

Provisional

For participants only

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International Law Commission

Sixty-seventh session (second part)

Provisional summary record of the 3278th meeting

Held at the Palais des Nations, Geneva, on Friday, 24 July 2015, at 10 a.m.

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Present:

Chairman: Mr. Singh
Members: Mr. Caflisch
Mr. Candioti
Mr. El-Murtadi
Ms. Escobar Hernández
Mr. Forteau
Mr. Gómez-Robledo
Mr. Hassouna
Mr. Hmoud
Ms. Jacobsson
Mr. Kamto
Mr. Kittichaisaree
Mr. Kolodkin
Mr. Laraba
Mr. Murase
Mr. Murphy
Mr. Niehaus
Mr. Nolte
Mr. Park
Mr. Peter
Mr. Petrič
Mr. Saboia
Mr. Šturma
Mr. Valencia-Ospina
Mr. Vázquez-Bermúdez
Mr. Wako
Mr. Wisnumurti
Sir Michael Wood

Secretariat:

Mr. Llewellyn Secretary to the Commission

The meeting was called to order at 10.05 a.m.

Immunity of State officials from foreign criminal jurisdiction (agenda item 2)
(continued) (A/CN.4/686)

Ms. Escobar Hernández (Special Rapporteur), summing up the debate, said that she was grateful for the interest shown by the Commission members in her fourth report and for their rigorous and detailed analysis of its content. Many members had supported the methodological approach employed in the fourth report, which was similar to that of the third report. Yet, some members had criticized certain methodological aspects of the fourth report, and, at times, their comments had gone beyond purely methodological issues. The observations made had primarily addressed the analysis of judicial practice in the report, the reference to domestic legislation, and the use of States' comments and statements.

Many Commission members valued the way in which both international and national judicial practice had been analysed; however, some members had expressed doubts as to whether such analysis was relevant or useful for the purposes of the report. The non-uniform and inconsistent nature of national judicial practice had been cited as one reason for those doubts; furthermore, it was felt that, precisely because of its lack of uniformity, national case law could not be taken into account for identifying a rule of customary international law in relation to immunity from foreign criminal jurisdiction. One member considered that the case law of national courts could not be attributed the same importance as the decisions of international courts and tribunals, which, in that member's opinion, were coherent and uniform. Other members held that the treatment of case law in the report was not particularly useful, since judicial decisions were merely cited without giving specific treatment to each individual case; in their view, it would have been helpful to provide more information on the context of the cases in question and the judgements handed down.

Bearing in mind that most Commission members considered an analysis of judicial practice to be useful for the Commission's work, she wished to reiterate her view that the practice of national courts was particularly significant, since it did not seem possible to identify the material element of immunity *ratione materiae* without first ascertaining how national courts had ruled on the question of which acts were covered by such immunity and which were not. Furthermore, the non-uniformity of national judicial practice was not a reason to conclude that its analysis was not useful for the purposes of the Commission's work. On the contrary, an understanding of the current situation with regard to national judicial practice was essential in order to be able to identify the issues that needed to be addressed; otherwise, there was a risk that the Commission's work could end up being based solely on theoretical concepts or preconceptions. Besides, the lack of uniformity identified in national judicial practice was, in itself, a factor that should be taken into account and analysed by the Commission.

She did not fully agree with those members who had asserted that the judicial practice of the International Court of Justice and the European Court of Human Rights was entirely uniform and coherent. While international judicial practice was certainly more coherent than national judicial practice, it could not be regarded as totally uniform, especially if the nuances and very specific approximations reflected in some international decisions were taken into account. However, although by and large she agreed with the suggestion by one member that different weight should be attributed to international and national judicial practice, she did not believe it was necessary to establish some kind of hierarchy between the two categories of case law. While she perfectly understood the importance that must be accorded to decisions of the International Court of Justice and the European Court of Human Rights as

international or regional judicial organs, she did not believe that the importance of national judicial practice was thereby diminished, since national courts were the bodies that generally dealt with the issue of immunity on a day-to-day basis.

One member of the Commission had very rightly pointed out that the work of the Inter-American Court of Human Rights should be taken into account in analysing judicial practice. Another member had suggested that references to case law relating to the temporal element of immunity *ratione materiae* should be included; that proposal could be taken into account when drafting the commentary.

Lastly, while she agreed with those who had suggested that individual analysis of each of the cases cited would perhaps have added value to the Commission's work, she wished to point out that such analysis would likely have resulted in an overly long, inaccessible and unintelligible report. Even in the absence of case-by-case analysis, the references to judicial practice, which were always systematic and linked to the issues being analysed in each paragraph, could still prove useful. Moreover, the footnotes to the report contained additional information on the type of acts that judicial organs had, or had not, deemed to be acts covered by immunity *ratione materiae*; such information could be useful for defining the concept of "an act performed in an official capacity". Lastly, it should be recalled that the approach she had taken in her third and fourth reports was in no way inconsistent with the Commission's previous practice regarding the use of judicial decisions.

Some members had criticized the treatment of domestic legislation in the report, maintaining that particular attention should be given to such legislation for identifying what was meant by an "act performed in an official capacity", since each State was competent to determine which acts performed by its officials should be regarded as "official" acts. Others had added that it would have been relevant to address domestic legislation in the report, especially since considerable attention had been paid to the judicial practice of national courts, which, as a general rule, based their decisions on domestic law. In that regard, she accepted the comments of those members who had indicated that it was inappropriate to use the term "irrelevant" with reference to national law, in paragraph 32 of the report. That said, while the use of the term was perhaps exaggerated, it should be understood in the light of the rest of the paragraph, which explained that domestic legislation should serve as a complementary interpretive tool, rather than a determining factor, in defining the scope and meaning of the expression "act performed in an official capacity".

