Provisional

For participants only

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International Law Commission

Seventieth session (second part)

Provisional summary record of the 3439th meeting
Held at the Palais des Nations, Geneva, on Tuesday, 31 July 2018, at 10 a.m.

Contents

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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 10.05 a.m.

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

The Chair invited the Commission to resume its consideration of the sixth report of the Special Rapporteur on immunity of State officials from foreign criminal jurisdiction.

Mr. Nolte said that, as the translated versions of the report had been made available so late, he had not had time to fully analyse it and prepare a comprehensive statement. He would thus limit his comments to one part of the report and address the others at the next session. The sixth report was an interim report in several respects: it covered only one part of the procedural aspects of the topic, it did not propose any new draft articles, and it did not address the relationship between the procedural and substantive aspects of the topic. However, he understood that the Special Rapporteur would deal with those aspects in her seventh report.

The proposed order of work provided the Commission with an opportunity, at the current session, to collectively reflect on future work on the topic without being under pressure to take decisions. He would have preferred to undertake the reflection more informally, for example in a working group, and explore possible avenues for overcoming the division among members that had resulted from the debate and recorded vote on draft article 7 at the previous session. However, he accepted that the Special Rapporteur would rather have at least a partial debate on the sixth report in plenary meetings to help her prepare the seventh report, with the aim of arriving at a consensual outcome on the topic.

With that common goal in mind, he would make a number of remarks inspired by the motto for the Commission's seventieth anniversary: "Drawing a balance for the future". In his view, a good future could only be achieved by properly taking the past into account. He did not wish to suggest that the Commission should reopen the debate on draft article 7 at the current stage, but the question of whether it reflected existing customary international law or was a proposal for progressive development of international law would have to be reviewed at the following session if the Commission wished to achieve a consensual outcome. Most States were asking for an answer to that very question, as had been evident during the debate on the matter in the Sixth Committee in 2017, a summary of which was provided in paragraphs 13 to 20 of the report.

As the summary showed, very few States were even close to believing that draft article 7 reflected customary international law. Only one — Italy — had expressly stated that it did, and 21 States had explicitly rejected the claim. He agreed with the Special Rapporteur that the division within the Commission was reflected in the comments of States in the Sixth Committee, which had been fairly evenly divided between those favourable towards and those critical of draft article 7. The significance of that division among States went far beyond mere statistics.

Most States that had expressed a positive opinion about draft article 7 had suggested that they considered it to be a proposal for the progressive development of international law (*lex ferenda*) and not codification of existing law (*lex lata*). As the Special Rapporteur noted in paragraph 18, many States on both sides had called on the Commission to clarify whether the proposal represented codification or progressive development. In addition to the 12 States cited by the Special Rapporteur in footnote 68, Belarus, Japan, the Russian Federation, Sri Lanka and Thailand had also made a request for clarification.

As noted in paragraph 20, many States had expressed concern that the Commission was split and had resorted to a vote, and had urged it to move forward cautiously with a view to achieving consensus. He therefore agreed with the Special Rapporteur that the Commission should carefully consider its future approach to the topic.

Another reason for clarifying the legal character of draft article 7 was that the question would have to be addressed once the outcome of the Commission's deliberations on procedural aspects were linked to substantive rules, such as draft article 7. If, for example, procedural rules regarding cooperation between the State of the official and the forum State were proposed, States would need to know whether the Commission

considered that they must be followed as a matter of existing law or should be accepted and further developed by States, and whether any exceptions to the immunity of State officials *ratione materiae* could be applied only after the procedural rules had been followed. The procedural and substantive aspects of the topic were therefore interconnected. Nonetheless, he agreed that it made sense for the Commission to focus on procedural aspects at the current session.

To maximize the chances for a constructive and consensual outcome, it was necessary to distinguish between general procedural requirements that applied to all situations in which the immunity of a State official was at issue and specific procedural safeguards that applied to situations in which an exception to such immunity, as in draft article 7, was at issue. The report dealt only with the first category. As he had been unable to properly digest the text in the short time available, he could not address the detailed considerations provided by the Special Rapporteur in that respect. However, he wished to offer a few suggestions regarding the second category. Indeed, a very large majority of States agreed that, if there was to be a provision along the lines of draft article 7, there must also be effective procedural safeguards. In his view, a possible provision might read:

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

(1) The foreign official is present in the forum State;

(2) The evidence that the official committed the alleged offence is fully conclusive;

(3) The decision by the forum State to pursue criminal proceedings against a foreign official is taken at the highest level of Government or prosecutorial authority; and

(4) The forum State cooperates with the State of the official. This duty to cooperate means that the forum State must:

(a) Notify the State of the official if it intends to pursue criminal proceedings and inquire whether the State of the official wishes to waive the immunity of its official; and

(b) If the State of the official is able and willing to submit the matter to prosecution before its own courts, the forum State must transfer the proceedings and extradite the alleged offender to the State of the official or, if agreed between the States concerned, transfer him or her to a competent international court or tribunal; or, alternatively, if the State of the official is not able or willing to submit the matter to prosecution before its own courts or before an international court or tribunal, the forum State must, before permitting the continuation of the prosecution by its national instances, offer to be ready to transfer the alleged offender to a competent international court or tribunal if such a court or tribunal has jurisdiction.

The jurisdiction of an international criminal court or tribunal in such cases might result from its statutory basis or from a specific agreement between the forum State and the State of the official, if such an agreement was compatible with the statute of the international court or tribunal and if such international court or tribunal was willing and able to take the case.

He hoped that those specific procedural safeguards for the application of an exception to immunity *ratione materiae* in cases of alleged international crimes would be generally acceptable to the Commission members and, if so, that they could also contribute to reaching an agreement on other aspects of the topic. However, if the Commission wished to achieve a consensual outcome, it must also make it clear that the rule envisaged in draft article 7 did not reflect existing customary international law but was a proposal for the progressive development of international law. The members could then set aside their differences regarding whether or not there was a "trend" in either direction. In his view, the Commission had two options. It could either state that the draft articles on immunity of State officials from foreign criminal jurisdiction were intended to become a treaty or reformulate draft article 7 and couch it as a recommendation, for example by replacing the

word “shall” with “should”. It would not be sufficient to indicate in the commentaries that draft article 7 contained elements of progressive development and of codification and that it was not always easy to distinguish between the two. In the case of draft article 7, it was possible to make that distinction.

Mr. Hassouna said that, while he had been fortunate to have access to an earlier unofficial translation of the Special Rapporteur’s insightful and thorough sixth report, it was to be hoped that the next report on the topic, in all language versions, would be made available at an early stage so as to allow members to thoroughly study its content. The current report, which addressed procedural aspects of immunity, complemented the discussion of exceptions and limitations to immunity in the fifth report and contributed to a more complete and comprehensive understanding of the topic. He was confident that, with the Special Rapporteur’s guidance, the Commission could strike the appropriate balance between the need to preserve immunity as a principle of sovereign equality and the interests of the international community in combating impunity for the most serious international crimes.

