Document:-
A/CN.4/3146

Summary record of the 3146th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
2012, **vol. I**

on her remarkable preliminary report. As for how to deal with the subject at hand, as he had already indicated in 2011, the Commission must strike a balance between two needs: on the one hand, the need to ensure stability in relations among States and, on the other hand, the need to fight impunity. The Special Rapporteur had captured that problem, as was evident in paragraphs 27 to 34 of her report. With regard to the methodology, he agreed with those members of the Commission who had pointed to the dovetailing between codification and progressive development, or *lex lata* and *lex ferenda*, although he sometimes had trouble grasping the very subtle distinction drawn by Mr. Petrič between progressive development and *lex ferenda*.

66. He wished to make three main points. First, the distinction between immunity *ratione personae* and immunity *ratione materiae* was no doubt useful from the methodological point of view, at least as a basic conceptual approach to the subject, but it would very quickly become clear that the problem was more complex than that and that such a distinction would not always hold. In many situations, the two kinds of immunity overlapped. Second, immunity apparently belonged to the State. But what might seem obvious in the case of *ratione materiae*, where it was firmly established that the State could lift immunity, was not so clear when it came to *ratione personae*: Could the State lift the immunity of a member of the troika? Third, procedural aspects were an important part of the subject. The Special Rapporteur had understood that and had referred to it very briefly in paragraphs 69 and 70 of her report. On that score, the analysis presented by Mr. Kolodkin in his third report[283] warranted the Commission's full attention. The question could be raised whether immunity was mandatory, a means imposed on the judge even when the person benefiting from the immunity did not invoke it. The International Court of Justice apparently would have it so but the national case law of certain States went against that rule. He pointed to the decisions rendered under Swiss and French case law, in particular those handed down a few years earlier in the case concerning the recovery of Mobutu's assets[284] and much more recently in the so-called "ill-gotten gains" affairs involving three African Heads of State. In the case in question, the Paris public prosecutor's office had received a complaint from Transparency International and Sherpa against the three Heads of State for misappropriation and embezzlement of public funds, with the money hidden in banks in France, which allowed the persons in question to acquire an enormous amount of property. The investigating judge at the Paris Tribunal had rejected the complaint for lack of *jus standi*, and the decision had been upheld by a 2009 decision of the Paris Court of Appeal. However, in a decision handed down on 9 November 2010, the Court of Cassation had overturned the decision of the Court of Appeal, ordering that the case should be investigated.[285] The counsel of the persons in question had not directly or principally invoked the immunity of the Heads of State in question. In any event, it could be deduced from the decision of the French Court of Cassation, the highest court in France, that invoking immunity was not mandatory. Should immunity then be invoked *in limine litis* at the risk of losing its benefits if it were reserved for use later in the proceedings? That was one of the questions that the Special Rapporteur could address. While her efforts to produce the workplan proposed in paragraph 72 were to be praised, it should be borne in mind that the complexity of the subjects and the way deliberations developed within the Commission always led to adjustments to initially established plans.

67. Lastly, the discussion on principles and values suggested by the preliminary report and so well described by Mr. McRae in his statement could not be avoided. However, as Sir Michael had suggested, such a discussion should not be held in abstract terms. There was no interest in pursuing the subject unless the discussion was founded specifically on possible treaty provisions, on case law and to a certain extent on doctrine, as demonstrated by Mr. Nolte and Mr. McRae. On the other hand, he did not go so far as to endorse the position put forward by Mr. McRae when he said that it was sometimes necessary to place the individual or dissenting opinions of some judges of the International Court of Justice at the same level as the decisions of the Court, as he considered that to be going too far.

The meeting rose at 1 p.m.

3146th MEETING

Tuesday, 17 July 2012, at 10.05 a.m.

Chairperson: Mr. Bernd NIEHAUS (Vice-Chairperson)

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

Cooperation with other bodies (*continued*)*

[Agenda item 12]

STATEMENTS 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. Tchikaya and Mr. Getahun, and invited them to address the Commission.

---

[283] *Yearbook … 2011*, vol. II (Part One), document A/CN.4/646.

[284] See "Chronologie du blocage des avoirs Mobutu en Suisse (1997–2009)", annex 2 to the draft federal law on the restitution of assets of politically exposed persons obtained by unlawful means (www.admin.ch/opc/fr/federal-gazette/2010/2995.pdf) of 28 April 2010.

[285] For information concerning the progress made in this case, see www.transparency-france.org/ewb_pages/div/Chronologie_Biens_mal_acquis.php (in French only).

* Resumed from the 3140th meeting.