From that perspective, she remained convinced that domestic legislation could not be regarded as the central element for defining an "act performed in an official capacity" or its characteristics, as there were sometimes significant differences between national legal systems. In addition, when analysing domestic legislation, it would be necessary to decide whether to take into account all rules relating to State activity or, as seemed preferable to her, only those specifically relating to the immunity of the State or its officials. It should in any case be noted that none of the States whose domestic legislation she had examined when preparing her fourth report had laws relating to the immunity of a foreign State or its officials that contained specific definitions of an "act performed in an official capacity". Consequently, there were, in her opinion, adequate grounds for the methodological approach taken in the fourth report with regard to domestic legislation. Furthermore, the assessment of domestic legislation as a complementary interpretive tool should not be viewed as giving rise to, or having any relationship with, the methodological decision to analyse national judicial practice.

She attached great importance to the written comments submitted by States in response to the questions contained in chapter III of the Commission's report on the work of its sixty-sixth session (A/69/10), as well as to the statements delivered in the

Sixth Committee. Her fourth report took all such comments and statements into account, with the exception of the comments submitted by two States after the report's completion, which had had been circulated to the Commission members. Those comments, to which various members had already made detailed reference, should be taken into account in the future work of the Commission.

She took note of the very valid suggestion that specific reference to States' written comments should be included in the report. The reason why she had not included such references was that some communications simply confirmed that legislation and practice on the issues raised was non-existent, while others merely informed the Commission of national judicial practice that had been duly reflected in the report. A third group of comments, which essentially related to the issue of limits and exceptions to immunity, would be examined in the fifth report. In any case, she would include references to States' written comments in the footnotes to her next report.

Lastly, she agreed that States' comments and statements should be taken into account not only for the information they provided with regard to national practice, but also for the light they shed on how international law was perceived in the area of immunity. It had in fact been her intention to seek such information in 2012; however, the Commission had decided at that time only to request information from States on national judicial practice.

Turning to the comments made by Commission members on the concept of an "act performed in an official capacity", she said that several members had shown themselves to be in favour of including a definition of that concept in the draft articles, while other members had expressed doubts as to its usefulness. It should be recalled that discussions had arisen in previous sessions as to whether definitions of "jurisdiction" and "immunity" should be included in the draft articles; the arguments put forward then had been similar to those advanced in the current session by certain members regarding the expression "act performed in an official capacity", namely, that the terms did not need to be defined because they were commonly used in international instruments and international practice, and their meaning was generally understood. Nevertheless, the definition of such terms was in fact no minor issue and the lack of a definition of an "act performed in an official capacity" would be particularly problematic for the Commission's work. The analysis of judicial practice, especially national judicial practice, had shown that, in many cases, courts did not only rule on the link existing between the State and the official but also analysed the type of act performed by the official, in order to conclude whether or not it was covered by immunity. However, there did not seem to be any clear and generally accepted understanding of what was meant by an "act performed in an official capacity". The same could also be said of the Commission's recent debates, in which members had maintained different positions on such issues as whether an international crime could be regarded as an act performed in an official capacity.

It should be noted that some of the Commission members who were now questioning the value of defining an "act performed in an official capacity" had called into question the need to define the concept of a "State official" at the previous session, when they had argued that the essential element for understanding immunity *ratione materiae* was the material element, in other words, the act performed in an official capacity. Despite those arguments, the Commission had decided to address the two concepts separately. Yet, in view of the aforementioned considerations, she wondered whether the Commission was getting caught up in contradictory arguments that would hinder the progress of its work. If the concept of an "act performed in an official capacity" was essential for defining immunity *ratione materiae*, it seemed reasonable that the Commission should provide a definition. In that connection, a

relatively large number of States in the Sixth Committee — both those that had accepted the need for separate definitions of a “State official” and an “act performed in an official capacity” and those that maintained the importance of focusing on the concept of “act performed in an official capacity” — had called for the Commission to analyse in detail the latter concept, thereby suggesting that they too would welcome a clear definition. Such a definition would increase legal certainty, which would in turn place in context the indeterminate legal concepts to which one Commission member had referred. Admittedly, such concepts sometimes had no legal definition; however, they were only operative when they could be clearly defined on the basis of case law or practice. Unfortunately, it was not possible to conclude that an act performed in an official capacity, if it were indeed an indeterminate legal concept, could be defined clearly and with certainty through case law or practice. Furthermore, while it was sometimes the case that indeterminate legal concepts were defined in opposition to another expressly defined legal concept, that was not a feasible proposition in the case of an “act performed in an official capacity” in opposition to an “act performed in a private capacity”, since no definition of an “act performed in a private capacity” could be identified in judicial practice either.

There were significant advantages to defining an “act performed in an official capacity”, particularly bearing in mind that such acts were relevant for the purposes of delimiting the relationship between the right of the forum State to exercise jurisdiction and the immunity granted to an official for the benefit of the foreign State, two components that were closely linked to the principle of the sovereign equality of States. In that context, a decision not to define the concept of an “act performed in an official capacity” and to treat it as an indeterminate legal concept lacking legal certainty — thereby leaving it to the judge’s discretion to decide in each case what the concept meant — was, in her opinion, not in keeping with a correct legal approach or with the functions of the Commission, which included to contribute to the progressive development of international law and its codification and to promote the harmonious interpretation of law.