Immunity of State officials from foreign criminal jurisdiction was a topic of great importance, as it concerned not only States and their practices in foreign relations, but also courts, which would undoubtedly turn to the Commission’s final product for guidance. The topic was also politically sensitive and therefore required careful treatment and attention to State practice. An important recent development in that regard had been the request by African States to the General Assembly to seek an advisory opinion on the topic. The Special Rapporteur should be commended for thoughtfully summarizing and responding to issues raised in the Sixth Committee in 2017.

Although States had expressed great interest in the topic in Sixth Committee debates, few had responded to requests for information on their national practice. Fewer than 10 States had provided written comments on their treatment of procedural aspects of immunity, and no African or Asian States had contributed thus far. Perhaps the forthcoming meeting of the Asian-African Legal Consultative Organization might provide the opportunity for those States to formulate their positions on the topic.

In the Sixth Committee debate, States had continued to call on the Commission to label aspects of its proposals as codification or progressive development. The Commission should discuss its response to those requests, and other comments on its methodology, at the next meetings of the Working Group on methods of work. As the topic related to others under consideration, including crimes against humanity and peremptory norms of international law (*jus cogens*), as well as universal criminal jurisdiction, which had recently been added to the long-term programme of work, the Commission should obviously maintain a common approach so as to ensure consistency and harmony among the topics.

He welcomed the Special Rapporteur’s comprehensive approach to procedural aspects of immunity. She suggested revisiting the definition of criminal jurisdiction proposed and discussed in previous reports, but while she correctly noted that the concept of jurisdiction inherently related to the procedural aspects of immunity, formulating such a definition might not be necessary in the current context. Certain considerations discussed in chapter II of the report, such as the adoption of binding decisions that imposed coercive measures on a State official, seemed to be most relevant for ascertaining the reach of criminal jurisdiction within the general concept of jurisdiction. The functional definition developed in the report was, in his view, sufficient for the discussion of criminal jurisdiction with respect to procedural aspects of immunity.

The Special Rapporteur thoughtfully analysed three categories of procedural questions: when immunity should be considered by a forum State; what acts of the forum State affected immunity; and which State organ should determine whether immunity applied. With respect to the first question, of timing, the Special Rapporteur expanded upon the conclusion reached by the former Special Rapporteur, Mr. Kolodkin, that immunity should be considered either at the early stage of court proceedings or even earlier, at the pretrial stage. He agreed with the current Special Rapporteur’s conclusion that courts must consider questions of immunity before imposing any obligations on the foreign official that might lead to coercive measures and impede the proper performance of his or her State

functions, which would be consistent with the jurisprudence referenced in paragraphs 53 to 56. He welcomed her references to the International Court of Justice and to an extensive list of national court decisions, including new cases that had not been available at the time of the previous Special Rapporteur's reports. With respect to the reference to the Special Court for Sierra Leone, the Special Rapporteur should clarify the nature of the Court and the relevance of mixed or hybrid courts in her future work. All the cases cited related to the determination of immunity *ratione personae*. In that regard, it might be useful to consider the ongoing case concerning the *Enrica Lexie Incident* (*Italy v. India*) before the Permanent Court of Arbitration, which related to the exercise by India of criminal jurisdiction over Italian marines.

The discussion on timing referred to immunity in general terms, whereas the Special Rapporteur often distinguished between immunity *ratione personae* and *ratione materiae* elsewhere in the report. He would welcome clarification as to whether the conclusions in paragraph 63 applied to both types of immunity. It would be appropriate for determinations on immunity to be made before a forum State took measures that impinged on a foreign official's ability to operate in his or her official capacity. However, given the distinctions between immunity *ratione personae* and *ratione materiae*, both with respect to other procedural aspects and exceptions and limitations, further consideration of that issue might be warranted.

The Special Rapporteur concluded that immunity must be considered before bringing charges against or prosecuting a foreign official. In his second report on the topic, however, the former Special Rapporteur had found that the commencement of criminal proceedings against a foreign official would not violate the official's immunity, so long as the proceedings did not impose any obligation upon that person under the law of the forum State. It should be clarified whether instituting criminal proceedings alone, in the absence of measures imposing obligations on the official, could nevertheless impede the performance of official functions.

The Special Rapporteur's conclusion that questions of immunity did not need to be considered ahead of or during investigations by a forum State was convincing and supported by previous reports on the topic, scholarly works and policy. The distinction that should be emphasized in that regard was not between investigation prior to entering charges and those measures that came after criminal proceedings began, but whether the measures imposed obligations on the foreign official concerned and, in particular, whether those obligations would interfere with the official's State functions. That distinction was an important procedural safeguard against politically motivated prosecutions of foreign officials. Clear procedures for prosecutors and other actors in the investigation phases would be of great value in enhancing transparency and fairness and limiting abuse of discretion.

With respect to the second category — the material element — it should be clarified whether the phrase "acts affected by immunity" referred to acts which were precluded by or which violated immunity. The Special Rapporteur distinguished between immunity *ratione personae* and *ratione materiae* but, again, the determining characteristic of acts which violated the immunity of a foreign official was whether they imposed obligations on the official. A forum State that imposed obligations on a foreign official, whether it be to appear as witness, present documents or information, or not leave the forum State, would violate the immunity of that official. According to the report, the result would be the same whether immunity *ratione personae* or *ratione materiae* applied, since in either situation immunity precluded enforcement of those measures that prevented the foreign official from carrying out his or her State functions.

The only case in which a forum State imposing obligations on a foreign official would not necessarily violate immunity seemed to be where the official enjoyed immunity *ratione materiae* and was summoned to appear as a witness. In paragraph 86, the Special Rapporteur explained that a foreign official in that situation would only be precluded from appearing as witness if the summons to appear "is binding and his or her testimony touches on this category of acts". In his view, the binding character of the summons alone might conflict with the foreign official's immunity *ratione materiae*. There could be situations in which obligating a foreign official to testify might restrict the performance of his or her

official functions, even if the subject matter of the testimony did not relate to acts performed in an official capacity.

The discussion of who determined whether immunity applied was similar to the Special Rapporteur's treatment of the issue in the fourth report. He supported her analysis of the general competence of courts from the forum State in determining immunity. The role played by a State's high court should be emphasized and explained in the commentary. The Special Rapporteur's reference to the written comments provided by States on that question was appreciated, and might encourage States to participate more actively to the debate on the topic. In his comments on the fourth report at the Commission's sixty-seventh session, he had stated that, in limited instances, through treaty interpretation, the International Court of Justice had served as a check on the exercise of broad State authority to impose its criminal jurisdiction on another State's official. However, it was problematic that, without the Court's intervention, interpretative authority would be left either to States themselves or to regional bodies. A general concern regarding that question had been raised by a number of States in the Sixth Committee, including Austria, which had proposed the creation of an international dispute resolution mechanism to prevent abuse and politically motivated prosecutions. Naturally the Special Rapporteur could not analyse mechanisms that did not yet exist, but the oversight role left for the International Court of Justice and regional bodies in the existing system could be clarified.

