Provisional

For participants only

4 September 2024

Original: English

International Law Commission

Seventy-fifth session (second part)

Provisional summary record of the 3679th meeting

Held at the Palais des Nations, Geneva, on Tuesday, 9 July 2024, at 10 a.m.

Contents

* Second reissue for technical reasons (5 December 2024).

Present:

Chair:	Mr. Vázquez-Bermúdez
Members:	Mr. Akande
	Mr. Argüello Gómez
	Mr. Asada
	Mr. Cissé
	Mr. Fathalla
	Mr. Fife
	Mr. Forteau
	Mr. Galindo
	Ms. Galvão Teles
	Mr. Grossman Guiloff
	Mr. Jalloh
	Mr. Laraba
	Mr. Lee
	Ms. Mangklatanakul
	Mr. Mavroyiannis
	Mr. Nesi
	Mr. Nguyen
	Ms. Okowa
	Ms. Oral
	Ms. Orosan
	Mr. Ouazzani Chahdi
	Mr. Oyarzábal
	Mr. Paparinskis
	Mr. Patel
	Mr. Reinisch
	Ms. Ridings
	Mr. Ruda Santolaria
	Mr. Sall
	Mr. Savadogo
	Mr. Zagaynov

Secretariat:

Mr. Llewellyn	Secretary to the Commission

The meeting was called to order at 10.10 a.m.

Immunity of State officials from foreign criminal jurisdiction (agenda item 3) (*continued*) (A/CN.4/775)

Ms. Orosan, expressing appreciation to the two previous special rapporteurs for their work in framing what was a difficult topic, said that the current Special Rapporteur's efforts in his first report to assess the contributions received from members and the views expressed by States within the Sixth Committee of the General Assembly, so as to ensure as clear a picture of the *opinio juris* and practice of States as possible, were to be commended. She considered such an approach the correct one, given the time that had elapsed since the Commission had begun work on the topic, developments in national jurisdictions and the crystallization of the views of States, particularly in response to the fully fledged war launched by the Russian Federation against Ukraine.

The draft articles and commentaries thereto must be examined carefully to ensure that they accurately reflected the current state of the law, especially in sensitive areas, without reinforcing any perception that immunity equated to impunity. On the contrary, immunity was a temporary procedural bar to the exercise of jurisdiction by a State but did not override either the protection of the right violated or accountability for the violation, which would be postponed – not effaced – by invoking immunity. As most States had noted, the challenge lay in balancing the principle of sovereign equality of States, which justified immunity from the exercise of criminal jurisdiction by another State, against accountability for the most serious crimes under international law, which might even justify stating that immunity did not apply at all. There was no absolute immunity, but that implied that there must be procedural guarantees in place to ensure that exceptional situations were not abused to such an extent as to render immunity devoid of content.

To further consolidate the balance between immunity and accountability, it would be useful to consider, in the context of the topic, the interplay between the individual responsibility of a State official and the responsibility of the State on behalf of which the official acted and which claimed immunity for the official in question. Such a discussion might be more relevant in cases involving immunity *ratione personae*, which, in conjunction with a prolonged term in office, could give rise to a sense of impunity. It might also be relevant in clarifying the distinction between the legal regimes applicable to State responsibility and individual responsibility in the context of *ultra vires* acts by a State official; other members had suggested a similar approach.

With regard to draft article 1 (1), some States had suggested defining the scope of the provision more precisely by clarifying the distinction between criminal immunity and inviolability and addressing the impact of the draft articles on other types of jurisdiction, such as administrative and civil jurisdiction. The Special Rapporteur intended to provide clarification on the immunity–inviolability paradigm in the commentaries to the draft articles, which would be welcome; currently, the commentary to draft article 9, in particular, merely excluded inviolability from the scope of the draft articles, while recognizing that the two distinct institutions – immunity and inviolability – were regularly dealt with together. It would therefore be pertinent to place discussion of the issue earlier in the Commission's output by including elements further clarifying the impact of the draft articles on the inviolability of a State official in the commentary to draft article 1 (1).

She remained unconvinced of the need to include a specific definition of terms in draft article 2 but was open to further discussion on that point. Adjusting the commentaries to clarify concepts such as "exercise of criminal jurisdiction", for example, might help to ascertain which elements of criminal jurisdiction could not be exercised owing to the procedural bar of immunity. She saw no need, however, to expand on the relationship between the draft articles and immunity from the exercise of other types of jurisdiction, as draft article 1 clearly stated that the scope of the draft articles was limited to immunity from the exercise of criminal jurisdiction in inter-State relations. There was a settled understanding in national and international law as to what was meant by "criminal jurisdiction", which should in itself be sufficient to distinguish it from other types of jurisdiction.

On draft article 1 (3), the Special Rapporteur had rightly suggested an addition. As a number of States had observed, the paragraph as adopted on first reading did not cover all possible ways in which international tribunals were established and operated. Leaving aside questions of terminology, which could be discussed by the Drafting Committee, she favoured the deletion of the words "as between the parties to those agreements" from the proposed paragraph 3 (a). As Switzerland and various members of the Commission had emphasized, such wording called into question the jurisdiction and functioning of the International Criminal Court. It was not for the Commission to undermine, even by implication, the independence of that court or any other to determine its own jurisdiction in a given case, based on the treaty establishing it. The addition of paragraph 3 (b) was pertinent and welcome, but she would favour more general wording, such as "any instruments establishing a criminal court …", with United Nations Security Council resolutions provided as examples. Such an approach would avoid prejudging the outcome of discussions concerning acceptable methods and means under international law of establishing international courts or tribunals for the purposes of ensuring accountability for international crimes of the gravest nature. Such a discussion or predetermination lay beyond the scope of the topic.

In general, she agreed with the Special Rapporteur's recommendation to leave draft article 2 (a) unaltered; however, the explicit reference to "current and former State officials" could be omitted, as the matter was covered by the rules on immunity *ratione materiae*. Such a precise definition ought only to be relevant from the point of view of determining the limits of the exemption to the exercise of criminal jurisdiction by another State. Paragraph 2 (b), meanwhile, should be retained as relevant to the application both of immunity *ratione personae*, which also covered private acts, and of immunity *ratione materiae*, covering strictly acts performed in an official capacity.

Draft article 3 reflected settled customary international law, which limited immunity *ratione personae* to the so-called "troika" – Heads of State, Heads of Government and Ministers for Foreign Affairs. No recent developments in international law would provide a persuasive argument for expanding its application beyond those categories of officials; rather, discussions seemed to indicate an interest in limiting the personal scope of immunity *ratione personae* further. She therefore agreed with the Special Rapporteur's decision not to modify the draft article as adopted on first reading.