That said, the inclusion of a definition of an “act performed in an official capacity” should not be confused with the development of a restrictive concept incorporating a narrow list of acts that would put the judge into a straitjacket. On the contrary, the definition should correspond to the identification of a set of parameters that, applied on a case-by-case basis, would assist a national judge in concluding whether or not to grant immunity from foreign criminal jurisdiction in respect of a given act performed by a given State official. It was essential to define those criteria, and it was to that end that she had proposed draft article 2 (f), although perhaps it could have been formulated differently.

With regard to the observations of some Commission members that draft article 2 (f) did not reflect the substantive characteristics set out in paragraph 95 of the report, it should be noted that the expression “exercise of elements of the governmental authority” had been used in the definition in order to incorporate the substantive link that existed between the act and the State of the official.

A sizeable group of Commission members had been in favour of indicating in draft article 2 (f) that the act of a State official could not be regarded as having been performed in an official capacity unless a special relationship existed between the State and that official. That relationship had to be closely bound up with the functions of the State and the exercise of sovereignty. Generally speaking, that group accepted the use of the term “exercise of elements of the governmental authority”, although she agreed that it might be advisable to clarify that notion. She therefore inferred that that group supported her position that, in order to be covered by immunity *ratione materiae*, an act had to be attributable to the State in substantive and not only in

subjective terms. In other words, an act performed by a State official could not be automatically attributed to the State for the purposes of obtaining immunity.

Other members, on the contrary, had taken the view that the expression “exercise of the elements of governmental authority” added nothing to the definition of the acts in question. They held that the term had been discarded during the sixty-sixth session and that it was sufficient to repeat the phrase “who represents the State or who exercises State functions”, already contained in draft article 2 (e), as provisionally adopted by the Commission.

She disagreed that the official nature of the link between the act and the State was reflected in draft article 2 (e), even when that provision was read with draft article 5, which referred to State officials “acting as such”. On the contrary, those two draft articles referred only to the subjective element of immunity and the phrase “represents the State or exercises State functions” had been included as a compromise in order to obviate any reference to “act” in the definition of “State official” and thus clearly to differentiate between those normative elements. Paragraph (15) of the commentary to draft article 2 (e), which had been provisionally adopted by the Commission at its sixty-sixth session, specified that the terms “represent” and “exercise State functions” might not be interpreted as defining in any way the substantive scope of immunity.

For that reason, the suggestion put forward by some members of the Commission purely and simply to replace “exercise elements of the governmental authority” with “represent or exercise State functions” would be extremely confusing and therefore impractical. For the same reason, it appeared inadvisable merely to include a reference to the State official “acting as such” since, as paragraph (3) of the commentary to draft article 5 explained, that phrase said nothing about the acts that might be covered by immunity *ratione materiae* and the expression “acting in an official capacity” had not been used, in order to avoid potential confusion with the concept of an act performed in an official capacity.

She, like other members of the Commission, therefore considered that qualifying an act as having been performed in an official capacity clarified its special link with the State. In reply to the question put by Sir Michael Wood, she explained that, in her opinion, the use of the expression “exercise elements of the governmental authority” made it possible to establish a very close link which, in practice, restricted the number of acts to which immunity could apply, by tying them to the legal interests to be protected, in particular the sovereign equality of States and the stability of international relations. Hence the expressions “exercise of elements of the governmental authority” and “exercise of State functions” could not be regarded as synonymous.

When commenting on that special link, some members had highlighted the difficulties caused by making sovereignty an element for defining the link between the act and the State. Several members had pointed out that it was not easy to define what constituted “acts inherent to sovereignty” or “sovereign acts by nature” and that it was not the task of the Commission to define sovereignty or its essential components. It was true that there was no precise definition of the term “sovereignty”, which was an indeterminate legal concept, albeit one with clear contours, the content of which had been established unambiguously in practice; although it was a dynamic concept which was constantly being redefined. While defining “acts inherent to sovereignty” or “sovereign acts by nature” was not easy, it was nevertheless possible to identify examples thereof through an analysis of practice, including the national judicial practice to which reference had been made in paragraphs 54 and 58 of her fourth report and footnotes thereto, where French and German courts had set forth their understanding of the essential elements of sovereignty and governmental authority.

On the other hand, while the expression “exercise of elements of the governmental authority” had already been employed by the Commission in the test for attributing an act to a State, she was prepared to accept other wording, provided that it was not inconsistent with the use of terms already employed by the Commission with a specific meaning in the draft articles. That might be a task for the Drafting Committee. At all events, the Commission’s work would be of far greater use to States if examples of acts which courts had included in or excluded from that category were mentioned in the commentary to draft article 2 (f) and if the criteria contained in paragraph 119 of her fourth report were incorporated in the commentary, as had been suggested by several members of the Commission.

The reference to the criminal nature of the act deemed to have been performed in an official capacity had given rise to an unfortunate misunderstanding among some members of the Commission, who had considered that draft article 2 (f) apparently characterized any act performed by a State official in an official capacity as a crime. Nothing could have been further from her intentions and that interpretation could not be inferred from the original Spanish version of her fourth report. The purpose of draft article 2 (f) was to define the notion of an “act performed in an official capacity” solely in the context of immunity from the exercise of foreign criminal jurisdiction and not in an abstract manner. In that context, it was obvious that the act in question would have an unambiguous criminal connection.