With regard to future work, he supported the Special Rapporteur's intention to address the possible impact of the obligation to cooperate with an international criminal court on the immunity of State officials from foreign criminal jurisdiction and related procedures. Her plan for future work covered all the topics addressed in the concept paper circulated at the previous session, which in his view would comprehensively conclude the discussion of procedural aspects. He welcomed the plan to include a draft article on procedures in the seventh report, which should complement those previously adopted on limitations and exceptions. The distinctions between immunity *ratione personae* and *ratione materiae* should be reflected in their respective procedural rules.

He agreed that the topic was politically sensitive and at times controversial. However, it was the Commission's role to proceed in the face of disagreement in order to find solutions and bridge the gap between divergent views. It should not shy away from pursuing the codification and progressive development of difficult topics when they reflected the pressing concerns of the international community, when they were sufficiently ripe for consideration and when they served the needs of States. It was for those reasons that the Commission had begun its work on the topic, and for those reasons that he supported the continuing efforts of the Special Rapporteur as she navigated difficult waters.

Mr. Grossman Guiloff said that the Special Rapporteur's sixth report contained a comprehensive analysis of the procedural aspects of the topic, and provided a helpful summary of the Commission's work and States' reactions to the topic to date. Although States unsurprisingly held a range of views on the procedural aspects of the topic, it was not an exaggeration to say that they all considered the topic important. There was also some agreement as to the focus on procedural safeguards. As the Special Rapporteur pointed out in paragraph 29, since 2011, the focus of Commission members had shifted somewhat towards the need to establish procedural safeguards to prevent the politicization and abuse of criminal jurisdiction in respect of foreign officials. A similar approach had been taken in the Sixth Committee, as noted by the Special Rapporteur in her fifth report. Although the sixth report did not contain draft articles, it was well researched and would provide constructive guidance for the Commission's discussions. He intended to make provisional comments on the report that he would develop further in the course of the coming year.

The discussion of the topic demonstrated the need to achieve a balance between the principle of sovereign equality of States and the rejection of impunity for the most serious crimes, namely those listed in draft article 7. In his opinion, the balance sometimes tipped too far in one direction or the other, with consideration given only to efforts to combat impunity or only to the prevention of abuse. As the Special Rapporteur noted in paragraph 39, that balance was particularly relevant in the case of immunity *ratione materiae* in respect of the crimes set out in draft article 7. As mentioned in the report, one difficulty might be the limited specialized procedural doctrine on the topic. The analysis of the topic

by the Commission was an opportunity to provide certainty for States on a variety of points, including assurances that jurisdiction would not be exercised in an abusive or politically motivated manner, and that immunity would not undermine the necessary struggle against impunity.

As the Special Rapporteur pointed out in paragraph 33 of the report, the concerns expressed by States in the Sixth Committee at the seventy-second session of the General Assembly reflected the debate within the Commission, which was to be expected. States were well aware of the discussions that had taken place on the topic and the different issues at stake. Their suggestions for the Commission's consideration included the usefulness of the "prosecution or waiver of immunity"; the establishment of a mechanism for the settlement of disputes between the forum State and the State of the official — a very important issue, since assertions of exception would inevitably provoke debate; and the establishment of procedural safeguards to ensure that the exercise of jurisdiction would not undermine due process. The Special Rapporteur proposed that those issues should be addressed and considered it necessary to establish a proper mechanism for communication between States, particularly when an issue of exception was at stake.

As pointed out by the Special Rapporteur, adequate mechanisms for communication between the State of the official and the forum State were necessary to enable forum State courts to take into account whether the State of the official had an interest in protecting the immunity of its official. Such communication was also required, according to paragraph 36 of the report, in order to "evaluate factors such as whether the individual can be considered a 'State official', whether the act giving rise to the potential exercise of jurisdiction can be considered to have been 'performed in an official capacity', and whether the official was acting 'in exercise of official functions' at a given moment". He agreed with the Special Rapporteur's statement in paragraph 37 that issues of concern should be addressed in a manner that afforded an element of neutrality, creating conditions of trust between the forum State and the State of the official. Communication channels and the creation of a climate of trust were two important topics that could be further developed and analysed in the seventh report in respect of, *inter alia*, the timing and manner of communication.

It was necessary to emphasize that a broad approach should be taken to the analysis of the procedural aspects of immunity, as pointed out by the Special Rapporteur in paragraph 41. It was not possible to give absolute answers to every question raised in respect of the topic under consideration; sometimes the special circumstances of each case would be relevant and must be taken into account. He agreed with the Special Rapporteur that it was important to study the effect that the obligation to cooperate with an international criminal court might have on the immunity of State officials from foreign criminal jurisdiction and the related procedures. *Mutatis mutandis*, it was important for the Special Rapporteur to consider the procedural implications that were created for States that had ratified treaties which established that the crimes defined in them could be committed only by public officials, such as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. That Convention had been ratified by 164 States and had given rise to many problems in respect of exceptions to immunity of jurisdiction. Many crimes involving torture were linked to the crimes listed in draft article 7; for States that had ratified the Convention against Torture, the issue of immunity had a different connotation than for States that had not ratified it. Similarly, the International Convention for the Protection of All Persons from Enforced Disappearance established that enforced disappearance 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. Since States had drawn up treaties establishing that certain crimes could be committed only by public officials, the Commission needed to ascertain all the consequences deriving from such explicit treaty obligations. It had been clear from the very beginning that the object and purpose of those two conventions was to regulate certain types of official conduct, namely acts carried out under colour of law. It was worth noting that those conventions also established the duty to try or to extradite.

Additionally, it would be of interest to consider the procedural implications of crimes that constituted serious breaches of the Geneva Conventions, in particular when they were committed by public officials. That aspect of the topic should be analysed in the light

of the Rome Statute of the International Criminal Court and the relevant doctrinal practice. While special circumstances, including treaty-based obligations, should be taken into account, the Commission needed to see if it could develop or establish some general principles. It would be most useful if the Commission could provide States with principles and guidelines on how to approach the topics identified by the Special Rapporteur in paragraph 41, including, *inter alia*, the determination of immunity, the point at which immunity should be considered, and which categories of acts were affected by immunity.

With respect to the timing of the consideration of immunity, he took note of the Special Rapporteur's position, as described in paragraph 49 and elsewhere. He agreed that immunity against foreign jurisdiction must begin to operate in the early stages of the process; there was no need for a country to waste time proceeding with a case when immunity would apply. It was important to note that the determination of immunity should be made early in the process for reasons of procedural economy. Clearly, immunity should be determined before the merits of the case were considered. As noted by the Special Rapporteur, that position had been confirmed by the International Court of Justice in *Difference relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, in which it was stated that questions of immunity were preliminary issues that must be resolved in *limine litis*. The matter had also been addressed within national jurisdictions, as in the cases cited by the Special Rapporteur in paragraph 56 of the report.

