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Held at the Palais des Nations, Geneva, on Tuesday, 16 July 2019, at 3 p.m.

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Present:

Chair:	Mr. Šturma
Members:	Mr. Al-Marri
	Mr. Argüello Gómez
	Mr. Aurescu
	Mr. Cissé
	Ms. Escobar Hernández
	Ms. Galvão Teles
	Mr. Gómez-Robledo
	Mr. Grossman Guiloff
	Mr. Hassouna
	Mr. Hmoud
	Mr. Huang
	Mr. Jalloh
	Mr. Laraba
	Ms. Lehto
	Mr. Murase
	Mr. Murphy
	Mr. Nguyen
	Mr. Nolte
	Ms. Oral
	Mr. Ouazzani Chahdi
	Mr. Park
	Mr. Rajput
	Mr. Ruda Santolaria
	Mr. Saboia
	Mr. Tladi
	Mr. Valencia-Ospina
	Mr. Vázquez-Bermúdez
	Mr. Wako
	Sir Michael Wood
	Mr. Zagaynov

Secretariat:

Mr. Llewellyn	Secretary to the Commission

The meeting was called to order at 3.10 p.m.

Immunity of State officials from foreign criminal jurisdiction (agenda item 2) (*continued*) (A/CN.4/722 and A/CN.4/729)

Mr. Nguyen said that he wished to express his sincere gratitude to the Special Rapporteur for her extensive work in preparing the sixth and seventh reports on the topic "Immunity of State officials from foreign criminal jurisdiction" (A/CN.4/722 and A/CN.4/729) and for her oral introduction the previous day, which had provided a solid foundation for the Commission's discussion.

Due to time constraints, he would focus his comments on some general points raised in the seventh report, as he had already made initial comments on the sixth report at the previous session.

Draft article 7 had been a key focus of debates in the Sixth Committee. Delegations had generally been in favour of an examination of procedural provisions and safeguards relating to the immunity of State officials from foreign criminal jurisdiction, an area that had not been addressed extensively in the relevant literature and jurisprudence. Clarification of the procedural aspects of the immunity of State officials from foreign criminal jurisdiction was crucially important at the current juncture for three reasons. First, immunity was procedural in nature. Secondly, consideration of procedural aspects informed draft article 7. The non-application of immunity *ratione materiae* from the exercise of foreign criminal jurisdiction in some specific cases must be examined in conjunction with the procedural aspects of such immunity. Procedural safeguards facilitated the fair and effective application of the immunity of State officials, including the exemptions envisaged in draft article 7. Paragraph 31 of the sixth report confirmed that the application of that draft article should be understood in the light of the procedural rules on the application of immunity. Thirdly, consideration of procedural aspects furthered the promotion of the Commission's previous work on immunity issues. The Special Rapporteur had added new elements of procedural safeguards to the so-called traditional procedural elements of consideration, invocation and waiver of immunity: namely, notification, exchange of information, transfer of criminal proceedings, consultations and the concept of a fair and impartial trial.

The mechanism of immunity could be likened to a vaccine produced by States to protect the stability of the international order, grounded in respect for the sovereign equality of States. There was a diversity of national procedural law and practice on criminal jurisdiction. The timing of consideration or determination of immunity differed depending upon the capacity, internal structure and legal culture of each national system, an example in that regard being the Criminal Procedure Act of the Republic of Korea mentioned by Mr. Park at the previous meeting. Timely, clear and exclusive guidance on the international procedural aspects of the immunity of State officials from foreign criminal jurisdiction was an important requirement. Any study conducted with a view to producing such guidance must identify common elements on the matter in order to develop fair and effective international procedural safeguards for the immunity of State officials from foreign criminal jurisdiction.

