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For participants only

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International Law Commission

Seventy-first session (second part)

Provisional summary record of the 3483rd meeting

Held at the Palais des Nations, Geneva, on Wednesday, 17 July 2019, at 10 a.m.

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Immunity of State officials from foreign criminal jurisdiction (*continued*)

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Present:

<i>Chair:</i>	Mr. Šturma
<i>Members:</i>	Mr. Al-Marri
	Mr. Argüello Gómez
	Mr. Aurescu
	Mr. Cissé
	Ms. Escobar Hernández
	Ms. Galvão Teles
	Mr. Gómez-Robledo
	Mr. Grossman Guilloff
	Mr. Hassouna
	Mr. Hmoud
	Mr. Huang
	Mr. Jalloh
	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
	Mr. Zagaynov

Secretariat:

Mr. Llewellyn	Secretary to the Commission
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The meeting was called to order at 10.05 a.m.

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

Mr. Nolte said that, although the Special Rapporteur's well-structured seventh report on immunity of State officials from foreign criminal jurisdiction (A/CN.4/729), read together with the sixth report (A/CN.4/722), contained much valuable material and made some useful proposals on a number of important points, it unfortunately failed to address one major issue, namely procedural safeguards in relation to the subject matter of draft article 7, entitled "Crimes under international law in respect of which immunity *ratione materiae* shall not apply". For that reason, his statement would consist of two parts: the first part would address the relationship of the sixth and seventh reports to draft article 7, and the second would comment on those reports themselves.

The Sixth Committee's debates during the seventy-second and seventy-third sessions of the General Assembly had shown that it was important to address the relationship of the sixth and seventh reports to draft article 7. The Special Rapporteur's statement in paragraph 12 of the seventh report that "the inclusion of the draft article and its content received broad support from States, regardless of whether they considered said precept a proposal of *lex lata* or of *lex ferenda*" was not the right point of departure for the Commission's discussion of the proposals contained in the seventh report.

In the debates in the Sixth Committee, about half of the States had expressed a positive view of the draft article and half had expressed a negative view. A clear majority of States had opposed the suggestion that the draft article reflected *lex lata*. Many States had emphasized that it was essential to distinguish between *lex lata* and *lex ferenda*, had asked the Commission to clarify whether the draft article reflected *lex lata* or *lex ferenda* and had urged the Commission to achieve a consensual outcome. At the seventy-third session, express support for the draft article had been voiced by only 9 of the 14 States listed in footnote 45 of the seventh report, and Azerbaijan, which was listed among those States, had in fact strongly criticized it. Seven other States had explicitly rejected it, while a further seven delegations had expressed reservations or had asked the Commission to reconsider it. Thus, in 2018, as in 2017, States in the Sixth Committee had been almost evenly divided in terms of their support or rejection of draft article 7. The statement that the draft article had received "broad support" was therefore difficult to accept.

The Special Rapporteur's view that draft article 7 had been supported by States "regardless of whether they considered said precept a proposal of *lex lata* or of *lex ferenda*" also needed to be nuanced, since none of the States listed in footnote 46 had expressly indicated that they considered that draft article to be *lex lata*, and four more States should be added to those listed in footnote 52 which had rejected that position. The affirmation that "some States" did not regard draft article 7 as *lex lata* was therefore a strong understatement.

As for the assertion that "Some States recalled the trend in practice to exclude international crimes from the application of immunity *ratione materiae*", he could find only one State that had expressed that opinion; in contrast, at the seventy-third session of the General Assembly, five States had disputed the existence of any such trend. It was also worth noting that seven States in addition to those listed in footnote 57 of the seventh report had urged the Commission to reach a consensual outcome.

In recalling the deliberations in the Sixth Committee, his intention was not to rekindle past debates, but to draw attention to some major issues that needed to be addressed at the current session in order to achieve a satisfactory and consensual outcome. He wished to emphasize, rather, that those debates were still open and were inextricably connected with the current debate, and that the Commission should see that as an opportunity to help resolve the issues surrounding draft article 7.

A systematic shortcoming in the substance of the seventh report was the fact that none of the draft articles proposed therein applied to situations covered by draft article 7. That draft article provided that immunity did not apply in respect of certain crimes, whereas all the draft articles proposed in the seventh report presupposed that immunity might

possibly apply. When considering the issuance of an arrest warrant against a foreign State official suspected of having committed a war crime, a domestic judge would not follow the procedural rules proposed in the report. Rather, like most lawyers, he or she would conclude from draft article 7 that there was no need to apply the procedural safeguards proposed in draft articles 8 to 15, because immunity did not apply to alleged war crimes. Why, indeed, should a procedural safeguard apply when there was nothing to safeguard?

The Special Rapporteur's understanding that draft articles 8 to 15 applied to situations covered by draft article 7 was clearly contradicted by the text of that draft article, under which cases concerning certain international crimes were excluded entirely from the scope of immunity *ratione materiae*. Draft article 7 thus forestalled any justification for the application of procedural provisions or safeguards in situations covered by it. For that reason, as long as draft article 7 retained its current wording, the Commission must explicitly state that any general procedural provisions and safeguards also applied to situations covered by draft article 7 and explain how they could serve as safeguards in that context. Even if the Commission included such a statement, it would also need to devise additional procedural rules or safeguards that were specifically tailored to apply in the situations covered by draft article 7. The Special Rapporteur seemed to assume that general procedural provisions and safeguards were sufficient to ensure the proper operation of draft article 7, although she acknowledged the special importance of procedural safeguards in that context. One of the central concerns expressed in the 2017 and 2018 debates in the Commission and the Sixth Committee had been that exceptions to immunity *ratione materiae* under draft article 7 could be abused for political ends. That concern had been the main reason why, in 2017, 24 States had emphasized the interdependence between procedural safeguards and the content of draft article 7. He wondered why the Special Rapporteur had not drawn clearer conclusions from her acknowledgement of the fact that preventing the politically motivated or abusive exercise of criminal jurisdiction against foreign officials was a core function of procedural safeguards.