As noted in paragraphs 61 and 62 of the report, the fact that immunity was a preliminary issue did not imply that it had immediate application at the investigative stage. However, he had doubts about whether immunity could be disregarded at that stage. It was obvious that an investigation could be a very complex matter involving private actors, with potential distinctions to be made between the public and private domains. In that respect, it was important to take note, as the Special Rapporteur did in paragraph 58, of the joint separate opinion of Judges Higgins, Kooijmans and Buergenthal in *Arrest Warrant of 11 April 2000* (*Democratic Republic of the Congo v. Belgium*), in which they held that commencing an investigation on the basis of which an arrest warrant might later be issued did not of itself violate the principles of the immunity and inviolability of a minister. In his opinion, the Commission should be very careful about making a general statement as to whether the investigative phase was excluded or included. If an investigation was informed that a Head of State had clear immunity, there would be serious issues to consider.

In his view, the Special Rapporteur had carried out a thorough analysis of both international jurisprudence and national State practice, concluding in paragraph 56 that the consideration of a foreign official's immunity from jurisdiction was directly related to the time at which the court of the forum State must take a binding decision with regard to that person. However, given the limited practice in the matter, he tended to believe that immunity could be invoked at any stage, including during the investigation, indictment or prosecution stage of proceedings. In paragraph 63, the Special Rapporteur stated that there was nothing to prevent courts of the forum State from considering immunity at a later stage, especially during an appeal. That seemed to indicate that the appeal was an appropriate stage at which to consider the question of immunity. In his view, the appeal stage was too late for such consideration to take place. He would appreciate clarification from the Special Rapporteur on that point.

With regard to procedural guarantees, concerns expressed by States included the need to ensure that a State official who might be affected by the exercise of foreign criminal jurisdiction benefited from all the procedural safeguards recognized under international law, particularly international human rights law. Certain rights of the official might be affected even before the foreign jurisdiction had taken a decision on applicability, as pointed out by the Special Rapporteur in paragraph 40. Therefore, it was important to establish the proper guarantees of due process for any official over whom a foreign criminal court was exercising, or attempting to exercise, jurisdiction.

Exceptions to immunity were among the issues considered by the International Criminal Police Organization (INTERPOL) when assessing requests for Red Notices. He encouraged the Special Rapporteur to make a more in-depth analysis of both Red Notices and Blue Notices issued by INTERPOL. He attached a great deal of importance to the letter

on the question of immunity sent to the Codification Division by the Director of the Office of Legal Affairs of INTERPOL in 2010, despite the fact that parts of it had since been overtaken by new developments. It was important to understand, from a practical point of view, the norms applied by INTERPOL in respect of immunity. INTERPOL made a distinction between private and public actions: following a request from an international tribunal, in 1994, the General Assembly of INTERPOL had concluded that: "Political power can only be exercised within the limits of the law, and that includes international law ... Consequently, the offences referred to in the Tribunal's Statute cannot have been committed in the exercise of political power; they can only have been committed outside of such power and the offender bears personal responsibility for them. Offences committed by politicians must therefore be assessed to determine whether the political or the ordinary criminal law aspect is predominant, in the same way as offences committed by other people." The issue was, however, more complicated; INTERPOL had not applied the official/private capacity test in respect of requests from international tribunals such as the International Tribunal for the Former Yugoslavia or the International Criminal Tribunal for Rwanda. The test was applied in respect of requests sent by one country against a former State official of another country whose acts (for example, the ordering of a military operation) had clearly been carried out in an official capacity. In such cases, INTERPOL would generally apply article 3 of its Constitution to ensure that the Organization did not intervene in an inter-State dispute or otherwise compromise its neutrality. The test was also applied in respect of requests sent by one country against a former State official of another country who might enjoy immunity under international law, namely a former Head of State, Head of Government or Minister of Foreign Affairs. In such cases, INTERPOL would deny the request if the country of the individual concerned protested against the request, since such a protest was understood to be an indication that the protesting country considered the relevant acts to be official in nature.

INTERPOL had recognized, however, that its practice could create serious problems, including by application of the exception of political acts. INTERPOL had highlighted as an example a situation in which a former President of one country was sought by another country for committing an act of genocide while in office. In such cases, the only way to bring the person to justice before the national courts of a foreign country was to create a legal fiction similar to the one created by the General Assembly of INTERPOL in 1994, namely to view the person's acts of genocide as private. All those matters required further study: there was extensive practice on them, including recognition of the complications, and he encouraged the Special Rapporteur to look further into the issue.

As the Special Rapporteur had noted, procedural protections for State officials were particularly relevant in the area of immunity. Red Notices put out against State officials would need to be deleted from the INTERPOL database when immunity was recognized, as in, for example, the case of Teodoro Nguema Obiang Mangue, the Vice-President of Equatorial Guinea. However, INTERPOL had in some cases retained Red Notices against officials who allegedly had immunity, for example in the case of the terrorist attack on the Argentine Israelite Mutual Association in Argentina, in which Red Notices had been retained in respect of a number of Iranian State officials. Some Latin American State officials or former State officials had been the subject of Red Notices for crimes such as enforced disappearance and crimes against humanity. He intended to share with the Special Rapporteur the details of a number of such cases involving Chile, Argentina and other countries.

With regard to appearing as a witness, covered in paragraphs 80 to 89 of the sixth report, he was in general agreement with the Special Rapporteur's analysis. She rightly noted, for example, that any measure of a binding nature summoning a Head of State, Head of Government or Minister for Foreign Relations to appear as a witness would be affected by immunity from foreign criminal jurisdiction. He also agreed with her that the same conclusion would not necessarily apply to summonses addressed to foreign officials enjoying only immunity *ratione materiae*. He welcomed the attention paid by the Special Rapporteur to the question of access to documents, and he agreed with her that a request for a State official to surrender documents might be affected by immunity from jurisdiction *ratione materiae* if the request was binding or related to acts performed by the official in an

official capacity. State legislation aimed at insulating officials from domestic legal action with regard to official acts might provide some insight in that respect. There were numerous State norms containing provisions to the effect that information not in the public domain, whether secret, restricted or confidential, could not be the object of a summons in any circumstances.

In connection with precautionary measures, with regard to the title to property, he agreed with the Special Rapporteur that such public officials as a Head of State, Head of Government or Minister for Foreign Affairs enjoyed immunity from execution. However, as noted in paragraph 94, property belonging personally to a Head of State and located in the territory of a foreign State could not be subject to any measure of execution except to give effect to a final judgment rendered against such Head of State. The Special Rapporteur could usefully analyse further the conceptual consequences of that distinction for the purposes of other public officials, since even in the case of a Head of Government the application of a sentence involving his or her personal property that had *res judicata* was an important exception. As noted by the Special Rapporteur, the forum State could take provisional measures over personal property while the legality of the acquisition was being established. It would also be interesting to have more data on the exceptions to immunity with regard to the illegal acquisition of property in juxtaposition with the immunity provided for crimes against humanity. If, in the case of property, it was possible to provisionally attach the property while the legality of the acquisition was being investigated — even in the case of a Head of State — there could perhaps be some consequences that applied in the case of crimes against humanity in terms of people's lives and physical and psychological integrity.

