articles on the responsibility of States for internationally wrongful acts[282] seemed to suggest that certain *ultra vires* acts were considered official acts that could be attributed to the State. Although the topic of immunity had different foundational bases than the draft articles on the responsibility of States for internationally wrongful acts, a number of scholars had made strong arguments for aligning the two. In any case, the question of whether such official acts were covered by immunity *ratione materiae* could be tackled when the Special Rapporteur dealt with exceptions to immunity in her next report. That said, he shared the view that the Special Rapporteur seemed to be expanding the scope of *ultra vires* acts beyond what was contemplated in article 7 of the draft articles on the responsibility of States for internationally wrongful acts. Owing to the importance of the issue, reference should be made in the current project to the concept of *ultra vires*, at least in the commentaries.

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

[282] 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.

23. With regard to the term "State official", which appeared in draft article 2 (*f*) and draft article 6, it was important to be clear whether the term was being used in its narrow sense, as defined in draft article 2 (*e*),[283] or to refer to persons, bodies or entities that were not State officials *per se*, but had acted on behalf of the State. A number of other terms that appeared in the draft articles required clarification, including the words "element" and "governmental authority" that appeared in draft article 2 (*f*). He supported the inclusion in the commentaries of examples of State officials exercising elements of the governmental authority, in order to add clarity to the definition. Paragraph 3 of draft article 6 was not necessary, and consideration should be given to moving its content to the commentary.

24. Since the issue of limits and exceptions to immunity of State officials was politically sensitive, it should be approached cautiously so as to ensure that a consensus on it was reached in the Commission and the Sixth Committee. In addressing that issue, the Special Rapporteur should attempt to strike a balance between preserving the basic norms of existing immunity regimes and responding to the international community's efforts to combat impunity. He proposed that the fifth report address all other remaining issues relating to the topic, both substantive and procedural. That would allow Commission members whose terms would expire at the end of the current quinquennium to state their views on all aspects of the topic, while leaving it to future members to finalize the project.

25. He recommended referring the two proposed draft articles to the Drafting Committee.

26. Mr. PETRIČ said that, despite the complexity of the topic under consideration, the Commission was gradually moving towards a good set of draft articles that would be helpful to States and all those involved in decisions on the issue of immunity, especially immunity *ratione materiae*. Nevertheless, bearing in mind the realities of contemporary international relations, he increasingly believed that the Commission's decision simply to follow the majority decision in the judgment of the International Court of Justice in the case concerning the *Arrest Warrant of 11 April 2000* and confine immunity *ratione personae* to Heads of State, Heads of Government and Ministers for Foreign Affairs had been somewhat unwise.

27. The Special Rapporteur's fourth report provided a thorough analysis of the concept of an "act performed in an official capacity". He basically agreed with the description, in paragraph 21, of the conditions that must be met in order for an individual to enjoy immunity *ratione materiae*, though it was unclear why the wording "may be considered a State official" had been used. Did it mean that such an individual might or might not be an official? And was the individual considered to be a State official by those who gave him or her orders or authorization to act for the State and possibly to commit a crime, or by those who were attempting to prosecute the individual? That said, he agreed with the Special Rapporteur that the relevant consideration in determining the applicability of immunity *ratione materiae* was whether the act concerned was an "act performed in an official capacity", irrespective of who had carried out the act. Furthermore, the connection to the State, both the connection linking an official to the State and the connection linking the State to certain acts that represented expressions of sovereignty and the exercise of functions of governmental authority, should be regarded as the decisive criterion in determining whether an act was performed in an official capacity. That approach was reflected, to some extent, in State practice and judicial practice.

28. In defining an "act performed in an official capacity", the Commission's starting point should be the definition in draft article 2 (*e*) adopted at the Commission's sixty-sixth session according to which "'State official' means any individual who represents the State or who exercises State functions". Such individuals might not necessarily be only those who were formally employed in the executive or legislative branches of a State administration, or its judiciary, army or police; they could include individuals working for private mediation companies involved in the settlement of civil disputes, for example, or experts engaged under short- or long-term contracts to perform typical State functions. Individuals under such arrangements might be regarded as exercising State functions and thus considered to be State officials; consequently, their acts, when performed under the authority, control, supervision or instructions of a State, and within the limits of the authority attributed to them, could be regarded as acts performed in an official capacity.

29. He agreed with the Special Rapporteur that the distinction between an "act performed in an official capacity" and an "act performed in a private capacity" was not equivalent to the distinction between *acta jure imperii* and *acta jure gestionis*. In determining the criteria for identifying an "act performed in an official capacity", the Special Rapporteur had drawn several important conclusions, based on her analysis of international, regional and national judicial practice, treaty practice and the Commission's work. He attached particular importance to her conclusion, in paragraph 63 of her fourth report that, in accordance with the Vienna Convention on Diplomatic Relations, an "act performed in an official capacity" was an act that occurred in "the exercise of the functions" of members of the mission, and he agreed that the question of whether a given act had been performed in an official capacity should be resolved on a case-by-case basis. Even a locally hired member of a mission might exceptionally act within the authority of, and in close connection with, the State and thus perform an act in an official capacity.

