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Present:

Chair:	Mr. Valencia-Ospina
Members:	Mr. Argüello Gómez
	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. Peter
	Mr. Petrič
	Mr. Rajput
	Mr. Reinisch
	Mr. Ruda Santolaria
	Mr. Saboia
	Mr. Šturma
	Mr. Tladi
	Mr. Vázquez-Bermúdez
	Mr. Wako
	Sir Michael Wood
	Mr. Zagaynov

Secretariat:

Mr. Llewellyn	Secretary to the Commission

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

Immunity of State officials from foreign criminal jurisdiction (agenda item 3) (A/CN.4/722)

Ms. Escobar Hernández (Special Rapporteur), presenting her sixth report on immunity of State officials from foreign criminal jurisdiction (A/CN.4/722), said that in it she had begun to study the procedural aspects of the topic. Unlike in previous reports, no draft articles were proposed for adoption by the Commission. The introduction of the report also differed somewhat from the analogous sections of her earlier reports in presenting a more detailed summary of the Commission's previous work on the topic and discussion thereof by the Sixth Committee of the United Nations General Assembly.

The reasons for including a more detailed treatment of the discussions in the Commission and in the Sixth Committee were the following: (i) debate within the Commission at its sixty-ninth session and the Sixth Committee during the seventy-second session of the General Assembly had been particularly intense on the issue of limits and exceptions to immunity, given the sensitive nature of the issue and the divergence of views; (ii) in addition, many comments had been made on procedural aspects, particularly in respect of guarantees and safeguards, during discussion of her fifth report (A/CN.4/701) and draft article 7 proposed therein; and (iii) some members of the Commission had referred to the need to strike a balance between that draft article and procedural safeguards in explaining their votes when the draft article had been provisionally adopted. The summary in her sixth report was intended to be purely informative, rather than to reopen debate on issues already decided.

Chapter I of the report dealt with general questions relating to the procedural aspects of immunity from jurisdiction. She emphasized that the approach to procedural aspects within both the Commission and the Sixth Committee had varied over time. From an almost exclusive focus on the classic elements of the question — the timing of consideration of immunity, invocation of immunity, waiver of immunity and determination of immunity — discussion had begun to encompass new dimensions, with growing interest in "procedural safeguards" and references to the need to avoid abusive exercise of jurisdiction and politically motivated proceedings against foreign officials and to ensure that such officials were fully covered by the rights and procedural safeguards recognized in international human rights law.

The latter set of issues had acquired particular significance in 2016 and 2017, when the Commission had discussed limits and exceptions to immunity and provisionally adopted draft article 7. Although the Commission had not taken up the call of some members to make adoption of draft article 7 conditional upon the adoption of safeguards, its debates had revealed almost unanimous acknowledgment of the importance of safeguards and the need to tackle that issue. A footnote to the titles of Parts II and III of the draft articles to that effect had been included as a result. Debate within the Commission had been echoed in the Sixth Committee at the seventy-second session of the General Assembly, as outlined in paragraph 33 of her report, and interest in procedural aspects had also been shown during the interactive dialogue that had taken place in October 2017 as part of that year's International Law Week.

The need to analyse the procedural aspects of the topic was beyond doubt, in particular bearing in mind that immunity was claimed in a foreign criminal jurisdiction. The work of the Commission would not have its maximum effect unless adequate answers were provided to the distinctly procedural questions listed in paragraph 35 of her report, which should be considered in the light of the criteria set out in paragraphs 36 to 40 thereof. Essentially, they included the need to take into account the fact that the courts of the forum State were dealing with a foreign element of a specific nature — a State official — whose actions, at least in terms of immunity *ratione materiae*, were "performed in an official capacity"; the need to uphold the principle of sovereign equality in relations between the forum State and the State of the official, balancing the right of the former to exercise its own jurisdiction against the right of the latter to have the immunity of its officials respected; the need to ensure balance between respect for the immunity of State officials and the aim of eliminating impunity for the most serious crimes under international law; and the need to

ensure that any State official subject to the exercise of foreign criminal jurisdiction benefited from the rights and procedural safeguards recognized in international human rights law.