2. Mr. TCHIKAYA (African Union Commission on International Law), after conveying the best wishes of the AUCIL President, Mr. Adelardus Kilangi, who was unable to attend, said that it was indeed an honour to address the International Law Commission, which played a crucial role in international relations, peace and security. In his statement, he would focus on two issues: the reasons for the establishment of AUCIL and its working methods.

3. On 4 February 2009, the member States of the African Union had adopted the statute of AUCIL on the occasion of the fiftieth anniversary of the independence of African States. Yet the need to establish AUCIL had been mentioned in the African Union Non-Aggression and Common Defence Pact, which was adopted in 2005. In July 2009, the 11 members of the Commission, including one woman, had been elected. The principal objectives of AUCIL were twofold: to undertake activities relating to the codification and progressive development of international law from the African perspective; and to provide advice to the member States of the African Union and its policy organs on legal matters. It was in the latter respect that AUCIL differed from other international law commissions.

4. AUCIL had been established as an independent consultative body, in accordance with article 5, paragraph 2, of the Constitutive Act of the African Union. Basically, it functioned in two ways. First, when a general legal issue was referred to it for consideration, it followed an approach similar to that of the International Law Commission: A rapporteur was appointed, who conducted studies, consulted member States and drafted a preliminary report that was considered by the plenary Commission. Then, subject to the approval of the African Union administrative hierarchy, the report was transmitted to the Assembly of the African Union. Second, when the advice of AUCIL on a particular legal issue was sought by another body, private and often extensive discussions were held to consider all aspects of the issue in depth; if necessary, a vote was taken.

5. The achievements of AUCIL since the start of its work in 2010 were significant. Aside from the adoption of its rules of procedure on 19 May 2011, at the request of the Peace and Security Council of the African Union, the Commission had issued a legal opinion on certain aspects of the situation in Libya and on the scope, legal implications and obligations of Member States of the United Nations and of the member States of the African Union under Security Council resolutions 1970 (2011) and 1973 (2011), of 26 February and 17 March 2011, respectively.

6. In addition, since AUCIL was also empowered to issue opinions on its own initiative, AUCIL had at its previous session addressed the matter of the situation in Mali. A rapporteur had been appointed for that purpose and studies relating to the question were under way.

7. AUCIL was unique for a number of reasons, including its limited membership and the fact that it could conduct studies on topics that it considered particularly important on its own initiative. Examples of such topics included piracy in Africa; the harmonization of ratification procedures; frontier disputes; immunity of State officials; and the Rome Statute of the International Criminal Court. Last but not least, at the African Union Summit in Kampala in 2010, the Government of Ghana had requested a study on the legal bases for reparation for slavery and other damage inflicted in Africa.

8. Mr. GETAHUN (African Union Commission on International Law) said that since one of the African Union's primary objectives was the integration of the continent, part of the mandate of AUCIL was to contribute, through studies, to the progressive development and codification of international law in Africa, to enable African decision makers to harmonize laws and to revise treaties that had been in existence since the establishment of the Organization of African Unity in 1963. The inception of AUCIL was directly related to maintenance of peace and security in Africa, since, as Mr. Tchikaya had noted, its foundations lay in the African Union Non-Aggression and Common Defence Pact.

9. Currently, AUCIL was involved with tasks relating to its recent establishment, including the finalization of its working methods. Some of the original members had since been called to higher office elsewhere; one had already been replaced, and further elections would be held in January 2013.

10. One of the main priorities of AUCIL, in accordance with the mandate set forth in its statute, was the carrying out of studies on legal issues. Studies had been undertaken on the immunity of officials in the light of decisions taken at African Union summits concerning the implementation of the Rome Statute of the International Criminal Court, as well as on universal jurisdiction in the context of the actions of some States against African officials visiting Europe.

11. As Mr. Tchikaya had noted, AUCIL was also mandated to issue legal opinions. Although it had already issued one legal opinion, the way in which legal advice should be sought and processed by policy organs had not yet been finalized.

12. High priority was also accorded to the teaching and dissemination of international law. Some studies had been completed, and one result had been the draft legislation to permit the implementation of the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa.

13. Under article 25, paragraph 3, of its statute, AUCIL was requested to establish close cooperation with the International Law Commission in order to promote cooperation in international law on the African continent. As a first step in establishing a formal framework for cooperation, he suggested that the Commission should select a few members to attend AUCIL sessions and intersessional activities. Arrangements could also be made to exchange information on studies and publications and to invite members of other bodies to organize joint events, such as seminars.