30. As for the comments in paragraph 68 of the fourth report, he disagreed with the Special Rapporteur's conclusion that, since the Rome Statute of the International Criminal Court did not make specific reference to the possible perpetrators of a crime of torture, it might be concluded that the connection with the State and the official nature of the act were no longer required in order for an act to be regarded as torture. On the contrary, it could be regarded as indicating that the possible perpetrators of torture were not only formal "State officials", but in fact anyone acting under the authorization or control of the State and in connection with the State. The Rome Statute of the International Criminal Court did not fail to provide

[283] *Yearbook … 2014*, vol. II (Part Two) and corrigendum, p. 143.

for the act's connection with the State; what it did not do was stipulate that the act must be committed by "formal" State officials. The definition of enforced disappearance in the International Convention for the Protection of All Persons from Enforced Disappearance was particularly interesting in that regard, since it provided in its article 2 that the crime had to have been committed "by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State", in other words not only by formal State officials, but also by persons who had a connection with the State. Moreover, the draft articles on the responsibility of States for internationally wrongful acts covered certain types of conduct by persons who were not organs or agents of the State. Thus, it should be understood that the link between the State and the act carried out by a State official, discussed in paragraph 111 of the report, could also exist between the State and persons acting under the instructions, authorization or control of the State, based on a contract. While he agreed with the Special Rapporteur's reasoning regarding the distinctions that existed between State immunity and the immunity of State officials, he did not think those differences proved that the only persons who acted under the authority of a State were State officials exercising elements of the governmental authority.

31. Concerning *de facto* officials, discussed in paragraphs 114 and 115 of the fourth report, he agreed that it seemed unreasonable for a State to be able to claim immunity for individuals to whom it had not voluntarily conferred the status of organ or person authorized to exercise elements of the governmental authority or with whom it had not established a special link of dependence and effective control at the time the acts in question were committed. On the other hand, if a State had voluntarily established a special link of dependence and effective control with a *de facto* official, the acts of that individual, except for *ultra vires* acts, should be attributed to the State, since *de facto* officials had a connection with the State and should be entitled to the same status as formal State officials.

32. Since immunity was a rule of international law, regulating relationships among States, it must be claimed by the State and not by the individual concerned. In claiming immunity *ratione materiae*, the State must prove that the individual had acted not in his or her private capacity but within the authority of the State and under its control, as an agent of the State, whatever the individual's rank or formal position.

33. He agreed with the conclusion that the two criteria proposed by the Special Rapporteur in paragraph 119 for defining the "exercise of elements of the governmental authority" should be applied logically and on a case-by-case basis. With regard to the first element, namely, activities which, by their nature, were considered to be expressions of or inherent to sovereignty, such activities should be understood to include all functions of a modern sovereign State. As for the second element, activities linked to sovereignty in functional terms, he considered that it was not necessary to consider the question of sovereignty in that context since immunity *ratione materiae* was functional in nature, unlike immunity *ratione personae*, which stemmed from State sovereignty.

34. It would be helpful if the Special Rapporteur could provide information in her next report on where to find additional information on the views concerning international crimes presented in paragraph 121. Since States had accepted an obligation, which might even be ranked as a peremptory norm, to prevent and punish international crimes, it was difficult to conceive that any immunity could be claimed for their perpetrators. Such crimes should therefore be excluded from the scope of immunity.

35. He shared the concerns of other Commission members about the statement in proposed draft article 2 (*f*) that "[a]n 'act performed in an official capacity' … by its nature, constitutes a crime". The question could also be addressed from the point of view of *lex certa*. An act was a crime if it could be precisely defined as such, according to the principle *nulla poena sine lege*; if not, it was not a crime. Certain activities might be of a criminal nature, but unless they were defined as crimes, they were irrelevant for deliberations on the immunity *ratione materiae* of State officials from foreign criminal jurisdiction. Besides, immunity was invoked before it had been proved that a crime had been committed. The words "by its nature, constitutes a crime" should be deleted and the subparagraph should be redrafted. Furthermore, he proposed that the definition of an "act performed in an official capacity" should be broadened to make clear that the expression meant an act performed by a State official exercising elements of the governmental authority or by another person acting under governmental guidance and control. Such an approach would be more in line with the definition of "State official" adopted at the previous session. It might even be the case that a general definition of an "act performed in an official capacity" was not useful at the current stage, since each request for immunity should be decided on a case-by-case basis.

36. The proposed draft article 6 should be modified to take into account any changes to the definition of an "act performed in an official capacity" in draft article 2 (*f*). He agreed that draft article 6, paragraph 3, was not necessary; its substance could be mentioned in the commentary to the draft article. Both draft articles proposed by the Special Rapporteur should be referred to the Drafting Committee.