Considering such matters from a procedural standpoint would enable procedural solutions to be found that would ensure security both for the forum State and for the State of the official and reduce political factors and the possibility of abusive or politically motivated exercise of jurisdiction as far as possible. The procedural approach would introduce an element of neutrality, help to build confidence between forum States and the States of officials, and avoid upsetting international relations. It required a broad, comprehensive scope, focusing on the four separate but related sets of issues described in paragraph 41 of her report: (i) the procedural implications for immunity arising from the concept of jurisdiction, in particular with respect to timing, the identification of the acts of the authorities of the forum State that might be affected by immunity, and the consideration of issues related to the determination of immunity; (ii) the procedural elements that had autonomous procedural significance as a result of their direct links to the application or non-application of immunity in a given case, and that served as a first-level safeguard for the State of the official, in particular issues concerning the invocation and waiver of immunity; (iii) the procedural safeguards for the State of the official, in particular mechanisms to facilitate communication and consultation between it and the forum State and to transmit information between the judicial authorities concerned, as well as instruments of international legal cooperation and mutual assistance between the States concerned; and (iv) the procedural safeguards inherent in the concept of a fair trial, including respect of international human rights law.

As explained in paragraph 43 of the report, she considered that the Commission should analyse the effect that the obligation to cooperate with an international criminal court could have on the immunity of State officials from foreign criminal jurisdiction. The issue had been addressed in the fifth report but had not been mentioned in draft article 7 as provisionally adopted because various members of the Commission had suggested that the issue could be better examined by taking a broader perspective that did not concern only limitations and exceptions to immunity. In that regard, she would particularly welcome suggestions on how to tackle the issue in the draft articles.

Information from States on domestic practice and how relevant procedural aspects were regulated at national level would also be welcome, particularly in view of the limited number of replies that the Commission had received to its questions to date.

Chapter II of the report dealt with the first set of above-mentioned issues, in particular the timing of consideration of immunity, the identification of which acts by the authorities of the forum State could be affected by immunity, and the consideration of issues related to the determination of immunity; it took into account the prior analysis set out in the background study by the Secretariat and the reports of the previous Special Rapporteur. The issues covered were closely related to the concept of jurisdiction and could only be understood in that context. She recalled that her second report (A/CN.4/661) had proposed a draft article containing definitions of the concepts of jurisdiction and immunity, which had been referred to the Drafting Committee. The basic elements of the definition of immunity had largely been recognized in the draft articles provisionally adopted, but the definition of jurisdiction remained an open question. While she did not intend to raise the matter again at present, the Commission should reflect on how important its understanding of the concept of jurisdiction was to the topic, particularly when it had a direct effect on the main procedural aspects involved. In that regard, the report focused on an analysis of "when", "what" and "who".

Regarding "when", she emphasized that since the immunity of State officials from foreign criminal jurisdiction was conceived as a procedural barrier to the exercise of jurisdiction, the object of which was to determine the alleged criminal responsibility of the official in question, it was clear that immunity must operate and be considered at an early stage of criminal proceedings or it would lose its *raison d'être*. However, determining what "an early stage" meant was more complex and could not be reduced to the mechanical identification of a specific point in the process. That process could include police investigations, in which judges and prosecutors were not involved; inquiries and

investigations, which they might supervise; and trial. Given the diversity of national procedural legislation, it was impossible to identify the point at which immunity should be considered by simple reference to those stages of the process.

The report therefore not only looked at the identification of a specific procedural phase but also took into account the effect that a particular act could have on the foreign official, which was an approach generally accepted in international practice and jurisprudence. Applying both criteria together, the report concluded that immunity must be considered by the courts of the forum State as soon as they began to exercise jurisdiction, before taking any decision on the merits of the case, and before ordering any binding measure that could affect the foreign official and the performance of his or her official functions. Consequently, the courts must consider immunity at least before investigating, charging or committing the official for trial, and at the latest before the start of the oral hearing. Immunity should also be considered during the inquiry or investigative stage, if it became necessary to order binding measures that could affect the official and the performance of his or her official functions, particularly with regard to pretrial detention, accusations that did not constitute formal charges, or similar precautionary measures. On the other hand, police or judicial actions of a purely investigative nature that did not directly affect the official or the performance of his or her official functions were not affected by immunity, which therefore did not need to be considered by the State authorities during the initial phase of police investigations in which the courts were not involved. The distinction between immunity *ratione personae* and immunity *ratione materiae* could also have a bearing on determining the point at which immunity should be considered, especially as it would be immediately obvious to the courts if they were dealing with a Head of State, Head of Government or Minister for Foreign Affairs.

With respect to "what", she concluded in her report that the acts affected by immunity were the bringing of a criminal charge, a summons to appear before the court as a person under investigation or to attend a confirmation of charges hearing, a decision on the confirmation of charges, committal for trial, a summons to appear as the accused in a criminal trial, a court detention order or an application to extradite or surrender a foreign official. The jurisdictional nature of all of those acts was plain, their purpose being none other than to make it possible for the forum court to exercise its jurisdiction over a given person (in that case the foreign official) in order to be able to decide whether he or she bore criminal responsibility. The exercise of jurisdiction was always inherent in those acts and, for that reason, such acts were necessarily affected by the immunity of State officials from foreign criminal jurisdiction.