With regard to the determination of immunity, he agreed with the Special Rapporteur that the courts of the forum State would be competent to give a definitive view on that issue, although it would also be possible for organs other than judicial bodies to inform the decision on the applicability of immunity from criminal jurisdiction that a given foreign official might enjoy, since executive bodies often had more expertise in foreign relations. However, such decision-making should be isolated, to the extent possible, from political influence, so that a judicial body always had the final say. That decision-making process depended heavily on the structure of the court system within the forum State, including the forum State's appeals process. He wondered if there was a general State practice leaning towards courts of higher rank, such as the national or federal courts, to determine whether or not immunity applied. He agreed with Mr. Tladi that the determination of immunity should be made at the higher — if not the highest — judicial levels. Generally speaking, a matter of foreign relations involving State officials such as ambassadors or heads of State was adjudicated in the highest court. It would be interesting to know to what extent it was possible to identify whether that had generated a customary rule.

He agreed with Mr. Murase that the public prosecutor's discretion would need to be scrutinized if the prosecutor was instilled with the authority to determine immunity. However, he did not believe that the Japanese example of citizen review of the prosecutor's decision would always be appropriate; if the prosecutor's discretion was to be reviewed, it would be better for such review to be conducted through the forum State's appeals process. Perhaps the determination of immunity by a court could be reviewed by an appeals court prior to final judgment, as in the United States with interlocutory appeals. That way, the appeal on determination of immunity could be expedited, thus avoiding the wastage of resources related to the trial process before a decision was handed down, only to be appealed.

He agreed with the Special Rapporteur's analysis in paragraphs 106 and 107 of her report regarding the validity of the information provided by the forum State and the State of the official regarding the official's status and whether the acts performed by the official were to be considered as having been performed in an official capacity. However, the final determination should be made by the courts of the forum State.

It would have been useful for the report also to cover existing possibilities for recourse to the International Court of Justice or other international mechanisms provided for by treaties, as there would necessarily be disputes on such matters and the ultimate

safeguard was certainty as to how a dispute could be settled. He suggested taking an inventory of such mechanisms. Sixty-six States had already accepted the jurisdiction of the Court, so that if there was a dispute about exceptions to immunity, there was already a mechanism of judicial determination. In addition, there were many treaties, such as the American Treaty on Pacific Settlement, or Pact of Bogota, that established dispute settlement mechanisms. It would be useful to assess how many States — and which ones — did not have a mechanism to settle disputes when they arose, and to encourage States to turn to higher courts in such cases. It would be interesting to consider, in the context of the current topic, the idea put forward by Sir Michael Wood during the Commission's debate on the topic "Peremptory norms of general international law (*jus cogens*)", namely, that a State disputing an exception to immunity could propose submitting the case to the International Court of Justice, and that rejection of that offer would have consequences for the determination of an act's legality. After all, there was no better safeguard than the option of recourse to the International Court of Justice.

Regarding chapter III of the report, entitled "Future workplan", he applauded the Special Rapporteur's determination that the Commission should complete its deliberation of the topic with her seventh and last report on the topic, which would take into consideration the comments made by Commission members. He welcomed her thorough research thus far, especially given the vast scope of the topic, which brought together multiple aspects of international law.

In conclusion, he commended the Special Rapporteur for her valuable analysis of the immunity of State officials from foreign criminal jurisdiction, a topic that was of crucial importance and at the heart of the Commission's purpose in clarifying and balancing international standards.

Mr. Saboia said that he welcomed the Special Rapporteur's sixth report, which addressed procedural issues related to immunity; although the previous Special Rapporteur's work on the topic, his third report in particular, had contributed to Commission members' understanding of such issues, he had not proposed any action to be taken on the basis thereof.

Bearing in mind that, if there were exceptions to immunity *ratione materiae*, adequate procedural measures that were commensurate with draft article 7, adopted by the Commission at its previous session, must be in place, the Commission must now look beyond the issues already addressed by the Special Rapporteur and her predecessor in their reports, in order to examine guarantees that might prevent the abusive resort to exceptions to immunity. At the same time, as the current Special Rapporteur had pointed out, those issues were important to the forum State, against whose jurisdiction immunity was to be invoked, as well as to the State of the official concerned.

The suggestions made by a number of Commission members regarding, *inter alia,* how to establish certain limitations on prosecutorial discretion without jeopardizing prosecutors' independence and the importance of decisions on immunity being taken by higher courts were sensible; perhaps the experience of the International Criminal Court and the relationship between the Prosecutor and Pre-Trial Chambers of the Court might provide good examples in that regard. The fact that such procedures were dealt with under national law could, however, create difficulties for the Commission if it were to issue recommendations.

He noted the acknowledgement by the Special Rapporteur that there was limited available doctrinal material or jurisprudence on the procedural aspects of immunity of State officials and, moreover, that during the Commission's debate on the topic at its sixty-third session, some members had expressed the opinion that it was too early for in-depth consideration of the procedural aspects of immunity, as the Commission had not yet reached an agreement on the substantive elements mentioned in the second report. He further noted that the Special Rapporteur's current report underlined the gradual shift in recent years, within both the Commission and the Sixth Committee, from an emphasis on definitions, acts, phases and other strictly procedural aspects regarding situations in which immunity arose, to an emphasis on the need to avoid the politicization and abuse of criminal jurisdiction in respect of foreign officials and a focus on safeguarding the

sovereign equality of States. While he shared the view expressed in paragraph 31 of the report, according to which the consideration of such safeguards was an important aspect of the Commission's deliberations on the topic, that did not mean that any kind of procedural condition should be accepted.

The Special Rapporteur rightly argued that adequate procedural measures could offer more security to both the forum State and the State of the official and could minimize the abusive exercise of jurisdiction against an official of a foreign State. It would also contribute to enhancing trust between the concerned States. Procedural safeguards should, moreover, adequately cover the official's rights, as emphasized in the report. The ultimate goal was to strike a balance between, on the one hand, preservation of sovereign equality among States and the stability of international relations and, on the other, the values and interests of the international community as a whole in fighting immunity in respect of the most serious crimes of international concern.

In addressing the scope of the procedural aspects of immunity, the Special Rapporteur had drawn up a list of issues that must be considered for a comprehensive analysis of the matter; he noted that in the oral presentation of her report, the Special Rapporteur had more explicitly referred to the rights and guarantees recognized under international human rights law. Although the latter half of the list, covering (a) the category of procedural guarantees for the State of the official and the mechanisms aimed at facilitating communication and consultation between the forum State and the State of the official and other forms of cooperation to be applied between the two States, and (b) the procedural safeguards inherent in the concept of a fair trial, was not dealt with in the Special Rapporteur's report, he welcomed them as "second-generation" procedural issues that could be given further consideration.

