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Held at the Palais des Nations, Geneva, on Monday, 15 July 2019, at 3 p.m.

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Present:

Chair:	Mr. Hmoud (First Vice-Chair)
later:	Mr. Šturma
Members:	Mr. Al-Marri
	Mr. Argüello Gómez
	Mr. Aurescu
	Mr. Cissé
	Ms. Escobar Hernández
	Ms. Galvão Teles
	Mr. Gómez-Robledo
	Mr. Grossman Guiloff
	Mr. Hassouna
	Mr. Huang
	Mr. Jalloh
	Mr. Laraba
	Ms. Lehto
	Mr. Murase
	Mr. Murphy
	Mr. Nguyen
	Mr. Nolte
	Ms. Oral
	Mr. Ouazzani Chahdi
	Mr. Park
	Mr. Rajput
	Mr. Ruda Santolaria
	Mr. Saboia
	Mr. Tladi
	Mr. Valencia-Ospina
	Mr. Vázquez-Bermúdez
	Mr. Wako
	Sir Michael Wood
	Mr. Zagaynov

Secretariat:

Mr. Llewellyn	Secretary to the Commission

Mr. Hmoud, First Vice-Chair, took the Chair.

The meeting was called to order at 3 p.m.

Succession of States in respect of State responsibility (agenda item 6) (*continued*) (A/CN.4/731)

Sir Michael Wood said that he welcomed the Special Rapporteur's third report on the topic "Succession of States in respect of State responsibility" (A/CN.4/731) and also wished to extend thanks to the Secretariat for its excellent memorandum comprising information on treaties which might be of relevance to the future work of the Commission on the topic (A/CN.4/730). It was regrettable that only one State, Cabo Verde, had responded to the Commission's request for information; there must be many States with relevant information.

That said, the request had been a challenging one; the memorandum itself bore witness to that. The Secretariat had been very cautious, and not only with their comprehensive disclaimer in paragraph 7 of the memorandum; they had also acknowledged that the treaty materials included in the memorandum might or might not be relevant to the topic. Indeed, many of the materials related to rights and obligations under "international instruments", itself a somewhat unclear term. For the most part, it seemed, those instruments were in fact treaties within the meaning of the Vienna Convention on the Law of Treaties. He supposed that the succession of States in respect of international responsibility for breach of a treaty lay within the topic under consideration; it was not covered in either the Vienna Convention on Succession of States in respect of Treaties of 1978 or the Vienna Convention on Succession of States in respect of State Property, Archives and Debts of 1983. To that extent, therefore, those treaty materials might be of some relevance, but many of them actually seemed to address State succession to rights and obligations under treaties, while others were concerned with private or public law obligations, neither of which were within the scope of the current topic. Therefore, little in the memorandum seemed directly relevant to the subject matter of the topic under discussion; that realization, however, was in itself very valuable.

Turning to the debate in the Sixth Committee on the Commission's report on its seventieth session, he said that there were important lessons to be drawn both from the overall debate and from the debate insofar as it related specifically to the present topic. The Commission was addressing the general issues raised in the Sixth Committee in its Working Group on methods of work.

As for the debate in the Sixth Committee on the current topic itself, it was difficult to see any great enthusiasm. On the contrary, there had been a considerable amount of criticism and questioning. While some representatives had been positive, others had been quite critical. One important point stressed by a number of representatives was the lack of State practice. In the Commission's own debate on the topic at the current session, Mr. Murphy had made particular mention of the thoughtful views expressed by China. The Commission, and especially the Special Rapporteur, was in a good position to take account of such views, since its work on the topic was still at a relatively early stage.