14. One matter of concern was the need for a formal arrangement to ensure good relations between the

secretariats of the two bodies. AUCIL did have its own secretariat, and a secretary had been appointed six months previously. However, AUCIL did not have the same resources as the International Law Commission, and while it had signed a memorandum of understanding with the United Nations Secretariat, a separate arrangement with the International Law Commission secretariat would help it to benefit from the latter's experience.

15. Mr. TLADI said that it was a particular pleasure to welcome the representatives of AUCIL, since he had been involved in negotiating its statute in 2008. He nevertheless had some observations to make. First, as the importance of State practice was clearly spelled out in its statute, it would be interesting to know what approach AUCIL took to the sometimes inconsistent State practice of the member States of the African Union. For example, member States might take one decision in the Assembly of the African Union, but adopt a different position on the substance and direction of law in other forums and even in their domestic legislation. Furthermore, since the harmonization of ratification procedures had been mentioned as a priority, he wondered how the pronouncements of the Assembly *vis-à-vis* the ratification of instruments could be reconciled with the differing constitutional provisions of member States. A similar situation obtained with regard to some of the other study topics mentioned, such as frontier disputes and the implementation and interpretation of treaties. He enquired whether AUCIL had already devised a strategy to address such problems.

16. Second, he wished to know whether any publicity was given to the work of AUCIL, which was surely of interest to bodies in addition to the International Law Commission.

17. Lastly, one aspect of its work that distinguished AUCIL from the International Law Commission was its ability to provide legal advice to the policy organs and member States of the African Union. In that connection, he wondered what relationship existed between AUCIL and the Office of the Legal Counsel of the African Union.

18. Mr. EL-MURTADI SULEIMAN GOUIDER said that, despite having been involved in the drafting of the AUCIL statute, he had learned much about the institution's establishment and mission from the presentation just delivered. AUCIL had a very broad mandate and that clearly posed some problems, in particular in connection with the provision of legal advice. A further problem lay in the fact that AUCIL could issue opinions on its own initiative, including on sensitive issues such as border disputes and political matters referred by other bodies. However, he applauded the efforts made thus far.

19. Nevertheless, he did wish to know how AUCIL struck a balance between its work on the codification and progressive development of international law and the need to bear in mind the African perspective, particularly with regard to the issuing of legal opinions and the selection of topics on its own initiative.

20. Mr. MURASE said that AUCIL and the Asian–African Legal Consultative Organization (AALCO) seemed to have a common goal, namely the transformation of international law, which was traditionally dominated by Western States, into an international legal order that was more just towards Asian and African countries. At the annual session of AALCO that had taken place recently in Abuja, the topics considered by the International Law Commission had been discussed. He suggested that AUCIL should establish close working ties with AALCO in order to avoid any duplication of effort. Furthermore, it would be desirable if the visits of representatives of AUCIL and AALCO to the International Law Commission could coincide in the future.

21. He enquired how AUCIL envisaged the results of its work being implemented outside the framework of the African Union, since there seemed to be no reference to that eventuality in its statute, and international law should be applicable universally. He wished to know, in that connection, what relationship AUCIL had with the Sixth Committee.

22. Mr. TCHIKAYA (African Union Commission on International Law) said that Mr. Tladi had highlighted a problem that had become apparent to AUCIL at its very first session in 2010: the different legal approaches taken by different States. The problem was of particular significance since AUCIL had no case law to guide it in its codification work. It would therefore seek solutions based on the outcome of discussions in AUCIL aimed at ensuring harmony among the member States of the African Union.

23. He noted that studies conducted on the harmonization of ratification procedures had revealed the existence of differences not only in internal ratification procedures but also in the views of States and Governments with regard to international rights in general. Approximately one third of all treaties signed and negotiated in the context of the African Union had yet to be ratified, a situation that was clearly problematic. The results of a survey had shown that States failed to ratify treaties after signature for a variety of reasons, including changes in Government and attitudes, knowledge of international law and the rigorous nature of the treaty texts. That situation was a matter of particular concern because of the overall context of political and legal integration in which the African Union operated. The difference in approaches adopted by States was a *de facto* situation that must be lived with, but States must nonetheless be reminded of their duty to ratify treaties they had signed.

24. He agreed that AUCIL activities needed to be better publicized. The AUCIL website was currently in the process of being set up. In the meantime, therefore, it would be advisable to access information *via* the African Union website.