In the vast majority of cases analysed in the fourth report immunity had been claimed in respect of persons who had been accused of, or who were under investigation for the alleged commission of a crime. For that reason, it was impossible to dispense with that element in the categorization of the act performed in an official capacity by a State official who claimed immunity from foreign criminal jurisdiction. Moreover, that criminal component was reflected in the definition of the scope of the draft articles contained in draft article 1. The latter did not, however, define sufficiently clearly the kind of acts which would be unambiguously regarded as criminal behaviour under the legislation of the forum State and which might be covered by immunity *ratione materiae*. On the one hand, immunity had to apply before criminal courts exercised jurisdiction; on the other hand, immunity could be claimed only once it was certain that the intention to exercise criminal jurisdiction existed and that required a complaint, an accusation or an investigation into the commission of crimes. Without that criminal element, no jurisdiction would arise and there would be no need for immunity.

She understood the concern expressed by several members that, as it stood, the wording of draft article 2 (f) might give rise to misunderstandings, insofar as the assertion “constitutes a crime” could be construed as a threat to the inalienable principle of the presumption of innocence. Since that was clearly not her intention, the proposal to use the phrase “may constitute” was a good idea. The suggestion that the word “act” should be replaced with “crime” so as not to treat every act performed in an official capacity as a crime and thereby avoid the criminalization of the State was most helpful. Those amendments could be reviewed in the Drafting Committee with a view to finding a balanced solution which disposed of the aforementioned problems while retaining the vital reference to the criminal nature of the act in question.

Repeated reference had been made to the relationship between international responsibility and immunity. Most Commission members had been in favour of the “single act, dual responsibility” model and its consequences for the attribution of the act to the State as well as for the distinction between the State’s immunity from jurisdiction and State officials’ immunity from jurisdiction. Nevertheless some members, while accepting the above-mentioned model, had argued that it was

impossible to differentiate between those two forms of immunity because the latter was a manifestation of the former.

One member had been of the opinion that it was impossible to posit any relationship between the rules governing immunity and those related to responsibility, since the two institutions followed a different rationale, while other members had held that it was vital to consider both sets of rules in conjunction with one another. Although she understood that difference in rationale, she was convinced that the two institutions had some connecting elements which meant that they could not be completely separated and analysed as watertight compartments. It was sufficient to think of the nexus of problems posed by international crimes that had to be dealt with simultaneously in accordance with the rules on responsibility and the rules on immunity in order to comply with the existing international legal system.

Most Commission members had recognized that not all the criteria for attributing the act to the State for the purposes of determining responsibility could be applied in the context of immunity and had thus supported the position that she had adopted in her fourth report. At the same time, they had drawn attention to the need for a more detailed examination of the notion of *ultra vires* acts and acts performed by *de facto* officials. In her report, she had used the expression "*ultra vires*" as it had been construed in the context of State responsibility. A private act could not therefore be equated with an *ultra vires* act. The case law on that subject was, however, imprecise and above all inconsistent.

One member had maintained that none of the criteria for attributing an act to a State contained in the articles on responsibility of States for internationally wrongful acts could be applied for the purposes of immunity, albeit for different reasons to those which had led her to rule out the application of certain of those rules of attribution for the purposes of qualifying an act as having been performed in an official capacity. That member had been of the opinion that the act could not be described as an act performed in an official capacity because it could be attributed to the State; but, on the contrary, it could be attributed to the State precisely because it had been qualified beforehand as an act performed in an official capacity. The relevant factor was that the State official acted as such and therefore any of his or her acts was an act of State for which he or she enjoyed immunity. That interpretation was incompatible with the methodology adopted by the Commission in order to define the structure of immunity, according to which immunity comprised three normative elements all of which had to be present simultaneously, namely the subjective, the material and the temporal. That methodology had not only been agreed by the Commission, but had also been reflected in draft articles which had already been provisionally adopted by the Commission.

Draft article 6 had generally been well received, although some Commission members had made some interesting comments on paragraphs 1 and 2, of which the Drafting Committee should take note. For example, it should carefully appraise the use of the terms "in office" and "term of office", in the English version, and it might be advisable to reverse the order of paragraphs 1 and 2 in order to emphasize the material element of immunity *ratione materiae*. If that change were made, the reason for it would have to be properly explained in the commentary in order to avoid any ambiguous interpretation based on an automatic comparison of that draft article with draft article 4. Those members that had called attention to the expressions "exclusively" and "when acting in that capacity" should recall that she had corrected them orally in her introductory statement.

She disagreed with the Commission members who thought that paragraph 3 was superfluous and could be deleted, since the underlying issue had not been fully resolved in draft article 4, paragraph 3. The latter had been approved as a saving clause without prejudice to the specific legal rules on immunity *ratione materiae*

which the Commission might establish one day. In that connection, she drew attention to the statement in paragraph (4) of the commentary to draft article 5 that the matter would be covered more fully in a future draft article on the substantive and temporal scope of immunity *ratione materiae*. It was not a matter that could simply be resolved in a commentary. Moreover, paragraph 3 was unlikely to lead to confusion in respect of the distinction between the rules applying to immunity *ratione materiae* and those on immunity *ratione personae*, which had been made sufficiently clear in draft article 4. Article 6, paragraph 3, merely spelled out that distinction and was a consequence thereof.