The underlying problems with the topic, especially the lack of convincing State practice – and that was in no way a criticism of the Special Rapporteur – were such that the Commission should perhaps reconsider its ultimate objective. Although he had been an early supporter of the topic, he now wondered, in particular, whether it was really appropriate to prepare draft articles, with the potential to become a convention, which would be unlikely to find acceptance among States, or whether the Commission should be aiming for an outcome in the form of a study or, as Mr. Rajput had suggested, guidelines. He shared Mr. Rajput's view that a decision on the outcome of the topic should be taken sooner rather than later and he would encourage the Special Rapporteur to consider making a recommendation in that regard, perhaps in his next report, after consultation with other members at the current session and taking into account the debate in the Sixth Committee at the General Assembly's seventy-fourth session.

He agreed with many of the statements made by other members of the Commission in the course of the current debate. To take just one example, he agreed with almost

everything in Mr. Nolte's statement, with the exception of his suggestion that the Commission should be engaged in an exercise aimed at progressive development of the law in the field covered by the topic. It was not clear what form such progressive development would take; he doubted that a convention would be welcomed by States.

He very much agreed with Mr. Nolte's emphasis on the Special Rapporteur's reaffirmation, in paragraph 19 of the report, that "State practice is diverse, context-specific and sensitive in this area". He also agreed with Mr. Nolte on the need to exercise particular caution when assessing State practice in the field under consideration. Mr. Nolte and others had noted that a substantial part of the State practice cited in the report did not support the Special Rapporteur's conclusions. As Mr. Nolte had said, "most of these cases do not evidence an *opinio juris* regarding a general rule in connection with State succession, but they rather constitute context-specific arrangements". Mr. Nolte's criticism of three cases was extremely relevant.

The third report dealt mainly with reparation for injury resulting from an internationally wrongful act committed against a predecessor State, for which the predecessor State had not received full reparation before the date of succession of States.

He noted that other members had questioned the wording, used in various places in the report, that States "may request reparation" from another State. That seemed to be no more than "soft law". He wondered therefore whether the Commission should be contemplating such a path, at least at such an early stage of its work on the topic. Although it might be necessary to go down that path as a last-minute compromise, in order to save the topic, to start with something as legally empty as "may request" seemed rather questionable.

He agreed with those members who saw no need to change the title of the topic. He would not support doing so. Nor did he see any need for a definition of the phrase "States concerned". Indeed, it could lead to confusion.

Proposed draft articles 12, 13 and 14, on reparation for injury committed against a predecessor State, raised many questions, in terms of both substance and drafting. However, in view of the limited time available, he was happy to raise those questions in the Drafting Committee, also in the light of the many suggestions made by others in the current debate.

As for draft article 15, he agreed that the Commission needed to take due account of its earlier work on the subject of diplomatic protection, which had culminated in the 2006 articles on diplomatic protection. Specifically on the question of how to apply the rule of continuous nationality, which was dealt with in part two, chapter IV, of the Special Rapporteur's report, it was advisable, for the reasons given by Mr. Murphy, to stick more closely to the 2006 articles.

While the time available had not allowed him to make more detailed comments, he, like other members who had participated in the debate on the current topic, did not agree with some of the reasoning and examples given by the Special Rapporteur in his report, even where he agreed with the result. He therefore hoped that there would be an opportunity to consider the draft commentaries thoroughly. He commended the Special Rapporteur for his efforts in that regard.

He broadly supported the Special Rapporteur's views on the future programme of work, although he would like serious consideration to be given to the eventual outcome sought by the Commission on the topic, as he now had serious doubts that draft articles would be an appropriate form.

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

Mr. Šturma (Special Rapporteur), summing up the debate on his third report on succession of States in respect of State responsibility, said that the large number of contributions to the discussion attested to the significant interest in and relevance of the subject. In particular, he welcomed the prevailing sense of the debate, which was not whether the Commission should deal with the topic, but rather how it should deal with it in order to achieve a balanced and generally acceptable outcome.