One such common element was the distinction between immunity *ratione personae* and immunity *ratione materiae*. Obviously, a variety of different procedural rules, applicable according to the roles of different officials and their respective duties, was necessary. That question was also raised by the Special Rapporteur in paragraphs 44 and 52 of the seventh report. Separate procedural safeguards applied in respect of the immunity of incumbent Heads of State, Heads of Government and Ministers for Foreign Affairs. They were entitled to absolute immunity *ratione personae* and inviolability from the criminal jurisdiction of foreign courts. Such immunity covered all acts performed by them, whether in a private or official capacity, during or prior to their term of office. It continued to apply even when they were alleged to have committed acts constituting international crimes. That customary rule had been confirmed by jurisprudence, in particular in the case concerning the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*. Immunity *ratione personae* was automatically triggered as soon the above-mentioned officials took office, and the international community was notified of their status through

diplomatic channels. Obviously, the procedural requirements of consideration, determination or invocation of immunity *ratione personae* for Heads of State, Heads of Government and Ministers for Foreign Affairs were not necessary or at least their specific status involved another procedure. In paragraph 42 of the seventh report, the Special Rapporteur noted that "the immunity of Heads of State and Heads of Government must be assessed *proprio motu* by the courts of the forum State". She also stated in paragraph 58 that "invocation is designed only as a procedural requirement in relation to immunity *ratione materiae*", and in paragraph 95 that "in the case of immunity *ratione personae*, non-invocation of immunity cannot under any circumstances be taken as a waiver of immunity". Paragraph 143 again recognized the difficulty of transferring criminal proceedings involving immunity *ratione personae*, since the courts of the forum State had virtually no margin of discretion when determining the immunity from criminal jurisdiction of incumbent Heads of State, Heads of Government and Ministers for Foreign Affairs. The troika was a symbol of the sovereign State. Consequently, no State would consider surrendering its Head of State to another State for the purpose of prosecution before the court of a foreign State or even to the International Criminal Court. Two factors came into play in that regard: symbolic sovereignty and the principle of non-intervention. The hesitation of States to accede to the Rome Statute of the International Criminal Court in recent years showed that to be true. It was also demonstrated by the decision of some States to withdraw from the Statute. In Asia, the Philippines and Malaysia had withdrawn from the Rome Statute to stop any possible investigation into their Heads of State. Under those circumstances, the incumbent troika would be tried only in the event of a change of regime or waiver of the official's immunity by the State. However, cases of a waiver of immunity *ratione personae* were rare. Such a waiver had occurred in respect of the former President of the Philippines, Ferdinand Marcos, when, in 1988, the Government of the Philippines had waived his immunity in legal proceedings before a United States district court on the grounds that his illegal activities had been performed in the territory of the Philippines, but not in the territory of the forum State. He noted that in 2001 the Institute of International Law had passed a resolution entitled "Immunities from Jurisdiction and Execution of Heads of State and of Government". Draft articles 3 and 4 dealt with immunity *ratione personae*, while draft articles 5 and 6 provided for immunity *ratione materiae*. Accordingly, it was better to have a separate draft article on the procedural aspects of immunity *ratione personae* applicable to Heads of State, Heads of Government and Ministers for Foreign Affairs. Otherwise, as noted previously by Mr. Hmoud, Mr. Murase and Mr. Park, the analysis contained in paragraphs 49 and 50 must be developed to clarify the different procedural aspects applicable to different types of State officials, namely the troika, diplomats and members of special missions, functional State officials and others.

Immunity *ratione materiae* was accorded to State officials who performed their functions in an official capacity. In allowing holders of official or diplomatic passports to enter its territory, a forum State agreed to create favourable conditions for them to perform their functions. From that perspective, one of the two principal factors for determining immunity on the grounds of customary or treaty-based rules was triggered as soon as such persons passed the border checkpoints. The status of State officials was known and recognized. The courts and other authorities of the forum State were aware of the rights and interests of foreign State officials and took them into consideration in any decisions that could have an impact on the inviolability of those persons. Consideration of the immunity of State officials reflected the sovereign equality of jurisdictions. Consideration of immunity differed from determination of immunity inasmuch as it related to the identification of the function of State officials. The former could take place at the pretrial stage, in preparatory investigations, when coercive or judicial measures had not been taken. It did not preclude a preparatory investigation, but the authorities of the forum State needed to exercise caution with respect to any decision involving a foreign official. Regarding the determination of immunity in judicial proceedings, when, in the light of the established evidence, a formal accusation was brought against a foreign official for an illegal act under the applicable law of the forum State, the national courts of the forum State would determine the level of applicable immunity. The aim in so doing was to allow immunity to be considered and applied as early as possible, regardless of whether it had been invoked or waived. While a State could invoke or waive immunity, those actions did not prevent the consideration of immunity at the earliest time possible. In that regard, he supported the