Various queries had been raised by Commission members such as how to determine which authority was competent to decide whether an act had been performed in an official capacity, or what would happen if legal proceedings concerned several people, only one of whom enjoyed immunity. Those two issues would have to be discussed in a report devoted to the procedural aspects of immunity. The term “direct control”, which had been used in footnote 210, had been employed by the International Court of Justice in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*. In paragraph 137, in referring to the judgement of the Italian Constitutional Court, she had merely wished to draw attention to a real problem of practice which directly affected the relationship between international and domestic law and which might have a bearing on the topic under consideration. She did not consider that the judgement of the Italian Constitutional Court formally diminished the authority of the judgment of the International Court of Justice, or that it was intended to do so, since the Italian Constitutional Court had itself expressly stated that it did not wish to examine questions related to international law such as immunity and *jus cogens*. That had not, however, prevented it from concluding that an extraordinarily important judgement of an international court could not be executed in Italy. That finding undeniably gave rise to a problem in terms of responsibility under international law and to a host of questions concerning the relationship between international and domestic law and between national and international courts. The Commission would have to reflect on such matters, since they were not unrelated to the topic under discussion; in fact, there was nothing new about them. She wondered whether, in a different context, the Commission was not faced with a fresh conflict of jurisdiction similar to that which had arisen in the past between the German Constitutional Court and the Court of Justice of the European Communities in relation to the definition of standards for protecting human rights and the definition of the competence of each of those courts in that respect. Predicting the consequences of the judgement of the Italian Constitutional Court lay more in the realms of science fiction, although she trusted that a solution would be found through the conciliatory doctrine established in the *Solange I* and *II* cases.

She had taken note of the many viewpoints expressed by Commission members during the lively debate on the future workplan. It echoed an earlier debate in which most members had supported her proposal to address exceptions to immunity and procedural aspects of immunity in separate reports, in accordance with the plan agreed by the Commission at the beginning of the quinquennium. She was still convinced that that was the best way to approach those issues and saw no reason to depart from it.

At the same time, she was aware that it was unrealistic to insist on such separate treatment as an absolute rule, as was clearly demonstrated in her third and fourth reports, which were interrelated. A further demonstration of that understanding was the treatment of the temporal element of immunity *ratione materiae* in chapter II.C of her fourth report, which included more than a simple analysis of the material and temporal elements of immunity *ratione materiae*. Along the same lines, her fifth report

would address the procedural aspects of immunity that she considered necessary for a better understanding of the limits and exceptions to immunity.

That said, she could not agree with the contention that the procedural aspects of immunity were substantive issues, unless it was in the sense of their being important; however, they were not substantive in the sense of being material. As a result, it was preferable to deal with them only after the Commission had completed a detailed analysis of the substantive scope of immunity, which necessarily included a prior consideration of limits and exceptions to immunity. That approach was not unlike the one adopted by the former Special Rapporteur, Mr. Kolodkin, who had dealt with the issue of exceptions and the procedural aspects of immunity in his second and third reports, respectively. In any case, the procedural aspects of immunity were sufficiently important and interesting to warrant being dealt with in a separate report.

As to suggestions from Commission members that she should deal with both issues in a single report in order to provide a complete picture of the topic during the current quinquennium, her view was that speeding up the consideration of the issues was not a good strategy, nor was it in the Commission's best interests. In order to ensure a good product, it was better to develop the topic calmly and carefully. At the current stage of the Commission's work, it was simply not possible to include more subjects in a single report than could be handled properly in one session; nor did she think it advisable to defer the treatment of limits and exceptions in order to deal first with procedural matters. That was all the more true given that the Commission's workload at the sixty-eighth session was expected to be heavy. It would include addressing Mr. Kolodkin's third report, in respect of which the debate in the Commission had not been conclusive. Therefore, unless the Commission decided otherwise, her fifth report would be devoted entirely to the issue of exceptions to and limits of immunity *ratione materiae*. In conclusion, she requested the Commission to refer the two draft articles to the Drafting Committee.

The Chairman said he took it that the Commission wished to refer draft article 2 (f), and draft article 6, to the Drafting Committee, taking into account the comments made during the debate.

It was so decided.

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

Mr. Forteau (Chairman of the Drafting Committee) said that the Drafting Committee on Immunity of State officials from foreign criminal jurisdiction was composed of Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Kolodkin, Mr. McRae, Mr. Murphy, Mr. Nolte, Mr. Park, Mr. Petrič, Mr. Saboia, Mr. Tladi, Mr. Wako and Sir Michael Wood, together with Ms. Escobar Hernández (Special Rapporteur) and Mr. Vázquez-Bermúdez, (*ex officio*).

Provisional Application of Treaties (agenda item 5) (*continued*) (A/CN.4/687)

The Chairman invited the Commission to resume its consideration of the third report of the Special Rapporteur on the topic of provisional application of treaties (A/CN.4/687).

Mr. Niehaus said that the importance of the topic related to the growing need to give effect to the obligations arising from international treaties more expeditiously, without waiting for the lengthy ratification processes prescribed by domestic legal systems. Furthermore, as revealed by the viewpoints expressed in the Sixth Committee, States recognized that on account of its flexibility, provisional application helped to promote and accelerate the acceptance of international law. Article 25 of the 1969 Vienna Convention on the Law of Treaties constituted a strong basis and

provided legal certainty with regard to the obligations arising from provisional application, without precluding States from assuming such obligations on a unilateral basis.