Regarding his general approach to the topic, most members had welcomed the considerations that could potentially inform further work, contained in paragraphs 17 to 23 of the report, although some members had expressed some criticism in respect of specific points. In addition, some general comments had been made on aspects that he had not highlighted, as he understood them as self-evident. For example, Mr. Hmoud had expressed concern that a situation in which a successor State was legally treated under the proposed draft articles as responsible for wrongful acts that were not attributed to it would contravene the Commission's articles on responsibility of States for internationally wrongful acts. He wished to assure all Commission members that that was not the intention behind the proposed draft articles. The articles on State responsibility continued to be the basis for the Commission's work; rather than seek to revise them, the Commission's work on the present topic was meant to clarify the ways in which general rules on State responsibility applied in various situations of succession of States. The basic concepts, such as internationally wrongful acts and rules of attribution, would remain untouched, as was confirmed in draft article 6 of the present topic. The Commission's work on the present topic sought to clarify the fate of the legal consequences of an internationally wrongful act and the possibility of claiming reparation, after the date of succession of States, by a predecessor State or by a successor State. Conversely, the possibility of requiring reparation from the predecessor State or the successor State had been the subject of his second report; the relevant draft articles were being discussed in the Drafting Committee. He supported the view expressed by several members that it was important to maintain consistency in terminology and substance. He was ready to resolve some problems of terminology in the Drafting Committee. For example, he agreed to avoid the use of the term "secession"; furthermore, he wished to make it clear that the use of the terms "injury" and "injured State" was not intended to replace the international wrongful act as the basis of responsibility, but simply to align the language of the draft articles with that of Part Two and Part Three of the articles on State responsibility.

Regarding the issue of codification and progressive development of international law, he was grateful to Mr. Huang for recalling the drafting history of Article 13 of the Charter of the United Nations and the Chinese contribution thereto. Indeed, both the progressive development and codification of international law were within the purview of the General Assembly and the Commission. Both the Charter and the Commission's statute put progressive development of international law before codification. Therefore, he agreed with those members who had stated that the present topic could and should include elements of progressive development. It seemed that Mr. Murphy and Mr. Zagaynov also accepted the progressive development of international law in the Commission's work on the current topic, if States could decide to support or reject it. Mr. Nolte and Mr. Hmoud had pointed out that the Commission should exercise caution in proposing draft articles, by stating clearly that the Commission was engaging in progressive development, taking into account best practices rather than proving the existence of generally applicable rules. Mr. Jalloh had expressed concern about the Commission's flagging specific provisions as entailing codification and others as progressive development; in Mr. Jalloh's view, it was preferable to set out at the beginning of the commentary what was to follow. He himself agreed that it should be stated clearly, where necessary, that some provisions represented progressive development and that that could be done in a general commentary at the beginning of the draft articles.

Some members had expressed support for the suggestion in the report that a flexible, realistic approach should be adopted, while other members had requested further clarification. A number of members had emphasized the subsidiary nature of the draft articles and the priority of agreements between the States concerned. In that context, Mr. Grossman Guiloff had cautioned against the interchangeable use of the terms "subsidiary" and "residual" in describing the nature of the draft articles. He generally agreed with those comments. Draft article 1 (2), as provisionally adopted, clearly acknowledged the subsidiary nature of the draft articles and the priority of agreements between the States concerned; further clarifications were provided in the commentary.

The issue of the quantity, quality and evaluation of practice had often been raised by members during their debate on the topic. Many had reiterated the statement in the third report that available State practice was often "diverse, context-specific and sensitive".

While that did not make work on the topic impossible, he agreed that the Commission needed to approach the examples of State practice with caution. Any such examples included in the commentaries would need to be accompanied by a detailed explanation. In any event, it seemed that the inconclusiveness of the State practice available was an argument against a single general rule on succession or non-succession. Although some members had expressed support for such a rule, he agreed with Mr. Zagaynov that it was difficult to affirm the existence of a general rule.