approach of the Special Rapporteur in having two draft articles, on consideration of immunity and determination of immunity, with an indication that immunity should be considered at an early stage of the proceedings. While the last word in a determination of immunity lay with the judicial organ of the forum State, the executive authorities could be involved in the consideration and determination of immunity. A trend towards including consideration of immunity at the early stages of the criminal process would ensure respect for the safeguards applicable in respect of State officials. However, it would also affect the freedom of national courts in fighting impunity. That nuance must be clarified in the commentary.

In her summary of the debate in the Sixth Committee in 2018, the Special Rapporteur, in paragraph 12 of the seventh report, recognized the concern expressed by States in relation to the need to clarify the relationship between the immunity of State officials from foreign jurisdiction and peremptory norms of international law (*jus cogens*) and the trend, in practice, to exclude international crimes from the application of immunity *ratione materiae*. That question was briefly touched upon in paragraph 102 of the seventh report, where the Special Rapporteur explained that the reason for not considering that concern in the report was because it had become "meaningless once the Commission provisionally adopted draft article 7". The same argument was used in paragraphs 132 and 144 on procedural provisions on the exchange of information and transfer of criminal proceedings. He regretted that the question had not been elaborated upon, especially given that the Commission had recently adopted on second reading its draft articles on crimes against humanity and on first reading its draft conclusions on peremptory norms of general international law (*jus cogens*). He recalled that in the Commission's debate on the topic in 2017 Sir Michael Wood and Mr. Murphy had both highlighted the need for procedural safeguards and that during that debate Mr. Nolte had stated that exceptions to immunity were inextricably connected with procedural safeguards. During the current debate, Mr. Hmoud, Mr. Park, Mr. Tladi and Mr. Murphy had noted the need to have specific procedural safeguards and guarantees for the application of the exceptions set out in draft article 7. States should consider the invocation and waiver of immunity in cases where the most serious crimes of concern to the international community as a whole had allegedly been committed by their agents.

Regarding draft article 10 (1), according to which "a State may invoke the immunity of any of its officials from foreign criminal jurisdiction before a State that intends to exercise jurisdiction", it should be borne in mind that the requirement of respect for the State immunity of incumbent Heads of State, Heads of Government and Ministers for Foreign Affairs of a foreign State should be enforced by a forum State, including by its national courts, at any time when those officials were present abroad. The immunity of the troika was automatic and did not need to be invoked. Any violation of that special status would meet with diplomatic objection. Therefore, the special treatment of the troika should be dealt with separately in draft article 10 (1) or clarified in the commentary.

Regarding draft article 11 (1), in order to underline the interconnection between draft article 7 and the waiver of immunity, consideration should be given to the wording of article II (3) of the 2009 Institute of International Law resolution entitled "Immunity from Jurisdiction of the State and of Persons Who Act on Behalf of the State in case of International Crimes" and to the proposal made by Mr. Nolte in the Commission's 2017 debate. The paragraph could be recast to read: "A State may waive the immunity of its officials from foreign criminal jurisdiction, particularly in the case where the most serious crimes of concern to the international community as a whole are allegedly committed by their agents".

