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Held at the Palais des Nations, Geneva, on Monday, 22 July 2019, at 3 p.m.

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Present:

Chair:	Mr. Šturma
Members:	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. Reinisch
	Mr. Ruda Santolaria
	Mr. Saboia
	Mr. Tladi
	Mr. Valencia-Ospina
	Mr. Vázquez-Bermúdez
	Sir Michael Wood
	Mr. Zagaynov

Secretariat:

Mr. Llewellyn	Secretary to the Commission

The meeting was called to order at 3.05 p.m.

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

Sir Michael Wood said that he agreed with most of what had been said by Mr. Hmoud, Mr. Murphy, Mr. Nolte, Mr. Rajput and Mr. Zagaynov with respect to the Special Rapporteur's seventh report on immunity of State officials from foreign criminal jurisdiction (A/CN.4/729). Mr. Hmoud, whose statement at the Commission's 3480th meeting had opened the debate on the report following the Special Rapporteur's introduction, had made three essential points that many members had subsequently echoed. First, the fact that the report did not directly discuss how safeguards could be provided against politically motivated prosecutions of State officials in the national courts of foreign States was a cause for concern. Second, the larger issue of the procedure and procedural guarantees that were specific to limitations or exceptions to immunity *ratione materiae* were also not addressed in the report. Third, while the Special Rapporteur indicated in paragraphs 21 to 23 of the report that the underlying premise of the draft articles proposed therein was that essential legal interests must be balanced and preserved, the proposed procedural provisions seemed to place more emphasis on the right of the forum State to exercise jurisdiction than on the right of the State of the official to invoke immunity. He fully agreed with Mr. Hmoud and others that there was no reason for the Commission to take up the highly contentious judgment of the Appeals Chamber of the International Criminal Court on the appeal lodged by Jordan in relation to the case of *The Prosecutor v. Omar Hassan Ahmad Al-Bashir*, as it was simply not relevant to the topic at hand.

Concerning the current status of the topic, although one member had seemed to suggest that differences within the Commission had become less acute, he did not believe that to be the case. Draft article 7 remained as much of an obstacle to agreement on the topic as it had been on the day of its adoption by recorded vote. The members of the Commission should have no illusions on that point. As it stood, draft article 7 was not acceptable to States generally, nor was there agreement on it within the Commission. It was not a basis for the successful conclusion of work on the topic. As the Special Rapporteur now seemed to accept, draft article 7 did not reflect *lex lata* and was not a statement of customary international law. That would have to be made clear if the draft article was retained. The draft article also did not reflect a "trend" in the way that the law was developing. Given the position of many States, representing a variety of regions and legal traditions, he did not believe there was any real prospect that draft article 7 would come to reflect customary international law. A change in the applicable rules of international law in the sense of draft article 7 would take place only as between States that became parties to a duly ratified convention. If a provision that was in any way similar to draft article 7 were to be retained, effective procedural safeguards would need to be included in order to prevent abuse of the proposed exceptions to immunity *ratione materiae* so as to avoid the risk of politically motivated or otherwise abusive prosecutions.

One or two members had put forward views on the nature of draft article 7 that were fundamentally misconceived. It was clear that, when draft article 7 had been adopted, a large majority of the Commission members had not considered that they were agreeing to a text that reflected the existing state of international law. On the contrary, Commission members, like States in the Sixth Committee, had been overwhelmingly of the view that it did not reflect *lex lata*. A majority of the members had worked on the assumption that the Commission was preparing draft articles to propose to States for inclusion in a convention, if States so decided. The Commission's other draft articles in the area of immunities, most recently the articles on jurisdictional immunities of States and their property, had been designed to become conventions. To seek to codify existing law on possible exceptions would have been a hugely controversial matter on which there were obviously widely differing views within the Commission; several supporters of draft article 7 had clearly stated that it was not settled law.

There seemed to be general agreement, within the Commission and among States, that if a provision similar to draft article 7 was eventually retained, the Commission would need to propose effective procedural safeguards. A good number of speakers had addressed that question in a constructive spirit at the previous and current sessions, notwithstanding the very

serious reservations that some of them had about the draft article. Mr. Nolte, in particular, had recalled the proposal that he had made at the previous session for genuine procedural safeguards applicable to draft article 7. Other members had referred to his proposal and had made proposals of their own.

He wished to draw attention to the proposed safeguards that he considered to be most important. Exceptions and limitations to immunity under draft article 7 should not apply unless the foreign State official was present in the territory of the forum State. In cases where that condition was met, a presumption of immunity should apply notwithstanding draft article 7, until such time as a "determination" of absence of immunity had been made. The State of the official should be notified prior to any determination of non-immunity based on draft article 7, so as to obtain that State's invocation or waiver of immunity. If the State of the official then invoked immunity, that invocation should trigger consultations between the States concerned and should suspend any criminal proceedings while the consultations were ongoing. Any determination that there was no immunity because of draft article 7 must be based on fully conclusive evidence that supported the allegation of a crime within the scope of draft article 7. The application of an exception to immunity pursuant to draft article 7 in the forum State should be subject to judicial review and to appeal before the highest courts of the forum State. If a determination of no immunity was made in application of draft article 7, the forum State should offer to transfer the proceedings to the State of the official, if the latter was able and willing to submit the matter to prosecution. Only after all those steps had been taken could the forum State exercise coercive measures *vis-à-vis* a State official in application of draft article 7. Decisions should be taken at the highest possible level of the relevant authority, whether executive, prosecutorial or judicial. States should be obliged to adopt any necessary national laws or regulations designed to prevent the arbitrary or aggressive use of prosecutorial discretion against foreign State officials, at least in relation to draft article 7. Binding dispute settlement provisions should be added to the draft articles to ensure compliance with those conditions and the peaceful settlement of disputes between the forum State and the State of the official, at least in relation to draft article 7.

He attached particular importance to the requirement that the accused must be present in the territory of the forum State in relation to draft article 7. There was nothing more likely to result in abuse than efforts to exercise criminal jurisdiction against a foreign official who was not present in the forum State for an alleged offence that might not even have been committed in the forum State, when the act had been committed in an official capacity. If the Commission was to make progress at the current session, the Drafting Committee must consider Mr. Nolte's proposal, together with the others that he had just outlined, at the same time as the proposals in the Special Rapporteur's seventh report. That approach would be entirely consistent with the outcome of the preliminary debate held at the seventieth session on the sixth report (A/CN.4/722), in which members had alluded to the importance of addressing the dual components of procedural aspects: the traditional considerations concerning such issues as timing, invocation and waiver, as well as a full range of considerations concerning safeguards in the light particularly, though not exclusively, of the adoption of draft article 7.

The main problem with the nine draft articles proposed in the seventh report was that, for the most part, they did not contain real safeguards for the State of the official in cases where draft article 7 might be applicable. At the very outset of its work on the topic, the Drafting Committee should discuss how it intended to approach the task of dealing with both the proposals for specific draft article 7 safeguards and the proposals set out in the seventh report. For example, it would need to decide whether to add a specific provision on safeguards in the context of draft article 7 or whether to work such safeguards into the nine draft articles already proposed, or a combination of both.

Concerning the draft articles proposed in the seventh report, he agreed with the Special Rapporteur and other members that most of the proposed procedural provisions and safeguards would represent an exercise in progressive development. For the most part, they only made sense in the context of a treaty. Second, while the draft articles on procedural matters might seem long when compared with the substantive provisions that had already been developed, and he could support efforts in the Drafting Committee to shorten them, what mattered was that the key points should all be covered and should be clear and detailed

enough to be effective and operational. Third, he agreed with Mr. Nolte that the first five procedural draft articles should be reordered. Draft article 8 should come first and should be followed by the provisions that were currently numbered as draft articles 12, 10, 11 and 9, in that order. Fourth, the Special Rapporteur's texts seemed to be shaped by reference to criminal procedure as it existed in civil law systems, in which there was a heavy emphasis on the judiciary, whereas in other systems the executive or prosecutorial authorities would be involved. He agreed with Mr. Hmoud, Mr. Tladi and others that, save in very specific circumstances, the draft articles should refer in general terms to the authorities of the forum State, not specifically to the courts of the forum State. Fifth, the emphasis on mutual legal assistance rather than diplomatic channels and diplomatic contacts did not reflect what happened in practice. Sixth, he agreed with Mr. Park and others that draft article 16 was out of place; there was no need for particular fair trial provisions just because the accused was a State official.

Draft article 8 seemed to concern the important rule of international law that the competent authorities, and especially the courts, must determine immunity *in limine litis*. However, as others had pointed out, the draft article did not state that rule very clearly. Many useful suggestions had been made to improve the text, and he trusted that the Special Rapporteur would bring them all to the attention of the Drafting Committee and propose further improvements herself. In terms of the specific difficulties with the current text, in paragraph 1 the obligation to "consider immunity" was particularly unclear. What conclusions would "consideration" lead to if, by virtue of draft article 7, immunity did not exist? In the same paragraph, the phrase "a foreign official may be affected by a criminal proceeding" was also extremely vague. The relationship between the three paragraphs, and especially between paragraphs 2 and 3, was not entirely straightforward.