In her report, the Special Rapporteur concluded that immunity must be considered by the courts of the forum State at the earliest opportunity, when they began to exercise their jurisdiction and before they delivered any judgment on the merits of a case. Regarding the investigation stage preceding a court order, the situation was less clear, given the diversity of the authorities and regimes involved. The Special Rapporteur was of the view that it would not be sensible to block investigations at that stage, because, *inter alia*, it might involve other persons not having the status of foreign official or not benefiting from immunity; a similar position had been adopted by the previous Special Rapporteur. However, measures during the investigation stage that involved coercion, such as summons and precautionary measures, should require an examination of the issue of immunity. The important factor, as stressed by the Special Rapporteur in her report, was that immunity must be considered before any measure that was coercive or that might impede the full exercise of an official's State functions was taken.

Referring to the Special Rapporteur's detailed analysis of the categories of the acts by the forum State that were affected by immunity — in relation to which he expressed appreciation for the information provided by Mr. Grossman Guiloff on INTERPOL — he said that the Special Rapporteur drew useful distinctions between the concepts of immunity and inviolability and between immunity *ratione personae* and *ratione materiae*, and provided a helpful analysis of whether the acts of the authorities negatively affected the unimpeded discharge of official acts by the official concerned. Such distinctions were relevant but complex and it remained to be seen how they might be translated into rules.

He welcomed the final part of the report, on the determination of immunity, which dealt with questions such as which organs of the forum State were competent to take decisions regarding immunity and how such processes worked.

Although no draft articles had been submitted as part of the Special Rapporteur's report, the latter would help the Commission make progress in considering procedural issues and thus, following the Special Rapporteur's seventh report, the Commission might be able to conclude its review of the topic and adopt the draft articles on first reading at its seventy-first session. However, for that to be possible, there would need to be sufficient time allocated before and during the debate to consider the topic.

Mr. Šturma, noting that discussion of the Special Rapporteur's seventh report would carry over into the Commission's seventy-first session, said that he wished to make

some preliminary remarks, which he hoped would prove useful to the Special Rapporteur in drafting her seventh report. The report currently under consideration was generally useful and contained many references to State practice and international and national case law, even if not all the information provided was directly related to procedural aspects of immunity. He would not comment on the first part of the report, which referred to draft article 7 and the debates of the Commission and of the Sixth Committee on that article.

He agreed that the subject matter of the sixth report — procedural aspects of immunity of foreign officials — concerned the most important issues relating to the topic. It was precisely those aspects and the matter of procedural safeguards that could contribute to achieving consensus within the Commission. Noting that the report was merely an introduction to procedural aspects and to the concept of jurisdiction and procedural aspects, he said that in terms of methodology, it was important to deal separately with the general concept of jurisdiction, including the State's basis for jurisdiction, and the issue of the institutions that were competent to exercise criminal jurisdiction of a State in practice.

The Special Rapporteur stated that, based on the principle of sovereign equality, the jurisdiction of the State of the official should be the preferred option, provided that the exercise of such jurisdiction was effective. In that connection, it was important, especially when dealing with international crimes, to be able to refer to a number of basic objective criteria for assessing such effectiveness. He suggested that the Special Rapporteur should develop such criteria before analysing other procedural aspects. That was jurisdiction in the most general sense, to determine which State — the forum State or the State of the official — should exercise its criminal jurisdiction in a given case.

Regarding the four dimensions of the procedural aspects of immunity, the Special Rapporteur stated that in order to analyse them, it was necessary to establish a definition of the concept of jurisdiction. Nevertheless, she did not refer to a definition, since a decision on the draft definition proposed in her second report was still pending within the Drafting Committee, but instead relied on a methodology involving just two basic aspects on which there was supposedly consensus: the "preliminary nature" of the issue of immunity from jurisdiction; and the characteristics of acts that do not give rise to immunity from jurisdiction. Regarding the first aspect, he agreed that the general rule should be that the determination of immunity was made prior to the trial phase, which would be consistent with the preliminary nature of such immunity. The second aspect, however, involved the expansion of the scope of application of immunity from jurisdiction, since, depending on the characteristics of the so-called constraining act of authority, it could also affect those acts that had taken place during the pretrial investigation stage. The problem was that, depending on the legal system of a given State, such "acts of authority" carried out by jurisdictional authorities, or even by tax or law enforcement authorities, might or might not be subjected to the intervention of a judge. In that sense, it would be useful to analyse how it was possible to ensure that the State of the official, including in the aforementioned cases, could respond in time and invoke immunity from jurisdiction, in the case of immunity *ratione materiae*, or confirm immunity, in the case of immunity *ratione personae*.

The types of acts affected by immunity also depended on the scope of the concept of jurisdiction. According to the report, the concept covered not only the jurisdiction exercised by jurisdictional bodies — the courts — but also acts performed by officials and other bodies — the public prosecution service and the police. That scope was important in the context of acts performed during the pretrial phase. Once a trial had begun, immunity from jurisdiction should be understood to affect all acts, without prejudice to the effects of an act. While that might appear obvious, it should be stated clearly and explicitly in the report.

It was useful to draw a distinction between a criminal investigation into a situation and investigative procedures in respect of a single person, as had been done by the International Criminal Court. On the one hand, the investigation could involve a great many different people. On the other, only investigative procedures in respect of a single person had the potential to raise the issue of immunity.

In view of the foregoing, the discussion centred on what acts performed outside the trial phase, such as the preliminary investigation or police actions, were also affected by

immunity. In that regard, pursuant to the judgment of the International Court of Justice in *Arrest Warrant of 11 April 2000* (*Democratic Republic of the Congo v. Belgium*) and *Certain Questions of Mutual Assistance in Criminal Matters* (*Djibouti v. France*), immunity affected only binding acts that imposed coercive measures on officials, and obligations that, if unfulfilled, gave rise to coercive acts that had an effect on the exercise of their functions.

It was true that the detention of officials who enjoyed immunity *ratione personae* could occur outside or prior to a trial and that it was their personal inviolability that would be affected. Nevertheless, one might ask to what extent the act of detention itself, in being performed by bodies such as the public prosecution service or the police, could be considered an "act of authority" through which they "exercised jurisdiction". With that in mind, could it be argued that a foreign official who enjoyed jurisdictional immunity *ratione materiae* was also protected from such "acts of jurisdiction"?