With regard to draft article 4, she agreed with those who favoured a limited change to the wording; however, she considered that the change in question should be made to paragraph 1, rather than paragraph 3, with "term of office" altered to something that would more appropriately reflect the fact that immunity *ratione personae* applied for as long as the person enjoying it held office. Paragraph 3 should be deleted altogether, as that aspect was covered under draft article 6 (3), and more logically placed there. There was also logic behind the way in which the draft articles in Part Two and Part Three were arranged, which was worth preserving for reasons of clarity but could be discussed within the Drafting Committee.

She supported the modifications to draft article 5 proposed by the Special Rapporteur but suggested that the reference therein to draft article 6 should be expanded to cover the draft articles in their entirety by using a phrase such as "under the conditions and within the limits of these draft articles". The commentary to draft article 5 made reference to draft article 7, the application of which would not be affected by draft article 5 as currently worded. Deleting the words "acting as such", as suggested by the Special Rapporteur, was justified because draft article 6 clarified which acts benefited from immunity *ratione materiae* when performed by State officials.

The minimal modifications proposed to draft article 6 (3) were welcome, as they would help avoid doubt as to the meaning of the text; however, two further changes to that paragraph would also be useful. First, the reference to "term of office" should be aligned with the analogous wording agreed for draft article 4 (1). Second, the phrase "in accordance with the pertinent rules of international law" should be added to the end of the paragraph, and also to the end of paragraph 2. While she strongly supported the deletion of draft article 4 (3), the relevant paragraphs of the commentaries could be moved to the commentary to draft article 6 (3), with the necessary linguistic and logical adaptations.

She agreed that draft articles 1 to 6 should be submitted to the Drafting Committee for discussion and looked forward to receiving the Special Rapporteur's promised revision of the draft commentaries.

Mr. Ouazzani Chahdi said that the first report of the Special Rapporteur gave a very clear and precise account of the views of States on the draft articles prepared by the previous Special Rapporteur in 2022. In his report, the current Special Rapporteur indicated that any modification to the draft articles and commentaries thereto should be based on observations received from States and should take account, above all, of developments in international law since the adoption of the draft articles on first reading. Such an approach was judicious, but he could perhaps have paid even more attention to the most recent developments, given that several States had expressed the view that the draft articles did not seem to be fully supported by State practice.

In their comments, States had considered the nub of the issue of immunity, in addition to focusing on the source of the draft articles and the form that the output of the Commission's work should take. It was clear from States' general comments that the topic had been highly sensitive from the outset, given the controversial and emotive nature of the concept of jurisdictional immunities of States. Such sensitivity arose also from States' desire to see a balance in the Commission's work between stability in international relations, ensured through respect for the principle of the sovereign equality of States and international rules on immunity, and fighting impunity for the most serious violations of international law, including international humanitarian law and international human rights law. While the first of those considerations reflected a classical approach to international law, the second was characteristic of developments in the field since the end of the Second World War.

States' insistence on such a balance being maintained in the Commission's work also reflected lessons learned from international practice, particularly in the sphere of international criminal justice, whether administered domestically by means of universal jurisdiction or internationally through the International Criminal Court. In both cases, it had been found that when combating impunity at the international level involved curtailing the immunity of State officials, it triggered significant diplomatic crises. While there was widespread support for the principle of fighting impunity, the comments made by States revealed that, although some were committed to developing international criminal jurisdiction, others, such as Saudi Arabia and Morocco, seemed reluctant to allow foreign criminal jurisdiction to be exercised over their officials.

On the subject of the source of the draft articles, the views of States appeared to fall into three main categories. One group of States considered that the work of the Commission included elements of both codification and progressive development of international law, with some elements going even beyond progressive development and constituting new law in the view of Israel, Malaysia, the United Arab Emirates and the United Kingdom. A second group of States, including Singapore, viewed the Commission's work as falling almost entirely into the realm of progressive development, such that some elements were not backed up by convincing *opinio juris*. Lastly, the Nordic States took a more progressive stance reminiscent of the doctrine of "new custom" discussed by Professor Georges Abi-Saab in his 1987 course at the Hague Academy of International Law. They considered customary international law to be dynamic and to have been reinvigorated in recent years through developments in international criminal law. Consequently, they viewed the draft articles as the result of an exercise in the codification of customary international law, as explained in the excerpt from the statement by Norway quoted in paragraph 22 of the Special Rapporteur's first report.

States also differed in their views on what form the output of the Commission's work should take. Those that considered there to be insufficient practice for codification were requesting the Commission to devote even more time to the topic. Some, including the Russian Federation and the United Arab Emirates, were of the opinion that the draft articles could not serve as the basis for an international treaty. Those that saw the draft articles as a mixture of customary international law and rules formed through progressive development were proposing either that the output be split into draft articles and draft guidelines or that the draft articles might be used as a starting point for treaty negotiations. In that respect, he

agreed with the Special Rapporteur that the project should result in an outcome consistent with those options and that the Commission should consider the matter.

With regard to draft article 1, some States had requested further work to define notions such as criminal immunity and inviolability more clearly. Others had referred to the distinction between criminal and other jurisdiction, and there had also been calls for a more detailed explanation of the term "international criminal courts and tribunals". In his recommendations on draft article 1, the Special Rapporteur seemed determined to provide clarification, despite the Commission's earlier decision not to define such concepts. Personally, he would not favour such an approach, though it might be useful to specify how those concepts were related, given that concepts such as inviolability and immunity from responsibility, as enjoyed by a Head of State, for example, existed in various legal systems, including in democratic countries, with the potential procedural effect of holding back the fight against impunity.

He agreed with the Special Rapporteur's proposal not to modify the text of draft article 2, though the Special Rapporteur had noted that certain States had requested clarification of the term "State official" and of issues relating to the nationality of such officials, especially in cases of dual nationality. France and the Russian Federation had also suggested revisiting the translation of the term into French. While the Special Rapporteur might agree with the proposal to alter "*représentants de l'Etat*" to "*agents de l'Etat*", he did not: the former was more appropriate in the context, even though a version of the latter appeared in the 2009 Institute of International Law resolution on the immunity from jurisdiction of the State and of persons who acted on behalf of the State in case of international crimes. With regard to *ultra vires* acts, which, as clearly explained in paragraphs (32) to (34) of the commentary to draft article 2, were not carried out in an official capacity and were therefore not covered by immunity, he nevertheless agreed with the United Kingdom that they should be defined more clearly.