Regarding draft article 12 (1), consideration should be given to the replacement of the words "shall notify" with "should notify". He agreed with the Special Rapporteur on the importance of notification so as to allow the State of the official to consider invoking immunity. However, neither practice nor treaties imposed any obligation on the forum State to notify the State of the official of its intention to exercise criminal jurisdiction over the official. Draft article 12 (2) could also include a reference to making a request to the State concerned to waive the official's immunity in cases where the most serious crimes of

concern to the international community as a whole had allegedly been committed by its agent.

Regarding future work, he supported the inclusion in the draft articles of two new issues: the definition of a mechanism for the settlement of disputes between the forum State and the State of the official; and the preparation of guidance on procedural aspects of the immunity of State officials from foreign jurisdiction. There were some questions in the relation to the State of the official and forum State that remained unclear in the draft articles. In that regard, guidelines were required on settling disputes between the States concerned regarding the abusive denial of the immunity of the State official by the authorities of the forum State, especially with regard to the implementation of draft article 7. Moreover, there were no procedural guidelines for dealing with cases involving the transfer of criminal proceedings where, instead of accepting the request of the forum State to transfer the criminal to the State of the official, the latter requested the forum State to surrender its official to the International Criminal Court in accordance with the principle of complementarity. The need to include new issues and to consult the recent judgment of the Appeals Chamber of the International Criminal Court in relation to the non-compliance by Jordan with the request by the Court for the arrest and surrender of Omar Al-Bashir meant that more time would be required to complete the draft articles. The Special Rapporteur's proposal to finish the first reading in 2020 was therefore apt.

To conclude, he supported the referral to the Drafting Committee of draft articles 8 to 15 and the annexes contained in the seventh report.

Mr. Al-Marri said that the Special Rapporteur's well-researched seventh report addressed a number of important issues that had remained pending for some time, including the requirement of invocation of immunity by the State of the official. Draft article 10 clarified procedural and substantive matters in that respect, namely that invocation of immunity was a power of the State of the official which could be exercised, save in expressly excluded cases; that invocation was not a procedural requirement for the courts of the forum State to consider the immunity of the State or of one of its officials from jurisdiction; and that the courts of the forum State should assess and decide *proprio motu* on the immunity of State officials.

Draft article 11, which dealt with the important issue of waiver of immunity, made clear that for such waivers to operate they must be express and unequivocal. Waiver of immunity from foreign criminal jurisdiction was irrevocable and could not be derived from general treaty provisions, such as the obligation on States parties to exercise jurisdiction in respect of certain crimes and the obligation to cooperate with an international criminal court.

The report dealt at length with the need to encourage States to cooperate with the International Criminal Court and other national and international tribunals by waiving, as appropriate, any immunity the concerned State officials otherwise might enjoy under international law in cases involving international crimes, such as genocide, crimes against humanity or serious war crimes and aggression. He shared the view that any proposal by the Commission in that regard should be couched in the form of a recommendation, bearing in mind the strong views held by States and the sensitivity of the subject matter.

The report contained various new proposals on procedural safeguards that both the Commission and States considered essential to prevent politically motivated or abusive exercise of jurisdiction against foreign officials. That aspect was particularly relevant in the context of consideration of draft article 7, provisionally adopted by the Commission, which provided for an exception and automatic denial of immunity to State officials in the case of international crimes.

Mr. Aurescu said that he agreed with much of what had been said in relation to ensuring the right balance between the legal positions and interests of the State of the official and of the forum State, as well as the issue of procedural guarantees in connection with draft article 7. He would focus his comments on those proposed draft articles that, in his view, required some modification. He generally agreed with the Special Rapporteur's proposals in respect of the other draft articles, although he reserved the right to intervene in the Drafting Committee.