Regarding the appearance of a foreign official as a witness, the Special Rapporteur referred to the Order of 17 June 2003 on the request for provisional measures in *Certain Criminal Proceedings in France* (*Republic of the Congo v. France*) with the aim of demonstrating that, in respect of senior officials, a summons to appear or testify was not contrary *per se* to immunity from criminal jurisdiction, but only when the summons was not mandatory and thus did not give rise to coercive measures. The Court's analysis in that case concerned whether the summons to appear issued by the French court would cause "irreparable harm" to the Republic of the Congo that warranted the introduction of provisional measures. One might wonder, however, whether the effect of immunity from criminal jurisdiction could be brought about without it being necessary to reach the level of "irreparable harm". In any event, he agreed that the situation differed from that of officials who enjoyed only immunity *ratione materiae*.

The Commission should be very careful about stating that public prosecutors — who were empowered to conduct pretrial proceedings without the involvement of a judge so as to gather evidence and assess whether or not to prosecute — might have the power to decide on the applicability or otherwise of immunity.

With any judicial act, such as a summons to appear at the trial of a third party, there was a need to include the necessary safeguards to allow for an appeal.

As to the determination of immunity, cooperation mechanisms between the judicial body and other bodies of the forum State, such as the Ministry of Foreign Affairs, and the State of the official should not, under any circumstances, imply that the judge was free from the obligation to justify his or her acceptance or rejection of an opinion or information that he or she had received.

With regard to the future workplan, he largely agreed with the Special Rapporteur. It would be helpful to analyse and, subsequently, propose a possible communication mechanism between the forum State and the State of the official based on the principles of subsidiarity and complementarity as set out in the Rome Statute.

He hoped that, in 2019, the Commission would be in a position to adopt, on the basis of the Special Rapporteur's seventh report, the relevant draft articles.

Mr. Huang said that, like previous speakers, he regretted that the translations of the Special Rapporteur's sixth report had been made available too late for most Commission members to study the report properly. As far back as 1996, the Commission had stated that all reports by Special Rapporteurs should be available to members of the Commission some weeks before the commencement of the session, to enable study and reflection. He hoped that members would never again have to discuss a report the day after receiving it, as such a situation ran counter to scientific rigour, prevented members from discharging their duties in an effective way and undermined the Commission's work in the long run.

He welcomed the Special Rapporteur's suggestion, in paragraph 20 of the report, that the Commission might wish to consider the question of its decision-making system in general and as it affected the current topic in particular. However, he also wished to reiterate his dissatisfaction over the Commission's hasty adoption of draft article 7 at its sixty-ninth session, despite strong objections from some members. The adoption had not

only deviated from the Commission's principle and fine tradition of acting, to the extent possible, by consensus when considering major legal issues, but had also been criticized by Member States in the Sixth Committee. At the event held in New York in May 2018 to commemorate the seventieth anniversary of the Commission, the Chair of the Sixth Committee, Mr. Burhan Gafoor, had said:

> One of the unique things about the Sixth Committee is that it has so far worked on the basis of consensus. I have been an advocate of consensus. In the context of the Sixth Committee, preserving the working method of earning consensus and avoiding putting things to a vote precisely because I think it provides [a] solid foundation ... In the Sixth Committee, there was [a] temptation to put something to a vote on some topics. We did our best to avoid it because I still believe there is virtue in building [a] very strong foundation [for] consensus.

Some Commission members might argue that the Commission and the Sixth Committee were two different bodies and that the former did not necessarily need to adopt the same set of rules of procedure as the latter. But it was helpful to recall an assertion made by the Commission itself on the subject of consensus. In 1996, at its forty-eighth session, the Commission had discussed its decision-making procedures and had concluded that:

> At present the Commission and its subsidiary bodies attempt to reach consensus, and there is no doubt that as a general rule this is right. When decisions ultimately come to be taken, again every effort should be made to reach a consensus, but if this is not possible in the time available, a vote may have to be taken, perhaps after a "cooling off period" to allow time for discussion and reflection.

The Commission had further concluded that, in the case of decisions that were effectively final, recourse to a vote was not to be encouraged. In retrospect, one might ask whether the approach advocated by the Commission in 1996 and the spirit of consensus had been respected and followed during the consideration of draft article 7 in 2017. The answer was, of course, that they had not, with the outcome giving credence to the proverb "more haste, less speed".

The topic of immunity of State officials from foreign criminal jurisdiction bore upon important aspects of international relations. Major differences existed within the Commission on whether there should be exceptions to the principle of immunity under customary international law and the scope of any such exceptions. Nearly one third of the members of the Commission had explicitly objected to the adoption of draft article 7, which sought to expand the exceptions to immunity, both in the Drafting Committee and when the Commission had met in plenary. In the circumstances, the Commission should have proceeded in accordance with the principle of consensus and continued consultations on the draft article, or at least gone through a "cooling off period" and followed the reasonable suggestion of some members to wait until after the Special Rapporteur had proposed a draft article on procedural safeguards, so that draft article 7 and the draft article on procedural safeguards could be considered together at the current session. Instead, the Commission had hastily put the matter to a vote, had forced through a draft article that was highly controversial and had handed over what remained a delicate issue within the Commission to the Sixth Committee and Member States. It had become clear that the Commission's actions had been hasty, harmful and counterproductive, and that they would not receive the support of the majority of Member States. Of the 45 representatives of Member States who had taken the floor on the topic during meetings of the Sixth Committee in 2017, as many as 26 had expressed reservations and concerns of varying degrees in respect of the Commission's practice of adopting draft article 7 by vote. Such opposition had rarely been seen in the 70-year history of the Commission, which could not turn a blind eye to the questions and criticisms of Member States. Achieving consensus on important legal issues was a basic principle and a fine tradition within the Commission. It was also a proven, effective method of work that should be adhered to in the long term.

Mr. Nguyen said that he wished to express his sincere gratitude to the Special Rapporteur for her extensive work on her sixth report and to pay tribute to the former Special Rapporteur, Mr. Kolodkin, for his concise, comprehensive and well-structured

reports. Taken together, the reports on the current topic provided a solid foundation for the Commission's discussions. Although the topic had been included in the Commission's programme of work over a decade previously, its significance and relevance were undiminished.

The report provided a summary of the Commission's rich debate on draft article 7 and of the reaction of States to the controversial and politically sensitive question of immunity in the context of international relations. The summary gave the impression that the Commission should strive, as much as possible, to achieve consensus in its decision-making. A vote should be taken only for decisions on procedural, rather than substantive, matters. It was important to remember that the Commission was a subsidiary organ that gave recommendations to States and the General Assembly. The divergence of opinion within the Commission, whose members represented the main forms of civilization and the principal legal systems of the world, would make States hesitant to adopt any draft text on the topic.

In *Jurisdictional Immunities of the State* (*Germany v. Italy: Greece intervening*), the International Court of Justice had noted that the rules on immunity of States were of a procedural character. Similarly, the former Special Rapporteur had highlighted, in his preliminary report, that the immunity of State officials from foreign criminal jurisdiction was procedural, not substantive, in nature. Academic writings, however, had generally focused more on the substantive, rather than the procedural, aspects of immunity, while underlining that both aspects were inextricably interrelated. Nevertheless, that did not mean that an analysis of the procedural aspects could begin only after all the substantive aspects had been clarified. The consensus within the international community on the inapplicability of immunity to international crimes such as genocide, crimes against humanity, war crimes, torture and enforced disappearance indicated that the time was right to establish an initial procedure in relation to immunity. That procedure would continue to be applicable as the list of international crimes expanded in the future.