Immunity *ratione personae*, covered by draft article 3 and recognized in customary international law as being enjoyed by members of the troika, was of particular interest at present, with a ruling eagerly awaited from the French Court of Cassation in relation to the validity of an arrest warrant issued for President Bashar al-Assad of the Syrian Arab Republic. In 2015, the same court had denied immunity *ratione personae* to the Second Vice-President of a foreign State on the grounds that the applicant's functions were not those of a Head of State, Head of Government or Minister for Foreign Affairs. Similarly, in 1961 the Paris Court of Appeal had rejected immunity for a Minister of State from Saudi Arabia because he was not the Minister for Foreign Affairs. Such cases at the national and international levels provided arguments against expanding immunity *ratione personae* beyond the existing beneficiaries. The comments and observations of States revealed some divergence in views: several had defended the notion that immunity *ratione personae* applied to members of the troika, recalling that such immunity was well established under customary international law. The overwhelming majority of States that had commented on draft article 3 had approved of the wording adopted on first reading, and he therefore supported the Special Rapporteur's recommendation that it should not be modified.

States had generally supported draft article 4 as reflecting customary international law. Some, such as the Russian Federation, had suggested changing "term of office" to "the fact of being in office", but the Special Rapporteur considered that the issue could be dealt with in the commentary, with no modification to the text of the draft article; the Special Rapporteur had also supported the suggestion from France to refer to the "*cessation*" of immunity, rather than "*extinction*", in the French version of the text. For his part, he supported both that suggestion and the proposal to discuss the links between immunity *ratione personae* and inviolability in the commentary. He also agreed with the Special Rapporteur that suggestions regarding the overall structure of the draft article, such as that made by Norway, should be considered by the Drafting Committee. The Special Rapporteur had stated his openness to entertain proposals that might simplify the text without having an impact on the content, and he endorsed that approach.

With regard to draft article 5, he supported the modifications proposed by the Special Rapporteur. On draft article 6, he took note of the Special Rapporteur's agreement that there was a need to confirm in the commentary that immunity *ratione materiae* continued after

cessation of the immunity *ratione personae* of members of the troika and to clarify the type of immunity referred to in draft article 6 (3); his openness to specific proposals on merging draft article 6 (3) and draft article 4 (3) in order to avoid duplication; and his intention to refer the matter to the Commission before formulating any recommendations. Lastly, he expressed support for referring draft articles 1 to 6 to the Drafting Committee.

Ms. Okowa said that the Special Rapporteur's excellent first report provided a concise summary of the substantive issues to be addressed by the Commission. He had shown appropriate deference to the views of the many States that had provided comments in writing or during discussions in the Sixth Committee. Irrespective of the final outcome of the topic, the efforts of all three special rapporteurs who had worked on it would be of undoubted benefit to the field of international law.

It was a matter of considerable regret that the comments received from Governments, though extensive, were not sufficiently representative. Only two African States had contributed, yet the opposition of African Governments to what they had long viewed as jurisdictional overreach in the exercise of criminal jurisdiction was well known. They had also long supported the application of immunity *ratione personae* to members of the troika, and the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (the Malabo Protocol), while not yet in force, went even further, extending immunity to other high-ranking officials.

Malawi, Chad, South Africa and Kenya had had occasion to pronounce themselves on the matter and would in any case support the application of both immunity *ratione personae* and immunity *ratione materiae* to members of the troika. In their submissions before the International Criminal Court regarding their failure to arrest the then President of Sudan, Omar al-Bashir, Chad and Malawi had stressed the application of immunity *ratione personae* to those three categories of official. For its part, the Supreme Court of Appeal of South Africa had relied on customary international law to draw a distinction between inviolability and immunity, before stating the application of the latter to those officials. Finally, the Court of Appeal of Kenya had followed a similar path, finding that, under customary international law, both forms of immunity applied to all members of the troika. Ultimately, the credibility of the Commission's work hinged largely on the extent to which it reflected the practice of States, in particular those that could be regarded as "specially affected". It was therefore appropriate for the Commission to take it upon itself to examine, *proprio motu*, the views of such States in contexts other than the formal consultation process.

With regard to the definition of an international criminal tribunal given in draft article 1 (3), the regime proposed was without prejudice to the special regimes applicable to international criminal tribunals, which had generally proceeded on the assumption that neither immunity *ratione personae* nor immunity *ratione materiae* applied to conduct falling within their jurisdiction. Consistent case law over many years supported that proposition: in that context, the Commission was right to do no more than formulate a general reservation clause on matters falling within their scope. As pointed out by Mr. Jalloh and Mr. Reinisch, however, as well as by Austria in its written comments, it would be sensible to include a definition of international tribunals that was broadly consistent with international law; otherwise, the category would be open to manipulation and States might be able to avoid the careful balance that the proposed regime aimed to strike between sovereign equality and immunity by establishing a tribunal that was only marginally international. Consideration should be given to what characteristics would make a tribunal sufficiently international for the purpose of the general reservation included in draft article 1 (3), such as whether it acted on behalf of the international community as a whole, rather than a small number of like-minded States. The issue had arisen most prominently in relation to academic discussions around a hybrid tribunal for Ukraine and whether such a tribunal could be deemed international for the purpose of the rules on immunity. If a hybrid tribunal was not really international, should it be obliged to honour the structural restrictions relating to personal and functional immunity under the proposed draft articles, just as a national court would? Further clarification on that point would be welcome, either in the text of the draft articles or in the commentary.

The Special Rapporteur was correct in his conclusion that only official acts were covered by immunity *ratione materiae*. In general, she supported his proposed definition of

the scope of that immunity, but there remained considerable uncertainty not only as to what qualified as an official act in the exercise of State authority but also in respect of which official acts States or State officials were entitled to claim immunity as a matter of international law. The Commission had wrestled with a similar problem in the course of its work on jurisdictional immunities of States and their property, adopting a distinction that had much support in the practice of States, where immunity extended only to "governmental acts", not to non-governmental conduct, as expressed in the maxims *acta jure imperii* and *acta jure gestionis*, respectively.

Such debates and domestic case law indicated that there were no reliable tests to be employed in deciding which of the myriad activities undertaken by States could be regarded as governmental, and therefore immune, and which were to be regarded as non-governmental and therefore not attracting immunity. There had been concern that, in the absence of clear and reliable tests, the characterization of conduct as official was open to manipulation by forum States seeking to extend or avoid jurisdiction. There was a risk of normative inconsistency if the character of an act depended not on an articulated set of criteria derived from international law but entirely on context. Moreover, there remained no consensus among States, even those that were otherwise ideologically aligned, on the proper limits and scope of State authority. Courts in the United Kingdom had recently struggled with that question in the context of surveillance operations carried out by intelligence services at the behest of a Head of State against his estranged wife and deemed relevant in the context of matrimonial proceedings. The decision of the United States Supreme Court in the case against former President Donald Trump, characterizing all acts employing executive authority as official, regardless of motive or intent, indicated that there was a real risk of harm to normative coherence in the absence of indicia or criteria setting out genuine guidance on the matter. While a degree of latitude must be left to forum States, the Commission had a responsibility to steer States in the direction of normative coherence by providing such a set of criteria.