37. Mr. MURASE said that he had some reservations regarding the basic approach and the content of the Special Rapporteur's fourth report. The Commission's focus should be, not on ordinary crimes, but on serious international crimes committed by high-ranking officials. It was deeply regrettable that the draft articles proposed by the Special Rapporteur undermined the efforts of the International Criminal Court and the international community to combat impunity. The Special Rapporteur's fourth report, in discussing the issue of official capacity, did not even refer to article 27, paragraph 1, of the Rome Statute of the International Criminal Court, which provided that the Statute applied equally to all persons without any distinction based on official capacity.

38. The fundamental problem surrounding the current topic was the lack of consensus among the Commission members regarding the purpose of the draft articles, as the Special Rapporteur appeared to acknowledge in

paragraph 135 of her fourth report. Did the Commission intend to establish the principle that high-ranking State officials enjoyed immunity at the risk of fostering impunity or, on the contrary, was it trying to draw up rules to restrict the scope of immunity in order to avoid impunity for the perpetrators of serious international crimes? From a legal perspective, immunity and impunity were two quite separate matters; however, open-ended recognition of immunity would likely lead to the impunity of those perpetrators. It was regrettable that the Commission seemed to be heading in that undesirable direction, and in so doing was going against the international community's normative demand that impunity should be countered.

39. Even though the jurisdiction of national courts varied from one legal system to another and could not be equated with the mandates of international courts and tribunals, the Commission should not establish a regime for national courts that was radically different from the regime established under the Rome Statute of the International Criminal Court. Domestic and international regimes, rather than being diametrically opposed to each other, should be mutually supportive. The same approach should be taken for the current topic as had been taken for crimes against humanity. In addition, the Commission should be faithful to its earlier work, in particular draft article 7 of the 1996 draft code of crimes against the peace and security of mankind.[284]

40. It was important to establish whether the content of the notion "acts performed in an official capacity" was determined by international law or national law and, in the event that national law prevailed, whether the law of the State where the official served or the law of the forum State was applicable. The Special Rapporteur's conclusion that domestic legislation should not be a determining factor in defining the scope and meaning of the expression "act performed in an official capacity" was contradicted by the finding of the Appeals Chamber of the International Tribunal for the Former Yugoslavia that an act performed in an official capacity should be exclusively determined by each State. At the same time, the Appeals Chamber had stressed that, in exceptional cases of serious international crimes, international criminal law served as a determining factor. The notion of "an act performed in an official capacity" was therefore still unsettled.

41. With regard to the judgments considered by the Special Rapporteur in her analysis of international judicial practice, the *Arrest Warrant of 11 April 2000* case concerned the immunity *ratione personae* of an incumbent Minister for Foreign Affairs, while the judgment of the International Court of Justice in *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)* did little more than to hold that the State which sought to claim immunity for one of its organs was expected to notify the authorities of the other State concerned. The Court's judgment in *Jurisdictional Immunities of the State* and the judgments of the European Court of Human Rights cited in the fourth report in paragraphs 43 to 47 all concerned the question of the immunity of States from the civil jurisdiction of foreign States, while the judgments of the International Tribunal for the Former Yugoslavia related to immunity from the jurisdiction of international tribunals. Meanwhile, domestic court decisions were far from uniform, as the Special Rapporteur herself had indicated.

42. Given the inconclusive nature of international judicial precedents and domestic and treaty practice, the Commission must engage in the progressive development of international law, rather than its codification. Furthermore, given the lack of clarity surrounding the concept "official capacity", it could not be used as a viable criterion for determining the scope of immunity *ratione materiae*.

43. As pointed out by the Special Rapporteur in paragraph 121 of her fourth report, the relationship between immunity and international crimes was not clearly defined. He agreed with the position expressed in the joint separate opinion of Judges Higgins, Kooijmans and Buergenthal in the *Arrest Warrant of 11 April 2000* case that serious international crimes could not be regarded as official acts because they were neither normal State functions nor functions that a State alone could perform. Incidentally, the way in which the Special Rapporteur cited that passage in paragraph 38 of her fourth report was somewhat misleading, since the judges in question were not in fact questioning whether serious international crimes could be regarded as official acts but were clearly stating that they could not. In any event, if serious international crimes could not be regarded as official acts, then immunity *ratione materiae* should not be granted to the State officials who were the perpetrators of such crimes.

44. The concept of "dual responsibility" introduced by the Special Rapporteur seemed to be an easy compromise and was artificial in the context of the discussion of immunity *ratione materiae*. Furthermore, it did not clearly explain the relationship between an act performed in an official capacity and international crimes. Since the Special Rapporteur proposed analysing the crucially important question of exceptions in her next report, it might be advisable to defer consideration of the proposed draft articles to the next session, although he would not oppose referring them to the Drafting Committee at the current session if the majority of Commission members so wished.