25. Mr. GETAHUN (African Union Commission on International Law), addressing Mr. Tladi's question regarding State practice, said that AUCIL found guidance for its work in an area in its statute that mandated it to "consider mechanisms for making evidence of customary international law more readily available"[286]

[286] African Union, Executive Council, fourteenth ordinary session, 16–30 January 2009, Statute of the African Union Commission on International Law (EX.CL/478 (XIV)a), art. 6, para. 13.

through the compilation and publication of documents on State practice. However, AUCIL was still at the stage of developing its working methods, and he urged the International Law Commission to bear with it and support it where possible.

26. One member of AUCIL was in charge of developing its working methods, including methods relating to the publicizing of its work. AUCIL was unclear, however, as to how many of its documents should be made public, as some documents were intended for African Heads of State and of Government, and the Assembly had to decide whether such documents could be issued publicly.

27. With regard to legal opinions, he pointed out that AUCIL was not tasked with giving legal advice but rather with preparing legal studies on matters of interest to the African Union, and it tended to take more of a doctrinal than an interpretative approach in such studies. In the case of the opinion that had been issued on the matter of Libya, some Commission members had been unhappy about the way in which the Commission had been approached for its opinion: it appeared that some of the requesting parties had anticipated a certain outcome that they could use to support a particular political position. Looking at the preparation of legal studies from that perspective made AUCIL seem more like a legal department than a collegial body of experts providing independent opinions. He noted also that the number of issues on which AUCIL was asked to give opinions was considerable, a situation that had the capacity to undermine its work. What was most important about the issuing of legal opinions was that it was intended to reflect an African perspective.

28. With regard to Mr. Murase's question as to how the work of AUCIL would be used outside the framework of the African Union, he said that AUCIL had no direct relations with the Sixth Committee. However, opinions issued by AUCIL could help the African States to consolidate their views on various issues in the United Nations, an important consideration, given that Africa represented one of the largest regional blocs within the Organization.

29. Mr. WAKO welcomed the establishment of AUCIL, which would encourage an "African reading" of issues of international law. International law was not confined to Africa, but was a global matter, and the contribution of African States to the development of international law would be enhanced by the work of AUCIL. He therefore hoped that the current visit by members of this African institution would be the first of many. In fact, AUCIL might well be better placed to determine State practice regarding issues of international law than the International Law Commission itself, which often encountered difficulty in eliciting information and views from States. Moreover, the international community itself was becoming truly global, and input from AUCIL in determining trends in international law would be very useful.

30. With regard to the subject of universal jurisdiction, for example, he recalled that at its eleventh ordinary session, the Assembly of the African Union had expressed the hope that the International Law Commission would take up that topic with a view to helping AUCIL to develop it.[287] He hoped that AUCIL would give priority to that topic, since an internationally uniform approach to serious international crimes would be more effective than addressing the issue through national standards, which tended to be more politicized.

31. With regard to the issuing of legal opinions, he acknowledged that that task was mandated by the AUCIL statute; he therefore wished to know how AUCIL differed from the African Court of Justice and Human Rights in that respect. He was pleased to note that the representatives of AUCIL had recognized the problematic nature of that particular task.

32. The relations between AUCIL and the International Law Commission could be improved in many areas, and exchanges of ideas on a number of topics could be useful. He urged AUCIL to submit its annual reports to the Commission, which already received the reports of such bodies as the Inter-American Juridical Committee and AALCO, much of whose work was similar to that of AUCIL. All those regional organizations had an important role to play in the progressive development of international law.

33. Mr. PETER also welcomed the visit by representatives of AUCIL but offered a word of caution: AUCIL was a young institution and could thus afford to be adventurous. It should not model itself on the International Law Commission but should do its own work; if anything, it might identify the contribution that Africa could make to the Commission. African countries had in fact contributed much to the development of international law, yet their contribution had largely gone unnoticed. For example, the concept of the exclusive economic zone, which was an important feature of the law of the sea regime, had been developed by the African States. Aspects of international humanitarian law such as alternative dispute settlement mechanisms and truth and reconciliation commissions also bore a distinctly African stamp.

34. He agreed with Mr. Tladi that AUCIL had a duty to encourage African States to be consistent in their approach to international law. States could not ratify an international instrument and then decide not to comply with it. AUCIL should be hard on States in urging compliance.

35. He acknowledged the challenges facing AUCIL. The first was funding, which was crucial to the its independence. Once regional institutions had been established, it was not right to look to outside sources to fund them, although he noted that the African Union was doing much better in supporting its own bodies. The other challenge was for AUCIL to retain its independence by not bowing to political pressures. In so doing, it would gain the respect of Africa and the world.

36. Mr. KAMTO wished to know how the members of AUCIL were selected and whether any member State of the African Union could propose an item for consideration.