In paragraph 25 of his report, the Special Rapporteur presented six categories of State practice in respect of provisional application. Yet that categorization did not always coincide with the comments that had been submitted to the Commission by States. Costa Rica was a case in point, since the Special Rapporteur had included it in the category of States in which provisional application was prohibited by the constitution or not accepted by the legal system. In reality, the Costa Rican Constitution did not explicitly prohibit the provisional application of treaties, and Costa Rica was a party to the 1969 Vienna Convention, whose article 25 allowed for the possibility of that practice. Yet, according to the case law of the Constitutional Court, international treaties clearly required legislative approval as a prerequisite for their entry into force; thus their provisional application was not possible. That example demonstrated the importance of examining the details of each State's practice.

Although there was no doubt that the point of departure for the Commission's work on the topic was article 25 of the 1969 Vienna Convention on the Law of Treaties, he agreed that the Special Rapporteur had reached too hasty a conclusion when stating in paragraph 58 of his report that, provided it was valid, provisional application produced the same effects as any other international agreement and was therefore subject to the rule *pacta sunt servanda*, and that its legal effects were definite and enforceable.

Of particular interest was the subject of provisional application with regard to international organizations dealt with in chapter IV of the report. However, he would have welcomed a more extensive discussion under sections C, D and E of that chapter, on the highly relevant and important aspects of provisional application with regard to treaties establishing international organizations, treaties negotiated within international organizations or at diplomatic conferences, and treaties to which international organizations were party. In particular, the information provided, in paragraph 122, concerning treaties to which international organizations were party and the status of the 1986 Vienna Convention on the Law of Treaties warranted a more detailed and substantiated analysis.

He concurred with the view that the Commission's output on the topic should not take the form of guidelines, but that conclusions with titles would be more helpful. In general, he endorsed the contents of the draft guidelines which were based on article 25 of the 1969 Vienna Convention on the Law of Treaties. Nevertheless, it was not necessary, in draft guideline 1, to reiterate parts of article 25 of the 1969 Vienna Convention. For the sake of clarity, he would suggest simplifying its text to read: "States and international organizations may provisionally apply a treaty, or parts thereof, in accordance with the rules of international law and the internal law of the State or the rules of the relevant organization" [*Los Estados y las organizaciones internacionales podrán aplicar provisionalmente un tratado, a partir de él, conforme al derecho internacional y en concordancia con su derecho interno con las reglas de la organización del caso*]. As to draft guideline 4, he agreed with other Commission members that it was too general, and proposed its deletion. Draft guideline 6, which dealt with a complex subject, warranted a more extensive and detailed analysis in order to avoid confusion. He supported the Special Rapporteur's proposal to reiterate the Commission's invitation to States to submit information on their national practice in relation to the provisional application of treaties. In the light of the comments made, he recommended referring the draft guidelines to the Drafting Committee.

Mr. Kolodkin said that the Commission's primary task under the topic was to identify the rules of the law of treaties and other rules of international law relevant to the provisional application of treaties. The cornerstone of such law was article 25 of the 1969 Vienna Convention and it would be useful to give States clear guidance as to whether the article reflected a customary rule of international law. However, article 25 did not address all the issues underlying the provisional application of treaties. For example, it stated that a treaty could be applied provisionally pending its entry into force; yet practice showed that multilateral treaties in force could also be applied provisionally between the States parties, on the one hand, and potential States parties, on the other hand. It also stated that a treaty could be applied provisionally if the negotiating States had so agreed; however, in practice, such agreements were not made by negotiating States only. Furthermore, article 25 was silent on whether other rules of the law of treaties and of international law, including those relating to matters of responsibility and succession, applied to provisionally applied treaties.

The Special Rapporteur must therefore conduct a thorough analysis of applicable international law in the light of article 25 with a view to drafting clear guidelines for States on how the provisional application of treaties was initiated and carried out, what legal effects it had — compared to the legal effects of a treaty in force — how long it might last and how it could be terminated.

There were a number of issues to be addressed: whether only negotiating States could agree on provisional application; whether such agreement should be explicit or might also be tacit or implied; and whether it should be legally binding or might take the form of an arrangement or understanding, as some legal writers had held.

With those issues in mind, he wished to focus on the example of the provisional application of the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction by the Syrian Arab Republic. The Special Rapporteur presented it in the report as an example of a unilateral act whereby the Syrian Arab Republic had assumed an obligation to apply a treaty provisionally. One member had also suggested that it might be a new form of provisional application that went beyond the scope of article 25.

However, since he had been directly involved in handling the case, within the framework of the Organization for the Prohibition of Chemical Weapons (OPCW), he held the view that there had been a tacit agreement between the Syrian Arab Republic and the parties to the Convention within the meaning of article 25 of the Vienna Convention. When making the declaration regarding the provisional application of the Convention at the time of depositing its instrument of accession, the intent of the Syrian Arab Republic had been not only to fulfil its obligations, but also to exercise its rights under the Convention as an OPCW member State. The States parties had been aware of that situation and it had been taken into account by the OPCW Executive Council when drafting its decision on the case. An effort had been made to ensure that the wording of the decision reflected the fact that all States parties, and not only those represented on the Council, had tacitly consented or agreed to the provisional application of the Convention by the Syrian Arab Republic. Other factors at play had been the lack of opportunity to convene a conference of the parties, the fact certain States parties did not wish an explicit reference to consent to provisional application in the Executive Council's decision, and of course the concern that the Syrian Arab Republic should fulfil its obligations under the Convention during the period of provisional application.