45. Turning to the two draft articles, he said that he had difficulty with the definition of "act performed in an official capacity" proposed in draft article 2 (*f*), since it apparently suggested that State officials acting in that capacity were all criminals, although he realized that this was not the Special Rapporteur's intention. The definition would have to be qualified in order to be meaningful. In fact, as the United Nations High Commissioner for Human Rights had said in his statement to the Commission, the whole issue of immunity should be approached from the perspective of the victims of international crimes and not from that of State officials. To that end, it would first be necessary to clarify which law to apply in order to determine the content of "official capacity" and what criteria should be used in order to ascertain its existence. A case in point was *Japan v. William S. Girard*, in which the Maebashi District Court had found that the term "official capacity" required the existence of a substantial link between the act of the official and his official duty.

[284] *Yearbook … 1996*, vol. II (Part Two), pp. 17 *et seq.*, para. 50.

46. In draft article 6, paragraph 1, the concluding phrase "both while they are in office and after their term of office has ended" should be deleted. In paragraph 2, the word "exclusively" should be deleted, and "the" inserted before "acts", and the phrase "as long as there is a genuine and substantial link with the official's duty" should be added at the end of the paragraph. With regard to paragraph 3, it was widely accepted that, in the case of high-ranking officials, immunity *ratione materiae* was the residual immunity of immunity *ratione personae*, by analogy with the residual diplomatic immunity *ratione materiae*, for which provision was made in article 39, paragraph 2, of the 1961 Vienna Convention on Diplomatic Relations, and with the residual immunity of a Head of State which had been recognized in the decision of the House of Lords in the *Pinochet* case. He tended to agree that paragraph 3 was unnecessary and should be deleted. If it was retained, a more appropriate place for it would be in draft article 4 on immunity *ratione personae*.[285]

47. Mr. TLADI recalled that the issue of who was entitled to immunity *ratione personae* had been raised at the start of the current quinquennium. Some members had been in favour of a very restrictive application of that immunity, while others had advocated its extension to an even broader circle of persons than was currently recommended.

48. Article 27, paragraph 1, of the Rome Statute of the International Criminal Court concerned criminal responsibility, not immunity. The provision on immunity was article 27, paragraph 2, which clearly related to proceedings before the Court, which lay outside the scope of the topic under consideration. In the case of *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, the Court's Pre-Trial Chamber II had interpreted article 27 in a very restrictive manner, holding that the article applied solely to officials of States parties to the Statute.

49. Mr. CANDIOTI asked the Special Rapporteur to specify what kinds of crimes would be covered by the immunity of State officials from foreign criminal jurisdiction. Did they include all crimes, or only serious crimes committed by those persons?

50. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said it was clear from draft article 1 and the commentary thereto[286] that the topic covered any criminal behaviour by State officials which might be subject to the criminal jurisdiction of the forum State; in other words, it referred to any crimes and logically also covered crimes under international law. That was where the question of exceptions came into play. She would deal with that matter in her forthcoming report. She fully understood the concerns of Mr. Murase and Mr. Candioti regarding crimes under international law.

51. With regard to the comment by Mr. Candioti earlier in the debate concerning the Spanish terms for "crime", in many Spanish-speaking countries the distinction that he had drawn between the terms *crimen* and *delito* no longer existed. He was, however, quite right in saying that *delito* was the correct term in domestic law when referring to a serious crime. She had employed the expression *crimen* because that was the word that tended to be used at the international level, including in the United Nations system, when referring to an activity that could entail consequences under criminal law.

52. Mr. CANDIOTI said that the definition of "crime" should be couched in terms that made it clear that it covered a wide range of crimes, including genocide.

53. Mr. MURASE said that the wording of article 27 of the Rome Statute of the International Criminal Court had been greatly influenced by the 1996 draft code of crimes against the peace and security of mankind. The commentary to draft article 7 of the draft code indicated that the article was intended to prevent the conferring of any immunity upon any individual who had committed such a crime. Article 27, paragraph 1, of the Rome Statute of the International Criminal Court referred to criminal responsibility and was certainly linked to the question of immunity.

54. Mr. NIEHAUS said that it would be necessary for the Spanish language group to clarify the use and content of the terms *crimen*, *delito*, *matanza* and *homicidio*.

55. Mr. PETRIČ said that Mr. Candioti's comment was important from more than just a linguistic standpoint. When the Commission had started to debate the topic, it had intended it to cover serious crimes, not only those under international law. At the same time, it seemed strange to treat the latter under the heading of "exceptions to immunity" and not yet to have dealt with them. He therefore wondered what direction the Commission was taking and what crimes it had in mind.

56. Mr. KAMTO said that, in French, matters could be simplified by referring to *infractions pénales*, as that term covered both *délits* and *crimes*. The distinction between *meutre* and *assassinat* was that the former implied an element of intention whereas the latter did not. It was only fair to note that the Special Rapporteur had announced her intention to deal with exceptions to immunity in her forthcoming reports.