However, the same was not true of other kinds of acts that were also examined in the report: certain types of detention and similar acts, especially for the registration of information or arrest warrants in international police cooperation systems; appearances as a witness; and certain precautionary measures that could affect the foreign official or his or her property. There was no simple, universally applicable approach to such acts. Paragraphs 67 to 96 of the report examined each category in detail. Her principal conclusions were that how an act was affected would vary depending on whether immunity *ratione personae* or *ratione materiae* were in play, the former having the greater effect, and that, except in the case of inviolability of the official or his or her property, the above acts would be affected by immunity only if they were coercive in nature, could be imposed on the foreign official and would incontrovertibly affect the ability of the foreign official to perform his or her functions. The question was especially relevant to the potential detention of a foreign official, in which respect she would particularly welcome the Commission's views.

With regard to "who", she said that the issue of determining immunity had been tackled from the perspective both of the State organ in the forum State that was competent to decide on the applicability of immunity in respect of a foreign official and of factors that the organ must consider in reaching its decision in a particular case. She concluded in her report that competence to decide on the applicability of immunity lay with the specific organs whose jurisdiction it would affect. In practice, the decision would ultimately rest with the courts of the forum State, although other bodies, such as public prosecutors, might also need to take decisions if the issue of immunity arose in the exercise of their functions. Such a conclusion would not prevent other State organs from cooperating with the

competent courts by providing them with legal information or opinions, in accordance with the State's domestic legislation. The related issue of whether the State of the official could transmit information to a court in the forum State to assist it in exercising its functions and determining immunity would be covered in her seventh report, in the context of international cooperation and mutual legal assistance.

From a substantive standpoint, the determination of immunity would require the competent body to consider various different factors depending on whether it was determining immunity *ratione personae* or *ratione materiae*, as described in paragraph 108 of her report. Regarding the former, it sufficed for the court to consider whether the State official was a sitting Head of State, Head of Government or Minister for Foreign Affairs. Regarding immunity *ratione materiae*, the court had to assess whether the individual was a State official, whether the acts in question had been performed in an official capacity and during the term of office of the State official, and finally whether the acts fell within any of the categories of crimes under international law to which immunity *ratione materiae* did not apply

She recalled that her plan for future work on the topic was outlined in paragraph 109 of the report. The seventh report would consider the invocation and waiver of immunity, communication between the forum State and the State of the official, the transmission of information by the State of the official to the forum State, international cooperation and mutual legal assistance between the forum State and the State of the official, and other general issues related to the procedural safeguards relevant for both the State of the official and the foreign official concerned. In addition to the issues listed therein, the report would consider the possibility of establishing a means of resolving disputes between the forum State and the State of the official, which would conclude the analysis of procedural matters relating to immunity. She said that she had chosen not to include any draft articles in her sixth report not because the issues discussed did not merit reflection in draft articles but so that the procedural aspects covered in the sixth and seventh reports could be considered together by the Drafting Committee. A complete package of draft articles on procedural aspects would be submitted to the Commission with her seventh report, in 2019.

Finally, she said that the seventh report would conclude her consideration of the questions included in the original programme of work on the topic, giving the Commission a comprehensive basis for adopting a complete set of draft articles. Some definitions proposed in her second report remained pending before the Drafting Committee; they might need to be considered in 2019, when she hoped that the Commission would be in a position to adopt the draft articles on first reading.

Mr. Murase, after thanking the Special Rapporteur for her excellent sixth report, said that the Commission had agreed in 2011 that special rapporteurs should submit their reports at least six weeks prior to the beginning of the session at which they would be considered. He hoped that the Special Rapporteur's future reports would be submitted on time in order to facilitate their translation from Spanish into the other official languages and thus to ensure that all Commission members had sufficient time in which to prepare their statements on the important topic under consideration.

It was puzzling that the Special Rapporteur had not proposed any draft articles in her sixth report. It was particularly regrettable that no draft articles had been proposed to reflect the Special Rapporteur's excellent analysis, in chapter II of the report, of the specific features of procedural safeguards.

He was pleased that draft article 7 had been provisionally adopted by an overwhelming majority in 2017. He had repeatedly emphasized that the project would make no sense without a draft article on exceptions to immunity. As had been noted in 2017, the provisions on procedural safeguards would guarantee the fair and effective operation of draft article 7, although it had been made clear that they were also relevant to the draft articles as a whole.