In his third report, the former Special Rapporteur had discussed the so-called "traditional procedural elements", namely the timing of consideration of immunity, the invocation of immunity and the waiver of immunity. In her analysis in paragraphs 41 to 44 of the report, the current Special Rapporteur included additional elements, such as mechanisms and instruments of international legal cooperation and assistance to facilitate communication and consultation between the forum State, the State of the official and their relevant organs, procedures of cooperation with international courts and related procedures. Her approach was highly appreciated, because the procedural aspects of immunity should be examined in a broad and comprehensive way. Nevertheless, the fact that those aspects were analysed and presented without any draft articles being proposed to reflect the content of the report made it difficult for the reader to follow the analysis and provide constructive comments. For example, in paragraph 41, the Special Rapporteur listed four dimensions that needed to be analysed, before stating, in paragraph 42, that the first and second dimensions had already been analysed in the third report of the former Special Rapporteur. Despite acknowledging that the remaining dimensions had not yet been addressed in the Commission's work, she surprisingly stated, in paragraph 44, that she would examine only the first dimension in her sixth report. The reader might therefore be somewhat confused by the Special Rapporteur's logic. As he understood it, the remaining dimensions could be analysed in the seventh report. It was regrettable, too, that the Special Rapporteur did not discuss the rights of the defence and other elements pertaining to the concept of a fair trial, as she had promised to do in 2017.

With regard to timing, the Special Rapporteur emphasized the lack of guidance from treaties and jurisprudence as to the definitions of the terms "early stage" and "at the earliest opportunity". She did, however, provide some helpful jurisprudence, including from the International Court of Justice, on when immunity should be considered. The report contained more examples of national jurisprudence than the previous report, particularly from European, American and African States, though it was regrettable that no Asian State practice was mentioned in paragraph 56. It would have been useful, perhaps, to refer to the 2011 case of *Democratic Republic of the Congo and Others v. FG Hemisphere Associates LLC*, in which the Hong Kong Court of Final Appeal had held that sovereign States were

absolutely immune from jurisdiction in Hong Kong. In that connection, article 5 (2) of the Vietnamese Criminal Code of 2015 offered some guidance on the procedure of application of immunity to State officials. However, the limited State practice available was insufficient to guide the Special Rapporteur to the conclusion that "immunity must be considered by the courts of the forum State, at the earliest opportunity". National procedural legislation was diverse and presented a variety of approaches to establishing a point of departure for immunity to be invoked, implemented or waived. While the trend towards including immunity at the early stages of the criminal process provided State officials with appropriate safeguards, it also affected the freedom of national courts in the fight against impunity. Those two elements should be considered jointly. In addition, the Special Rapporteur did not put forward a firm recommendation with regard to timing, as she identified three different times when the forum State should consider the immunity of State officials. She did, however, note that there was nothing to prevent courts from addressing immunity at a later stage, even during the appeal stage.

The lack of State practice pushed the Special Rapporteur to adopt a deductive methodology. For example, in paragraph 70, she stated that: "It may be concluded by extension that this inviolability also applies to Heads of State, Heads of Government and Ministers for Foreign Affairs. This may be inferred from the Convention on Special Missions." She went on to add that the inviolability in question appeared to have been recognized as a rule of customary law. It might be advisable to be more explicit in that regard.

In section C of chapter II of the report, on the material elements of jurisdiction, the Special Rapporteur explored three categories of acts affected by immunity. The categories were helpful in illustrating the distinction between immunity *ratione personae* and immunity *ratione materiae*, and the challenges associated with identifying the latter. For example, in the case of detention, the Special Rapporteur highlighted that there were no rules under treaty law, customary law or case law that recognized the inviolability of State officials who enjoyed immunity *ratione materiae*. Similarly, in respect of appearing as a witness, the applicability of immunity *ratione materiae* was not entirely clear as it required the provision of official documents to prove that an act had been performed in an official capacity. As to precautionary measures, the Special Rapporteur stressed that there were no special rules or examples of State practice to support the argument that such measures affected immunity *ratione personae* or immunity *rationae materiae*. The jurisprudence cited in the footnotes was also very limited and mostly from international courts. Consequently, it appeared that there was insufficient evidence in treaty law, case law and State practice to suggest that the three categories explored by the Special Rapporteur mainly affected immunity *ratione materiae*.

In section D of chapter II, the Special Rapporteur dealt with the determination of immunity. Although the issue was indisputably relevant to the concept of jurisdiction, the Special Rapporteur highlighted that "it seems obvious to conclude that this competence belongs to the specific organs of such jurisdiction". The matter therefore seemed to go beyond the scope of the Commission's work and should be left to States to decide in their national legislation. The Special Rapporteur considered that the best instrument of determination was the "suggestion of immunity" applied in the United States of America, where the Department of State referred to courts its opinion as to whether or not a given foreign official enjoyed immunity. However, the Special Rapporteur did not provide any reasoning or justification for labelling that instrument the "best" or most appropriate to adopt. The case law that she cited was exclusively from the United States. He was thus not convinced by her conclusion, which was unsubstantiated and would have benefited from an in-depth analysis of other foreign courts and jurisprudence.

It was asserted in the report that the administrative organs of some States did not have the capacity or desire to transmit their views to courts, as they wanted to avoid speculation of improper political influence. However, the Special Rapporteur cited only one State, namely Germany, in support of that point. It would have been more convincing and helpful if the Special Rapporteur had provided examples and analysis of other State practice.

When analysing the procedural aspects of immunity, the relationship between immunity, on the one hand, and *jus cogens* and universal jurisdiction, on the other, was impossible to ignore. In paragraph 132 of his third report on peremptory norms of general international law (*jus cogens*), the Special Rapporteur on the topic, Mr. Tladi, had drawn the conclusion that "immunity *ratione materiae* does not apply to any offence prohibited by a peremptory norm of general international law (*jus cogens*)". However, in the report under consideration, that point was merely alluded to in footnote 197, which concerned the conclusion of the United States Court of Appeals for the Fourth Circuit in *Yousuf v. Samantar* that "there was a growing trend in contemporary international law to refuse recognition of immunity of an official in respect of acts contrary to the *jus cogens* norms, irrespective of whether the act can also be ascribed to the State". *Jus cogens* and universal jurisdiction were incompatible with immunity *ratione materiae*. It was essential for that matter to be addressed in the seventh report in the interests of consistency in the Commission's work and in line with article 27 of the Rome Statute of the International Criminal Court.

The report would also have benefited from a bibliography at the end to help the reader to identify relevant primary and secondary sources on the topic.

The meeting rose at 12.30 p.m.