57. Mr. FORTEAU said that paragraph (5) of the commentary to draft article 1, which had been adopted by the Commission, made it clear that the scope of the draft articles covered all instances of criminal responsibility. The Special Rapporteur had already proposed a definition of "criminal jurisdiction" which had been referred to the Drafting Committee, where it was still being discussed.

58. Mr. PETER said, by way of a preliminary observation, that the work of the Commission on the topic might have moved faster and with less wastage of time and resources if the Special Rapporteur had not had to begin afresh but could have built on the work of the previous Special Rapporteur.[287] The Commission might wish to rethink its traditional working methods in that regard.

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

[286] *Ibid*., pp. 39–43.

[287] *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).

59. In her fourth report on immunity of State officials from foreign criminal jurisdiction, the Special Rapporteur had provided a very useful synthesis of her past reports[288] and of the debate on the topic in the Sixth Committee. She had then exhaustively canvassed international and national judicial practice, treaty practice and previous work of the Commission in an effort to address the question of how to determine whether an act was performed in an official capacity. Sadly, judicial practice had provided little guidance in that respect, since decisions had neither been consistent nor based on facts. In the case concerning *Jurisdictional Immunities of the State,* for example, the International Court of Justice regarded heinous crimes as acts *jure imperii* and accorded the State responsible for them immunity on purely technical grounds; it was refreshing to read the dissenting judgment of Judge Trindade, who held that international crimes were not acts of State. The decision of the European Court of Human Rights in *Jones and Others v. the United Kingdom* was disturbing in that it appeared to characterize torture as an act done on behalf of a State for which those involved could claim immunity. As the Special Rapporteur had noted in paragraph 56 of her fourth report, national courts had sometimes applied double standards, and in paragraph 54 she mentioned some bizarre and chilling decisions where acts that were really crimes had been regarded as an exercise in sovereignty. In view of the fundamental importance of human rights, the Commission should exercise great caution in its analysis of immunity and should not accept court decisions on the subject unquestioningly.

60. The Special Rapporteur's review of other relevant work of the Commission in paragraphs 78 to 94 of her fourth report was a useful reminder that much work had already been done in the area, and progress would be much faster if the Commission refrained from moving back and forth on the same issues.

61. He had a slight problem with the third characteristic element of an "act performed in an official capacity" postulated by the Special Rapporteur in paragraph 95 of her fourth report, namely that it involved "the exercise of sovereignty and elements of the governmental authority". The phrase "elements of the governmental authority" needed to be tightened up to ensure that only those who really deserved immunity would receive it, rather than just anyone loosely associated in some way with the Government.

62. The future workplan was realistic, and he endorsed the Special Rapporteur's proposal to address the issue of limits and exceptions to immunity in her fifth report. As noted in paragraph 135 of her fourth report, the importance of that issue had been highlighted by both the Commission and the Sixth Committee. Furthermore, as the Special Rapporteur had conducted an effective analysis of the normative elements of immunity *ratione personae* and immunity *ratione materiae*, the time had come to initiate debate on what was a rather controversial subject. He was confident that, in her fifth report, the Special Rapporteur would consider instruments such as the Rome Statute of the International Criminal Court, which, in his view, was helping to combat impunity.

63. The question of whether limits and exceptions should be dealt with together with procedural issues was one of practicalities and depended on the volume of the work facing the Special Rapporteur. Since the question of limits and exceptions unequivocally constituted the most politically sensitive issue to be addressed in the draft articles, had been the subject of ongoing debate and was considered by some members to be the very purpose of the topic, he wondered why the Commission wished to rush matters, particularly since combining it with procedural issues would result in a voluminous report. Such an important issue should be handled with care. He had no problem with the arrangement whereby a fifth report would be issued in 2016 and a sixth report in 2017, with a new membership. The Commission would hardly be starved of work in the meantime.

64. After such a long analysis of material, the Special Rapporteur was somewhat economical with her draft articles. While he had no comment on draft article 6, he found the term "elements" in draft article 2 (*f*) to be too vague and suggested that the Drafting Committee look for a term that would provide greater certainty. On that understanding, he recommended the referral of both draft articles to the Drafting Committee.

65. Mr. KITTICHAISAREE said that the fourth report was well researched and well structured and provided a useful basis for discussion. The regime of immunity *ratione materiae* was less settled than that of immunity *ratione personae*, and State practice in the former area lacked uniformity, partly because some national courts were confused about the difference between the immunity of States and the immunity of State officials from foreign criminal jurisdiction. Since it was difficult to establish solid criteria for identifying an "act performed in an official capacity", it had been suggested that the Special Rapporteur cite as many examples of national and international case law as possible in support of draft article 2 (*f*). In that regard, he agreed with the written comment by Poland that there was room for further progressive development with regard to immunity *ratione materiae*, especially in the light of the trend in the international community to restrict immunity, as was borne out by the statements of several States in the Sixth Committee and by their written comments, particularly since the entry into force of the Rome Statute of the International Criminal Court.