The Executive Council's decision had been based on the following compromise: first, the provisional application should relate to the whole Convention; secondly, the declaration by the Syrian Arab Republic had been circulated among the States parties on the date the Syrian Arab Republic had deposited its instrument of accession — 13

days before the adoption of the decision; thirdly, no objections regarding the declaration had been received from the States parties, not only from members of the Executive Council; fourthly, there was a recognition of the extraordinary character of the situation and the necessity to start immediately the activities necessary for the destruction of the Syrian chemical weapons programme pending the formal entry into force of the Convention; and, fifthly, the Syrian Government agreed to receive an OPCW delegation immediately and to cooperate with OPCW in accordance with the provisional application of the Convention prior to its entry into force.

What was significant, however, was that those provisions were in the preamble to the decision; the operative part made no reference to provisional application at all. Thus the Executive Council had not adopted a decision on the provisional application of the Convention as such, but a decision based on the presumption that, in the absence of objections, the request for provisional application had been settled beforehand between the Syrian Arab Republic and the States parties. Those who had framed the decision had considered that they had succeeded in reflecting that important legal point. As far as he knew, Syria had not taken part in the negotiations on the conclusion of the Convention, but, presumably, that did not preclude it from reaching an agreement on its provisional application.

In paragraph 5 of the report, the Special Rapporteur mentioned the possibility of provisional application based on a unilateral commitment by a State. However, it would be appropriate to consider whether there was any difference between such provisional application and the situations referred to in articles 34 and 35 of the Vienna Convention on the obligations and rights arising from a treaty for third States.

In his third report, the Special Rapporteur analysed the applicability of the rules contained in articles 11, 18, 24, 26 and 27 of the Vienna Convention to provisional application and stated his intention to examine the applicability of the reservations and succession regimes, the practice of depositaries and some aspects of the termination of provisional application in his next report. He shared the view that it was necessary to broaden the scope of the analysis of the applicable rules of international law. Indeed, a number of proposals had been made in that regard, most of which he endorsed. However, he was not convinced of the need to consider the applicability of article 60 of the Vienna Convention; since it was fairly simple to terminate the provisional application of a treaty, it hardly seemed necessary to refer to provisions relating to the breach of a treaty. Similarly, he questioned the relevance of article 18 of the Vienna Convention to provisional application, and agreed with the Special Rapporteur that provisional application could not be equated to the general obligation to refrain from acts, which would defeat the object and purpose of a treaty.

He also shared the view that while provisional application was not identical to entry into force, as a general rule, a treaty applied provisionally had the same legal effect as one in force. In his opinion, the difference between the provisional application of a treaty and a fully fledged treaty regime was procedural rather than substantive in nature. It was easier to initiate the provisional application of a treaty than its full operation since the latter must be preceded by its entry into force. Likewise, it was easier to terminate a provisionally applied treaty than one in force; yet the substantive legal effects of a provisionally applied treaty were the same. The principle of *pacta sunt servanda*, set out in article 26 of the Vienna Convention, also governed provisionally applied treaties. Accordingly, a breach of such treaties engaged the same responsibility as a breach of treaties in force.

It should be noted that provisionally applied treaties were binding on and within the Russian Federation, as confirmed by the 2012 decision of the Constitutional Court of the Russian Federation on the constitutionality of article 23 of the Act on International Treaties of the Russian Federation. The Court had held that consenting to

the provisional application of a treaty meant that the treaty formed part of the national legal system and should be applied in the same manner as international treaties in force (unless otherwise specifically provided). The Court had also noted that neither the Vienna Convention nor the Act on International Treaties of the Russian Federation provided for any exemptions from the principle of *pacta sunt servanda* with regard to provisionally applied treaties.

He contended that both provisionally applied treaties and agreements on provisional application were governed by the principle of *pacta sunt servanda*. However, if such an agreement was not legally binding, the principle did not prevail; yet it still prevailed for the provisionally applied treaty itself. In that sense, article 27 of the Vienna Convention was also relevant to provisionally applied treaties. Nevertheless, the general rule that provisionally applied treaties took precedence over domestic legislation was not absolute: States that agreed on the provisional application of a treaty or part thereof could also agree otherwise. For example, States might agree on the provisional application of certain provisions of a treaty precisely because those provisions did not conflict with the legislation of the States that wished to apply them provisionally.

Moreover, States could include a limitation clause in an agreement on provisional application to the effect that only provisions that did not run counter to their legislation would be provisionally applied. There were various forms of limitation clauses and they were frequently used in agreements relating to provisional application. As shown, *inter alia*, by the decision of the arbitral tribunal in its Interim Award on Jurisdiction and Admissibility in the case of *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, the exact wording of such clauses was important. He therefore considered that the Special Rapporteur could have reflected the decision in the *Yukos* case more accurately in the report, by referring specifically to paragraph 320 of the decision, in which the tribunal stated that its interpretation of the limitation clause of article 45 (1) was based on its specific language in its context; that parties to a treaty were free to agree to any particular regime, including a regime where each signatory could modulate (or eliminate) its obligation of provisional application based on the consistency of each provision of the treaty in question with its domestic law; but that agreement to such a regime would need to be clearly and unambiguously expressed.