Concerning draft article 10 on the invocation of immunity, the report examined the question of whether it was the State of the official that was required to invoke immunity before the authorities of the forum State or it was the forum State that had an obligation to consider immunity *proprio motu*. In answering that question, a distinction was made between immunity *ratione personae* and immunity *ratione materiae*. The Special Rapporteur concluded that, in the case of immunity *ratione personae*, the invocation of immunity by the State of the official was not necessary, whereas for immunity *ratione materiae* it was. Paragraph 50 of the report cited three reasons why immunity *ratione materiae* should be applied only if the State of the official invoked it: the fact that an individual possessed immunity *ratione materiae* was not always known to the organs of the forum State and so they could not necessarily consider immunity *proprio motu*; the interest of the State in defending the immunity *ratione materiae* of its officials could not be presumed in the same manner as for immunity *ratione personae*; and requiring invocation by the State was not an excessive burden and was not incompatible with the purpose of immunity or the principle of sovereign equality.

In his view, such a differentiated regime for immunity *ratione personae* and immunity *ratione materiae* was not justified, and he was not convinced that the application of immunity *ratione materiae* should depend on invocation by the State of the official. He had two reasons for that view, one theoretical and one practical. First, since immunity *ratione materiae* covered acts performed by officials in their official capacity, there was no reason to presume that a State had less of an interest in invoking it than in invoking *ratione personae*. On the contrary, both forms of immunity were based on the sovereign equality of States and had the same rationale – protecting the rights and interests of the State. Second, he had doubts as to how efficient such a regime would be in practice. As was rightly pointed out in the report, in order for the State of the official to be able to invoke immunity, the forum State had to communicate its intention to exercise jurisdiction. If the forum State was in any case the trigger mechanism for the entire procedure, there was no reason for it not also to consider, *proprio motu*, immunity *ratione materiae* as soon as it became aware of the status of the official and notified the State of the official of its intention to exercise jurisdiction.

He saw merit in the Special Rapporteur's argument that the organs of the forum State were not well equipped to know whether the alleged acts had been carried out in an official capacity or whether the individual had enjoyed immunity *ratione materiae* at the time the acts had been committed. However, he believed that those concerns could be addressed through exchanges of information and/or consultations between the two States, as envisaged by draft articles 13 and 15.

If that regime – which he did not support – was nonetheless retained, some changes would have to be made to the text of draft article 10. He had four comments in that regard. First, it was not readily apparent from the text of draft article 10 that a differentiated regime existed for immunity *ratione materiae* and immunity *ratione personae*; that distinction was discernible only on reading paragraph 6 – the last paragraph of the draft article. He would therefore propose that the distinction should be made clear at the outset. Second, the effects of the differentiated regime were not clearly spelled out. As the implications of that regime were significant, it should be stated more explicitly that immunity *ratione materiae* became applicable only if the State of the official invoked it and that the forum State had an obligation to consider immunity only if it was invoked. Third, as currently drafted, paragraph 4 seemed to suggest that the diplomatic channel was a sort of secondary means of invoking immunity, whereas it was quite widely used in practice. His proposal was thus to delete the word "preferably" in the first sentence and the word "also" in the second sentence and to recast the paragraph to read: "Immunity shall be invoked through the procedures established in cooperation and mutual judicial assistance agreements to which both States are parties, or through other procedures commonly accepted by said States, as well as through diplomatic channels." Fourth, paragraph 6 of draft article 10 appeared to be in conflict with paragraph 1 of draft article 8, which required the competent authorities of the forum State to consider immunity as soon as they became aware that a foreign official might be affected. Draft article 8 (1) made no distinction as far as immunity *ratione materiae* and immunity *ratione personae* were concerned.

Concerning the competence to invoke immunity, it was stated in paragraph 54 of the report that "it should be concluded that immunity can only be invoked by the State and not by the official". In his view, while it was clear that the decision to invoke immunity was to be taken by the State and not by the official concerned, it could not be ruled out that the State might instruct the official to inform the forum State of the decision to invoke immunity. The invocation by the official of his or her immunity should trigger at least a presumption that he or she enjoyed immunity, and so the forum State had to act accordingly.