Draft article 9 referred to the "determination" of immunity, by contrast with draft article 8, which referred only to "consideration". The main problem in draft article 9 and throughout the draft articles proposed in the seventh report was the emphasis on the primary role of the courts. As other members had pointed out, in practice the initial, and often key, decision was taken not by the courts but by the relevant prosecutorial authority or even the police or other investigators, who in many legal systems were not part of the courts, and who might or might not be part of the executive. Paragraphs 1 and 3 would need to be substantially revised in the Drafting Committee. Paragraph 2, while generally satisfactory, was rather unclear, as it seemed to place the draft articles on the same footing as national law. What would happen if there was a discrepancy between the two? He did not agree with Mr. Murase that a reference to "other applicable rules of international law" should be added to paragraph 2, as that would make the provision's meaning even more obscure.

Draft article 10 introduced the notion of "invocation" of immunity, which he considered rather strange in that context. Immunity existed as a matter of international law, whether or not it was "invoked" by the State of the official. "Invocation" suggested some type of formal requirement that simply did not exist in that context. He agreed with most of the suggestions that had been made for the merging or deletion of various paragraphs in draft article 10. Regarding paragraph 6, a key issue raised by draft article 10 was whether a distinction should be made between State officials entitled to immunity *ratione personae* and those entitled to immunity *ratione materiae*.

As currently formulated, draft article 11 on waivers of immunity also raised many issues. He fully agreed with the members who had proposed that paragraph 4 should be deleted. In his view, the draft article should be kept simple, as had been done in the Commission's earlier texts on waivers of immunity, such as article 32 (1) and (2) of the Vienna Convention on Diplomatic Relations. A single sentence stating that immunity could be waived by the State of the official and that such a waiver must always be express would be sufficient.

Draft article 12 could likewise be streamlined to some degree. For example, in paragraph 3 there was no need to refer to "means provided for in international cooperation and mutual legal assistance treaties"; they had relatively little to do with the notification of immunity, which was a matter for diplomatic channels. All references to "acts of the official that may be subject to the exercise of criminal jurisdiction" should probably be qualified by the word "alleged".

Like other draft articles, draft article 13 seemed to assume the existence of a particular type of legal system that was not found in many parts of the world. Draft article 14 was an important provision, since it dealt with the transfer of proceedings. However, as proposed by the Special Rapporteur, it offered no safeguard to the State of the official and would only benefit the forum State. As others had proposed, the Commission should consider providing for an obligation on the forum State, under certain conditions, to transfer the proceedings when so requested by the State of the official. The additional paragraph that had been proposed by Mr. Nolte should be seriously considered by the Drafting Committee, and something along those lines should be adopted.

He welcomed both the substance and the brevity of draft article 15, which was a general but important provision on consultations. However, reference should perhaps be made to the timing of consultations. Lastly, as he had already mentioned, he saw no need for draft article 16.

As to future work, it remained to be seen how many of the nine draft articles could be dealt with in the remainder of the session. The Commission should seek to adopt a clear position on the outcome that it envisaged for the topic; doing so would help to reconcile the diverse views within the Commission and, it was to be hoped, also among States. It had been obvious to him from the outset that the Commission was proposing draft articles on the basis of which States would decide whether or not they wished to proceed to the adoption of a convention. That understanding was confirmed by the procedural provisions currently under consideration, many of which would only make sense as part of a convention. It would be inappropriate for the Commission to produce only a study or soft law instrument on the topic, as immunity from foreign criminal jurisdiction was a matter that fell within the scope of criminal law and procedure, and was not a suitable subject for theoretical study.

Other members had noted that the sixth and seventh reports still left a number of substantive issues outstanding, which must be dealt with before a first reading could be completed, including draft article 2 on the use of terms. Mr. Park had referred to the need to deal with a number of definitions and had suggested that that should perhaps be done at a later stage. In his own view, however, definitions were an essential part of the text and must be dealt with on first reading. In particular, the Commission must add a definition of "criminal jurisdiction", which could be important to the project as a whole, including the procedural safeguards. The Commission would also need to revisit the issue of a dispute settlement provision, unless the Special Rapporteur was able to propose one at the current session in the light of the Commission's debate. He would like to hear more about her ideas for best practices, although it was not clear that they would be particularly helpful.

One matter of great practical importance, which he had raised previously, was the need to ensure that inviolability of the person was covered in addition to immunity from prosecution. If inviolability was already covered by the term "immunity", that understanding should be clarified, preferably not just in the commentary but also in the article on definitions. Earlier instruments that were based on the Commission's work mentioned inviolability of the person expressly and separately. For example, article 29 of the Vienna Convention on Diplomatic Relations provided for the inviolability of diplomatic agents, while article 31 provided for their immunity from the criminal jurisdiction of the receiving State. If the matter was not dealt with in the Drafting Committee at the current session, the Special Rapporteur should cover it in the eighth report.

The sixth and seventh reports addressed important procedural aspects of the topic, many of which had already been covered in the previous Special Rapporteur's third report (A/CN.4/646), on which there had been a thorough debate in 2011. The Commission might wish to consider the sixth and seventh reports together with the relevant parts of the Secretariat's now somewhat dated 2008 memorandum (A/CN.4/596 and A/CN.4/596/Corr.1) and the previous Special Rapporteur's third report, since, as the current Special Rapporteur acknowledged, those documents answered a number of the questions that were currently before the Commission.

In conclusion, he said that he supported the referral of all the proposed draft articles to the Drafting Committee, with the possible exception, if the Special Rapporteur agreed, of draft article 16. At the same time, he agreed with Mr. Murphy, Mr. Nolte and others that the

Drafting Committee should, as always, feel free to consider other proposals in addition to or in place of those that were put forward in the seventh report. He hoped that the consideration of all the draft articles could be completed at the current session, although it was not unprecedented for drafts to be held over in the Drafting Committee until the following year.

Mr. Grossman Guiloff said that the Special Rapporteur had provided a helpful inventory of the Commission's work and of most, if not all, State reactions on the topic to date. Unfortunately, however, many States had not yet expressed their views on the topic. The Commission should be careful not to base its position solely on the views of a relatively small number of States. He supported the referral of the nine draft articles proposed in the seventh report to the Drafting Committee, bearing in mind his forthcoming comments and those made by other members. As he had stated his views on the sixth report at the previous session, he would limit his comments to some of the issues covered in the seventh report, although he reserved the right to raise further points in the Drafting Committee.

One point on which the international community had consistently been broadly in agreement was that the perpetrators of the crime of genocide, crimes against humanity, war crimes, apartheid, torture, and enforced disappearance must be brought to justice. Any hesitation in the approach to the topic had mostly concerned the potential for politically motivated abuse, which had necessitated the drafting of procedural safeguards but not a wholesale limitation on foreign criminal jurisdiction for those crimes. He shared the concerns of the many members who had rightly stressed the need to find a balance between the prevention of impunity for the gravest international crimes and the avoidance of politically motivated prosecutions. However, it was important to bear in mind that there was currently no such balance, since impunity was a prevailing reality in international relations, and the balance thus needed to be restored. The Commission should, of course, take the valid concern of politically motivated abuse extremely seriously, especially in view of its potential negative impact on international relations. The Special Rapporteur could perhaps focus more on such abuse and provide examples of ways to combat it. The danger of politically motivated prosecutions had been raised often, with good reason, but it now needed to be addressed in more depth if the Commission was to avoid taking nothing more than an abstract, theoretical position.

In focusing on combating impunity, the Commission must not ignore the enduring practice of selective prosecution, notwithstanding the necessity of prosecuting wrongful acts when possible. Addressing impunity created space for the rule of law, regardless of the position of the State of the official. The unanimous disavowal by States of the crimes listed in draft article 7 confirmed, as had been concluded in the 1970 judgment of the International Court of Justice in *Barcelona Traction, Light and Power Company, Limited*, that a distinction must be drawn "between the obligations of a State towards the international community as a whole, and those arising *vis-à-vis* another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*. Such obligations derive, for example, in contemporary international law, from the … rules concerning the basic rights of the human person, including protection from slavery and racial discrimination".

Accountability for international crimes was not only a sovereign issue; the consequences of such crimes affected other States and the international community as a whole. Perhaps the Special Rapporteur could provide statistical data on the scourge of impunity and its effects, such as its connection with refugee crises, the destruction of the environment and corruption. The *erga omnes* nature of the prohibition of crimes such as torture and genocide created a positive obligation on all States to ensure the effective prosecution of individual perpetrators. One example of State practice that might be relevant was the 25 July 2012 decision of the Swiss Federal Criminal Court in *A. v. Ministère Public de la Confédération*, which concerned a former major general in the Algerian army and former Minister of Defence accused of war crimes. The Court had stated that there was undeniably an explicit trend at the international level towards restricting the immunity of former Heads of State *vis-à-vis* crimes that were contrary to rules of *jus cogens*; the prohibition of genocide and crimes against humanity, including the prohibition of torture, were part of *jus cogens* and therefore mandatory. It had also asserted that that trend was also

reflected at the national level, where a similar effort to put an end to impunity for the most serious crimes could be observed.

The broad rejection of those crimes was further evidenced by the wide, and in some cases universal, ratification by States of treaties prohibiting such conduct, including the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Prevention and Punishment of the Crime of Genocide and the Geneva Conventions of 12 August 1949 for the protection of war victims.

The *Pinochet* case that had come before the United Kingdom House of Lords had been instrumental in reinforcing the possibility of States' exercising jurisdiction over the crime of torture in accordance with their treaty obligations under the Convention against Torture. He wished to highlight a number of important points arising from that case. The Government of the United Kingdom had not considered itself to be obligated to notify Chile of its plans to detain the former Head of State of that country. It had not regarded the fact that he was carrying a diplomatic passport as evidence that he was acting in an official capacity. The United Kingdom had decided to grant extradition to Spain. The extradition requests submitted by other States, including France, Belgium and Switzerland, which were based on the inapplicability of immunity to accusations of torture, demonstrated those States' understanding that immunity did not apply to the actions of the former Head of State in violation of that Convention. In Germany, the Federal Court of Justice had not considered immunity to be an initial obstacle to the proceedings. Since that case, obligations under the Convention against Torture had also been used as a basis for addressing claims of immunity in British courts regarding crimes committed by Prince Nasser bin Hamad al-Khalifa of Bahrain.