Specifically regarding the statement by Mr. Rajput that the inconclusiveness of practice could only lend support to the "clean slate" principle, he wished respectfully to reject that conclusion. The "clean slate" principle appeared as a kind of general rule in the 1978 Vienna Convention, but only in respect of Part III, which dealt with newly independent States. That rule did not apply to other categories of succession of States. It did not appear necessary to discuss at the current stage whether the "clean slate" rule had been included at the time of the Convention because of general practice or owing to policy considerations. In the 1983 Vienna Convention, there was no general rule, but rather only special rules for different categories of succession of States and different areas, namely State property, archives and debts. In short, the Commission's previous work and the 1978 and 1983 Vienna Conventions confirmed the existence of several specific rules, rather than one general rule. In the context of the present topic, it would be odd and legally incorrect to elevate the "clean slate" principle to the status of a general rule, in particular in situations where the predecessor State continued to exist.

Moreover, even if Mr. Rajput was probably correct when it came to the non-transfer of obligations arising from an international wrongful act to the successor State that was a newly independent State, the invocation of rights was a different matter. It would be absurd if the former colonial power, and not the newly independent State, requested reparation for injury resulting from an international wrongful act committed by another State before the date of succession if the consequences of such act affected the territory or population of the new State. Recalling the case concerning *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, he said that he agreed with members who had pointed out that the jurisdiction of the International Court of Justice had been based on the consent of the parties in dispute and that neither Nauru nor Australia had invoked issues relating to succession of States. However, that might be because the harmful consequences in the territory of Nauru were evident and because no State other than the newly independent State of Nauru would have an interest to act.

Therefore, that argument not only went against the so-called general "clean slate" principle, but also justified the separate treatment of obligations and rights in the second and third reports and the draft articles proposed in each. On that point, he agreed with Mr. Rajput, although his approach was based on the general rules of State responsibility and succession of States, whereas Mr. Rajput had advanced the general principle of "acquired rights". Those justifications were not incompatible, but rather mutually supportive. In any case, he wished to reiterate that the separate treatment of obligations and rights was not simply a matter of convenience in drafting the respective reports, but that it related to substantive grounds.

Also with regard to State practice, he agreed with the members who had pointed out that State practice was mainly focused on European sources and that more diverse sources were required, as requested by the Sixth Committee; however, it had proved difficult to find relevant State practice from regions outside of Europe. He would welcome the provision of such examples from Commission members and Member States and was considering reiterating such a request in the relevant chapter of the Commission's report on its seventy-first session.

In his view, the present topic relied significantly on agreements, which needed to be classified and interpreted. The memorandum prepared by the Secretariat on treaties which might be of relevance to the future work of the Commission on the topic was an important source in that regard. In addition, as Mr. Grossman Guiloff had rightly pointed out, the Commission might also consider general principles of law as a useful source in its work on the current topic. Other members had also referred to general principles, such as the protection of acquired rights and prohibition of unjust enrichment. It seemed that those and

other principles, such as fairness and reasonableness, might support the conclusions reached in his third report and in some of the draft articles.

Having said that, caution should be applied in respect of the role of general principles. As the International Court of Justice had stated in its judgment of 1 October 2018 in the case concerning the *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, while the principle of legitimate expectations might exist in international investment law and arbitration, it did not follow from such references that a principle of legitimate expectations existed in general international law. Consequently, in relation to the present topic, some of the aforementioned principles might apply in the instances of succession of States in respect of the consequences of international wrongful acts affecting the investments or other property rights of States or their nationals. However, it was open to question whether they applied equally in other areas of international law. As a matter of policy, it would be odd to confirm the right of a successor State to request reparation for expropriation or other breach of property rights and to deny the right to reparation for the consequences of genocide, for example. As a matter of law, it seemed that the present topic built on general secondary rules of international law; therefore, it should not propose rules that were specific to any one branch of international law.

Nevertheless, while general principles of law could not provide the main or only basis for the progressive development and codification of law on the current topic, they could play a role alongside State practice, case law and agreements. Moreover, as in any other instance, general principles could evolve over time into customary rules of international law and could inform the negotiation of agreements between States.