With regard to the effects of late invocation, it was mentioned in paragraph 64 of the report that if the State official invoked immunity at a later stage, it should be concluded that "acts that would have been performed by the authorities of the forum State would be valid and may not be considered a violation of the immunity of the official affected by said acts from foreign criminal jurisdiction". In his view, that was not entirely accurate: a difference should be made between the validity of such acts performed by the forum State and the fact that they could not be seen as violating the immunity of the official. If the second part of that thesis was correct, the validity of the acts in question should be affected retroactively by the invocation of immunity, especially if the State of the official had invoked immunity at a later stage because it had not been aware of the intention of the forum State to exercise its jurisdiction.

Turning to draft article 11 and the issue of the waiver of immunity, he said that the report first set out the rule that waiver must be express, a rule which, according to the report, was reflected not only in the Commission's previous work and in international conventions but also in national laws relating to immunity. However, the only reference to national law was to an organic act of Spain, which provided for express waiver for the members of the troika. While he understood that State practice might be limited in that area, he would have been interested to know whether any States other than Spain provided for express waivers in their national laws and whether certain States recognized implicit waivers and, if so, under which circumstances.

After laying down that waiver must be express, the report examined three possible exceptions in the form of implied waivers: when the State of the official accepted the jurisdiction of the forum State over its official; when the State of the official became a party to a treaty that obliged States parties to exercise criminal jurisdiction over foreign nationals; and when the State did not invoke the immunity of its official after being notified of the forum State's intention to exercise jurisdiction. Under each of those possible exceptions, the report envisaged certain situations in which a waiver of immunity could be deduced. However, some of those scenarios were not reflected in draft article 11, while others needed further clarification.

As to the acceptance of the jurisdiction of the forum State, in paragraph 86 of the report the Special Rapporteur stated that the waiver could be implied if a State denounced its official and requested the forum State to initiate proceedings against him or her. There might be other similar exceptions, for example where the State extradited its official to the forum State. Draft article 11 did not seem to cover such scenarios. Paragraph 4 thereof did not recognize the possibility of deducing the waiver from an acceptance of jurisdiction and paragraph 2 even seemed to exclude it.

As to the second exception – the obligation to exercise criminal jurisdiction – it was noted in paragraph 87 of the report that the waiver could be deduced from a treaty that imposed an obligation on States parties to cooperate in an unrestricted manner to prosecute any person who was subject to their jurisdiction, including State officials. While that scenario was reflected in paragraph 4 of draft article 11, it could be further clarified in the commentary. For example, an explanation could be provided as to what qualified as a "clear and unequivocal" waiver or what was meant by cooperating "in an unrestricted manner". He noted in that connection that in Security Council resolution 1593 on the referral of the situation in Darfur to the International Criminal Court, it had been stipulated that the Government of Sudan "shall cooperate fully" with the Court. One of the Pre-Trial chambers of the Court had interpreted such cooperation as an implied waiver, but that interpretation had been the subject of much debate.

With regard to the third exception – failure to invoke immunity – according to paragraph 94 of the report, in some cases, non-invocation of immunity had been taken as an implied waiver. The Special Rapporteur argued that failure to invoke immunity *ratione materiae* could only be interpreted as a waiver if the State of the official was aware that the authorities of the forum State intended to exercise jurisdiction over its official, whom it considered to enjoy immunity, and nevertheless remained inactive. The distinction between waiver and non-invocation of immunity was blurred when it came to immunity *ratione materiae*. It was not clear whether the two had different legal effects and at what point failure to invoke immunity turned into a waiver and became irrevocable. In his opinion, it was imperative for those issues to be clarified and for the effects of a failure to invoke immunity versus the effects of an implied waiver to be made explicit in the draft articles.

He proposed that the second part of paragraph 2 of draft article 11 – "and shall mention the official whose immunity is being waived and, where applicable, the acts to which the waiver pertains" – should be deleted and moved to the commentary. Draft paragraph 2 would then simply read: "Waiver shall be express and clear". That change would broaden the scope of the paragraph, allowing it to cover both express waivers made by way of a note verbale, letter or non-diplomatic document, and those made by way of a treaty provision, in which case it would be impossible to mention the official whose immunity was being waived or the acts to which the waiver pertained. As to paragraph 3, he reiterated the comments made in relation to paragraph 4 of draft article 10 that diplomatic channels should not be treated as a secondary means of communicating the waiver.