In 2018 he had made a proposal to meet that concern by including a short list of specific procedural preconditions that might make draft article 7 more acceptable to the large group of States that were critical of that draft article ([A/CN.4/SR.3439](#)). Unfortunately, the Special Rapporteur seemed to have misunderstood that proposal as an attempt to recast draft article 7. In fact, he had merely suggested that draft article 7 should be accompanied by effective procedural safeguards. His proposal had been noted with interest by five members of the Commission. In addition, Professor Claus Kress had expressed the view that the proposal represented a very promising direction for a procedural compromise that duly considered the conflicting considerations that lay at the heart of the matter. He therefore took the liberty of reminding members of that proposal, which read, in essence:

“An exercise of national criminal jurisdiction based upon an exception to immunity *ratione materiae* as described in draft article 7 is only permissible if:

- the evidence that the official committed the alleged offence is fully conclusive;
- the decision by the forum State to pursue criminal proceedings against a foreign official is taken at the highest level of government or prosecutorial authority; and
- the forum State must cooperate with the State of the official by notifying the State of the official and offering to transfer the proceedings to its courts or to an international criminal court or tribunal under certain conditions.”

The requirements that evidence must be “fully conclusive” and that the decision to pursue criminal proceedings must be taken “at the highest level of government” were specific to situations covered by draft article 7 and did not apply to other situations. That was not only because some of the dangers of political abuse were specific to certain international crimes, but also because specific thresholds were necessary in those cases, given that immunity would otherwise not apply. The Special Rapporteur had developed some elements of that approach in draft article 14 (Transfer of proceedings to the State of the official), with the principle of subsidiarity in mind. The Commission should

acknowledge the special significance of that principle in the context of draft article 7. For those reasons, he proposed that the Commission should adopt an additional draft article to make it clear that general procedural provisions and safeguards also applied to situations covered by draft article 7, along with certain specific safeguards. That article might read:

“Draft article X

In order to determine, in accordance with draft articles 8–14, whether an exception to immunity *ratione materiae* pursuant to draft article 7 applies, the competent authority of the forum State shall ascertain whether:

- (1) a decision to open criminal proceedings against a foreign official has been taken at the highest level of government or prosecutorial authority;
- (2) the evidence that the official committed the alleged offence is fully conclusive; and
- (3) the forum State has notified the State of the official of the intention of its competent authorities to open criminal proceedings and offered to transfer the proceedings to courts of the State of the official, on the condition that this State provides assurances demonstrating its ability and willingness to carry out proper proceedings against the official, or to an international criminal court or tribunal.”

The wording of the chapeau drew largely on paragraph 128 of the seventh report.

Turning to some of the matters that were addressed directly in the two reports, he said that the order of the proposed draft articles should highlight the function of the procedural provisions and safeguards by making it plain that the determination of immunity under draft article 9 should occur after the domestic authorities of the forum State had notified the State of the official of their intention to exercise jurisdiction and had thereby given the latter State enough time for consultation and sufficient opportunity to invoke or waive immunity and to exchange information. Notification should be a prerequisite for “determination” under draft article 9. In order to reflect the proper sequence of steps, draft articles 8 to 12 should be rearranged in such a way that draft article 8 (Consideration of immunity by the forum State) came first, followed by draft article 12 (Notification of the State of the official), then draft article 10 (Invocation of immunity), then draft article 11 (Waiver of immunity) and finally draft article 9 (Determination of immunity).

While he agreed with the general thrust of draft article 8, the relationship between the three paragraphs was unclear, and he hoped that the draft article could be streamlined in the Drafting Committee.

With regard to draft article 10, he endorsed the Special Rapporteur’s view that invocation of immunity was not a precondition for the application of immunity *ratione personae*. Whether that was also true of immunity *ratione materiae* was a more difficult question. Perhaps it might be possible to reconcile members’ differing opinions in that regard by starting from the premise that, if there were sufficiently clear indications that a person might enjoy immunity *ratione materiae*, the authorities of the forum State must consider that type of immunity and notify the State of the official. In the absence of such indications, the forum State could proceed until immunity was formally invoked by the State of the official. The forum State could also proceed if the State of the official did not react within a reasonable time after notification. On the other hand, the forum State must determine whether immunity applied once the State of the official formally invoked it. That invocation might even have a suspensive effect. If the State of the official did not invoke immunity within a reasonable time after it had been notified or made aware of the proceedings, it should be deemed to have renounced the official’s immunity, or to have forgone certain procedural safeguards. There was a terminological question as to whether that form of renunciation should be termed an “implied waiver”, as the Special Rapporteur seemed to suggest, or whether the term “waiver” should be reserved for clear and express forms of renunciation of immunity. He was open to the formulation of a paragraph providing for the exceptional possibility of an “implied” or “presumed” waiver in that situation, or describing the situation with a phrase such as “shall be considered as having renounced”.

On that understanding, the role of the invocation of immunity *ratione materiae* was compatible with the judgment of the International Court of Justice in *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, as well as with the approach of the former and current Special Rapporteurs and the position of those members who were reluctant to see immunity *ratione materiae* downgraded. He agreed with Mr. Aurescu that the line between the non-invocation of immunity and the waiving of immunity should not be blurred, but the commentary could provide some guidance on how long the State of the official could wait to invoke immunity *ratione materiae* before it could be deemed to have renounced such immunity. He acknowledged that, in footnote 117 of the third report of the previous Special Rapporteur on the topic (A/CN.4/646), the latter indicated that he was “not familiar with any court judgments, practices, State opinions or doctrines which either clearly confirm or are at variance with such an approach to the issue”. That important aspect of invocation in cases of immunity *ratione materiae* might require further examination in the context of draft article 10.

He concurred with the Special Rapporteur that the courts of the forum State were competent to determine immunity and were not obliged to “blindly accept any claim” of immunity put forward by the State of the official. At the same time, the courts of the forum State did not have complete freedom to determine whether or not immunity was applicable in a particular case. The invocation of immunity should possess presumptive weight and the courts must naturally comply with the pertinent rules of international law. If they failed to do so, they would engage the international responsibility of the forum State. The Commission also needed to address the complex and delicate situation that arose when the State of the official had not yet informed the forum State whether it intended to invoke the immunity *ratione materiae* of its State official.

As far as draft article 11 (2) was concerned, he agreed with the Special Rapporteur that a waiver must, as a general rule, be express and clear. However, that provision should also accommodate the possibility of inferring a State’s consent to the exercise of jurisdiction from its clear conduct to that effect, or, in specific cases, its lack of reaction, within a reasonable time, to a notification by the forum State.