In Italy, the recent case against the perpetrators of Operation Condor might be a useful example of State practice. In particular, the court's analysis might be relevant, as it focused on the responsibility of senior officials in the military dictatorships of Chile, Paraguay, Uruguay, Brazil, Bolivia and Argentina. On 8 July 2019, four such senior officials had been sentenced for their role in the torture and killing of 43 people, including 23 Italian citizens. Although the ruling could still be appealed against before the Court of Cassation, that case and the others he had mentioned presented a persuasive argument that a trend was developing in the area of immunity of State officials. He proposed that the Commission should examine such examples in order to avoid drawing overly broad conclusions.

It was unnecessary to elaborate on the fact that human rights treaties created conventional obligations for States parties to ensure the effective prosecution of such crimes. He agreed with the Special Rapporteur's assertion, in the seventh report, that the real purpose of procedural safeguards was to ensure the necessary balance between respect for the principle of sovereign equality and the need to prevent politically motivated trials and the prosecution of innocent people. In the commentary, the Commission should consider making specific reference to the scope of the procedural safeguards.

Additionally, as he had mentioned in his statement on the sixth report on the topic (A/CN.4/SR.3439), *mutatis mutandis*, it was important for the Special Rapporteur to consider the procedural implications for States that had ratified treaties that established that their provisions referred only to crimes committed by public officials. That was true of the Convention against Torture, article 1 of which required, as part of the definition of torture, that it must be "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity", and the International Convention for the Protection of All Persons from Enforced Disappearance, which stated that enforced disappearance, by definition, could be perpetrated only "by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State". The clear object and purpose of the two conventions was to regulate only official conduct and to impose an obligation to try or extradite.

A related point that he had raised during the debate on the sixth report concerned the practice of the International Criminal Police Organization (INTERPOL). In the sixth report, the Special Rapporteur noted that INTERPOL, with regard to the application of immunity of State officials in respect of international crimes, had taken the position that political power could be exercised only within the limits of the law, including international law. That position

further supported the idea that certain crimes could not be considered to have been committed in the exercise of official duties. In that regard, it was important to recall that INTERPOL had retained Red Notices against officials who allegedly had immunity. For example, in the case of the terrorist attack on the Argentine Israeli Mutual Association in Argentina, Red Notices had been retained in respect of a number of Iranian State officials. In addition, some Latin American State officials had been the subject of Red Notices for crimes such as enforced disappearance and crimes against humanity. That practice warranted further examination.

As other members had stated, it was important to recognize the areas of agreement in the approaches of the former and current Special Rapporteurs on the topic. Both had identified the need for the home State to invoke immunity at an early stage and, in any case, before trial; the inherent differences between immunity *ratione personae* and immunity *ratione materiae* in terms of the way in which they operated and were invoked; and the sovereign right of each State to determine its own internal procedures regarding immunity. In his view, the consensus achieved by the Special Rapporteurs on those points was relevant to the Commission's ongoing debate.

He did not agree that the draft articles on procedural safeguards were not sufficiently supported by State practice. While the concerns expressed by those who had defended that position might have some merit, the safeguards were not merely the product of progressive development of the law. If that were the case, States would be under no obligation to respect them. He did not believe that most Commission members would agree that the obligations to consult and to communicate, in particular, were not supported by legal principles. Furthermore, he agreed with Mr. Tladi that many of the Special Rapporteur's conclusions were "rules of reason" and might in fact reflect general principles of law. Indeed, the procedural safeguards were closely associated with the principle of good faith. When referring to similar procedural obligations that applied to the termination and suspension of treaties, the International Court of Justice, in its judgment in *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, had stated that such rules "at least generally reflect customary international law and contain certain procedural principles which are based on an obligation to act in good faith". Therefore, as noted by Mr. Tladi, a lack of State practice in relation to the procedural safeguards should not prevent the Commission from recognizing legal norms. The Special Rapporteur should perhaps consider the possibility that procedural safeguards had a different foundation in international law, such as general principles of law, at least in some respects. It could also be useful to conduct a comparative study of State laws on prosecution, including evidentiary standards and the types and levels of domestic courts that generally addressed matters with an international component. Lastly, the Commission might wish to explore State practice in cases where the crimes listed under draft article 7 had allegedly been committed in conjunction with terrorism, crimes of corruption, drug trafficking or money-laundering, or where nationals of the forum State were the alleged victims of such heinous crimes.

While some members had expressed concern about the fact that the procedural safeguards contained in the newly proposed draft articles did not seem to apply to cases involving the exceptions to immunity listed in draft article 7, others had suggested that draft article 7 should be revisited in response to that concern or that an additional article should be introduced to provide further clarification. He saw merit in the view expressed by Ms. Lehto and others that it was obvious that the proposed draft articles were intended to apply to the situations referred to in draft article 7. He expected that the Special Rapporteur would clarify that point.

A number of members had made suggestions for more explicit safeguards. He agreed with Mr. Nolte on the need to prevent frivolous prosecutions. Mr. Nolte's proposed "fully conclusive" evidentiary standard was interesting in that regard, although the phrase "reliable and sufficient" might be preferable. Should the Commission decide to adopt such language, it would need further information on comparative prosecutorial practices. He also had concerns about the practical utility of the "assurances" to be provided by the home State to the effect that it would genuinely prosecute an official or allow him or her to be prosecuted before an international tribunal.

Turning to draft articles 8 and 9, he said that he agreed with Mr. Huang and others that the Commission should not attempt to dictate how States organized their internal decision-making structures and that it should respect their sovereignty in matters of immunity. However, it was good practice for decisions relating to a State's international relations, including matters of immunity for State officials, to be taken at the highest level.

He agreed with the Special Rapporteur that immunity should be invoked at an early stage, before the merits of a case had been considered, for reasons of procedural economy. However, as he had noted in respect of the Special Rapporteur's sixth report, that did not imply that immunity must be invoked immediately at the investigative stage, as investigations did not necessarily affect the sovereign rights of States that the invocation of immunity was designed to protect. In that connection, he agreed with the point that Mr. Jalloh had made with reference to the joint separate opinion of Judges Higgins, Kooijmans and Buergenthal in the International Court of Justice case concerning the *Arrest Warrant of 1 April 2000 (Democratic Republic of the Congo v. Belgium)*, which was also referred to in the Special Rapporteur's sixth report. Specifically, he wished to highlight the statement, in the opinion, that "commencing an investigation on the basis of which an arrest warrant may later be issued does not of itself violate" the principles of the immunity and inviolability of Ministers for Foreign Affairs. In his view, the outer limit of the time frame during which immunity should be considered was correctly reflected in draft article 8 (1) and (3). He agreed with Ms. Lehto that assessing whether immunity applied before taking coercive measures reflected the purpose of immunity, which was to permit the effective performance of the functions of persons who acted on behalf of States. It was important to examine State practice, even where it was not extensive.

With regard to the specific language of draft article 8, paragraph 2 stated that immunity must be considered at an early stage of the proceeding; however, that same idea seemed to be captured in paragraph 1, which obliged the competent authorities to consider immunity as soon as they were aware that a foreign official might be affected by a criminal proceeding. Therefore, either the relationship between those two paragraphs should be elaborated upon or the paragraphs should be merged, as others had suggested.

Regarding draft article 9 (1), he proposed that the language should be simplified to read "The immunity of State officials from foreign criminal jurisdiction shall be determined by the competent courts of the forum State". As he had mentioned earlier, such a statement would apply only if national legislation so prescribed.

In draft article 9 (2), while he supported the reference to national procedures, the need for consistency between national procedures and the draft articles should be emphasized. He proposed that the paragraph should read "The immunity of foreign State officials shall be determined through the procedures established by national law, in conformity with the provisions of the present draft articles".

In draft article 10, while it was reasonable to assume that the decision by the State of the official on whether to invoke immunity would be communicated in a timely manner, some guidelines on the process should be set forth in the interest of justice. Allowing immunity to be invoked late in the proceedings might interfere with the judicial process of a sovereign State. Thus, in order to preserve the integrity of States' judicial processes and balance the respective rights of each State involved, the draft articles should include a requirement that a formal statement should be made in a timely fashion by the State of the official on whether it intended to invoke or waive immunity, once it had been notified of impending criminal proceedings by the forum State.

Ms. Oral and Ms. Lehto had pointed out that the former and current Special Rapporteurs agreed on the need to apply separate rules to immunity *ratione personae* and immunity *ratione materiae* regarding the invocation of immunity. Moreover, as Ms. Lehto had also observed, that distinction was supported by decisions of the International Court of Justice.

In draft article 10 (1), while he understood the reason behind the Special Rapporteur's choice of the word "may" in the phrase "may invoke", that word did not fully convey the idea that States needed to invoke immunity *ratione materiae* if they intended to avail themselves of that right. Therefore, he suggested that the word "may" should be replaced

with “is entitled to”. He further proposed that the word “such” should be inserted between the words “exercise” and “jurisdiction”.