Draft article 6 proceeded on the assumption that international law allowed for a distinction between official and non-official acts, but determining that distinction was left to the uneven discretion of forum States. The uncertainties implicit in the wording of the draft article could be dealt with in the commentary by offering some form of guidance, in the form of indicative criteria or a non-exhaustive list, on how to determine whether acts were performed in an official capacity, as defined in draft article 2, so as to avoid the law in that area degenerating into a morass of inconsistent decisions. As was well known in the context of jurisdictional immunities of States and their property, certainty was achieved by legislation providing for an indicative list of what acts were deemed governmental and a residual category of non-governmental acts. Similarly, the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property included indicators of when an act was to be regarded as commercial, and therefore non-immune, and when it was to be treated as governmental and therefore attracting immunity.

Under draft article 5, State officials acting "as such" – a term around which there had been much discussion – enjoyed immunity *ratione materiae* from the exercise of foreign criminal jurisdiction. Most acts that would give rise to foreign criminal jurisdiction were performed *ultra vires* and were sometimes illegal under local law. To exclude *ultra vires* acts would invariably result either in the exception consuming the rule or in the rule itself becoming incoherent. It would amount to a *de facto* abolition of immunity in almost all cases. There was little evidence in practice to support the conclusion that official conduct must be lawful in order for immunity to be applicable. In the Trump case, the United States Supreme Court had made clear that the former President enjoyed immunity in respect of his conduct if he was acting on the outer perimeter of his official responsibilities, even if in the specific case the conduct in question violated a generally applicable law, and irrespective of his motive in so acting.

Cases in the United Kingdom arising out of extraordinary renditions by the United States of America and its allies, and the resulting claims of false imprisonment and inhuman and degrading treatment by foreign officials, had overwhelmingly been treated as governmental acts and could have been the object of a successful challenge on grounds of State immunity or acts of State, notwithstanding their illegality in origin and the fact that the

officials involved had not acted in accordance with the requirements of local law. In other words, notwithstanding the characterization of their acts as *ultra vires*, they had still been deemed governmental acts.

The expression "acting as such" also turned on its head the long-accepted rule under the law of State responsibility that *ultra vires* acts were attributable to a State provided that they were performed ostensibly with the authority of that State. The Special Rapporteur should consider aligning draft article 5 with the rules of attribution under the law of State responsibility and deleting the qualification "acting as such".

As the Commission had yet to decide on the final form that the output of its work would take, the Special Rapporteur had invited comments on that point. She favoured a recommendation that the General Assembly should commend the draft articles to the attention of States in general and encourage their widest possible dissemination. In her view, the State practice on many of the issues addressed remained inchoate and was unlikely to garner the broad support required for the successful negotiation of a treaty. The United Nations Convention on Jurisdictional Immunities of States and Their Property, which had resulted from the Commission's work on that topic, had yet to come into force, despite the fact that, by the time of its adoption in 2004, State practice in the field had largely crystallized, and that national legislation had broadly incorporated the Commission's work in the intervening years. The topic of immunity was of immense political sensitivity at present, and a cautious "wait and see" approach would probably be more fruitful, though in the long run the interests of certainty and predictability would be better served by a draft treaty. She recommended that all six draft articles should be referred to the Drafting Committee.

Mr. Lee, commending the Special Rapporteur on his clear and concise first report, said that a more proactive approach to the second reading of the draft articles than that proposed by the Special Rapporteur might be in order, for several reasons. First, considerable State practice relating to the topic, including several domestic judicial decisions, had emerged since 2017, when the greater part of the Commission's work on the substantive provisions of the draft articles had been completed. While the commentary to the draft articles, as adopted in 2022, referenced a small number of judicial decisions rendered after 2017, a broader and deeper consideration of post-2017 developments, including a more detailed discussion of the 2020 arbitral award in the case concerning *The "Enrica Lexie" Incident (Italy v. India)*, in which the Permanent Court of Arbitration had addressed the core question of immunity of State officials, would shed more light on the topic.

Second, the draft articles adopted on first reading and the commentaries thereto appeared to contain some inconsistencies that needed to be addressed. For instance, in the commentary to draft article 7, the Commission had taken a rather agnostic position on whether the crimes enumerated in draft article 7 were to be regarded as "acts performed in an official capacity", and paragraph (14) of the commentary to draft article 7 offered two interpretations. Paragraph (14) stated that the Commission had not found it necessary to come down in favour of one or the other and merely pointed out that some national courts regarded those crimes as a limitation, while others regarded them as an exception. In contrast, in its commentary to draft article 2, the Commission had clearly favoured the latter interpretation when introducing the "single act, dual responsibility" model, also known as double or dual attribution.

Third, as could be seen from the comments made by States on the draft articles adopted on first reading, the draft articles might have some lacunae, such as the lack of definitions of "immunity" or "foreign criminal jurisdiction", to which a number of States had alluded.

Fourth, even though the draft articles purported to address the topic of immunity of State officials from foreign criminal jurisdiction, there were instances of syncretic conflation of immunity from civil jurisdiction and immunity from criminal jurisdiction. Many of the citations contained in the commentaries to the draft articles adopted on first reading addressed the former. That one might easily fall into the trap of such conflation was demonstrated by the *Enrica Lexie* ruling, in particular the dissenting opinion of Judge Robinson and the concurring and dissenting opinion of Judge Rao. It was evident that the conflation of the two

regimes of immunity, which differed from each other in various respects, would have a negative impact on such a politically sensitive topic.

The Commission should consider going beyond its recent practice of completing second readings in one year with a view to engaging more substantively with its output. He welcomed the Special Rapporteur's decision to conduct the second reading of the present draft articles over two years, which would enable the Commission to produce a convincing result on a sensitive and complex topic, and fully agreed with the suggestion that the Commission should have the opportunity to revisit the draft articles adopted on first reading so as to consider them from a holistic perspective.

With regard to draft article 1, he supported the Special Rapporteur's suggestion that paragraphs 1 and 2 should be maintained as adopted on first reading. Concerning paragraph 3, the reservations expressed by Switzerland relating to the phrase "as between the parties to those agreements" merited careful consideration. The wording of the paragraph might appear innocuous in itself, given the basic principle of *pacta tertiis* in treaty law, but in the specific context of the Rome Statute of the International Criminal Court, which also affected relations with States that were not party to the Statute, the phrase risked contradicting the very objective of article 1 (3), which was to serve as a "without prejudice" clause. He therefore supported its deletion.