With respect to draft article 11 (4), it was neither correct nor appropriate to regard the possible effects of treaties on immunity as a form of waiver. A characteristic feature of a waiver was that it expressed a State’s renunciation of immunity in an individual case. A State’s consent to renounce its immunity more generally under a treaty was a separate matter that should not be confused with the concept of waivers. That point had been well illustrated by the *Pinochet* (No. 3) case that had come before the United Kingdom House of Lords, to which reference was made in paragraph 83 of the report. As the Special Rapporteur correctly pointed out, most of the judges in that case had not taken the view that the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment contained an implied waiver, but had relied on the consent of Chile to that treaty to argue that immunity *ratione materiae* did not apply to the alleged offences.

The Commission should refrain from making a general statement about the effects of treaties on the immunity of State officials, since that might seem to imply that there was no need for close examination of the specific provisions of each treaty. In order to avoid that danger, he proposed that the issue should be addressed by means of a “without prejudice” clause.

He welcomed the Special Rapporteur’s valuable explanations with regard to the notification requirement contained in draft article 12. Notification was indeed a precondition for enabling the State of the official to invoke or waive immunity. Furthermore, the duty to cooperate under general international law might require the forum State to notify the State of the official of its intention to exercise criminal jurisdiction. Concerning the reference to German domestic law in paragraph 123 of the report, he explained that, while the executive branch was not allowed to instruct domestic courts on how to decide actual cases, and also could not formulate binding assessments regarding international law, in 2015 the Foreign Office had published non-binding guidelines for domestic courts on questions of immunity under international law. The Federal Court of Justice, which was the country’s highest criminal court, had referred to those guidelines in a recent decision.

Concerning draft article 14, he appreciated the emphasis that the Special Rapporteur had placed on the concept of subsidiary jurisdiction, which was a core element of any meaningful procedural safeguard, particularly with respect to the provisionally adopted draft article 7. The proposals that he had made in 2017 and 2018, which he hoped might help the Commission to find common ground, had been inspired by the concept. Nevertheless, he saw a problem with draft article 14 in its current form.

The problem concerned the role of the State of the official. As explained in the report and in the Special Rapporteur's introductory statement, draft article 14 focused on the forum State as the initiator of a transfer of proceedings. Like several other members of the Commission, he was not sure whether the Special Rapporteur was proposing that the State of the official should also be able to initiate a transfer of proceedings to its own jurisdiction. In any case, draft article 14, as it stood, did not provide for a right of the State of the official to request a transfer of proceedings to its own jurisdiction or to have proceedings blocked or suspended. Moreover, draft article 14 did not provide that acts of the State of the official demonstrating that it was willing and able to prosecute the official should have any weight in relation to the forum State's decision to transfer the proceedings.

In more general terms, the concept of subsidiary jurisdiction was hardly reflected in draft article 14 itself, despite the explanations given by the Special Rapporteur in the report. For example, in paragraph 141, she stated that "the transfer of criminal proceedings is based on the concept of subsidiary jurisdiction", which "may be fully transposed to the regime of immunity of State officials from foreign criminal jurisdiction". The Special Rapporteur referred to the judgment in the case concerning the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* and also based her findings on an analogy from the general rules on transfer of criminal proceedings and an analysis of a 2018 case before the Court of Appeal of Lisbon.

The discrepancy between the emphasis placed on the concept of subsidiary jurisdiction and the content of draft article 14 was perhaps due to the fact that the draft article was modelled on treaties such as the European Convention on the Transfer of Proceedings in Criminal Matters and the Model Treaty on the Transfer of Proceedings in Criminal Matters. Nonetheless, those treaties had a different thrust, as recognized by the Special Rapporteur in paragraph 142 of the report: they referred merely to "the ordinary context of the exercise of competing criminal jurisdictions" and were designed to deal with transnational crime. In such treaties, the primary aim of a transfer was to ensure the efficient allocation of prosecutorial resources, not the sensitive delimitation of jurisdiction for the prosecution of international crimes. In fact, as acknowledged by the Special Rapporteur in paragraph 142, such treaties even recognized immunity as a reason to refuse a transfer request.

For the purposes of the Commission's work, the model taken from the European Convention and the Model Treaty should be strengthened through wording aimed at ensuring a true subsidiary jurisdiction for the prosecution of international crimes. As Ms. Galvão Teles had pointed out in 2018, examples of a true concept of subsidiary jurisdiction could be found in the practice of States relating to the prosecution of foreign nationals for international crimes, including in national legislation in Belgium, Croatia, Spain and Switzerland, domestic prosecutorial practices in Denmark, Germany, Norway and the United Kingdom, and some court practice in Austria, the Netherlands and Spain. Such examples demonstrated that the concept of subsidiary jurisdiction was also an important element in the prevention of impunity for international crimes.

Accordingly, in order to strengthen the concept of subsidiarity, he proposed that a new paragraph 2 should be added to draft article 14 that would apply specifically to the situations covered by draft article 7. The paragraph would read:

"2. In cases in which draft article 7 applies, the authorities of the forum State shall decline to exercise its jurisdiction in favour of the State of the official and transfer to that State criminal proceedings that have been opened against the official, if the State of the official requests a transfer of proceedings to its own jurisdiction and provides assurances demonstrating its ability and willingness to carry out proper proceedings against the official."

Regarding draft article 16, he did not think that a provision on fair treatment was appropriate in the context of the topic, since, as rightly noted by the Special Rapporteur in paragraph 111 of the report, “it is generally accepted that State officials are afforded immunity from foreign criminal jurisdiction for the benefit of the State”. So-called “procedural safeguards” of immunity could thus consist only of rights pertaining to the State of the official. The individual rights of suspects or accused persons were typically guaranteed in treaties on cooperation with respect to certain crimes, human rights treaties and domestic laws. There was no need to add to those guarantees in situations involving the question of immunity. The Commission should not create the impression that procedural rights afforded special protection to State officials in their individual capacity.

Concerning the questions raised by the Special Rapporteur in paragraph 176 of the report, he, like Mr. Hmoud, was in favour of proposing a mechanism for the settlement of disputes between the forum State and the State of the official, but did not support the inclusion of recommended good practices in the draft articles, as the latter could become a complicated issue.

He wished to conclude with some general remarks. The International Court of Justice had stated, in paragraph 93 of its judgment in *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, that “[t]he rules of State immunity are procedural in character and are confined to determining whether or not the courts of one State may exercise jurisdiction in respect of another State”. That statement confirmed that all the rules of State immunity were procedural in character, including those on the immunity of State officials. The Commission must bear in mind that all those rules were interconnected. While some rules of immunity might appear to be more procedural than others, they all shared the same basic procedural character. In that sense, draft articles 5 to 7 did not constitute a sort of separate substantive law on immunity of State officials; they were part of a comprehensive procedural law of immunity and needed to be completed by rules that, for want of a better term, might be called “second-order procedural provisions and safeguards”.