Reading the sixth report, however, he wondered who would benefit from the procedural safeguards discussed therein. The Special Rapporteur seemed to consider three possibilities: the State to which the official belonged; the forum State in which the official was present; and the official himself or herself. For the first two possibilities, the Special

Rapporteur had employed the concept of "sovereign equality" as a sort of guiding principle. However, he did not believe that "sovereign equality" could be an element of procedural safeguards as commonly understood. It seemed to him to be a matter for international cooperation between the States concerned. In his view, procedural safeguards should be relevant only to the protection of individuals, namely State officials in the context of the topic under consideration.

As the Special Rapporteur noted in paragraph 40 of the report, procedural safeguards could include international human rights law, in particular the provisions of the International Covenant on Civil and Political Rights relating to minimum international standards in criminal proceedings. Those provisions included article 9 on arrest and detention, article 10 on the treatment of suspects and accused persons and article 14 on the right to a fair trial.

As the Special Rapporteur stressed in paragraph 37 of her report, procedural safeguards played an essential role in the application of draft article 7, namely to avoid abusive or politically motivated prosecutions. A related point was the scope of prosecutorial discretion, which he had already discussed in connection with Mr. Kolodkin's third report in 2011 and Ms. Escobar Hernández's preliminary report in 2012. As he had stated on those occasions, control over prosecutorial discretion was an important question in the context of the topic. The Commission needed to ensure that prosecutorial discretion was subject to adequate safeguards in order to prevent its abuse. Most importantly, prosecutors in both international and national criminal systems were required to exercise their discretionary powers in a transparent manner. With regard to national criminal systems, he wished to draw the Commission's attention to paragraph 17 of the Guidelines on the Role of Prosecutors, which stipulated that, in countries where prosecutors were vested with discretionary functions, the law or published rules or regulations should provide guidelines to enhance fairness and consistency of approach in taking decisions in the prosecution process, including institution or waiver of prosecution. The most effective means of preventing the arbitrary or aggressive exercise of prosecutorial discretion against foreign Heads of State and other State officials was to establish guidelines for prosecutors in the form of laws or regulations at the domestic level. Conversely, if prosecutorial discretion prevented a State official who had committed a serious international crime from being prosecuted, there should be some mechanism for reversing that decision. Thus, he believed that the Commission should consider how to prevent both forms of abuse of prosecutorial discretion.

Of course, as a general matter, the inherent power of prosecutors should be respected, and prosecutorial discretion *per se* should not be unduly restricted. Japan had a system of "prosecutorial review", which empowered special committees, each composed of 11 randomly selected voters, to overrule a prosecutor's decision not to prosecute. The Commission could recommend that States should adopt a similar control mechanism.

That said, the consideration of immunity and procedural safeguards should not be limited to the prosecution stage. As the Special Rapporteur stressed in her report, the question of immunity should begin to be considered, if not decided definitively, early on in the process, at the investigation stage. In principle, the consideration of immunity was relevant to the entire criminal procedure, including the investigation, arrest, detention, extradition, transfer, prosecution, prosecutorial review and provisional measures of protection, not to mention formal court proceedings, judgments and the execution of those judgments. In any case, it was crucial to ensure that immunity was considered carefully at an early stage of the proceedings in order to avoid confusion at a later stage.

In Japan, as in many other countries, a judge had to issue a warrant in order to authorize an arrest or a period of pretrial detention. A judge would certainly reject any request for a warrant if the suspect in question enjoyed immunity. It was important in that context that the rule on immunity was clear to law enforcement officials, prosecutors and judges. If two international instruments established conflicting rules in that regard, it would create serious confusion on the part of the law enforcement authorities of the forum State.

There should be a State organ designated to provide instructions to law enforcement authorities in the event of any doubt or ambiguity regarding the applicable law. That point

had been exemplified by the 29 July 2011 decision of the High Court of Justice of England and Wales in the *Khurts Bat* case. In Japan, the Ministry of Foreign Affairs had primary responsibility for interpreting international law, and the law enforcement and prosecutorial authorities could turn to that Ministry for advice on individual cases. That mechanism might be similar to the "suggestion of immunity" in the United States, to which reference was made in paragraph 100 of the report. The existence of such mechanisms underscored the importance of the topic: the draft articles would be the basic instrument referred to by the competent authorities in each State.