Although the Special Rapporteur was of the opinion that draft article 2, dealing with definitions, should be maintained as adopted on first reading, some considerations might invite him to revisit the question. A number of States had requested the Commission to fill in lacunae by providing definitions of "immunity" and "criminal jurisdiction". The Commission's response had been somewhat muted. In that regard, it should be noted that, while not directly addressing the question of definitions, the Commission had in fact engaged in definitional exercises in various draft articles. For instance, in paragraph 2 of draft article 9 and paragraph 4 of draft article 14, the Commission had tackled two elements falling under the notion of criminal jurisdiction: criminal proceedings and coercive measures. In connection with the latter, the concept of inviolability was also mentioned. The two definitions given in draft article 2 might benefit from greater coherence and logical clarity. Although they were intended to apply to the draft articles as a whole, there was a distinction between them in terms of their respective scope. The first definition related to the draft articles as a whole, while the second related largely to Part Three of the draft articles.

An important and difficult issue affecting the draft articles as a whole was the relationship between the attribution of an act to the State, on the one hand, and the immunity of State officials from foreign criminal jurisdiction, in particular immunity *ratione materiae*, on the other. The issue might also be framed as the relationship between the 2001 articles on responsibility of States for internationally wrongful acts and the present draft articles. Some Commission members had highlighted the close connection between the two, suggesting that consistency in the use of terms and expressions between the two topics should be enhanced as much as possible. Such a view merited careful consideration, but one must remain alert to the differences between the two topics.

First, there was a subtle but important difference between them in terms of scope. Second, the articles on responsibility of States for internationally wrongful acts dealt with the attribution of an act of State, generally without distinction between civil and criminal acts. In contrast, the Commission was now focusing exclusively on criminal acts performed in an official capacity. Third, the fact that the 2001 articles and the draft articles on the current topic, though closely related, operated in different normative landscapes was demonstrated by the different meanings of the term *ultra vires* in article 7 of the former and Part Three of the latter. In view of those differences, relevant rules could not be imported wholesale from one set of articles to the other.

Concerning draft article 2 (a), he supported the deletion of the words "and refers to both current and former State officials". As that phrase appeared to relate primarily to immunity *ratione materiae*, it seemed unnecessary to include it in a definition of State officials intended to apply to the draft articles as a whole. It was true that in draft articles 12 and 14 the expression "State officials" also included former State officials; however, if those provisions were read together with draft article 6, among others, there would be little room

for misunderstanding. In draft article 2 (b), he found the use of the expression "State authority" appropriate in the context of immunity *ratione materiae*. Opting for the expression "sovereign authority" instead would narrow the scope of immunity *ratione materiae* to those acts performed *jure imperii*. As articulated by Italy in the *Enrica Lexie* case and previously by the Commission, it was irrelevant for the purposes of attribution that the conduct of a State organ might be classified as "commercial" or as *acta jure gestionis*.

Draft articles 3 and 4, in their current form, appeared rather truncated, focusing only on Heads of State, Heads of Government and Ministers for Foreign Affairs. A link was needed to other parts of the draft articles. Consideration should also be given to how to address the question raised by a number of States as to whether draft article 3 was too restrictive in limiting the personal scope of immunity *ratione personae* to those three categories of official. The Commission might respond by referring to draft article 1 (2), which indicated that immunity *ratione personae* might also apply to persons connected with diplomatic missions, consular posts, special missions, international organizations and the military forces of a State. While it was well established that, under customary international law, immunity *ratione personae* was limited to members of the troika, the question could be raised as to whether States were prohibited from granting such immunity to people other than those officials. Given that the International Court of Justice had itself used the expression "such as" in that context, the Commission might take a more flexible approach to the question by including a saving clause, worded, for instance, as "unless otherwise agreed among States". With regard to draft article 4, he supported the Special Rapporteur's proposed modification.

Four possible scenarios could be envisaged with respect to the relationship between the attribution of an act to a State and immunity *ratione materiae*. The first involved acts that were *intra vires* and fell outside the category of crimes enumerated in draft article 7. Such acts would be attributed to the State and immunity *ratione materiae* would be recognized with respect to them. That was an interpretation confirmed by the arbitral tribunal in *Enrica Lexie* and the result contemplated by draft article 5, which provided a general rule on immunity *ratione materiae*. Questions could be raised as to whether immunity *ratione materiae* would obtain with respect to acts under the second scenario, which were performed *ultra vires* but could be attributed to the State. The third scenario involved crimes which, according to the commentary to draft article 7, could not be regarded as acts performed in an official capacity, including what the Commission had described in the commentary as "grand corruption". The fourth involved the crimes under international law found in draft article 7, which either required the existence of a State element or were committed with the backing of the State machinery and were therefore attributable to the State, but with respect to which immunity *ratione materiae* did not apply because of their highly egregious character.

Since the first of the four scenarios could be expected to cover most acts performed by State officials, a general rule could be drawn that an act performed by a State official in an official capacity attracted immunity *ratione materiae*, and that was the meaning intended to be conveyed by draft article 5 as adopted on first reading. That draft article had contained two requirements: the act must be performed by a State official and it must be performed in an official capacity.

The four scenarios showed that not all acts that were attributable to the State of the official attracted immunity *ratione materiae*. That point was particularly significant in the light of the traditional pre-1945 view that the crimes of international law set out in draft article 7 were not punishable precisely because they were regarded as acts of the State to which the State official belonged. In order to prevent impunity and a lack of accountability for crimes under international law committed by State officials, it must be made clear that some criminal acts, even when attributable to the State, did not attract immunity *ratione materiae*. It was difficult to support the merger of draft articles 5 and 6 if one subscribed to such an approach.

He supported the Special Rapporteur's proposal to delete the phrase "acting as such", which was too broad and, as pointed out by the United States of America, created uncertainty about the applicable standard for determining which acts were covered by immunity *ratione materiae*. However, the phrase that the Special Rapporteur had proposed inserting – "in accordance with draft article 6" – was too restrictive. Draft article 5 should both provide the

general rule of immunity *ratione materiae* for acts performed by State officials in an official capacity and indicate that there were exceptions to the general rule, including under draft article 7. Draft article 5 could, for example, be reformulated to read: "A State official who performs an act in an official capacity shall enjoy immunity *ratione materiae* in accordance with the provisions of the draft articles, subject to the exceptions provided for in draft article 7."

He supported the retention of paragraphs 1 and 2 of draft article 6. While he could accept the retention of paragraph 3, it would be preferable to move that paragraph to the commentary and thereby make draft article 6 clearer and more concise.

With respect to the form of the outcome of the Commission's work on the topic, he was open to either of the two options noted in the first report. It would be preferable for the Commission to reach a decision on the form soon, as it would then have a better sense of the direction of its work. He fully supported the referral of the draft articles to the Drafting Committee.

Mr. Akande said that he welcomed the Special Rapporteur's decision to spread the second reading of the draft articles on the topic "Immunity of State officials from foreign criminal jurisdiction" over more than one session. In his view, the Commission's work on the topic should result in a recommendation to the General Assembly to use the draft articles as a basis for the negotiation of a treaty. Significant parts of the draft articles restated customary international law, and such a recommendation should not be seen as undermining that conclusion. The procedural safeguards contained in Part Four, which were an important part of the work as a whole, could take effect only if contained in a treaty.