The Special Rapporteur made valuable proposals to that effect in her seventh report, but they did not resolve the difficult questions regarding draft article 7. That was particularly true for the question of whether the Commission should, in accordance with the view of a large majority of States, characterize draft article 7 as an exercise in progressive development. The same question arose in respect of the draft articles that the Commission might provisionally adopt on the basis of the sixth and seventh reports. As the dictum of the International Court of Justice suggested, a rule such as draft article 7 and any so-called “procedural provisions and safeguards” were inextricably interrelated, including with regard to the determination of their legal character. He agreed with the Special Rapporteur, Mr. Hmoud, Mr. Murphy and Mr. Tladi that most of the proposed procedural provisions and safeguards would constitute an exercise in progressive development, although certain elements of them might flow from the general duty of States to cooperate. However, as recognized by a large majority of States, draft article 7 was also an exercise in progressive development. That fact, and the interrelationship between the two sets of rules, should be acknowledged. The debates in the Sixth Committee in 2017 and 2018 reinforced that point.

The quality of the overall outcome of the Commission’s work on the topic would depend on the quality and acceptability of the procedural provisions and safeguards, particularly as they applied to possible exceptions to immunity *ratione materiae* under draft article 7. It might be that the legality of the application of an exception under draft article 7 by the forum State would be seen to depend on its compliance with at least some procedural provisions.

He supported the referral of the proposed draft articles to the Drafting Committee, on the understanding that the Committee might also consider additional proposals that would make clear that the general procedural provisions and safeguards applied equally to the exceptions referred to in draft article 7, and would provide for specific safeguards in respect of the situations covered by that draft article.

Mr. Murase said that, while he understood that Mr. Nolte was not trying to reopen the debate on draft article 7, it should be recalled that the draft article had been adopted in

2017 with support from a large majority of Commission members. The draft article should thus not be revisited until the second-reading stage, and the Commission should work to ensure that the procedural provisions and safeguards proposed by the Special Rapporteur contributed to the effective application of draft articles 1 to 7.

Mr. Nolte said that his intention had simply been to emphasize the interrelationship and complementarity between procedural rules and draft article 7.

Mr. Rajput said that, even at the first-reading stage, the Commission might have to reconsider all the comments made by States and reflect on how it wished to proceed with regard to draft article 7.

Ms. Galvão Teles said that she appreciated the Special Rapporteur's seventh report, which built on the discussion of the procedural aspects of immunity that had been initiated in the sixth report, submitted in 2018. As had been emphasized by many members of the Commission, the procedural aspects of immunity were a crucial part of what was an important but sensitive topic, particularly with regard to draft article 7, on exceptions to immunity *ratione materiae*, but also with regard to issues pertaining to immunity *ratione personae*. Those aspects must apply to all of the draft articles, which should be viewed as a package.

The seventh report contained nine new draft articles for the Commission's consideration. As she had stated in 2018, issues related to the procedural aspects of the recognition of immunity of State officials were largely absent from the literature and from international instruments dealing with immunities, which tended to focus on the substantive dimensions of the concept. Consequently, the Commission's work on those procedural aspects was not only extremely important but also innovative.

The nine proposed draft articles had a certain novelty value, since they mainly addressed matters not covered by existing international instruments dealing with immunities and relating to States, special missions, international organizations or diplomatic and consular immunities. The notable exceptions were the issues of invocation and waiver of immunity, particularly the latter, which had been addressed in studies on immunity and codified in treaties and other international instruments.

Nevertheless, the draft articles were of great relevance, since procedural aspects and safeguards helped to ensure the necessary balance between the different values and interests at stake, namely the sovereign equality of States and the stability of international relations, respect for the jurisdiction of the forum State and the position of the State of the official, the prevention of impunity, and the individual rights of the official concerned.

In her statement on the Special Rapporteur's sixth report (A/CN.4/SR.3440), she had referred extensively to a recent case before the Portuguese courts that might be of interest for the Commission's discussions on the procedural aspects of immunity. She was pleased to note that, in the seventh report, the Special Rapporteur took that case into account and carefully examined Portuguese national legislation and existing treaty instruments in the framework of the Community of Portuguese-speaking Countries.

Her comments on the seventh report should be read together with her observations on the sixth report, and were made on the understanding that she reserved the possibility to make more detailed comments and proposals regarding the draft articles in the Drafting Committee.

Invocation of immunity was a right of the State of the official that it could freely choose to exercise, just as it could freely renounce that right by waiving immunity. Invocation and waiver were, in that context, merely procedural institutions that in no way affected normative elements of the immunity of State officials and could not, in any case, be considered to constitute exceptions to immunity.

An important issue in that regard was whether immunity did not apply before the courts of a foreign State unless it was invoked by the State of the individual concerned. An analysis of normative practices showed that there was no clear rule in international or national instruments as to whether immunity must be invoked in order to be applicable. The absence of specific provisions in that regard seemed to lead to the conclusion that

invocation was not a prerequisite for immunity to be considered by the courts of the forum State.

The duty of courts to consider immunity *proprio motu*, even when it was not invoked, might be found to exist with regard to immunity *ratione personae*. As noted in the report, that was the rule that applied to the determination of State immunity under the United Nations Convention on Jurisdictional Immunities of States and Their Property and a number of national laws. The rule was justified by the fact that requiring a State to invoke immunity in order for it to be considered would be excessively burdensome and, arguably, would defeat the purpose of immunity and disrespect the principle of the sovereign equality of States. Furthermore, it was fairly easy for the forum State to identify the foreign State as a legal entity benefiting, at least potentially, from immunity. The same reasoning could be applied *mutatis mutandis* to require that the immunity of high-ranking State officials should be assessed and decided on by courts or other competent authorities even when it was not invoked by the State, particularly in the case of immunity *ratione personae*. The arguments put forward in the report stressed that, in such cases, there could be no doubt as to the identity of the beneficiaries of such immunity. The fact that all acts of the official were covered made the determination by the courts easier, and it could be assumed, as a rule, that the State had an interest in defending the immunity of its high-ranking officials. Consequently, disregarding that immunity would be a serious violation of the sovereignty of the State concerned. Support for that conclusion could be found in the literature and in the advisory opinion of the International Court of Justice on the *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, in which the Court had established that questions of immunity were “preliminary issues” that must be “expeditiously decided”.