He agreed with the proposal in draft article 12 to impose an obligation on the forum State to notify the State of the official of its intention to exercise criminal jurisdiction. As the Special Rapporteur rightly concluded in paragraph 127, the notification of the State of the official was a basic requirement to ensure the proper application of the regime governing immunities. While he fully supported draft 12, it would be useful to consider limiting the scope of the obligation to notify in cases where notification could create a risk that victims and potential witness might be harmed or evidence damaged, tampered or interfered with, or that the official might abscond. That language was inspired by article 18 (1) of the Rome Statute. It would also be appropriate to indicate that the notification should be subject to the conditions of confidentiality stipulated by the forum State, where applicable, mirroring draft article 13 (5). On paragraph 3, he had the same comments and suggestions that he had made in connection with draft article 10 (4) and draft article 11 (3).

Draft article 14 provided that the forum State could consider declining to exercise jurisdiction in favour of the State of the official and instead transfer the criminal proceedings to the State of the official. While he supported the inclusion in the draft articles of such a provision, it was important to consider including certain restrictions in order to limit the transfer of proceedings in certain situations, in particular when the State of the official was unwilling or unable genuinely to investigate or prosecute the official. That language was inspired by article 17 of the Rome Statute.

The case against the former Vice-President of Angola before the Lisbon Court of Appeal, referred to in paragraphs 145 to 147 of the report, illustrated that issue to some extent. The report also hinted at it in paragraph 149, when it referred to the complementarity regime before the International Criminal Court, but did not elaborate on the issue. In his view, draft article 14 should restrict the regime governing the transfer of proceedings in situations where the perpetrator was an official who enjoyed immunity from foreign criminal jurisdiction and there was a real, concrete risk that he or she would not be held accountable by his or her own State; and where the balance between accountability and the sovereign equality of States weighed in favour of the former. The possibility of refusing the transfer when the State of the official was unwilling or unable genuinely to investigate or prosecute was only relevant in situations concerning immunity *ratione materiae* where the forum State had found that immunity did not apply. In such situations, the alleged criminal act was either one of those listed in draft article 7 or an act which, by definition, had not been performed in an official capacity. As the criminal act was not an official act, there was less of a need to uphold the principle of the sovereign equality of States. The current hypothesis considered in draft article 14 concerned the situation where

the forum State took steps to initiate the transfer of proceedings, but in his view the situation where the State of the official requested the transfer should also be taken into account.

He supported the inclusion of draft article 16 on fair and impartial treatment of the official. The Commission might even consider providing a non-exhaustive list of rights considered to be the most important in enabling the State of the official to claim immunity from jurisdiction, namely the right to be informed promptly and in detail of the nature and content of the charge; the right to counsel; the right to have the assistance of an interpreter and such translations as were necessary to meet the requirement of fairness; and the right to communicate with and receive visits from diplomatic and/or consular representatives of the State.

Paragraph 3 of draft article 16, on the obligation of the forum State "to inform the nearest representative of the State of the official, without delay, of such person's detention or any other measure that might affect his or her personal liberty", needed to be carefully correlated with the content and purpose of draft article 12 on the notification of the State of the official of the intention to exercise jurisdiction. In fact, the detention or other measures affecting the liberty of a foreign official often represented an implicit indication of the intention of the forum State to exercise jurisdiction. That could also be inferred from the wording of draft article 8 (3): "immunity shall, in any case, be considered if the competent authorities of the State intend to take a coercive measure against the foreign official".

In conclusion, he said that he looked forward to discussing in the Drafting Committee the proposed draft articles in the light of the comments and suggestion made.

The meeting rose at 4.10 p.m.