Draft article 10 (2), as currently drafted, could be read as an obligation for States to invoke immunity, whereas such invocation was discretionary. He therefore suggested that the phrase “Immunity shall be invoked as soon as the State of the official is aware” should be replaced with “If a State decides to invoke immunity, it shall do so as soon as it becomes aware”. In addition, he suggested that the word “concerned” should be added at the end of the paragraph.

Regarding draft article 10 (3), he endorsed the formal requirements that the Special Rapporteur proposed for the invocation of immunity. However, there was another important aspect to consider: in the case of immunity *ratione materiae*, as noted by the Special Rapporteur in paragraph 50 of the seventh report, the competent authorities of the forum State might not have enough information to determine whether the acts over which they intended to exercise jurisdiction had been carried out in an official capacity. Therefore, the State invoking immunity *ratione materiae* should also specify which acts it covered. That requirement should be included in draft article 10 (3).

Regarding draft article 11, he agreed with other members that a waiver of immunity must be clear, concise and explicit. Requiring an express waiver seemed to be a logical extension of the principles of respect for the sovereign equality of States and legal certainty. Furthermore, he agreed with Ms. Lehto and others that the clarity of an express waiver was a strong basis for the conclusion that such a waiver was irrevocable. In his view, an express waiver necessarily suggested such a conclusion for the same reasons of legal certainty and judicial efficiency. In addition, a strong case could be made for the existence of estoppel.

With regard to “implied” waivers of immunity, States that had ratified treaties requiring the effective prosecution or extradition of individuals accused of certain international crimes could not claim that any of their officials who were accused of such crimes had immunity *ratione materiae* without directly violating their international obligations under such treaties. He would not support the abrogation of the *pacta sunt servanda* principle. He had concerns regarding the transfer of proceedings in such cases. The long-standing practice of implied waiver of immunity via treaty ratification should continue to operate, and that point should be incorporated into the draft articles by means of a “without prejudice” clause.

Draft article 11 should be supplemented with two additional elements. First, the text should explicitly mention the main effect of a waiver, which was that the forum State could begin or continue to exercise its criminal jurisdiction over the foreign State official concerned. Second, as observed by the Special Rapporteur in paragraph 70 of the seventh report, a waiver of immunity by the State of the official invalidated any debate as to the existence or application of immunity and as to the limitations and exceptions thereto. Therefore, a new paragraph could be introduced to explain that a waiver also had the effect of validating any criminal proceedings conducted thus far by the forum State.

Many members had commented on issues of complementarity in relation to draft article 14. He agreed with the Special Rapporteur that there were undoubtedly situations in which the State of the official was the most appropriate forum for prosecuting an official accused of one of the crimes listed in draft article 7. Indeed, the prosecution of such individuals in their home State might be cathartic for the country. Therefore, the forum State should assess carefully whether it would be beneficial for the State of the official to prosecute its own national, especially in cases where the majority of the victims resided in that same State. The model of cooperation proposed by the Special Rapporteur in draft article 14 should be carefully considered in the context of efforts to prevent impunity and to promote cooperation between the forum State and the State of the official. Regarding the transfer of the accused, the principle of *non-refoulement* applied, and not only in cases concerning torture under the Convention against Torture.

Nevertheless, the Commission should be careful not to allow an overreliance on complementarity to facilitate sham prosecutions in the State of the official. There were safeguards that must come into play in the consideration of whether a prosecution should be transferred, such as whether the State exhibited a consistent pattern of gross human rights

violations, whether regional and international organizations had spoken out about State-sanctioned patterns of abuse, and whether there was sufficient respect for the rule of law in the State concerned. In the case of Fernando Albán, for example, a Venezuelan national who had allegedly committed suicide by jumping from the tenth floor of a police station, and whose family had not been given access to his body for the purpose of autopsy, in spite of repeated requests to the Venezuelan authorities, it would be very important to consider the current circumstances in that country, including by reviewing the reports of international organizations on the situation of human rights there.

In his experience as a member of the Committee against Torture, States' so-called diplomatic assurances that individuals who were transferred to their jurisdiction would be protected against torture and other forms of ill-treatment had proved to be unreliable. Accordingly, the Committee had urged States to refrain from seeking or relying on diplomatic assurances where there were substantial grounds for believing that the person would be in danger of being subjected to torture. The more widespread the practice of torture or other cruel, inhuman or degrading treatment, the less likely it was that diplomatic assurances would provide protection from the real risk of such treatment, however stringent any agreed follow-up procedure might be. To some extent, such considerations were relevant to the Commission's work on the topic.

The failure of diplomatic assurances to protect individuals from torture was mirrored by the failure of such assurances to ensure effective prosecution, as illustrated by the prevailing situation of impunity to which he had already referred. Therefore, a State's diplomatic assurances of its intention to effectively prosecute should be considered insufficient, in themselves, to warrant a transfer of proceedings. For those reasons, he also had concerns about the language used in paragraph 3 of Mr. Nolte's proposed additional draft article X. In his view, the appropriateness of proposed transfers of proceedings should be assessed independently and impartially on a case-by-case basis. Furthermore, it must be borne in mind that while States had the right to claim immunity, they did not have a right to do so with a view to insulating their officials from the consequences of their actions. The forum State also had a right and, often, an obligation to inquire into the motives and circumstances of the case in question and to deny the transfer of proceedings in cases where it was unconvinced that the State of the official would pursue effective prosecution. Perhaps the Special Rapporteur could further elaborate on the criteria that should guide the forum State in deciding whether or not to transfer proceedings. In cases where prosecution by the State of the official was later found to have been inadequate, he wondered how jurisdiction over an accused official might be reclaimed once that official had been transferred from the forum State to his or her home State.

Regarding draft article 16, he agreed with other members that the accused should enjoy the protection afforded by due process guarantees, including an independent and impartial tribunal. In addition, the guarantee of a fair trial was not only a right of the accused; in the cases under consideration, a fair trial might also be seen as a safeguard on its own. If prosecutors adhered to the principles of due process, frivolous prosecutions would become more difficult. He encouraged the Special Rapporteur to conduct further study on the connections that might exist between fair-trial guarantees and the other procedural safeguards.

As for the issues suggested by the Special Rapporteur for future consideration by the Commission, he supported the addition of draft articles on recommended good practices, which might include training and capacity-building and criteria for decision-making. Regarding the creation of a mechanism for the settlement of disputes between the forum State and the State of the official, the effectiveness of such mechanisms should be a prime consideration. If one State claimed that another State had initiated frivolous proceedings, a mechanism for impartial decision-making was evidently important. Perhaps the Commission could base such a mechanism on the one established under article 66 of the Vienna Convention on the Law of Treaties.

In conclusion, he said that effectively addressing impunity was not an easy goal to achieve. The Commission members' varied experience would no doubt be of benefit in the overall consideration of the topic, including in respect of a number of sensitive issues. He hoped that the Commission's work, by striking the right balance between respect for the sovereign equality of States and the prevention of impunity, would help to ensure the

prosecution of those who ought to be brought to trial and avoid the prosecution of innocent people, while ensuring due process and establishing an effective mechanism for settling disputes.

Mr. Argüello Gómez, welcoming the Special Rapporteur's seventh report, said that the topic was a sensitive one, as it dealt with the endowment of national courts with powers that many States were unwilling to grant to international tribunals or that had been granted to such tribunals but had left States dissatisfied with the outcome. Noting that both the sixth and seventh reports of the Special Rapporteur related to the procedural aspects of immunity, he said that he wished to comment first on the subject of sanctions with extraterritorial effects, or sanctions that were imposed on State officials, in the absence of the accused, for acts that allegedly had been committed outside the State that imposed the sanctions. If the authorities of a State imposed sanctions of any kind on an official of another State on the ground that the official had committed crimes outside the forum State, those authorities were exercising criminal jurisdiction. By imposing sanctions, they disregarded the immunity that the official might enjoy, even when he or she was physically in the hands of the forum State.

The mere fact that the official in question was located outside the territory of the forum State did not make that situation irrelevant to the topic under consideration. The fact that the decision-making authority in such cases was normally the executive branch likewise made no difference, since the decision was based on a finding that the official had committed crimes such as terrorism or human rights violations. The authority of the forum State that imposed the sanction and declared that the official targeted by the sanction was guilty of criminal offences thus turned a blind eye to any immunities that the official might enjoy.

The Commission's work on the topic would be unnecessarily limited if it analysed only the procedural rights and immunities of officials who were physically present in the territory of the forum State, while overlooking the immunities of officials who were not under the forum State's territorial jurisdiction. In his view, that represented an omission from the reports on the topic and the Commission's debate thus far. In that context, Sir Michael Wood's emphasis on the importance of the presence of the accused in the territory of the forum State was particularly significant. The Commission had yet to explore the implications of that criterion in cases where sanctions were imposed for alleged offences, even when the authority imposing them was not part of the judicial branch. In that connection, he agreed with Sir Michael Wood that a definition of the term "criminal jurisdiction" was necessary.

Although sanctions imposed by States on other States were not within the scope of the current topic, he nevertheless wished to highlight the serious consequences that sanctions with extraterritorial effects could have for individuals; indeed, that issue was closely associated with human rights. He therefore proposed that such sanctions should be considered by the Commission in its future programme of work.