It could be argued that the same reasoning should not be applied to immunity *ratione materiae*, and the Special Rapporteur’s analysis was enlightening in that regard. One reason was that the forum State was not necessarily aware of, and did not always have the means to identify, all the individuals who could be considered State officials or who might have performed official functions in a particular situation. Often, the State of the official was in a better position to invoke immunity than the forum State was to investigate it. Second, the State’s interest in claiming immunity for a lower-ranking official could not be so straightforwardly presumed. Accordingly, requiring the State of the official to invoke immunity before the courts of the forum State in such cases and to enumerate the acts that it considered to be of an official nature could not be considered unreasonable. That seemed to have been the logic followed by the International Court of Justice, albeit implicitly, in the case concerning *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, in which the Court had dismissed certain claims by Djibouti on the grounds that Djibouti had not informed France of the official character of the acts in question or of the official functions performed by the accused. A number of authors supported that prerequisite in the case of immunity *ratione materiae* on the basis of the arguments that she had outlined.

An additional argument could be advanced on the basis of the principle of recognition of the State’s right to self-organization, which was mentioned in paragraph 56 of the report, and the principle of non-interference in the internal affairs of another State. In fact, a determination by the forum State that a certain individual qualified as a State official in a third State or that a certain act was of an official nature, without the third State’s having claimed as much, could be seen as a violation of both principles.

However, the possibility that the forum State might also decide *proprio motu* with regard to immunity *ratione materiae* could not be ruled out. She would therefore keep an open mind regarding the arguments that could be presented for redrafting draft article 10 (6) accordingly, as had been suggested by Mr. Aurescu, Mr. Nolte and Mr. Tladi.

In any case, it must be emphasized that the effect of the invocation of immunity by the State of the official was that the authorities of the forum State would be obliged to consider it and decide on its application, taking into account the information and arguments provided by that State. That did not mean, however, that the forum State had to defer to the State of the official in determining immunity; indeed, that had not been the case in practice.

Finally, it was clear that the invocation of immunity was a right of the State that could be exercised at any time during proceedings. As a general rule, it was not possible to conclude from the mere inaction of a State, even if it had been made aware of the forum State's intention to prosecute and of the relevant details of the case in question, that it had waived immunity for the official. A waiver of immunity must be clear and express. Accordingly, as a rule, the mere inaction of a State in the early stages of proceedings, or at the time it was made aware of such proceedings, did not preclude the possibility that it might invoke immunity at a later stage. In that regard, draft article 10 (2) might not express that rule clearly enough. She proposed that either the paragraph itself or the commentary should include a reference to the non-preclusion of the State's right to invoke immunity for its officials at any time prior to the end of the proceedings. Mr. Hmoud had made a similar point when he had suggested that the word "shall" in draft article 10 (2) should be changed to "should".

Turning to chapter III of the report, on procedural safeguards operating between the forum State and the State of the official, she said that the aim of such safeguards was first and foremost to ensure respect for the principle of the sovereign equality of both of the States involved. Specifically, such safeguards were intended to fulfil four purposes, which were reflected in draft articles 12 to 15, covering notification of the State of the official, requests for and exchange of information, transfer of criminal proceedings to the State of the official and consultations between the two States involved. The exercise, by the State of the official, of the rights to invoke or waive immunity essentially depended on that State's being made aware in a timely fashion of any ongoing criminal proceedings in the forum State and on its being able to obtain all the necessary information.

The question that arose, however, was whether the forum State had a legal obligation to notify the State of the official of its intention to exercise criminal jurisdiction. As the Special Rapporteur rightly pointed out in the report, the large majority of the treaties analysed did not establish such an obligation.

In cases involving State officials who clearly enjoyed immunity *ratione personae*, the absolute character of that type of immunity implied that the forum State must communicate its intention to prosecute to the third State and request a waiver of immunity. In those cases, States had an incentive – and a *de facto* requirement, if they wished to proceed with the exercise of criminal jurisdiction – to notify the State of the official, since they could neither initiate proceedings nor adopt coercive measures against the official unless immunity was waived.

The question was therefore most significant in relation to immunity *ratione materiae*, in cases where the authorities of the forum State found that the acts in question were not covered by immunity and could be prosecuted, or where the authorities were not even aware of the potentially official character of the acts or the fact that the defendant was a State official. In such cases, the intervention of the State of the official was more determinative; in principle, without prejudice to her earlier remarks, the courts of the forum State did not have an obligation to adjudicate on the issue of immunity unless it was invoked. The importance of the State's having knowledge of the proceedings in such cases seemed to be reflected in the Vienna Convention on Consular Relations, the only instrument identified by the Special Rapporteur as providing for a notification obligation when the forum State instituted proceedings against an official who was potentially entitled to immunity, specifically consular staff who might benefit from immunity *ratione materiae*.

In that context, emphasis must be placed on the fact that a State's being aware of the intention of a third State to prosecute one of its officials was an essential condition for its exercise of the sovereign right either to claim immunity for official acts or to waive such immunity. Furthermore, any delay in that State's awareness of the forum State's intention could also be undesirable for the forum State, as it would adversely affect the efficiency of the exercise of criminal jurisdiction. Given that immunity could be invoked at any time, the State of the official could invoke it at a later stage in the proceedings, creating an obligation for the court to address it at that point. That might not only disrupt the normal course of proceedings, but also, if a determination of immunity was made, require the proceedings to be immediately halted, in which case the resources that had been devoted to the investigation and prosecution would have been expended to no purpose. Accordingly, the

obligation to notify the State of the official, as reflected in draft article 12, should cover both immunity *ratione personae* and immunity *ratione materiae*. Its placement could also be discussed, since it might be more appropriately placed before draft articles 10 and 11 on invocation of immunity and waiver of immunity, respectively.

It should be borne in mind that a State's obligation to notify could extend only as far as its own knowledge. In certain cases, forum States would not be equipped to know that an individual had been a foreign official at the time he or she had committed the acts in question. In such cases, no obligation to notify should exist, unless and until such circumstances became known to the State.