In that connection, he wished to reiterate his basic position on the topic. Since the beginning, he had taken the view that the Commission should closely follow article 27 (1) of the Rome Statute of the International Criminal Court. If it did not, it would create confusion for law enforcement officials, prosecutors and judges working on cases involving suspects believed to have committed serious international crimes who happened to be high-ranking State officials. It was for that reason that he had emphasized the importance of ensuring that the Commission's draft articles were broadly in line with that instrument.

The Commission had adopted that approach in relation to the topic of crimes against humanity, and it should also have done so in relation to the topic under consideration. Draft article 7, which had been provisionally adopted in 2017, had gone a long way towards remedying the situation by bringing the draft articles closer into line with the Rome Statute. However, even draft article 7 did not fully bridge the gap between the two in terms of the range of State officials covered and that of the crimes included. In 2017, for example, the "crime of aggression" had been excluded from the project. He hoped that efforts would be made to codify a systematic and harmonious set of norms on the topic.

In any event, he hoped that the Special Rapporteur would propose a set of draft articles on procedural safeguards in her following report. Chapter II of her sixth report contained an excellent analysis of such issues as the timing of the consideration of immunity and the material elements to be considered in each procedural phase. He was convinced that the adoption of draft articles on those issues would make it possible to complete the first reading successfully in 2019.

Mr. Tladi said that, although the Special Rapporteur had not proposed any draft articles in her sixth report, it provided a solid basis for discussion, which could lay the ground for draft articles on the procedural requirements relating to immunity, particularly, but not exclusively, in connection with the exceptions thereto. He agreed with Mr. Murase's comments on the timing of the submission of the report. He was taking the floor on the understanding that the debate would not be closed and that, once he had been able to read the report properly and analyse its content, he would have the opportunity to give a more reasoned and possibly more comprehensive statement in 2019. In particular, he would refrain from commenting on chapter II for the time being. He thanked the Special Rapporteur for the useful summary that she had provided of the debate on draft article 7 in the Sixth Committee.

During the debate in the Commission on exceptions to immunity, a number of members had expressed the view that such exceptions should be addressed together with what had been referred to as "procedural safeguards". Mr. Murphy, for example, had referred to the case involving Ehud Barak, which had been dismissed by a court in the United States of America on the basis of a procedure whereby the sovereign State, presumably in the form of the executive, had recognized the immunity of the official in question. As he had himself noted in the subsequent mini-debate, that particular case seemed to pertain not so much to the question of exceptions as to the question of what constituted an official act, which illustrated that procedural issues applied not only to the question of exceptions but also to the entire set of draft articles. It was for that reason that he preferred the terminology chosen by the Special Rapporteur, namely "procedural issues" or "procedural aspects" rather than "procedural safeguards". He feared that, if too close a link was drawn between procedural safeguards and exceptions specifically, they might be used to limit the effects of the exceptions provided for in draft article 7.

As the Special Rapporteur and other Commission members had sought to emphasize, such procedural issues were important in ensuring that immunities, where applicable, were

respected in the interests of safeguarding the stability of international relations. The Commission needed to think carefully about the types of procedure that the draft articles would put in place in order to strike a delicate balance between respecting immunity and ensuring the stability of international relations, on the one hand, and taking into account exceptions to immunity with a view to combating impunity, on the other.

The issue of immunity in respect of grave crimes arose mainly, though not exclusively, in cases of universal jurisdiction. One potentially useful procedural requirement that was not explicitly mentioned in the report was the requirement that any exercise of jurisdiction over an official should be subject to a decision of a higher court. He agreed with the Special Rapporteur that it was for the courts of the forum State to determine whether immunity existed and, if so, whether there were any exceptions to it. Nonetheless, he thought that, as a procedural matter, some weight should be given to the executive and that a court of sufficiently high stature should make the determination. As Mr. Murase had noted, a related matter concerned prosecutorial discretion and the potential impact of its abuse on the stability of international relations. Presumably, the sending State would be required to introduce similar procedural guarantees, although it would probably be better to refer to the State of the official in question rather than the sending State.

He continued to oppose the language that the Special Rapporteur had proposed for paragraph 3 of draft article 7, which the Commission had not adopted, and rightly so in his view. The draft articles and commentaries adopted thus far made it clear that the Commission's work on the topic as a whole was without prejudice to treaty regimes, including, he believed, the Rome Statute. He saw no need to revisit that particular point, as States in the Sixth Committee were generally content with the conclusion that the Commission had reached in that regard.

The Chair said that, at the following session, Mr. Murase and Mr. Tladi would be offered a second opportunity to comment on the Special Rapporteur's sixth report.

The meeting rose at 4.10 p.m. to enable the Planning Group to meet.