Moving on to procedural safeguards for State officials who were accused of having committed international crimes, he noted that the debate had in part turned on whether those safeguards should apply to proceedings in respect of the crimes listed in draft article 7 or to all situations that fell within the scope of the topic under consideration. Many of the members who had held that those safeguards should apply solely to draft article 7 crimes had indicated that the only other persons to whom they might apply were the members of the so-called troika and that the latter enjoyed all applicable immunities *ratione personae ex officio*. However, that understanding was not as clear as it should be, since the power to recognize Governments and members of the troika lay with the State authority in charge of international relations. That power usually did not belong to the judiciary, as the reasons for recognizing a Government were not generally based on rules of law but on political considerations. In that connection, it was sufficient to recall the position with regard to the Bolivarian Republic of Venezuela. That country had a Government that controlled the whole of the national territory and the entire State apparatus, including public services, and was recognized by the country's judiciary, legislature and State security services. Yet there was a group of States that did not recognize either that Government or the troika who represented it. He therefore wondered what safeguards the troika of that country would enjoy *vis-à-vis* that group of States. Simply saying that that was an exceptional case that could be disregarded did not solve the problem. The same situation could arise with respect to any country, and could be brought about by a single State: if the forum State questioned the legitimacy of the other

State's Government, it would not recognize the immunities of that State's officials. Clearly, the subject of procedural safeguards had implications stretching beyond the rules to be followed before forum courts. Consideration of the topic would therefore be incomplete if those aspects were ignored.

The Special Rapporteur had made a very careful study of the mechanisms for notification, exchange of information and consultation. However, the most crucial issue was the definition of the procedural safeguards that should exist in order to protect the rights of the official, and of the State from which he or she derived immunity, in situations involving the exercise of criminal jurisdiction by the forum State. Draft article 7 had been adopted on the understanding that rules would be formulated to ensure that proceedings were fair and apolitical. For that reason, it was necessary to examine whether the rules proposed in the seventh report fulfilled that function. The assumption that, in the light of draft article 7, it was pointless to discuss procedural safeguards because they would always prove useless or inadequate would impede any further progress. Draft article 7 was not the problem; if the draft articles did not identify any crimes that were not covered by immunity, the discussion of the topic and the formulation of rules would make little sense. Conversely, the study of the topic would likewise be irrelevant if it was based on the premise that the forum State could exercise jurisdiction over any crime, as that would imply that immunity did not exist.

The method of provisionally adopting draft article 7 before discussing procedural safeguards had not been wrong. He did not see how the adoption of procedural safeguards could have affected the decision as to which crimes should be included in the list. The proposal that draft article 7 should indicate that no action could be taken against a foreign State official unless there was conclusive proof that he or she had committed one of the crimes listed therein seemed to him to be impractical.

Draft article 7 was not entirely devoid of safeguards, in that paragraph 2, by referring to the definitions of crimes in international treaties, ensured that the crimes in question could not be defined arbitrarily by the forum State. However, as lawyers well knew, the interpretation of a text was a complex matter and often depended on the legal and social system in which it was applied. As noted in *Oppenheim's International Law*, "in many states the courts have to apply their national laws irrespective of their compatibility with international law, and … courts naturally tend to see the problems which arise primarily from the point of view of the interests of their own state". There was therefore no certainty that the crimes in question would be interpreted in a manner consistent with the rules of international law.

The crux of the problem was to determine how to provide satisfactory guarantees to the State of the official, which was the primary beneficiary of immunity. The new draft article X proposed by Mr. Nolte at the Commission's 3483rd meeting had its merits as a means of attempting to provide safeguards in unforeseen situations that depended in large part on the political will of the States involved, but he wondered how evidence that the official had committed the alleged offence could be deemed to be "fully conclusive" if no trial, with the participation of the accused, had yet been conducted. He also wondered whether transferring proceedings to the State of the official, provided that it was willing and able to carry out proper proceedings, was really an effective safeguard if the decision as to whether that condition had been met was taken by the forum State. Idealism aside, what was most likely was that the forum State would transfer proceedings to the State of the official if the two States entertained good relations. Any dispute that arose between those States could not be resolved or anticipated by any rules that the Commission might formulate. Any such difference of opinion would constitute an international dispute that would have to be resolved by the means of peaceful settlement set forth in the Charter of the United Nations. The interesting suggestions for resolving such disputes that had been put forward by members of the Commission should also be taken into account.

Safeguards for the official in his or her individual capacity would mostly depend on whether he or she had close ties to the Government in power in his or her State. If that was the case, the forum State would probably be against the transfer of proceedings on the grounds that the State of the official was not genuinely willing to prosecute that person. In such a situation, the only solution would be pacific settlement in accordance with Article 33 of the Charter of the United Nations or, as suggested by Mr. Tladi, some variant of draft

conclusion 21 of the draft conclusions on peremptory norms of general international law (*jus cogens*). If the State of the official was against him or her, the only practical safeguards would be those offered by the legislation of the forum State, which would be at liberty to heed the Commission's draft articles without fear of international disputes.

In relation to measures to ensure the fair and impartial treatment of the official, it should be borne in mind that the manner in which the official was treated could be a means of bringing pressure to bear on his or her State. Measures to ensure fair treatment should not be directed solely towards securing the rights of the individual concerned, as important as it was to do so. When formulating procedural safeguards, the Commission should bear in mind the ones that applied in proceedings before the International Criminal Court, even though a distinction should be drawn between the latter and proceedings before national courts. Similarly, it would be wise to take on board some of the Court's practices in terms of the treatment of accused persons, as those practices took account of differences in language, customs and legal systems, separation of the accused from his or her family, and the attendant costs. The draft articles could state that the evidence and legal proceedings used in connection with the official must be similar to those used in trying persons of the same rank in the forum country. The question of whether or not to prohibit the transfer of the official to another jurisdiction for trial or the serving of a sentence would have to be assessed, with a view to preventing situations where a powerful State exerted pressure on a weaker forum State. The situation of the official *pendente lite* required some consideration. If the official was held in an ordinary prison, he or she would be serving a *de facto* sentence before being tried. In order to avoid the politicization of proceedings, it was also necessary to bear in mind the fact that some countries permitted agreements between the prosecutor and the defendant under which the latter received a reduced sentence in exchange for the incrimination of other persons. In cases that involved international relations, that practice might lend itself to manoeuvres that had little to do with bringing wrongdoers to justice.

He was in favour of referring the draft articles proposed by the Special Rapporteur to the Drafting Committee, together with the suggestions made by the Commission members.

Mr. Ruda Santolaria said that the draft articles proposed in the Special Rapporteur's seventh report were well substantiated by multiple references to treaties, legislation, doctrine and case law. Procedural safeguards would reduce the possibility of the abuse or politically motivated exercise of jurisdiction against an official of a State other than the forum State. Dealing with the procedural aspects of immunity would certainly make it easier to strike a balance between the principle of the sovereign equality of the forum State and the State of the official and the prevention of impunity, and between the right of the forum State to exercise criminal jurisdiction and the rights of the official of the other State.

As far as draft articles 8 and 9 were concerned, he agreed that immunity must be considered at an early stage of the proceedings, before the indictment of the official and the commencement of the prosecution phase, and that it was for the courts of the forum State to determine immunity from foreign criminal jurisdiction, without prejudice to the participation of other organs of that State, such as the Ministry of Foreign Affairs, which could contribute expert knowledge of the subject matter and of sensitive issues.

He also agreed that while the invocation of immunity was a right of the State of the official, possible immunity *ratione personae* should be considered *proprio motu* by the courts of the forum State. In situations involving immunity *ratione materiae*, immunity must be invoked by the State of the official, as the organs of the forum State might have no means of knowing whether, at the time the acts under consideration had been committed, the person in question had been an official of a foreign State and had performed those acts in an official capacity. He endorsed the emphasis placed on the application of due diligence in the exercise of a right of a State, in line with the findings of the International Court of Justice in the case concerning *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*.

Since State officials' immunity from jurisdiction was recognized for the benefit of the State and not of the individual, and States, not their officials, had the right to decide whether to invoke immunity, it followed that immunity could be invoked only by the State and not by the official. While the organ that was competent to take the decision to invoke immunity was determined by each State's domestic order, the invocation of immunity by the Head of State,

Head of Government or Minister for Foreign Affairs was indubitably valid, given that those officials represented the State at the international level. Similarly, immunity must be examined when it was invoked by the head of a diplomatic mission of the State of the official which was accredited to the forum State.

There was indeed no rule that limited the point in proceedings when the State of the official could invoke the immunity of one of its officials. However, for such an invocation to be useful and to produce the desired effects, the State should formulate it as soon as it was aware that the authorities of the forum State wished to exercise criminal jurisdiction over one of its officials. He therefore supported draft article 10 and, in connection with paragraph 4 thereof, wished to emphasize that the diplomatic channel, as the normal conduit for inter-State relations, offered legal certainty in respect of invocations of immunity. He likewise supported paragraph 6 of that draft article.

He concurred with the contents of draft article 11. The principle of continuity of the effects of a waiver meant that it covered not only immunity from jurisdiction but also immunity from execution. However, as the Special Rapporteur stated in paragraph 100 of the report, in the event of any intention to exercise criminal jurisdiction in respect of new acts distinct from those to which the waiver pertained, the question of the immunity of the State official from foreign criminal jurisdiction would have to be reconsidered by the authorities of the forum State.

The diplomatic channel was a particularly suitable means of communicating a waiver of immunity, as was illustrated by the case cited in footnotes 159 and 160 concerning *Ferdinand et Imelda Marcos c. Office fédéral de la police*, which had come before the Federal Tribunal of Switzerland. For the sake of legal certainty, waivers of immunity must be irrevocable.