---

[287] See Assembly of the African Union, eleventh ordinary session, 30 June–1 July 2008, Sharm El-Sheikh, Egypt, "Decisions, declarations, tribute and resolution" (Assembly/AU/Dec.193–207 (XI)), decision 199 (XI) on the report of the Commission on the abuse of the principle of universal justice (Doc. Assembly/AU/14 (XI)); available from http://au.int/en/decisions/assembly-african-union-eleventh-ordinary-session.

He also said that he would be grateful to have a copy of the AUCIL statute.

37. With regard to the work of AUCIL, he wished to know what form the outcome of studies done by special rapporteurs took: Did AUCIL issue reports or conclusions? He welcomed the information just provided on the way in which AUCIL intended to publicize the results of its work, for that information was important to legal scholars and to the International Law Commission. At the same time, since AUCIL was an independent expert body, he questioned the need to keep its work confidential.

38. State practice was very important in international law. Given the paucity of examples of African States practice available to the International Law Commission, he wondered whether African States were more responsive to AUCIL when it came to requests for examples of such practice. More generally, he wondered whether AUCIL planned to study the topics included in the agenda of the International Law Commission, as AALCO did.

39. Lastly, he shared Mr. Wako's concerns regarding the issuing of legal opinions: the question was one that merited careful study, as that task appeared to duplicate the work of the African Court of Justice and Human Rights, and AUCIL already had a very full agenda. As Mr. Wako had cautioned, there was always the risk that States could make use of such opinions for political ends.

40. Mr. HASSOUNA said that the establishment of AUCIL went hand in hand with the establishment of the African Society of International and Comparative Law and showed the importance that Africa attached to international law. He hoped that AUCIL would also study the topics considered by the International Law Commission and adopt views on them that it would then communicate to the Commission. Such important cooperation would enrich the Commission's own debates.

41. He noted that one of the items on the AUCIL agenda was the review of treaties. The question of why countries signed treaties and then failed to ratify them was a vexing one, not just for Africa but for the United Nations as well. He urged the African Union, through AUCIL, to exchange experiences with other regional and international organizations on that subject.

42. Lastly, he noted that the question of peace and security in Africa, which was of concern to AUCIL, was not an area of study for the International Law Commission, which endeavoured to avoid political issues, believing that political questions could create divisions among the membership. Yet if approached from a strictly legal point of view, the consideration of such questions could lead to the settlement of disputes, and he would be interested in hearing what success AUCIL had experienced in that area. He urged AUCIL and, more broadly, the African Union to maintain close coordination with the United Nations, which was the primary body having responsibility for peace and security in the world.

43. Mr. TCHIKAYA (African Union Commission on International Law) thanked Commission members for their questions regarding the work of AUCIL. He observed that most rules of international law applied in Africa since 1960 had been developed outside the region; thus the very existence of AUCIL was due to the fact that there was a need in the area of international law for a body that was connected to African realities and spoke for Africans.

44. He wished to assure Mr. Wako that the question of universal jurisdiction was under consideration in AUCIL, and a special rapporteur on that topic had been appointed.

45. AUCIL members were nominated by States, and their eligibility was determined in accordance with criteria set out in the AUCIL statute. The Executive Council, which was composed of African ministers of justice, then proceeded to a vote.

46. The work of special rapporteurs took the form of reports or studies that were discussed by Commission members; they were then approved by the Executive Council and transmitted to the Assembly for adoption. Any State could submit a topic for consideration; proposed topics were then approved by the Executive Council and the Permanent Representatives' Committee.

47. There was no reason why AUCIL could not consider topics on the agenda of the International Law Commission, particularly if they were of special interest to Africa. It was entirely possible for AUCIL to transmit its views on those topics to the Commission.

48. Discussions regarding the conditions for the publication of texts on the AUCIL website were currently under way,[288] but many documents were already available from the African Union website.

49. When the AUCIL statute had been drafted, it was unlikely that any thought had been given to the matter of whether AUCIL would be encroaching on the jurisdiction of what had been at the time the African Court on Human and Peoples' Rights if it gave advisory opinions. The fact that it could give advice meant that there were two possible sources from which a legal opinion could be sought. Like the International Law Commission, AUCIL was physically close to its parent organization. AUCIL met in Addis Ababa, the seat of the African Union, whereas the sessions of the African Court of Justice and Human Rights were held in Arusha, United Republic of Tanzania. To some extent, a parallel could therefore be drawn between the situation of the African Court of Justice and Human Rights and that of the International Court of Justice.

50. On issues specific to Africa, or requiring a purely African opinion, it was logical that the organs of the African Union should be able to seek the advice of AUCIL.