The goal of ensuring that the State of the official was fully aware of the prosecution in the forum State and was therefore able to exercise its right to invoke or waive immunity could be fully realized only if, besides notification, there were procedures in place that allowed for the exchange of information and consultations between the two States. Such procedures could be equally valuable to the forum State, whose authorities and courts would need information that they did not necessarily possess, in particular for the purpose of making a determination on whether the individual enjoyed immunity *ratione materiae*. The report included a discussion of the arrangements under which such exchanges and consultations between the two States could take place. In that regard, much could be derived, *mutatis mutandis*, from existing international instruments on cooperation and mutual legal assistance, which often contained detailed procedures through which States that intended to exercise criminal jurisdiction could request and exchange relevant information and hold informal consultations. At the same time, she agreed that greater emphasis should be placed on the importance of diplomatic channels in such matters. In that regard, draft article 12 (3) could be strengthened, and the same argument could be made with regard to draft article 10 (4). She broadly supported the other two new draft articles proposed in the report, namely draft article 13 (Exchange of information) and draft article 15 (Consultations). However, their wording could be improved and clarified in the Drafting Committee.

With regard to draft article 14 on the transfer of proceedings, she wished to reiterate the comments and suggestions that she had made in 2018 concerning the prosecution of such cases in the courts of the State of nationality. In cases where the State of nationality of the official wished to prosecute him or her in its own courts, the question arose as to whether that State should have preference in exercising jurisdiction over its officials and whether the person in question should be extradited, upon request, for that purpose, or, if the person was not in the custody of the forum State, the proceedings should be transferred to the State of nationality of the official. Some authors had proposed that horizontal enforcement of international criminal law, though both necessary and desirable in certain cases, should comply with the principle of subsidiarity. According to that view, the courts of the third State should consider, when assessing their own jurisdiction, whether there was a reasonable prospect that the defendant's conduct would be the subject of a genuine investigation in his or her home jurisdiction.

As she had also mentioned in 2018, national legislation and case law in certain States likewise supported the application of the subsidiarity principle in prosecutions of foreign officials. Furthermore, the idea of subsidiarity found expression in the principle of complementarity established in article 17 of the Rome Statute of the International Criminal Court, pursuant to which the Court could investigate a matter only if a State was genuinely unable or unwilling to investigate and prosecute. That principle was considered to promote a balance between State sovereignty and the pursuit of international justice. The introduction of a similar principle in the context of the exercise of criminal jurisdiction by foreign courts over officials of third States might be useful in order to strike that same balance. Even in those cases in which immunity did not apply to the conduct of foreign officials or when it could be set aside, an argument could be made that States should refrain from prosecuting foreign officials if their State of nationality was able and willing to investigate criminal allegations itself, so long as there were no indications that such proceedings were a sham and were intended only to avoid effective prosecution abroad. That would be an important safeguard to avoid politically motivated prosecutions, while still preventing impunity and promoting criminal responsibility. Draft article 14 represented

a good attempt to address those issues. She joined the other members who had expressed support for the draft article, but was of the view that it could be strengthened along the lines that she had just described and taking into account the suggestions that had been made by other members of the Commission.

Turning to paragraphs 174 to 177 of the report, which concerned the future workplan on the topic, she said that she agreed with the Special Rapporteur's proposal to return at a later stage to the issue of the relationship between immunity of State officials and international criminal courts, as a general matter. In paragraph 176, the Special Rapporteur mentioned that she would like to receive the members' opinions concerning the possible addition of two new elements to the draft articles, namely the definition of a mechanism for the settlement of disputes between the forum State and the State of the official, and the inclusion of recommended good or best practices that could help to solve the problems that arose in practice in the process of determining immunity.

With regard to the first element, the definition of a mechanism for the settlement of disputes was very appealing, given the potential for disputes in connection with immunity and their legal, diplomatic and political sensitivity for the States concerned. However, it was not clear what type of mechanism the Special Rapporteur had in mind or how it could be framed in the context of the draft articles, since a specific dispute settlement mechanism would fit better in the context of a future international convention on the matter, as other members had emphasized. In any event, the general mechanisms of dispute settlement would apply to any dispute between two States under the draft articles, depending, of course, on their acceptance by the parties in question.

Concerning the second element, the inclusion of a list of best practices could prove to be very useful for States. In particular, it could be a very effective way of reducing the risk of politically motivated or abusive exercises of jurisdiction over foreign officials. In fact, some of the provisions in the new draft articles proposed in the report were, arguably, already close to enunciating best practices to be followed by States. As pointed out several times in the report, the procedural aspects of immunity were, to a large extent, issues upon which existing treaties had not dwelt. For instance, the international instruments and national laws analysed did not contain any rules that indicated clearly the organs of the State that could invoke immunity or the channels through which the question should be raised. The large majority of the treaty instruments analysed did not require the forum State to notify the State of the official of its intention to exercise criminal jurisdiction, and the mechanism proposed for the transfer of proceedings took inspiration from only two conventions, which were applicable to the ordinary context of the exercise of competing criminal jurisdictions and whose provisions were not completely consistent. The exceptions in that respect, as previously stated, were part of the rules on waivers of immunity and the procedural rights of the defendant, which could be traced back to several international instruments and a consistent international practice. Thus, the Commission might wish to adopt only the more general provisions of the draft articles regarding procedural aspects, which were, to a large extent, proposals for progressive development, and to leave the more detailed procedures for a list of best practices. In that regard, she tended to agree with the members who had advocated the shortening and streamlining of the proposed draft articles.

With regard to draft articles 8 and 9, it was important to ensure consistency between the expressions "consideration" and "determination" of immunity and the expressions used in draft articles 1 to 7, which referred to the persons "enjoying" immunity and the cases where immunity should or should not "apply". That should be done either in the text of the draft articles or in the commentary, in order to clarify that part four of the draft articles, on procedural provisions and safeguards, applied irrespective of whether the immunity at issue was *ratione personae* or *ratione materiae*; whether immunity applied or did not apply, including in the cases referred to in draft article 7 on exceptions to immunity *ratione materiae*; and whether the process referred to in the draft articles led to a positive or negative conclusion on the issue of immunity. The wording of draft article 9 could be improved to emphasize the importance of national laws – including, in some cases, constitutional provisions on matters such as the separation of powers – in regulating the process, the competent organs and the participation of other organs in the determination of immunity. In paragraph 2, the reference to the "immunity of the foreign State" should be

replaced with a reference to the “immunity of the foreign State official” or a similar expression.