66. Concerning the methodology used in the fourth report, it was important not to transpose the entire regime of the 2001 text on the responsibility of States for internationally wrongful acts to the draft articles on immunity. He understood the Special Rapporteur's position to be that immunity *ratione materiae* was not applicable to *ultra vires* acts, even though, according to article 7 of the draft articles on the responsibility of States for internationally wrongful acts, such acts were attributable to States. In his view, the Special Rapporteur's position was correct, because the functional nature of immunity *ratione materiae* encompassed only official acts. While it was difficult to define the exact scope of *ultra vires* acts, the Commission could at least agree that it did not cover acts that were not part of

[288] *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).

the official functions of the person concerned in the light of the law of the State in which the person held office. He agreed with the position taken by many national courts, referred to in paragraph 58 of the fourth report, that immunity should be denied in relation to acts by State officials that were closely linked to a private activity and whose purpose was the official's personal enrichment and not the benefit of the sovereign, particularly in cases involving corruption.

67. The issue of whether private contractors employed by a State to perform acts on its behalf were entitled to immunity *ratione materiae* was one of growing importance; yet the fourth report did not provide any indications in that regard. His own inquiry revealed that there were diverging views among international jurists, even those from the same legal tradition. One view was that such private contractors were entitled to immunity *ratione materiae*, while the opposite view was that it was unlawful to allow private individuals to do Government work involving the exercise of sovereign authority, especially since the contractors were not subject to disciplinary measures imposed on State officials. The intermediate view was that if private contractors were granted immunity, it must be subject to stringent conditions so as to prevent the commission of crimes with impunity. However, it should be noted that a trend towards restricting or even denying immunity *ratione materiae* was emerging, in particular with respect to private contractors. For example, the status-of-forces agreement between the United States of America and Iraq did not grant immunity to American private contractors, but accorded Iraq the primary right to exercise criminal jurisdiction over American contractors and their employees. Also noteworthy was the International Code of Conduct for Private Security Service Providers,[289] which laid down the obligations of private security providers, particularly in relation to international humanitarian and human rights law, and was subject to an independent oversight mechanism. Such instruments could well pave the way towards a culture of accountability for private contractors.

68. He endorsed the Special Rapporteur's conclusion that international crimes could be categorized as acts performed in an official capacity because such crimes were often carried out through the State apparatus and with the State's support. However, he disputed the Special Rapporteur's position that only State officials could commit international crimes. The Commission's comments in connection with the drafting of the Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal,[290] the 1954 draft code of offences against the peace and security of mankind[291] and the 1996 draft code of crimes against the peace and security of mankind must be seen against the circumstances prevailing at that time. It was now settled practice that individuals with no connection with a Government could commit international crimes, as illustrated, *inter alia*, by the case law of the International Tribunal for the Former Yugoslavia. Notwithstanding the Special Rapporteur's comments concerning several cases of torture in the fourth report, he contended that the Tribunal's case law, in particular the 2002 judgment of the Appeals Chamber in *Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković*, showed that torture outside the context of the Convention against torture and other cruel, inhuman or degrading treatment or punishment could be committed with no Government involvement.

69. Furthermore, with regard to the policy element of international crimes, it was well known that acts committed by groups of individuals with no connection to the Government, but pursuant to a plan or policy formulated by that group, could be classified under the Rome Statute of the International Criminal Court as crimes against humanity. To hold otherwise would imply that members of armed groups such as the Lord's Resistance Army could not commit cirmes against humanity under the Rome Statute of the International Criminal Court.

70. He shared the view of other members regarding draft article 2 (*f*) that it was inappropriate to define an act performed in an official capacity as an act that constituted a crime with respect to which the forum State could exercise its criminal jurisdiction. It was the individual's official status and the official nature of the act performed that raised the issue of functional immunity when the individual was being sought for foreign criminal prosecution. The criminal nature of the act in question merely related to the exercise of criminal jurisdiction by the foreign court concerned and did not explain whether the act was performed in an official capacity. Such assumptions were drawn from the Special Rapporteur's conclusions in paragraphs 96, 97 and 112 of the fourth report, regarding the criminal nature of an act performed in an official capacity, which were not well founded.

71. Notwithstanding, he was in favour of referring the two draft articles to the Drafting Committee provided that any reference to linking an act performed in an official capacity to a crime was deleted from draft article 2 (*f*). He suggested that the commentary to the draft articles should clarify the Commission's position regarding *ultra vires* acts by State officials acts as well as the issue of immunity *ratione materiae* in relation to private contractors. As to the future workplan, he suggested that the fifth report address both exceptions to immunity and procedural issues, since the two questions were so closely related.

72. Mr. WISNUMURTI said he agreed that in order to study immunity *ratione materiae* it was essential to understand the concept of an "act performed in an official capacity". He also agreed that in order to understand the nature of that concept, it was important to remember that the presence of the State in immunity *ratione materiae* manifested itself through two distinct but complementary connections: one that linked the official concerned to the State; the other that linked the State to certain acts that represented expressions of sovereignty and the exercise of functions of the governmental authority.