The questions that had been raised with respect to draft article 1 (1), regarding the definition of immunity, the relationship of immunity to inviolability and the meaning of the exercise of criminal jurisdiction, should be addressed in the commentary. Precise definitions of those concepts were not needed. In the commentary, the Commission should indicate that, for the purposes of international law, criminal jurisdiction extended to all offences against a national or international community which could lead to the imposition of a penalty, and it should discuss the types of acts that were to be regarded as being within the "exercise of" criminal jurisdiction and those that were not. The Commission should consider, for example, whether the exercise of such jurisdiction included the opening of an investigation or the interviewing of potential witnesses or whether it commenced only when criminal proceedings were initiated or coercive acts taken against a State official. With regard to the relationship between immunity and inviolability, it should be clarified in the commentary that acts which affected the inviolability of a State official fell within the immunity of the official within the meaning of the draft articles when they were carried out as part of the process of establishing criminal responsibility, such as when an official was arrested on a criminal charge, but fell outside the scope of the topic when they did not relate to the exercise of criminal jurisdiction, such as when persons ordinarily entitled to immunity were detained on security grounds during an armed conflict.

He fully supported the thrust of draft article 1 (2), an important provision which confirmed that persons could enjoy immunity under special rules of international law even if they did not enjoy immunity under the draft articles. Special missions immunity, in particular, should always be borne in mind in the debate about who enjoyed immunity *ratione personae*. To say that, as a general matter, only Heads of State, Heads of Government and Ministers for Foreign Affairs – the so-called "troika" – possessed such immunity was not to exclude the possibility that other senior officials could, and often would, enjoy immunity *ratione personae* when abroad on official business.

In his view, the formulation of the references in draft article 1 (2) and in the commentary to the immunity that applied to persons connected with the military forces of a State was unnecessarily and unfortunately limited and did not take account of the long-standing acknowledgement under international law that the rules regarding immunity of officials which applied between belligerent States were different from those that applied during peacetime. Indeed, the need for the regime of combatant immunity under the law of armed conflict, which provided that one belligerent State could not prosecute combatants of an opposing belligerent for lawful acts of war, could be understood only when one realized

that the peacetime rule of immunity *ratione materiae* was not applicable between belligerents. In its comments on the draft articles as adopted on first reading, the Russian Federation had suggested that account should be taken of the doctrine of combatant immunity.

Likewise, it was by no means established that immunity *ratione personae* applied between belligerent States in situations of conflict. Practice during the Second World War confirmed that States were entitled to exercise criminal jurisdiction over leaders of an aggressor State. One of the arguments that the United Nations War Crimes Commission had relied on in rejecting the immunity of the leaders of Axis powers against whom charges had been brought was, as noted in the *History of the United Nations War Crimes Commission and the Development of the Laws of War*:

> "… that immunity was an accepted principle in time of peace, for reasons of expediency and courtesy vital to peaceful intercourse between nations, but that it ceased to exist in time of war and could not be maintained for the benefit of the aggressor. The practice of making and detaining heads of State and other State administrators prisoners, such as in the case of Napoleon I, Napoleon III, King Leopold of Belgium and Rudolf Hess, were also invoked as evidence that immunity did not exist in war time."

It should therefore be indicated in either draft article 1 (2) or the commentary thereto that the draft articles were without prejudice to special rules that applied as between belligerent States. It was important to note that draft article 1 (2) did not provide an exhaustive list of the special rules of international law regarding immunity.

He supported the proposed draft article 1 (3). It was important to make clear that the general rules regarding immunity set out in the draft articles would be subject to the rights and obligations undertaken by States or imposed on them with respect to international criminal courts, including with regard to the question of whether one State could arrest officials of another State at the request of an international criminal court. It was important to establish that, although the general rules set out in the draft articles might ordinarily preclude such an exercise of criminal jurisdiction, the draft articles could be derogated from by treaties that permitted or even required it.

Article 1 (3) would be crucial if the draft articles were indeed used as the basis for a treaty because, under article 30 of the Vienna Convention on the Law of Treaties, where successive treaties dealt with the same subject matter, the treaty that was later in time would prevail unless it specified that it was subject to or not to be considered as incompatible with the earlier treaty. If the draft articles became a treaty, draft article 1 (3) would make clear that that treaty would not override any differing rules relating to the operation of international criminal courts that States might have agreed to, and it would preserve the effect of treaties that permitted States to arrest State officials at the request of an international criminal court.

As such arrests could also be permitted or required by binding decisions of a competent international organization, he supported the Special Rapporteur's proposed addition of subparagraph (b). Although it could be argued that, even in the cases covered by subparagraph (b), the rights and obligations ultimately stemmed from a treaty, such as the Charter of the United Nations, it was useful to have a specific reference in the draft article to the instrument which directly created the obligation. With respect to the questions raised during the plenary debate regarding the formulation of subparagraph (b), he was of the view that a specific reference to the Security Council should not be included, even though the existing examples of relevant binding resolutions were resolutions of that body, because the potential establishment by another international organization of an international tribunal for States subject to its competence could not be excluded.

The use of the word "establishing" made subparagraph (b) too narrow, as relevant rights and obligations could arise under resolutions relating to the operation of a court as well as under those relating to its establishment. For example, it had been accepted, including by the Appeals Chamber of the International Criminal Court in the *Jordan Referral re Al-Bashir Appeal*, that a Security Council resolution referring a situation to the Court could have the effect of removing immunity *ratione personae* as between a State seeking to act on an arrest warrant issued by the Court and the State of the official subject to the warrant. He would

propose that subparagraph (b) should read, “decisions of a competent international organization relating to international courts and tribunals which are binding on the States concerned”.

With respect to the question raised as to whether the words “as between the parties to those agreements” should be deleted from the Special Rapporteur’s proposed subparagraph (a), it was his strongly held view that they should be retained. First, it was a basic point of treaty law that a treaty could only create obligations for the parties to it. While it could be thought that it was precisely because it was a basic point of treaty law that the words could be deleted, it should be remembered that that point had in fact been put in doubt. The critical question was whether the States parties to a treaty creating an international court could permit or require themselves to arrest officials of States that were not party to the treaty, contrary to the immunity that would otherwise have existed. Any such right or obligation that existed as a result of the treaty could operate only as between the parties to the treaty. It might be argued that there was a rule that allowed the States that were parties to a treaty establishing an international court to arrest officials of States not party to it, but any such rule could not arise out of the treaty. It would have to be established elsewhere and would fall outside the scope of draft article 1 (3). Second, if, after having included the words “as between the parties to those agreements” in draft article 1 (3), the Commission now deleted them, it could be taken to be expressing support for the proposition that treaties could create rights and obligations in the relations between parties and non-parties. In his view, the goal of drafting was clarity, not brevity, and it was therefore better to be clear than to be brief.