Regarding draft article 12, it was important to note, as the Special Rapporteur did in paragraphs 122 *et seq.*, that different States and legal systems had different approaches to the powers of and relationships between the executive and judicial branches, in terms of the communication between them. In some national systems, a strict application of the separation of powers principle meant that the organs of the executive branch could not under any circumstances communicate their opinions on immunity to the courts, request information in that regard or transmit information received from a third State, unless national law expressly authorized them to do so. She therefore wished to suggest that the fact that the application of draft article 12 was conditioned by the relevant domestic legislation should be emphasized, either in the text of the draft article or in the commentary. Those considerations were also important in relation to draft articles 13, 14 and 15. In draft article 15, the wording should be modified to indicate that consultations should be carried out “as appropriate” and “in accordance with the relevant provisions of domestic law”.

The seventh report concluded the Special Rapporteur’s analysis of the procedural aspects of immunity from foreign criminal jurisdiction. As previously noted, those aspects were largely absent from existing instruments that dealt with immunities, and, for the most part, no consistent State practice could be found. In the absence of well-established practices, the Commission was faced with the challenge of having to detail the procedures for the invocation or waiving of immunity and for cooperation between the forum State and the State of the official throughout the proceedings. In that context, a balance must be struck between, on the one hand, guaranteeing legal certainty and establishing mechanisms that could prevent both the abusive exercise of criminal jurisdiction against foreign officials and the over-enforcement of immunities and, on the other, avoiding the creation of excessive constraints that States would neither consider themselves bound by nor follow. As mentioned previously, a guide to best practices that would address some of those issues might prove to be a very useful instrument.

She recommended that all the draft articles should be referred to the Drafting Committee, taking into account the remarks made in the plenary discussion. She agreed with the Special Rapporteur that the Commission should seek to adopt the draft articles on first reading in 2020.

Mr. Tladi said that Ms. Galvão Teles had raised an important and interesting point regarding complementarity, which tied in with the comments made by Mr. Nolte regarding subsidiarity. The challenge in relation to complementarity was that of deciding who was entitled to determine whether the proceedings in the State of the official were legitimate, genuine and not a sham. That was the truly critical question with respect to that principle. The issue was also relevant to the International Criminal Court. In that context, it was ultimately the Court that made the final determination, although that could create a problem for States parties that wished to conduct the proceedings themselves.

Mr. Grossman Guiloff said that he agreed with Mr. Tladi that the principle of subsidiarity was very important. One relevant issue that had not been mentioned, however, was how the principle of subsidiarity was applied in cases where passive nationality was invoked as grounds for the exercise of jurisdiction. There was relevant case law in that regard. The previous week, an Italian court had sentenced 24 former officials of Argentina, Bolivia, Brazil, Chile, Paraguay and Uruguay for the killing or disappearance of 43 people, including 23 Italian citizens, during Operation Condor. There were further examples of State practice whereby courts had invoked the principle of passive nationality as grounds for exercising jurisdiction, and the relevance of that principle to the principle of subsidiarity should be studied. Before embracing the principle of subsidiarity without any exceptions, the Commission should consider that State practice.

Ms. Galvão Teles said that she too had been reflecting on the issue raised by Mr. Tladi, which was a valid point for the Drafting Committee to consider if indeed the Commission decided to pursue the avenue of what could be termed horizontal complementarity, as opposed to the vertical complementarity of the International Criminal Court. In the case of the latter, the issue remained in the hands of the Court, which could

decide to pursue a case if it found that the State was not able or willing to pursue prosecution at the national level. A possible solution could be found in one of the examples cited in the Special Rapporteur's report, namely the decision of the Lisbon Court of Appeal to transfer proceedings from the Portuguese courts to the Angolan courts on condition that the latter would effectively prosecute the case, with the possibility that the Portuguese courts could reassume jurisdiction if insufficient progress was made. Perhaps solutions of that type could be envisaged. Such possibilities should be discussed in depth in the Drafting Committee.

Ms. Escobar Hernández (Special Rapporteur) said that she did not wish to enter into the discussion, despite its undoubted importance, because she planned to follow the Commission's usual procedure by responding to all issues raised by members in her summing-up of the debate.

Mr. Rajput said that a compulsory dispute settlement clause and reference to the International Court of Justice would go a long way towards resolving the issues raised in the mini-debate. He looked forward to the Special Rapporteur's next report, which would probably address those questions.

Mr. Nolte said that he agreed with what Ms. Galvão Teles had said. With regard to issues of subsidiarity and complementarity, which also arose in other contexts, it was important not to jump immediately to the question raised by Mr. Tladi. There should be a procedure that ensured that all relevant factors were taken into account by different organs. At some point, one of those organs must take a final decision, but the question of which organ should do so must be asked at the end of the procedure, not at the beginning.

The meeting was suspended at 11.35 a.m. and resumed at noon.

Mr. Saboia said that he welcomed the Special Rapporteur's seventh report, which, like the previous reports, contained useful, well-researched considerations and proposals. On the basis of the Special Rapporteur's sixth report, the Commission had begun to discuss the broader aspects of procedural safeguards in respect of immunity; in his statement on that report ([A/CN.4/SR.3439](#)), he had expressed support for the Special Rapporteur's view that adequate procedural measures could offer more security to both the forum State and the State of the official and could minimize the risk of any abusive exercise of jurisdiction against a foreign State official. Procedural measures could also enhance trust between the States involved and reduce tensions. Such measures should adequately cover the legitimate rights of the official, with the overarching goal of preserving the balance between the principle of sovereign equality of States and the values and interests of the international community in preventing impunity in respect of international crimes.

In his view, the newly proposed draft articles contained in the Special Rapporteur's seventh report offered sufficient guarantees for the fair treatment of issues concerning the immunity of State officials from foreign criminal jurisdiction. Noting the suggestion by some members that additional procedural rules were needed in order to deal specifically with the cases described in draft article 7, where immunity did not apply, he said that the Commission should discuss any such proposals with an open mind and in good faith, within the framework of its consideration of the seventh report. In so doing, it should avoid any suggestions that could undermine draft article 7.

In chapter I of the report, which addressed the concept of jurisdiction and procedural aspects of immunity, two new draft articles were proposed. While draft article 8 dealt with the time at which immunity must be considered, draft article 9 focused on the role of competent authorities of the forum State in determining immunity. The Special Rapporteur assumed that, since immunity paralysed jurisdiction, the competence to examine and determine the applicability of immunity should belong to the courts of the forum State. Although that reasoning was correct, the reality was that, as the Special Rapporteur herself acknowledged, State practice varied considerably in respect of other organs of the State that could influence the process of determination of immunity. Draft article 9 therefore incorporated a certain degree of flexibility to account for the diversity of practice.