73. In her efforts to identify the concept of an act performed in an official capacity, the Special Rapporteur had conducted extensive research into international and national judicial practice, treaty practice and the Commission's other work and in that process used various terms

[289] Available from the website of the International Code of Conduct Association: www.icoca.ch.

[290] The text of the Principles is reproduced in *Yearbook … 1950*, vol. II, document A/1316, pp. 374–378, paras. 97–127.

[291] *Yearbook … 1954*, vol. II, document A/2693, pp. 151–152, para. 54.

such as "exercise of the governmental authority", "*acta jure imperii*", "sovereign act" and "act of the State". However, although she clarified those terms in her analysis, which helped to identify the concept of an act performed in an official capacity, not all of the terms seemed directly relevant to the draft articles proposed.

74. Following her analysis, the Special Rapporteur drew the conclusion, in paragraph 95 of her fourth report, that one of the characteristics of an act performed in an official capacity was that it was of a criminal nature. Although that conclusion had been the object of criticism by some members, *inter alia*, because it was contrary to the presumption of innocence, he believed that it should be construed as a descriptive notion whereby immunity *ratione materiae* was invoked only after the official concerned had been accused of a crime by the forum State that had criminal jurisdiction. If no official was suspected of having committed a crime, then no immunity *ratione materiae* could be invoked; accordingly, the question of presumption of innocence did not arise.

75. As to the concept of "single act, dual responsibility", he agreed with the Special Rapporteur's assertion in paragraph 105 of her fourth report that the immunity of State officials from foreign criminal jurisdiction *ratione materiae* was individual in nature and distinct from the immunity of the State *stricto sensu*. One important point made by the Special Rapporteur in her fourth report was the necessary link between an act performed in an official capacity and the attribution of the act to a State, and ultimately to its sovereignty, since the act constituted a manifestation of sovereignty in the form of an exercise of elements of the governmental authority. The latter was an important element in the concept of an act performed in an official capacity. In that regard, he endorsed the Special Rapporteur's conclusion in paragraph 119 of her fourth report that the definition of the exercise of elements of the governmental authority should be based on two criteria: certain activities which, by their nature, were considered to be expressions of, or inherent to sovereignty; and certain activities occurring during the implementation of State policies and decisions that involved the exercise of sovereignty and were therefore linked to sovereignty in functional terms. He also agreed that such criteria should be applied on a case-by-case basis. He supported the Special Rapporteur's position concerning the temporal element of immunity *ratione materiae*, namely, that such immunity applied at any time after the commission of the act, whether the official concerned remained in office or had left office.

76. Turning to the draft articles, he said that, basically, he had no problem with draft article 2 (*f*). The concerns raised regarding the phrase "exercising elements of the governmental authority" might be met by including in the commentary the explanation given in paragraph 119 of the fourth report. Furthermore, if the characterization of an act performed in an official capacity as constituting a crime was still considered a problem, it should be resolved in the Drafting Committee. It would also be useful to explain in the commentary the notion of "single act, dual responsibility", based on paragraphs 98 and 99 of the fourth report. He had no particular difficulty with draft article 6, as it reflected the broad understanding resulting from the Commission's previous deliberations, but would keep an open mind regarding the suggestion that paragraph 3 was unnecessary.

77. He welcomed the Special Rapporteur's proposal to analyse the politically sensitive issue of limits and exceptions in her fifth report. He maintained the view that the Commission should embark on its study of the issue only after completion of its study on the normative aspects of immunity *ratione personae* and immunity *ratione materiae*. In conclusion, he was in favour of referring both draft articles to the Drafting Committee.

78. Sir Michael WOOD said that the fourth report listed a wide range of materials from different fields of law and it was not always clear how those materials had led the Special Rapporteur to the conclusions she had drawn and the texts she proposed. On the subject of terms and definitions, he recalled that at its sixty-sixth session the Commission had provisionally adopted draft article 2 (*e*), containing a definition of the term "State official", and draft article 5, which stated that State officials acting as such enjoyed immunity *ratione materiae* from the exercise of foreign criminal jurisdiction, as well as a commentary to draft article 5 explaining some of those terms.[292] It had also made reference to acts performed in an official capacity in draft article 4, paragraph 2, in the expression "all acts performed, whether in a private or official capacity".[293] The Special Rapporteur now proposed that the term "acts performed in an official capacity" be used in draft article 6; however, along with other members, he was far from convinced of the need for a definition of the term in draft article 2 (*f*).

79. As to the methodology of the fourth report, he shared the view that it was not particularly useful to collect references to cases where the terms "official acts" or "acts performed in an official capacity" were used in treaties, international and national case law and scholarly writings. The individual examples would need to be analysed in detail to understand their effect; more importantly, the references were found in particular contexts and were largely *ad hoc*. The question of what constituted an official act must be considered on a case-by-case basis.