As in subparagraph (b), the use of the word “establishing” made subparagraph (a) too narrow. The phrase “treaties establishing” should be replaced with “treaties relating to the establishment or operation of”.

Since a view had been taken in the literature that there was a legal distinction between “international criminal courts”, “internationalized courts” and “hybrid tribunals” and that that distinction was somehow relevant to the question of immunity, the Commission should make clear that the words “international criminal courts and tribunals” referred simply to courts which were not located within the national criminal jurisdiction of a State. He supported the Special Rapporteur’s proposed use of two subparagraphs to restructure draft article 1 (3), which made the provision clearer and more precise.

As a definitions clause related to a treaty as a whole, he would prefer for the consideration of draft article 2 to be suspended until the Commission had the entire text of the draft articles in view, at which point it would be able to determine what terms needed to be defined and what the effect of the definitions used in draft article 2 would be. Without prejudice to the question of whether the Commission should seek to define any other terms in draft article 2, he supported the definition of “State official” contained in subparagraph (a). The definition should not be moved to draft article 6 because it did not relate only or mainly to immunity *ratione materiae*, which draft article 6 addressed. Indeed, the definition of “State official” was relevant to draft article 1 and to Part Four, where the term was used in a number of provisions. Furthermore, the reference in the definition to current and former officials should be retained, because the references to State officials in draft article 1 and Part Four did include current and former officials. However, since the terms “official” and “State official” were used interchangeably in Part Four, the definition should be reworded to begin “in relation to individuals, the term ‘official’ or ‘State official’ means …”.

He supported the definition of “act performed in an official capacity” in subparagraph (b) and welcomed the Special Rapporteur’s recommendation that the relationship between attribution and the immunity of State officials, including with respect to *ultra vires* acts, should be dealt with in the commentary. In his view, it was erroneous to suggest that an act was not done in the exercise of official capacity and therefore did not attract immunity simply because it was performed *ultra vires*. In any event, the conclusion would depend on the meaning given to the expression “*ultra vires*”. If an *ultra vires* act was simply one that was performed unlawfully under domestic or international law, the illegality of that act would not take it outside the scope of immunity. Indeed, in ordinary cases, which excluded cases involving the international crimes covered in draft article 7, the very purpose of the regime of immunity was to preclude a determination of the illegality of the act in question. Immunity precluded such a determination under international law, subject to draft

article 7; under the domestic law of the forum; and *a fortiori* under the domestic law of the State of the official.

There was alignment between the regime of immunity and attribution under the law of State responsibility with regard to *ultra vires* acts. Article 7 of the articles on responsibility of States for internationally wrongful acts suggested that persons acted in an official capacity even if their acts exceeded their authority or contravened instructions. What must be determined was when an act which was unlawful under the domestic law of the State of the official remained an act carried out in the exercise of State authority and when it did not. The answer depended on the purposes for which and the means through which the act was done. An act carried out for purposes associated with State policies, as opposed to purely personal reasons, and using State apparatus – in other words, under colour of law – should be considered an official act. An official corruptly embezzling money for himself was not acting in an official capacity, but a police officer tasked with controlling a riot who failed to follow domestic procedures for the discharge of lethal weapons was.

He supported draft article 3 as adopted on first reading. Immunity *ratione personae* should not be extended beyond the troika. Those who argued otherwise should bear two things in mind. First, since the draft articles were without prejudice to the rules relating to immunity of special missions, senior State officials not within the troika would in fact enjoy immunity *ratione personae* when on official business abroad or on special mission, with the only question being whether they enjoyed immunity *ratione personae* when abroad on a private visit. Second, the extension of immunity *ratione personae* even to all members of the troika when abroad on a private visit was already far-reaching. While it was true that, in *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, the International Court of Justice had put Heads of Government and Ministers for Foreign Affairs in the same category as Heads of State, the Court had provided no practice to support the proposition that those members of the troika enjoyed immunity from criminal jurisdiction when abroad on a private visit. In his 1994 course at The Hague Academy of International Law entitled "The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers", Sir Arthur Watts had stated:

> "Although it may well be that a Head of State, when on a private visit to another State, still enjoys certain privileges and immunities, it is much less likely that the same is true of heads of governments and foreign ministers. Although they may be accorded certain special treatment by the host State, this is more likely to be a matter of courtesy and respect for the seniority of the visitor, than a reflection of any belief that such treatment is required by international law."

While the reaction to the *Arrest Warrant* case now justified what was stated in draft article 3, there was no basis to go any further.

The use of the expression "term of office" in paragraphs (1) and (2) of draft article 4 was confusing, as the expression could be taken to mean a predetermined term or a period of office. It would perhaps be easier to clarify the meaning in the text of the draft article itself, rather than in the commentary, by following Mr. Oyarzábal's suggestion of using the expression employed by the International Court of Justice in the *Arrest Warrant* case, "period of office".

There was no need to retain both draft article 4 (3) and draft article 6 (3), as they largely covered the same issue. He preferred the wording of draft article 4 (3). Draft article 6 (3) spoke to the application of immunity *ratione materiae* only with respect to acts performed by members of the troika during their period of office, while the statement in draft article 4 (3), that cessation of immunity *ratione personae* was without prejudice to the application of immunity *ratione materiae*, would cover acts carried out by those officials both while in office and after their time in office had ceased. However, he preferred the wording of draft article 4 (3) as adopted on first reading. He saw no advantage in deleting the words "the rules of international law concerning" and agreed with Mr. Forteau that, without those words, the draft article could be taken to suggest that immunity *ratione materiae* applied automatically.

Draft articles 5 and 6 should be merged, as draft article 5 was overly duplicative of draft article 6 (1). There was no reason to keep the draft articles separate simply to maintain

symmetry with the provisions on immunity *ratione personae*. In fact, it might be preferable to acknowledge, through a lack of symmetry, that the two regimes were distinct. He would delete draft article 6 (3) for the reasons he had already given.

Mr. Fife said that the Commission should consider the practical needs of a domestic judge faced with a case involving foreign criminal jurisdiction, who would be seeking to determine the relevant rules with as much clarity as possible. Such a consideration spoke in favour of the use of draft articles as the form of the output of the Commission's work. A focus on the practical needs of judges would spur the Commission to assess the value that its work was adding. There was no doubt that the Commission's work on the topic involved the codification of a significant body of law. Given the length of time that had passed since the first reading, there was good reason for the Commission to take on board a number of the suggestions that had been made by States.