With regard to the procedural safeguard provided for in draft article 12, he subscribed to the Special Rapporteur's view, first, that the diplomatic channel played a particularly important role because the determination of whether or not immunity from foreign criminal jurisdiction applied to a particular official was undeniably an example of "official business"; and second, that if no other means of communication had been established to that end, article 41 (2) of the Vienna Convention on Diplomatic Relations would apply.

He also fully agreed with the Special Rapporteur's statement, in relation to draft article 13, that the participation of the State of the official in the exchange of information process could not in any way be construed as recognition of the competence of the courts of the forum State or as an implied waiver of the immunity of its official from criminal jurisdiction.

Draft article 14 deserved particular attention in view of the fact that the model of subsidiary jurisdiction could be fully transposed to the regime of immunity of State officials and that such immunity would not be affected if, at the time of its consideration or at some later stage, the courts of the forum State, having concluded that it was impossible or inappropriate for them to exercise their own jurisdiction over the official, put into motion the process to transfer the criminal proceedings to the State of the official. He concurred with the Special Rapporteur's reasoning, in paragraphs 142 to 144, that the transfer of criminal proceedings would be feasible in any case involving immunity *ratione materiae* and would amount to recognition of the primacy of the jurisdiction of the State of the official. It would consequently work in favour of the State in question, in that it would ensure that the courts of that State would, where applicable, be able to rule on the possible criminal responsibility of its official. At the same time, he endorsed the statement that defining a model for cooperation between the forum State and the State of the official through the transfer of criminal proceedings mechanism could help to counteract criticisms regarding the possibility that the forum State might use criminal jurisdiction for political purposes or motives. That would no doubt help to prevent impunity for the most serious international crimes and to reinforce the principle of the sovereign equality of States.

Draft article 15 was most welcome, since consultation had the advantage of being flexible. It could therefore be used alongside or instead of any other procedural safeguards. Consultations did not necessarily have to be confined to those between the organs that were competent to determine or apply immunity; they could also be conducted through the diplomatic channel.

The inclusion of draft article 16 would ensure consistency with the Commission's other work, such as the draft articles on crimes against humanity. Paragraph 3 was consonant with the Vienna Convention on Consular Relations.

As far as the future workplan was concerned, he hoped that, in the next report, the Special Rapporteur would analyse the appropriateness of providing for a mechanism for settling disputes between the forum State and the State of the official. It might also be advisable to recommend that States should draft guides or handbooks on the treatment of immunities of foreign State officials for use by the various State organs concerned.

He fully agreed that all the draft articles contained in the report should be submitted to the Drafting Committee.

Mr. Reinisch said that the Special Rapporteur's sixth report (A/CN.4/722) contained a very useful summary of the Commission's debate in 2017 and provided excellent background information on general conceptual issues related to jurisdiction and procedure. It therefore provided a bridge to the seventh report. The sixth report resumed the discussion on the proposed draft definition of "jurisdiction", under which jurisdiction was understood to mean the processes, procedures and acts required by judicial organs in order to establish and enforce the criminal responsibility arising from the commission of criminal acts. That definition had the merit of avoiding the difficult question of the legal basis on which a State might exercise jurisdiction and, at the same time, using wording that could accommodate exemptions from the exercise of jurisdiction in the form of immunity. The Commission should therefore resume its consideration of the definition of "jurisdiction" for the purposes of the topic.

The analysis of State and judicial practice contained in paragraphs 49 *et seq*. of the sixth report was most useful, although it demonstrated that a lack of consistency made it hard to identify any general practice. In one case, a national court's finding indicated that any inquiry or investigation by law enforcement agencies, even at a very preliminary stage, would be incompatible with the effects of immunity under international law. Similarly, the International Court of Justice, in its advisory opinion on the *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, had found that questions of immunity were preliminary issues that must be expeditiously decided *in limine litis*. In other cases, the International Court of Justice and other courts seemed to rely on whether State officials were subjected to any "constraining act of authority", as stated in *Certain Questions of Mutual Assistance in Criminal Matters*.

Those issues were related to the central question of procedural safeguards because States exercising jurisdiction would need to have sufficient evidence to decide whether their jurisdiction was barred by immunity *ratione materiae*. It was clear that, even at a preliminary stage of the investigation, persons faced with the possibility of criminal proceedings would have to hire lawyers to prepare their defence and would therefore already be subjected to indirect *de facto* constraints that could impede their ability to fulfil their functions.

Chapter II (C) of the sixth report dealt with categories of acts that were affected by immunity, one of which was detention, which raised some highly complex issues. He agreed with the Special Rapporteur that detention resulting from an executive act, as opposed to a court order, did not relate strictly to immunity from criminal jurisdiction, but rather to the personal inviolability of certain State officials such as diplomatic agents, members of special missions, diplomatic couriers and the troika. The troika should, of course, also enjoy immunity *ratione personae* from detention ordered by a court in the exercise of its criminal jurisdiction. It seemed that immunity *ratione materiae* would also protect a State official from court-ordered detention, but not from detention as a purely executive act prior to the official's appearance in court. He shared the concern that Mr. Rajput had expressed at the 3485th meeting, to the effect that, if immunity *ratione materiae* applied only to judicial detention, the distinction between executive and judicial detention might lead to abuse, as it was often the police, an executive organ, that took a person into custody before he or she was brought before a judge.

The question was to what extent inviolability in relation to purely executive detention was required in order to allow State officials to perform their functions. Unlike the Special Rapporteur, who took the view that it was impossible to find any rules in treaty law or

customary international law recognizing the inviolability of State officials who enjoyed immunity *ratione materiae*, he considered that an inviolability that was more limited than that enjoyed by the troika should, by analogy, be enjoyed by other State officials in order to protect the interests of their State. The different solutions contained in the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations were instructive. While the Vienna Convention on Diplomatic Relations granted diplomats general inviolability regardless of the type of crime allegedly committed, the Vienna Convention on Consular Relations was more nuanced and did not generally exempt consular officials from arrest or detention. The Vienna Convention on Consular Relations was interesting in that it delinked the question of inviolability from the underlying crime that had allegedly been committed, and thus from the scope of immunity *ratione materiae*. It suggested that any form of arrest or detention should be conducted in a manner that did not affect consular functions. While the approach of the Vienna Convention on Diplomatic Relations could be extended to the troika, that of the Vienna Convention on Consular Relations could be extended to other State officials who merely enjoyed immunity *ratione materiae*.

Naturally, when seeking guidance from the Vienna Convention on Consular Relations it was necessary to bear in mind some crucial differences. The forum State might have a stronger interest in securing the presence of a person not serving as a consular official, since the continued presence of such a person in its territory could not be taken for granted. The forum State might also need more time to assess whether immunity *ratione materiae* applied than in *prima facie* cases of immunity *ratione personae* of the troika or diplomatic personnel.

There appeared to be an interesting parallel between immunity from enforcement and State officials' immunity: in both cases, it was not the underlying claim that was decisive, but the potential interference of the forum State in the fulfilment of State functions. However, he recognized the potential for abuse in that area as well, given that State officials and States might use the convenient argument that detention was out of the question because those persons had to fulfil certain functions.

Plainly, any measures involving forced appearance as a witness would have to be treated in the same way as detention, because they would also raise the issues of inviolability or immunity. On the other hand, no major problems would arise from a mere invitation to a State official to attend a court hearing as a witness, since compliance in that case would be voluntary. He was uncertain whether the reference to the *Prosecutor v. Tihomir Blaškić* case in paragraph 88 of the sixth report was apt in the context of considerations regarding inviolability. In its 29 October 1997 judgment in that case, the Appeals Chamber of the International Tribunal for the Former Yugoslavia had ruled that the Tribunal could not address binding orders to State officials acting in their official capacity, but the ruling seemed to be based more on considerations of State sovereignty than on those of inviolability, since the Chamber had found that the Tribunal's power to issue binding orders did not include the determination of which State organ was competent to comply with the order. The Appeals Chamber had stated that "international courts do not necessarily possess, *vis-à-vis* organs of sovereign States, the same powers which accrue to national courts in respect of the administrative, legislative and political organs of the State".

Regarding precautionary measures, the Special Rapporteur distinguished between those affecting foreign officials themselves, such as the confiscation of travel documents, and those involving the seizure of property belonging to such officials. He agreed that, although measures of the first type did not affect foreign officials as strongly as formal detention, rules similar to those applicable to detention should probably apply in such cases; that implied that the troika should be exempt from such measures. However, it was hard to imagine that very different rules could be applied to other State officials, as their ability to perform their functions would be severely impaired by limitations on their freedom of movement.

He was not sure that he agreed with the suggestion in paragraph 96 of the sixth report that it would be legal to seize the personal property of State officials in cases where such property was being used for illegal purposes. In particular, the seizure of property in those cases would not qualify as a precautionary or provisional measure; rather, it would be an enforcement measure of a specific criminal-law nature.

Turning to chapter II (D) of the sixth report, on the determination of immunity, and in particular to the question of which organs of the forum State were competent to decide on the possible immunity from criminal jurisdiction of foreign State officials, he said that the Special Rapporteur provided a clear overview of practice in different States, ranging from cases where such decisions were exclusively within the domain of the courts to cases where the courts relied on determinations made by the executive branch. Between the two extremes were many variations, such as the practice of treating executive determinations as suggestions or recommendations on immunity that were not binding but might possess a high probative value. He agreed that it would be difficult to formulate a general rule on the basis of such divergent practice. Given that it was the State that was under an obligation to respect immunity in certain situations, it might be useful, however, for national legal systems to provide for a mechanism whereby domestic courts could fulfil that obligation. In other words, national systems should provide for a mechanism that facilitated the determination of immunity. He therefore agreed with the statement in paragraph 56 of the seventh report that the question of which organ was entitled to invoke immunity was part of the "self-organization" of each State and could not be determined in a general sense.