80. He also endorsed the comments of those members who considered that draft article 2 (*f*) should not define an act performed in an official capacity as constituting a crime, and he considered that the addition of the word "may" would not really help matters. Furthermore, if the second part of that subparagraph were deleted, the definition would be so short as to be almost bereft of meaning. In any case, he would appreciate some clarification from the Special Rapporteur regarding the expression "exercising elements of the governmental authority" and whether it was intended to be broader or narrower than the term "official acts".

81. With regard to draft article 6, he agreed that paragraph 3 could be omitted and dealt with in the commentary. As to paragraph 1, he shared Mr. Murphy's doubts about the expressions "in office" and "term of office". Paragraph 2 was rather oddly worded, and the last phrase seemed to have different meanings in the different

[292] *Yearbook … 2014*, vol. II (Part Two) and corrigendum, pp. 143 *et seq.*

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

language versions. Unfortunately, the same applied to many of the terms under consideration.

82. Looking to the future, he recalled that, from the outset, he had been of the opinion that the Commission should take up the procedural aspects of the topic at an early date. The previous Special Rapporteur, Mr. Kolodkin, had dealt with the matter very well in his third report, resulting in a constructive debate. He suggested that the current Special Rapporteur might wish to use the summary of the contents of that report, set out in paragraph 61 thereof,[294] as a basis for her work and the Commission's future debate on the subject.

83. On another matter, he hoped that the Special Rapporteur would not follow up on Mr. Hassouna's suggestion to revert to the issue of diplomatic immunity *ratione materiae*, in the light of the "without prejudice" clause on that subject in draft article 1, paragraph 2, provisionally adopted by the Commission.

84. In conclusion, despite the serious doubts he had raised, he was in favour of referring the two draft articles to the Drafting Committee, on the understanding that the Committee would consider the option of deleting draft article 2 (*f*).

The meeting rose at 6.05 p.m.

3276th MEETING

Thursday, 23 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. 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.

Cooperation with other bodies (*concluded*)*

[Agenda item 13]

STATEMENT BY REPRESENTATIVES OF THE AFRICAN UNION COMMISSION ON INTERNATIONAL LAW

1. The CHAIRPERSON welcomed the representatives of the African Union Commission on International Law (AUCIL), Mr. Solo, Mr. Appreku and Mr. Ben Dhiab, and invited them to address the Commission.

2. Mr. SOLO (African Union Commission on International Law) thanked the International Law Commission for its invitation to AUCIL to brief the Commission on its work and to exchange views on matters of common interest. Stressing that AUCIL was a young institution, particularly compared to the Commission, he recalled that it had been established in 2009 and had been inspired by the common objectives and principles enshrined in articles 3 and 4 of the Constitutive Act of the African Union, which underscored the importance of accelerating the socioeconomic development of the African continent through the promotion of research in all fields. Another goal in establishing AUCIL had been to promote respect for the rules and principles of international law with a view to consolidating peace, security and regional integration in Africa as well as enhancing the continent's contribution to the codification and progressive development of international law. AUCIL, whose headquarters were in Addis Ababa, represented Africa and focused on both international law and the codification and progressive development of the regional law of the African Union. Its mandate was in line with that of the IAJC, but shared many elements with that of the International Law Commission. As the youngest of the bodies, AUCIL sought to draw on the experience gained by similar bodies established before it. In accordance with its statute, the objectives of AUCIL were: (*a*) to undertake activities relating to the codification and progressive development of international law on the African continent, with particular attention to the laws of the Union as embodied in the treaties of the Union, in the decisions of the policy organs of the Union and in African customary international law arising from the practice of member States; (*b*) to propose draft framework agreements, model regulations and formulations to facilitate the codification and progressive development of international law; (*c*) to assist in the revision of existing treaties of the African Union, assist in the identification of areas in which new treaties were required, and prepare drafts thereof; (*d*) to conduct studies on legal matters of interest to the Union and its member States; and (*e*) to encourage the teaching, study, publication and dissemination of literature on international law, in particular the laws of the Union with a view to promoting acceptance of and respect for the principles of international law, the peaceful resolution of conflicts, respect for the Union and recourse to its organs, when necessary. AUCIL was composed of 11 members who served in their personal capacity and whose selection was subject to criteria of competence and nationality, bearing in mind the need to respect the principle of equitable geographical representation, representation of the principal legal systems of the continent and equitable gender representation. AUCIL held two ordinary two-week sessions in April and October or November of each year and could also convene extraordinary sessions. It had published the first edition of its *Yearbook* and would publish the second that year. The second edition of its *Journal on International Law* was also in progress, and members of the Commission were invited to make contributions.

3. AUCIL had finalized a number of studies on a variety of topics, such as the juridical basis for reparations for slavery and other related matters inflicted on the African continent and the revision of Organization of African Unity (OAU) and African Union treaties. AUCIL was also

[294] *Yearbook … 2011*, vol. II (Part One), document A/CN.4/646, pp. 242–243.

* Resumed from the 3274th meeting.