51. Mr. PETRIČ welcomed the establishment of AUCIL, which represented a major step towards the establishment of the rule of law in Africa and had worldwide implications. It was important to note, however, that the International Law Commission and AUCIL had different mandates. As a new body, AUCIL would be wise to draw on the 60 years of experience gained by the International Law Commission, but as it was operating in a completely different context it

[288] http://pages.au.int/category/special-pages/aucil.

should also explore new avenues. As a subsidiary body of the General Assembly, the International Law Commission had a fairly narrow mandate confined to the codification and progressive development of international law. While there were plenty of opportunities for cooperation between the two bodies in that sphere, institutional cooperation would be somewhat restricted by the main difference in their terms of reference—namely, that AUCIL could give advisory opinions in response to requests from individual States—and by the fact that its work had a substantial political dimension.

52. All the legal systems of the world were represented in the International Law Commission. The eight members of the Commission who hailed from Africa had made a substantial and very valuable contribution to the codification and progressive development of international law. He therefore wondered if there were other means by which AUCIL could help to ensure that ideas from Africa were incorporated in the work of the International Law Commission. Two possible ways in which AUCIL might contribute to the development of general international law would be to give active support to the African members of the International Law Commission and to encourage African States to respond more frequently to the questions that it directed to them.

53. Mr. KITTICHAISAREE said that he agreed with Mr. Peter that AUCIL must be independent and that Africa should contribute more to the field of international law because it was a continent rich in wisdom and human capability. South America had produced the Calvo Doctrine; why was there not something similar from Africa? As Mr. Murase had suggested, it might be useful for AUCIL to liaise more closely with AALCO. At the Third United Nations Conference on the Law of the Sea, AALCO had coordinated the position of African and Asian States on the exclusive economic zone. It had also done much to protect the rights and interests of landlocked and disadvantaged States and to secure equitable shares from deep-seabed mining.

54. Africa could best protect its interests if it had peace and internal stability. He therefore urged AUCIL to push for the rule of law in Africa as a means of forestalling the abuse of universal jurisdiction. If African States did enough to prosecute criminals in their own courts, there would be no need for the International Criminal Court to intervene. For that reason, he welcomed reports that the Government of Senegal had expressed its willingness to prosecute Hissène Habré, the former dictator of Chad, in its courts with the African Union's help.

55. Mr. GETAHUN (African Union Commission on International Law) said that he agreed with Mr. Kittichaisaree's comments regarding universal jurisdiction; while it was necessary to avoid politicization and the victimization of African officials, it was equally vital to fight impunity on the African continent. AUCIL was therefore directing its efforts at combating impunity by encouraging prosecution by national courts and the exercise of jurisdiction at the regional level.

56. The term "advisory opinion" did not appear anywhere in the AUCIL statute. The opinions of AUCIL could not be compared with the advisory opinions delivered by a court. AUCIL was an independent advisory organ that helped the other organs of the African Union to formulate policy. For that purpose, it conducted studies on legal matters of interest to the Union and its member States.

57. According to article 11 of the AUCIL statute, members were elected by secret ballot by the Executive Council. That decision was then referred to the Assembly for final approval. A maximum of two candidates could be proposed from each member State. Geographical distribution and gender representation had to be taken into account when electing new members to AUCIL.

58. There was no real danger that AUCIL would copy the work of the International Law Commission, because its history and mandate were completely different. AUCIL had to be innovative if it was to fulfil its responsibilities. Africa's contribution to international law could best be enhanced not only by cooperation between AUCIL and the International Law Commission but also through the conferences of the African Society of International and Comparative Law and various other mechanisms, such as meetings of ministers of justice and for foreign affairs.

59. The two Commissions had different agendas, but there were possible areas of overlap. For example, he had submitted a report to AUCIL on a model law on internally displaced persons. One of the sources he had consulted in order to define the term "disasters" had been the reports of the Commission's Special Rapporteur on the protection of persons in the event of disasters. While AUCIL did not systematically refer to the work of the International Law Commission, it did on some occasions use its texts as a resource.

60. The establishment of AUCIL and the studies it produced were not likely to fragment international law, but rather offered an opportunity for Africa to contribute actively to many areas of international law through the adoption of norms that represented radical progressive development. One example thereof was the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention). It was unlikely that such a binding instrument would ever be adopted at the level of the United Nations. Another example was the African Charter on Democracy, Elections and Governance, which had introduced to international law the principle that an unconstitutional change of Government must be rejected (art. 3, para. 10, and arts. 23–26).