He shared the view that it was not appropriate to analyse internal law regarding the provisional application of treaties. Nevertheless, the Special Rapporteur might wish to conduct an analysis of limitation clauses in agreements on provisional application, taking into account their interpretation in the practice of States and arbitral tribunals, and in legal writings. On the basis of such an analysis, the Commission could draft a model clause or guidelines establishing the criteria to be followed by States when drawing up such clauses. He also endorsed the proposal to complete the examination of questions related to the provisional application of treaties between States before taking up the provisional application of treaties by international organizations.

As to the draft guidelines, he was ready to discuss them in the Drafting Committee during the current session. However, judging from the debate thus far, it seemed that the Special Rapporteur would probably prefer to amend the draft guidelines himself before referring them to the Drafting Committee. He would follow the Special Rapporteur's wishes in that regard.

Mr. Candiotti said that he did not agree with Mr. Niehaus regarding the form the output of the Commission's work on the topic should take. It must be of some practical use to States, and thus draft guidelines would seem to be the most appropriate form, as proposed by the Special Rapporteur. Furthermore, he did not

endorse the proposal to delete draft guideline 4. On the contrary, it should be expanded since it dealt with what the Special Rapporteur considered to be the most important issue of the legal effects of provisional application.

Mr. Niehaus said that perhaps Mr. Candiotti was right and that draft guideline 4 should be retained. However, in that event, it should definitely be expanded, since, in its current minimal form it said virtually nothing.

Mr. Kamto said he had three comments to make on the Special Rapporteur's third report. First, he concurred with the Special Rapporteur's statement in paragraph 35 of his report that provisional application was intended for the period preceding the entry into force of a treaty. However, the Special Rapporteur seemed to equate the period between the signature and entry into force of the treaty with its provisional application. He also seemed to imply that the provisional application of a treaty was independent of the States parties' expression of consent to be bound by the treaty. There were two problems with that reasoning: provisional application of a treaty did not necessarily occur during the period between the signature of the treaty and its entry into force, and when it did, provisional application necessarily depended on the States parties' expression of consent to be bound provisionally by the treaty. Ultimately, the Special Rapporteur seemed to equate the notion of "expression of consent to be bound" with that of "entry into force", which was incorrect according to the law of treaties.

Pursuant to article 25 of the 1969 Vienna Convention, a treaty was provisionally applied pending its entry into force, meaning, necessarily, prior to its entry into force. The provisional application of a treaty that had already entered into force was a case that fell outside the scope of article 25 and therefore outside that of the current topic, as circumscribed by the Special Rapporteur and approved by the Commission.

His second comment was that certain Commission members, himself included, had stressed that it would be useful for the Commission, as part of its work on the topic, to examine the provisions of States' internal law that related to the provisional application of treaties. The Special Rapporteur had made an effort to incorporate that suggestion by examining the *Yukos* case and attempting to reflect its conclusions in draft guideline 1. However, he had failed to address article 46 of the 1969 Vienna Convention. It was imperative to decide whether that article did or did not apply to provisional application. Although article 46, which was entitled "Provisions of internal law regarding competence to conclude treaties", in paragraph 1 excluded the possibility for a State to invoke its internal law as invalidating its consent to be bound, it also included the clause "unless that violation was manifest and concerned a rule of its internal law of fundamental importance". The fundamental rules referred to were usually constitutional rules concerning the conclusion of treaties. Whereas the *Yukos* case did not deal precisely with treaty-making powers, in the case of *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)* the International Court of Justice had dealt directly with the question of the constitutional limits on the treaty-making powers of Heads of States. A guideline on that issue would therefore be useful. He was not advocating that it should apply to the entire national legal system — just the fundamental rules of internal law relating to treaty-making powers.

His third comment related to paragraph 60 of the report, where the Special Rapporteur stated that the binding nature of a treaty was determined exclusively by international law and that, whatever the provisions of the internal law of a State party to a treaty, they would have no effect on the international obligations of the State. It was unclear whether that meant that, irrespective of the fact that the provisions of internal law concerning the State party's consent to be bound were known to the other party or parties and had not been met, international obligations nevertheless arose

from the treaty. That question showed that the provisions of internal law concerning the conclusion of treaties were at the heart of the topic. If all the Commission said was that the provisional application of a treaty could be performed subject to the explicit agreement of the parties and created obligations for States, and that the violation of those obligations could engage the State's international responsibility, it was not adding anything new to existing international law. The formulation of guidelines on the provisional application of treaties was useful only to the extent that it helped States to identify the moment from which, and subject to which conditions, provisional application created international obligations for the parties. That objective could be reached only if the Commission clarified the issue of the provisions of internal law regarding the conclusion of treaties.

Turning to the draft guidelines, he noted that draft guideline 6 did not seem to be based on a prior analysis of the law of treaties or of State practice. Even if its purpose was simply to recall a general rule of international law, it would have been better to mention the provisions of the law of treaties and the international case law that underpinned that rule, even if it meant simply referring to the articles on responsibility of States for internationally wrongful acts. He hoped that the Special Rapporteur would deal with that lacuna in the commentary to draft guideline 6. In conclusion, he supported the referral of all six guidelines to the Drafting Committee.

The meeting rose at 1.05 p.m.