The Special Rapporteur's seventh report (A/CN.4/729) contained highly anticipated suggestions for procedural safeguards whose purpose was to "prevent abusive and politicized exercise of criminal jurisdiction by the forum State", as called for by States in the Sixth Committee and as acknowledged by the Special Rapporteur in paragraph 105, in which she recognized the "need to ensure that the forum State does not exercise its jurisdiction in an abusive or politically motivated manner and that the State of the official does not use the institution of immunity fraudulently". In that context, he agreed with Mr. Nolte and Mr. Saboia that if the procedural safeguards were intended to apply to draft article 7, that applicability should be made explicit in the text of the provision.

In his view, paragraphs 35 *et seq*. of the report were somewhat misleading. The subheading "Invocation as a procedural requirement" and paragraph 35 itself, in which it was stated that, "for immunity to be assessed by the organs of the forum State, it must be raised before them", suggested that there was a need to invoke immunity. In paragraph 36, however, the correct legal situation was reflected, in the sense that, while immunity might be invoked, that did not mean that invocation was "a prerequisite for immunity to be able to be considered and, as the case may be, applied by the courts of the forum State". The latter view tallied with the prevailing view that immunity had to be ascertained and respected as a matter of the courts' own decision-making, *proprio motu*, in order to meet the underlying obligation to respect immunity. He thus fully agreed with the statement in paragraph 43 that "invocation is 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".

He was less convinced by the distinction drawn by the Special Rapporteur in paragraph 53 between the need to invoke immunity *ratione materiae*, on the one hand, and immunity *ratione personae*, on the other. While courts were certainly more likely to be aware of immunity *ratione personae*, if a case of immunity *ratione materiae* was known to them, there should be no need for the State of the official to invoke his or her immunity. Consequently, he would modify draft article 10 to read "Organs that are competent to determine immunity shall decide *proprio motu* on its application in respect of State officials who enjoy immunity *ratione materiae* where such immunity is known to them", or "where there are sufficiently clear indications that such immunity may apply".

He largely agreed with the Special Rapporteur's explanations about waivers. He would, however, have preferred a more detailed discussion of whether or not waivers were irrevocable. Draft article 11 (6) merely stated that a waiver of immunity was irrevocable. He wondered whether that was necessarily true, or whether the revocability of a waiver could in fact serve as an additional procedural safeguard in favour of the State of the official.

He shared Mr. Aurescu's scepticism that the non-invocation of immunity could amount to an implied waiver, given the insistence in draft article 11 (2) that waivers must be "express". Similarly, like Mr. Nolte, he doubted the correctness of the view underlying draft article 11 (4) that a waiver could be deduced from a treaty. While he was aware of national jurisprudence containing references to "treaty-based waivers", he agreed with Mr. Nolte that

a characteristic feature of a waiver was that it expressed a State's renunciation of immunity in an individual case.

Draft article 12 contained language concerning a notification obligation owed by the forum State to the State of the official. It was the first of a number of procedural safeguards that had been intensely debated in recent years and that undoubtedly lay at the core of the process of balancing the need to enable the exercise of criminal jurisdiction so as to prevent impunity with the need to ensure the equality of States and the immunity enjoyed by them in respect of their official acts.

He agreed that, in principle, the obligation to notify should be the primary procedural safeguard, and he further agreed with the parallel drawn with the Vienna Convention on Consular Relations, which also dealt with immunity *ratione materiae* and thus provided a useful point of departure. However, he was not convinced by the proposed wording of draft article 12, which was imprecise and vague as to when a notification obligation was triggered. Draft article 12 (1) referred to a situation in which the forum State's authorities concluded that a foreign official "could be subject to its criminal jurisdiction". If taken at face value, that wording could trigger a deluge of notifications that might never actually be followed up. Such premature notifications were not only impractical but might also be inimical to effective prosecution, since persons who were alerted to potential prosecutorial acts would be likely to leave the forum State in order to evade accountability. He was therefore of the opinion that it would be better to follow the Vienna Convention on Consular Relations, pursuant to which an obligation to inform the State of the official was triggered when an arrest was made or when other prosecutorial steps were undertaken.

The issue of timing was also relevant to draft article 8, according to which the authorities should consider immunity "as soon as they are aware" that a foreign official might enjoy it. Regardless of the specific timing, he wondered whether it might be useful to add a paragraph to draft article 8 to reassure forum States that the potential immunity of a particular person did not impede the investigation of the crime in question in respect of other persons who might be involved.

He largely agreed with the wording of draft article 13 and with the rationale and policy reasons underlying it. Paragraph 1 appeared not to be problematic. The question was whether, under certain circumstances, the forum State should be required, rather than merely entitled, to request from the State of the official information that it considered relevant in order to decide on the application of immunity. From the standpoint of procedural safeguards aimed at preventing abusive assertions of jurisdiction, a provision placing the forum State under some form of obligation to request information before actually deciding on issues of immunity would be welcome. Paragraph 2 did not appear to pose any problems either, since it set out commonly accepted means of communication for exchanges of information, with the diplomatic channel being the default option. Paragraph 3, which dealt with direct communication, was perhaps overly detailed and delved too deeply into internal matters, many of which could be addressed in the commentary.

The assertion in paragraph 4 that a State could refuse a request for information did not seem to be problematic. Given that the State of the official usually had an interest in providing grounds for immunity in order to substantiate its application, such a State was unlikely to refuse such a request. In any event, the provisions of paragraph 5 on the conditional transmission and confidentiality of information were a useful way of tackling the problem. He agreed with the premise of paragraph 6 that a refusal to provide the requested information could not be considered sufficient grounds for declaring that immunity from jurisdiction did not apply, if the forum State had obtained information indicating that the official in question was entitled to immunity.

He agreed that the transfer of proceedings to the State of the official under draft article 14 would constitute a safeguard from the point of view of the State of the official if that State had the option of deciding whether or not a transfer should take place. However, the wording of the proposed draft article suggested otherwise, since paragraph 1 provided that the authorities of the forum State "may consider declining to exercise their jurisdiction" and transferring proceedings.

He struggled with the proposed wording of draft article 14 (2), which began with a reference to a transfer request – presumably from the State of the official, although that could be made more explicit – that triggered the suspension of criminal proceedings in the forum State, but then referred to the decision of the State of the official concerning that request. He would have thought that a transfer request would trigger a suspension, and not that the suspension would last only "until" such a decision was taken. If, however, the first reference to a transfer request meant a request made by the forum State, the suspension could last for an indeterminate period, should the State of the official not take a decision concerning that request.

Furthermore, draft article 14 did not sufficiently take into account the need to ensure that the State of the official was genuinely willing to exercise its jurisdiction and prosecute the alleged acts. Although the Special Rapporteur alluded to that need in paragraph 150 of the seventh report and mentioned, in paragraph 147, that it had been one reason that a Portuguese court had denied a transfer request, that central element for ensuring an effective prosecution and thereby preventing impunity was insufficiently reflected in draft article 14 (1), which referred only to proceedings that were initiated against an official in his or her own State. Yet the initiation or transfer of proceedings might serve merely to exonerate the official before the courts of his or her own State. Draft article 14 should thus include language indicating that the decision of the forum State to transfer proceedings should take those major competing interests into account.

He found proposed draft article 15, on consultations, to be helpful, and endorsed most of the points made in chapter IV of the report, although its title should perhaps have referred only to the procedural rights of officials, omitting any reference to the notion of "safeguards", which was more relevant to the context of inter-State relations affected by the exercise of jurisdiction over foreign State officials. The word "safeguards" was used to describe mechanisms for preventing politically motivated prosecutions in the forum State. The main concern in chapter IV was that officials should enjoy the right to fair treatment, as enshrined in various human rights instruments. He shared the Special Rapporteur's preference for the term "fair treatment" to mean the treatment to be accorded to persons subjected to criminal investigations and procedures. With that in mind, he suggested that references to "fair and impartial trial" should be replaced with either "fair treatment" or "fair trial". Consequently, draft article 16 should be entitled "Fair treatment of the official". The notion of "impartiality" appertained to the twin requirements of adjudication by an "impartial and independent" adjudicator and was one element of the broader notion of a "fair trial" or "fair treatment". He did not think that the element of impartiality should be highlighted as it currently was in the draft article.

Like Mr. Murphy, he would prefer to align the wording of proposed draft article 16 with that of draft article 11 of the draft articles on the prevention and punishment of crimes against humanity, so as to avoid giving the impression that the Commission was suggesting different standards of fair treatment.

While he was comfortable with most of the precise suggestions made by the Special Rapporteur in part four of the draft articles, he wondered whether they could truly achieve the challenging goal of preventing abusive exercises of criminal jurisdiction, on the one hand, and abusive invocations of immunity, on the other. Although proposed draft articles 8 to 16 would certainly facilitate cooperation and prevent misunderstandings, they hardly offered a solution to a scenario in which the forum State insisted on exercising criminal jurisdiction and the State of the official insisted on upholding immunity. It seemed to him that such a dilemma could ultimately be solved only through some form of neutral, third-party determination.