61. AUCIL was trying to promote the integration of the African States by filling gaps in regional integration, harmonizing laws and regulating certain activities—in other words, by doing what was necessary to lay the foundations of a United States of Africa. It had developed procedures that allowed members to read special rapporteurs' reports before they were published. Once those reports had been formally adopted, they became Commission reports.

62. The number of questions raised at the current meeting showed that there was much that could be discussed by the two Commissions. While he was pleased that the process had been initiated, more regular, structured discussions about ideas rather than resources would be needed in the

future. The comments of the International Law Commission would be conveyed to AUCIL members, and he hoped that members of the International Law Commission would attend AUCIL meetings.

63. The CHAIRPERSON thanked the representatives of AUCIL for their visit and for their suggestions regarding ways to strengthen relations between the two Commissions.

Immunity of State officials from foreign criminal jurisdiction (*continued*) (A/CN.4/650 and Add.1, sect. A, A/CN.4/654)

[Agenda item 5]

PRELIMINARY REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

64. Mr. GEVORGIAN commended the Special Rapporteur for presenting her substantive preliminary report so soon after her appointment. The Commission and the previous Special Rapporteur had already done a substantial amount of important work on the topic. The Commission's further deliberations should be guided by the previous Special Rapporteur's thorough analysis of existing practice and theory. The appointment of a new Special Rapporteur should not lead the Commission to change tack, as disregarding earlier work would be a pointless waste of resources.

65. Turning to the substantive questions raised in the report, he said that as far as methodology was concerned, he supported the distinction drawn between immunity *ratione personae* and immunity *ratione materiae*. Fortunately, there was a consensus within the Commission on that matter. That distinction would make it possible to tackle the subject in an orderly manner and to take account of the specific legal regime of each category. He agreed with Mr. Forteau, Mr. Nolte and Sir Michael that paragraph 57 of the report dwelt too much on the "functional nature" of the immunity of State officials from foreign criminal jurisdiction. As Mr. Murphy and a number of other speakers had rightly pointed out, immunity was also underpinned by the important principles of the sovereign equality of States and non-interference in internal affairs. The functional nature of immunity *ratione materiae* had to be seen from that perspective.

66. He agreed with the Special Rapporteur's suggestion that the Commission should adopt a phased approach. Dividing issues into groups and proceeding step by step would not prevent the Commission from gaining an overall picture or a clear idea of the direction to take.

67. The Commission's future work would have to take the form of draft articles of a convention. There was no other option, since it was too difficult an issue to be dealt with in guidelines or through "soft law". He had been struck by Mr. Park's reference to the United Nations Convention on Jurisdictional Immunities of States and Their Property. Unlike Sir Michael, who thought that the failure to secure enough ratifications for that Convention to enter into force was due to the fact that domestic ratification procedures were extremely complex, he personally believed that it was due to the fact that the Convention touched on a matter that was too sensitive for many States. He did not know of any Government that would officially proceed on the assumption that States had absolute immunity. While there was general agreement that State immunity was functional in nature, States were apprehensive about becoming a party to a binding legal instrument. The Commission found itself in a tricky situation because it was dealing with a difficult subject that straddled the border of functionality and non-functionality.

68. In the context of possible restrictions on immunity, the Special Rapporteur had referred a number of times in her report (e.g. paras. 29 and 60) to the need to bear in mind and to accept "new aspects of international law related to the effort to combat impunity" and to "a tendency to limit immunities" (para. 29). It was true that a trend towards the restriction of immunity was clearly emerging, but it was reflected in the existence of international courts and their action, notwithstanding the long hiatus between the Nuremberg Tribunal and the establishment of the more recent international criminal tribunals. A reverse trend could be discerned when cases were referred to national courts. When attempts had been made in Spain, Belgium and the United Kingdom to prosecute foreign Heads of State, internal legislation had been adopted to restrict that possibility.

69. As far as a general trend was concerned, the judgment of the International Court of Justice in the case concerning *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, which was of significance for the Commission's future work on the topic, had upheld the existing international legal rule and the position taken by the Court some years earlier in the cases concerning the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* and *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*.

70. As the Special Rapporteur had pointed out, the Commission had to premise its consideration of the topic on certain values, such as the stability of international relations and the fight against impunity. While those were complex values at the political and philosophical levels, at the legal level they were extremely complex. It was easy to say "no peace, no justice", but that maxim had not always prevailed. Of course, he subscribed to that view, but putting theory into practice might prove difficult. The Commission needed to find the delicate balance between the two.