Mr. Paparinskis said that the position taken in the draft articles adopted on first reading on the question raised by Mr. Akande, of the extent to which inviolability fell within the scope of the topic, was unclear. Although inviolability was addressed in draft articles 9 and 14, paragraph (13) of the commentary to draft article 9 stated that inviolability was outside the scope of the draft articles. States had raised various questions in that regard. He favoured the view put forward by Mr. Akande that inviolability fell within the scope of the topic with respect to matters related to criminal jurisdiction.

In its treatment of inviolability, the Commission could take either a maximalist or a minimalist approach. Under the former, it would address its understanding of inviolability directly, either by providing a definition or by thoroughly addressing inviolability in the commentary to Part One or in the general commentary; it would delve more deeply into the points relating to inviolability raised in Part Four; and it would consider practical questions such as whether inviolability was applicable in cases of immunity *ratione materiae*. The commentary as adopted on first reading seemed to leave that question open; the Netherlands had said the answer was no, but the last sentence of paragraph (2) of the commentary to draft article 43 of the Commission's draft articles on consular relations suggested the opposite. Under a minimalist approach, the Commission would simply include a "without prejudice" clause to make it clear to States that the rules on immunity were not the only rules that were relevant to the exercise of criminal jurisdiction. The draft articles as adopted on first reading seemed to reflect an unhappy medium between those two approaches.

He agreed with Mr. Akande that the Commission might have a fuller view of the issues relating to inviolability the following year, when it would have all the draft articles before it. The issues could therefore perhaps be addressed the following year. However, as they also raised questions of policy, it would perhaps be helpful for the Special Rapporteur to hold informal consultations on them.

Mr. Forteau said that, instead of asking whether *ultra vires* acts were, in the abstract, official acts, the Commission should ask whether domestic courts had in practice accorded immunity from criminal jurisdiction with respect to such acts. The dearth of such practice was probably what had caused the Commission not to take a clear position on the matter during the first reading of the draft articles. If the Commission wished to return on second reading to the question of whether *ultra vires* acts should be categorized as official acts, it must examine the relevant national practice.

Mr. Akande said that the difficulty in examining practice was that whether relevant practice would be found would depend on the view courts took on a particular issue. For example, if a court took the view that the question of whether a State official's acts were illegal was relevant to its decision as to whether to accord immunity, it would examine the issue, leaving evidence of that practice. However, if the court took the view that the illegality of those acts was irrelevant, it would not examine the issue and there would be no evidence of the practice.

Mr. Jalloh said that he would be curious to hear more about Mr. Akande's views on the implications for draft article 1 (3) of the finding in the *Jordan Referral re Al-Bashir Appeal* that Jordan, as a State party to the Rome Statute of the International Criminal Court, was obligated under international law to comply with the decisions of the Court, including with respect to the arrest of the President of the Sudan, a State that was not a party to the

Rome Statute. The Sudan had fallen within the jurisdiction of the Court by virtue of a Security Council decision. Future situations could be imagined where a State that was not a party to the Rome Statute would be obligated, on the basis of a Security Council decision, to effect arrest warrants issued by the Court, even though some States took the view that customary international law did not permit them to arrest a sitting official of another State. His concern was that, by taking a position on the matter and retaining draft article 1 (3), the Commission would be swaying the existing balance. It should be noted that that provision had been added at a late stage of the first reading and had not been well debated in the Commission.

Ms. Ridings said that it was important to look at State practice in cases where immunity was not invoked on the grounds that State officials had undertaken an illegal act in the territory of the forum State, as in *R. v. Mafart and Prieur*, known as the *Rainbow Warrior* case. The Commission should conduct a more detailed review of State practice with a view to identifying relevant practice, as Mr. Forteau had suggested.

Ms. Okowa said that, in a series of cases involving the complicity of officials of the United Kingdom in acts of extraordinary rendition carried out by the United States of America and its allies, United Kingdom courts had noted that if the foreign officials who had acted illegally under foreign law in performing those acts had appeared in court in the United Kingdom, they would have been entitled to immunity, notwithstanding the illegality of their conduct under foreign law. The Special Rapporteur might wish to review those cases.

Mr. Akande said that, in the *Jordan Referral re Al-Bashir Appeal*, the Appeals Chamber had based its conclusion – that a State party to the Rome Statute had an obligation to arrest the Head of State of a State that was not a party to it – on a rule of customary international law which it had claimed arose in cases where there was an international court and that court chose to ask a State to arrest an official of another State, although in his view no such rule existed. The Appeals Chamber had not, to his knowledge, based its conclusion on the Rome Statute.

Draft article 1 (3) addressed the rights and obligations of the parties to a treaty, which, as a matter of treaty law, could only exist between the parties. It was important to make that clear, since under article 30 of the Vienna Convention on the Law of Treaties, the starting point was that the treaty that came later in time prevailed. Thus, if the draft articles became a treaty, the starting point would be that the draft articles prevailed over the Rome Statute as between the parties, since the Rome Statute was also a treaty. Draft article 1 (3) was important because its effect would be to defer to earlier treaties relating to the operation of international courts and tribunals and to indicate that it was the provisions of those treaties that prevailed.

Organization of the work of the session (agenda item 1) (*continued*)

The Chair said that a note from the secretariat (A/CN.4/776) regarding the casual vacancy created by the resignation of Mr. Huang had been posted on the Commission's web page. In order to leave a reasonable amount of time between the date of resignation and the election to fill the vacancy, and to allow the person elected as member a reasonable amount of time to prepare for the Commission's following session, the Bureau recommended that the Commission should hold an election to fill the vacancy on 31 July 2024 and that that date should be announced on the Commission's web page.

Mr. Grossman Guiloff said that he wished to know whether Mr. Huang's letter of resignation could be shared with Commission members and whether Mr. Huang would be sent a letter of appreciation for all his years of service on the Commission. It would also be helpful to know whether there was any precedent for the filling of such a casual vacancy and, if so, whether the Commission was following the same procedure as in the earlier cases.

The Chair said that the letter of resignation would be circulated to the members. The Bureau had agreed that the Chair should write to Mr. Huang to confirm receipt of his resignation and express the Commission's appreciation for the contribution that he had made to the progressive development and codification of international law as a member of the Commission.

Mr. Llewellyn (Secretary to the Commission) said that the authority for the Commission to hold an election to fill a casual vacancy came from the Commission's statute.

To his knowledge, the last time that a member had resigned during a session had been in 2008, when Sir Ian Brownlie's resignation had taken effect at the beginning of the second part of the session. The Commission had elected Sir Michael Wood to replace him towards the end of that session, in a manner similar to what the Bureau was now proposing.

The Chair said he took it that the Commission wished to hold an election to fill the casual vacancy on 31 July 2024 and to announce the election on its web page.

It was so decided.

The meeting rose at 1.05 p.m.