In that connection, he generally shared the view expressed by several members that, by assigning priority to specific organs of the State, namely the courts, the Commission

might be going beyond its mandate. A reference to the competent authorities of the State would probably be sufficient. He also shared the view that diplomatic channels often played an important role in dialogue regarding issues of immunity and thus should not be relegated to a secondary position in the draft articles that dealt with different phases of the process, without prejudice to the role that other organs of the State might play.

In chapter II of the report, on invocation and waiver of immunity, the Special Rapporteur made the important distinction between cases of State immunity or State officials who enjoyed immunity *ratione personae* and cases of immunity *ratione materiae*. Regarding the first category, the authorities of the forum State were presumed to be aware of the immunity enjoyed by the State or by the high-level officials who enjoyed immunity *ratione personae* and should therefore consider the issue of immunity *proprio motu*, without prejudice to the right of the State concerned also to invoke immunity. In contrast, in the second category of cases, given the more complex process of determining the identity of the official who might have immunity *ratione materiae* and confirming the presence of the normative elements that formed the basis for immunity *ratione materiae*, immunity must be invoked expressly and formally by the State of the official.

The issues of competence to invoke immunity and the timing of the invocation of immunity were clearly addressed in chapter II. It was well established that, since immunity existed in order to protect the interests of States, it was States and not officials that had the right and the power to invoke immunity. However, members of the “troika”, namely the Head of State, the Head of Government and the Minister for Foreign Affairs, given their status as representatives of the State, were also acknowledged to have the power to invoke immunity in their own right. Other organs of the State could also, in accordance with domestic law, be competent to invoke immunity. The Special Rapporteur had not found sufficient evidence to reach a conclusion on the existence of rules on such competence in international law. On the other hand, heads of diplomatic missions were recognized as being competent to convey an invocation of immunity to the forum State.

Regarding the effects of the invocation of immunity, the Special Rapporteur noted that the goal pursued by the State of the official was to paralyse the jurisdiction of the authorities of the forum State. The authorities of the forum State should be mindful of that goal, but it should not override the need for objective consideration of the elements invoked by the State of the official. While the forum State must give serious and prompt consideration to those elements, it was not bound to accept them blindly.

Draft articles 10 and 11 concerned, respectively, the invocation of immunity and the waiving of immunity. The Special Rapporteur’s analysis indicated that waivers of immunity were subject to more explicit rules in national and international practice and in international case law than the invocation of immunity. A State was entitled to invoke immunity and could therefore, *ipso facto*, choose to renounce that right and waive immunity. While some doctrinal works had raised the possibility of an obligation to waive immunity, or the possibility of an “implied waiver”, as referred to in paragraphs 85 to 87 of the Special Rapporteur’s report, it seemed clear, at least in the context of the current topic, that a waiver of immunity was a faculty of the State and must be clear and unequivocal. In the specific case of immunity from foreign criminal jurisdiction, it was particularly important for the waiver to contain substantive elements to ensure that there could be no doubt about the scope of the waiver or about the persons, acts or types of immunity to which it applied, as stated in paragraph 84 of the report.

The question of whether the obligation to cooperate with an international criminal court might be tantamount to an implied waiver of immunity was a controversial matter. He tended to think of it as an issue that was separate from that of immunity of State officials from foreign criminal jurisdiction. Therefore, he preferred to reserve his position regarding both the content of paragraphs 92 and 93 of the report and that of draft article 11 (4).

He concurred with the Special Rapporteur’s analysis and conclusions regarding the effects of a waiver of immunity. In particular, as a waiver removed the bar to the exercise of jurisdiction by the forum State, domestic law would determine the successive steps of the process. A waiver of immunity was irrevocable and applied to the entire set of proceedings

instituted against an official in relation to the allegations against him or her. He supported draft article 11, with the exception of its paragraph 4.

Chapter III contained a helpful analysis, followed by proposals for developing and strengthening modalities of communication and the exchange of information between the States concerned in relation to the possible exercise of criminal jurisdiction over a State official who might be entitled to immunity. He welcomed the proposals, which, by facilitating an objective examination of the facts and the arguments put forward by the parties, were aimed at enhancing mutual trust and avoiding tensions. He looked forward to discussing, in the Drafting Committee, the draft articles proposed in chapter III and the many suggestions that had been made in that respect.

Regarding draft article 14, on the transfer of criminal proceedings, the concept of an agreement legitimately arrived at between two competing jurisdictions for the transfer of criminal proceedings was unquestionably positive, as it might result, in principle, in better conditions for the conduct of the judicial process, with due regard being given to the legitimate rights and interests of the parties, including the alleged offender. In the matter at hand, however, the mechanism, timing and consequences of such a transfer in cases involving the issue of immunity of State officials from foreign criminal jurisdiction were not clear. In the example given in the report, concerning the judgment handed down on 10 May 2018 by the Lisbon Court of Appeal, it seemed that a decision had already been taken not to recognize the immunity of the accused before the transfer of proceedings had been initiated.

Several members had raised an even more crucial concern, namely how to ensure that the transfer of criminal proceedings was not used merely to shield an alleged offender. The mini-debate that had taken place during the Commission's current meeting had provided an opportunity to clarify and improve the content of draft article 14.

Draft article 15, on consultations, might appear unnecessary, since States could consult each other even in the absence of a provision to that effect. However, the importance of encouraging States to engage in consultations, thereby building mutual trust, was borne out by the fact that such an invitation was included in a large number of international instruments, including the Convention on Judicial Assistance in Criminal Matters between the States Members of the Community of Portuguese-speaking Countries, as mentioned in the report.

Draft article 16, on the fair and impartial treatment of the official, was also an essential provision. After reviewing the Commission's previous work on provisions of a similar nature, including the one that appeared in the draft articles on crimes against humanity, the Special Rapporteur explained, in paragraph 172 of the report, that the current topic required different language because the protection of procedural rights and safeguards was being considered in the context of criminal proceedings in which the matter of immunity was being raised. At the same time, it must be borne in mind that those safeguards should operate at every stage of the proceedings, both in the determination of whether immunity was applicable and, if immunity was found not to apply, in subsequent proceedings. That was why the Special Rapporteur had decided to take a general and comprehensive approach to the issue. Paragraph 2 of the draft article specifically addressed cases in which draft article 7 was invoked.

In conclusion, he said that he supported the referral of the draft articles to the Drafting Committee.

The meeting rose at 12.25 p.m.