71. The immunity of a State official from foreign criminal jurisdiction meant immunity from criminal proceedings, but not from the substantive law of a foreign State and still less from the law of the State that that official had been serving. Hence, the existence of immunity did not mean that it was impossible to initiate or pursue criminal investigations and proceedings at the national level against a given high official. Of course, the State that the official enjoying immunity was serving or had been serving would always face a serious dilemma when that person was about to be prosecuted by a foreign court, namely whether it should invoke immunity with regard to the acts of which a Head of State stood accused, in which case they would become acts of the State itself, with all the consequences that would entail.

72. He supported the proposal made by the Special Rapporteur in paragraph 63 of her report that the Commission should consider the question of whether immunity *ratione personae* could be extended to persons other than the troika. That circle could certainly be widened, not by listing the persons in question, but by establishing particular categories. As far as immunity *ratione materiae* was concerned, the Commission would have to look for objective criteria for determining what constituted an "official act".

73. As to whether the topic should be approached from the perspective of codification or progressive development, he agreed with Mr. Murphy that the formulation of rules *de lege ferenda* was a very serious matter of legal policy that called for an extraordinarily careful approach, and he also agreed with Mr. Huang and Sir Michael that the Commission must be extremely cautious about any progressive development of international law in that respect. As there had been no unanimity in the Sixth Committee or in the Commission as to whether the latter should consider the topic with a view to progressive development, it would be sensible, as suggested in the report, to start by codifying existing rules of international law and only then to move on to the progressive development of "grey areas" or issues that were insufficiently regulated but on which there was consensus or wide agreement.

The meeting rose at 12.40 p.m.

3147th MEETING

Friday, 20 July 2012, at 10.05 a.m.

Chairperson: Mr. Lucius CAFLISCH

Present: Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gevorgian, Mr. Gómez Robledo, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Wako, Mr. Wisnumurti.

Immunity of State officials from foreign criminal jurisdiction (*concluded*) (A/CN.4/650 and Add.1, sect. A, A/CN.4/654)

[Agenda item 5]

PRELIMINARY REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

1. The CHAIRPERSON invited the Commission to continue its consideration of the preliminary report of the new Special Rapporteur on the immunity of State officials from foreign criminal jurisdiction. He gave the floor to Ms. Escobar Hernández to resume the debate on that topic.

2. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) thanked the members of the Commission for their reception of her preliminary report and for their constructive comments. Before turning to methodological considerations and the workplan, she would first summarize the points made with regard to substantive issues.

3. At the outset, it should be emphasized that all the members were in favour of maintaining a distinction between immunity *ratione personae* and immunity *ratione materiae*. At the same time, they recognized that both had a functional dimension, which was founded on the desire to preserve the sovereign equality of States and the stability of international relations. As far as some members were concerned, the attribution of immunity *ratione personae* to the highest-ranking State officials or representatives was justified by the fact that the latter represented or even personified the State, but at least one member contested that argument on the reasoning that the concept of State personification was no longer compatible with the modern principle of State sovereignty based on the people.

4. With regard to immunity *ratione personae*, a number of members were in agreement that its scope must be limited to the so-called troika: Heads of State, Heads of Government and ministers for foreign affairs. However, some members had reservations about granting immunity to ministers for foreign affairs; others, conversely, did not rule out the possibility of extending immunity to other high-level government officials whose mandates involved foreign relations. On the other hand, reservations were expressed about such an extension itself, in view of the difficulty of categorizing persons whose functions were governed by the national law of each State. In any event, there was general agreement that a system of lists was not workable and that it was preferable to establish criteria for the possible extension of immunity *ratione personae* to persons other than the troika, since such an extension could, moreover, be limited to specific periods or circumstances, such as special missions. A large number of members felt that the main criterion for determining who could enjoy immunity *ratione materiae* was the official or non-official nature of the act in question. In addition, the use of the expression "State officials" to designate those who enjoyed immunity appeared to have garnered the most votes.

5. The concept of an "official act" had itself elicited particular attention, and some members were of the view that it had implications not only for immunity *ratione materiae* but also for immunity *ratione personae*. It was emphasized that an official act was necessarily carried out on behalf of the State and in the exercise of the functions assigned to one of its representatives. All were in agreement that it was important to define the term "official act" in order to determine the scope of immunity, yet the definition itself was controversial. It was therefore necessary to identify which criteria could be used to characterize an act as "official". To that end, several members recommended using the criteria set out in the articles on responsibility of States for internationally wrongful acts[289] and the United Nations

[289] General Assembly resolution 56/83 of 12 December 2001, annex. The draft articles adopted by the Commission and commentaries thereto appear in *Yearbook … 2001*, vol. II (Part Two), paras. 76–77.