The fact that issues of immunity could be raised before the International Court of Justice had been well illustrated by the case concerning *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*. However, that case also demonstrated that the Court might not be in a position to decide on such issues before a decision on immunity had been taken by the forum State. Rather, once a national court had decided that it had jurisdiction and that a claim of immunity did not prevent it from exercising that jurisdiction, the State invoking immunity might feel aggrieved and institute legal proceedings before the Court, claiming a violation of public international law.

The Court's procedural rules did not allow States to request advisory opinions or make "preliminary references" in order to obtain a determination of whether or not a State official was entitled to immunity in a specific case, which could then be used as a basis for further decisions of the forum State. Changes to the Court's jurisdiction were theoretically and legally possible, but it might be more realistic to establish a kind of preliminary reference procedure that would allow national courts to stay criminal proceedings when immunity was invoked by the State of the official and the matter could not be settled bilaterally. A third-party dispute settlement mechanism, in the form of either *ad hoc* arbitral tribunals or permanent courts, could be empowered to deliver a judgment on the issue of immunity that would be binding on the States involved, including, in particular, on the courts of the forum State that made a preliminary reference.

In that regard, he noted the suggestion made by Mr. Tladi, and supported by Ms. Oral, that draft conclusion 21 of the draft conclusions on peremptory norms of general international law (*jus cogens*) could serve as a template for dispute settlement. As had been mentioned by Mr. Tladi, the draft conclusion set out procedural rules that did not constitute a third-party dispute settlement procedure *per se* but provided a mechanism that could be adapted to suit the draft articles under consideration. Under such an arrangement, the forum State could be bound to notify the State of the official that it intended to exercise jurisdiction. If the State of the official agreed to submit the matter to a third-party dispute settlement procedure, the forum State would be entitled to exercise jurisdiction only after a decision had been taken under that procedure. If there was no objection from the State of the official and no agreement to use a third-party dispute settlement procedure, the forum State could exercise its jurisdiction without following such a procedure.

With regard to the future workplan, he would caution against opening another forum in which to discuss the judgment of the Appeals Chamber of the International Criminal Court on the appeal filed by Jordan in relation to its obligation to cooperate with the Court in the arrest and surrender of the former President of the Sudan, Omar Hassan Ahmad Al-Bashir. The judgment on that appeal concerned questions of immunities under a treaty regime in the specific context of the referral of a situation by the Security Council to the International Criminal Court. There was little overlap between that case and the issue of the immunity of State officials from foreign criminal jurisdiction. The two issues in that case that related to foreign criminal jurisdiction were (i) the nature of an international court or tribunal; and (ii) whether States that acted in fulfilment of an obligation to cooperate with an international court or tribunal did so as "agents" thereof, and thus whether the "vertical" rules of immunities or the "horizontal" rules of immunity from foreign criminal jurisdiction should apply. Those issues appeared to go beyond the scope of the topic. The Commission might also wish to refrain from prejudging a question that might be submitted to the International Court of Justice for an advisory opinion.

He welcomed the Special Rapporteur's useful proposals that the Commission should discuss and, possibly, include in the draft articles a mechanism for the settlement of disputes between the forum State and the State of the official, and that it should draw up a manual or other instrument on best practices with regard to determining immunity issues. In fact, the establishment of a mechanism for the settlement of disputes between the forum State and the State of the official might be the ultimate procedural safeguard for ensuring, as stated in paragraph 105 of the seventh report, that "the forum State does not exercise its jurisdiction in an abusive or politically motivated manner and that the State of the official does not use the institution of immunity fraudulently".

To conclude, he said that he supported the referral of all the proposed draft articles to the Drafting Committee.

The Chair, speaking as a member of the Commission, said that he wished to thank the Special Rapporteur for her rich and substantive seventh report. While he did not think that the Commission should reopen the debate on draft article 7, it could and should discuss appropriate procedural rules and safeguards related to the draft article; he understood Mr. Nolte's very helpful proposals to have been made in that same spirit. In 2018, he had been one of the Commission members who had supported exceptions and limitations to immunity *ratione materiae* in principle, but he had wished to balance them with more fully developed procedural rules and guarantees. He had even proposed a mechanism of subsidiarity for the

determination of situations in which immunity did not apply. In that respect, he had made a proposal very similar to that of Mr. Nolte. In his view, the newly proposed draft articles should directly address the issue of guarantees concerning draft article 7.

The general procedural rules and guarantees set out in the report should apply equally to draft article 7, provided that they were amended and restructured. He was convinced that provisions on consideration, determination, invocation, exchange of information, consultations and transfer of proceedings could be of use even in situations in which the forum State faced the challenge of taking a decision with regard to exceptions under draft article 7.

It seemed to him that any decision on the immunity of a foreign State official had to be the result of a thorough process of determination that took into account all the elements available to the courts or other competent authorities of the forum State. It must include not only formal criteria, such as whether the individual concerned was a high-ranking State official who enjoyed immunity *ratione personae* or another State official acting in an official capacity, but also the question of whether any of the exceptions under draft article 7 applied. In other words, the inclusion of one of the crimes covered by draft article 7 in an accusation, arrest warrant or similar document related to criminal proceedings did not automatically rule out, *ex lege*, the immunity of the foreign State official concerned. The immunity or absence thereof still needed to be determined "in accordance with the provisions of the present draft articles and through the procedures established by national law", as stipulated in draft article 9 (2).

However, what was clear to him and to other legal experts might not necessarily be clear enough to other readers of the draft articles. He therefore supported most of the drafting changes that had been proposed by other members for the purpose of facilitating comprehension. Clarifying the general procedural articles was as important as including a special provision related to draft article 7, given that, as Mr. Tladi had recalled, there might be some doubts as to which officials other than the troika enjoyed immunity *ratione personae*. Moreover, as Mr. Zagaynov had rightly pointed out, some proposed exceptions, such as the territorial tort exception, had been removed from draft article 7 and would be addressed only in the commentaries. He did not question the correctness of the Commission's decision in that regard. He mentioned the matter simply to underline the importance of procedural rules and to show that factors other than international crimes might seriously complicate decisions on immunity.

The question was how to address such concerns. First, it seemed that restructuring the draft articles in the manner proposed by Mr. Nolte could help. Second, it was important for the foreign State official to be present in the territory of the forum State and for the determination of immunity to be made at a relatively high level. Such conditions and guarantees were relevant not only to crimes under draft article 7 but also to all other cases involving the determination of immunity. Third, the only specific guarantee related to draft article 7 appeared to be the requirement that the forum State should base its decision on conclusive evidence. That was because draft article 7 set out a substantive law exception that differed from the purely formal criteria applicable in other cases, namely that the person in question must be a foreign official acting in that capacity. Naturally, that could not mean that the evidentiary standard was the same as for conviction by a court, but the organs of the forum State had to be able to present a *prima facie* case.

Concerning draft article 8, he assumed that the competent authorities of the forum State were to consider both immunity *ratione personae* and immunity *ratione materiae* as soon as they became aware that either of them might apply. In practice, that might be when such immunity was claimed by an official or his or her defence lawyer. Although that did not have the same effect as invocation of immunity by the State of the official, it might trigger a mechanism of notification that would presumably lead to either an invocation or a waiver of immunity.

The key provisions were contained in draft articles 10 and 11, which he supported, subject to a few comments. With regard to immunity *ratione materiae*, it was not entirely clear whether a failure to invoke immunity constituted an implied waiver by the State of the official. On the one hand, draft article 11 rightly provided that a "waiver shall be express and

clear". On the other hand, draft article 10 provided for the determination of immunity *proprio motu* only in respect of officials who enjoyed immunity *ratione personae*. If the Special Rapporteur wanted the non-invocation of immunity by the State of the official to amount to an implied waiver or a lifting of immunity, she should make that clear, with the condition that the State in question must be notified and given a reasonable amount of time in which to invoke or waive immunity.

Draft article 11 (4) provided that a waiver that could be deduced from an international treaty to which the forum State and the State of the official were parties should be deemed an express waiver. Since sovereign States were able to limit or rule out the immunity of their officials in certain cases, he could imagine such an exception, but was not sure that it should be called a "waiver". To him, the word "waiver" denoted a decision in an individual case, rather than a general treaty provision. Waivers of immunity were irrevocable, and the courts or other competent authorities of the forum State simply accepted them. A treaty exception, however, needed to be deduced and interpreted by the competent authorities of the forum State. It was also possible that the State of the official might adopt a different interpretation and even invoke immunity; he wondered whether that State would not be precluded from doing so.

Regarding draft article 14, he found the transfer of proceedings to the State of the official to be one of the most important elements. It was a possible basis for a mechanism of subsidiarity. With that in mind, both the forum State and the State of the official should have the right to offer a transfer or make a request in that regard, which could be considered even before the final determination of immunity. As stated by the International Court of Justice in the case concerning the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, immunity was not impunity and did not protect foreign officials against criminal proceedings before the courts of their own State.

He generally supported draft articles 13, 15 and 16. Concerning the future workplan, he found the idea of revisiting the issue of the relationship between the immunity of State officials from foreign criminal jurisdiction and international criminal courts to be interesting but unnecessary in view of the scope of the topic. Following that course of action might even lead to a delay in the adoption of the draft articles. The Commission could resolve the issue of defining a mechanism for the settlement of disputes by following the examples set in the draft conclusions on peremptory norms of general international law (*jus cogens*) and the draft articles on the prevention and punishment of crimes against humanity. The inclusion of recommended good practices was potentially useful. However, an appropriate place would need to be found for them in the draft articles, in an annex or simply in the commentaries.

To conclude, he recommended that all the draft articles should be referred to the Drafting Committee.

The meeting rose at 6.10 p.m.