Turning to the issues of the title and the form of the outcome of the Commission's work, he said that while some members had suggested changing the title of the topic, other members had disagreed with such a suggestion. Yet another member, Mr. Jalloh, had found the current title adequate but would prefer alternatives. In his own view, it was preferable not to change the title at the present time. The current title reflected the Commission's intention to maintain consistency with the articles on State responsibility and the rules of succession of States. In particular, he was against any titles that would include words such as "aspects", "problems" or "issues", all of which were suitable for a lecture, study or book, but which would be a departure with regard to the topics considered by and the outcomes adopted by the Commission. Some proposals, such as Ms. Galvão Teles' reference to "instances of State succession" or her suggestion that the title of the topic should be aligned with the wording "in matters of international responsibility", used in a resolution of the Institute of International Law, should be given further consideration, perhaps at the end of the first reading when the content of all the draft articles was clear. According to the practice of the Drafting Committee, the body of a draft article was always adopted before its title.

Several members had questioned the appropriateness of draft articles as the form of the outcome on the topic, suggesting that the Commission should discuss whether alternatives such as draft guidelines, principles, conclusions or an analytical report or model clauses might be more appropriate. Other members had proposed that the Commission should postpone a decision on the form of the outcome until more substantive work had been done on the topic. One member, Mr. Murphy, had suggested, as an alternative, that the Commission might approach the project more directly as an effort to develop new law by means of a new convention. In the current situation, it seemed preferable to postpone a decision on the form of the outcome. According to the Commission's statute, draft articles were a standard method of work. The preparation of draft articles did not prejudge in any way the final outcome, which would not necessarily form the basis for a convention, but instead might be adopted as a resolution of the General Assembly or as an annex to such a resolution.

He was not in favour of the proposals to replace the draft articles with draft conclusions or an analytical report. In his view, the outcome of the Commission's work on the topic should, in principle, be both analytical and normative. While the analytical elements might be included in the reports and the commentaries to the draft articles, in his view draft articles or principles best served the normative objective. He did not see much difference between articles and principles, except that principles were burdened by other

connotations in legal terminology. Draft articles were more neutral and suitable for capturing both existing rules and proposals *de lege ferenda*. However, there was potential usefulness in the proposals by Ms. Galvão Teles and Mr. Hassouna that the Special Rapporteur should consider drafting model clauses to be used as a basis for negotiation of agreements or compiling an annex of clauses drawn from contemporary agreements between States. In his view, such proposals were not incompatible with the preparation of draft articles, since model clauses or an annex of existing clauses could be included as an annex to the draft articles.

In response to the questions which had been raised most often in connection with the four substantive draft articles, in other words draft articles 12, 13, 14 and 15, he noted that one common feature of the debate had been a querying of the meaning of the phrase "may request reparation" that appeared in draft articles 12, 13 and 14. One member had, however, pointed out that the Institute of International Law had employed a similar formulation and one member had been of the opinion that the use of soft language indicated that, in some circumstances, it might be possible to claim reparation after succession, although that was not automatically the case. He therefore concluded that while probably the majority of members had considered the language in question too weak, others had found it acceptable or strong enough.

His choice of language had been prompted by a wish to replace the stronger terms "transfer", "passage" or "devolution" which had been criticized in the debate in 2018. The expression "may request reparation" seemed flexible enough to cover all situations where a State was certainly entitled to reparation, *lex lata*, as well as those where that was more a question of *lex ferenda*. Of course, situations where such entitlement was a matter of the progressive development of international law must be indicated in the commentaries to the relevant draft articles.

That approach also rested on the understanding that the draft articles would be subsidiary to succession agreements between the States concerned. An analysis of such agreements showed that States were usually reluctant to include any reference to responsibility in those agreements, even when they covered the restitution of certain objects or financial compensation, whether in the form of lump-sum agreements or otherwise. For that reason, in situations where one of the parties denied responsibility for an internationally wrongful act, a stricter and possibly less ambiguous formulation might discourage States from reaching an agreement.

He also intended to allow for the possibility that, in the longer term, some *de lege ferenda* rules might evolve into rules *de lege lata*. Drawing too sharp a distinction between those two situations might prevent crystallization of rules in the future.

The main policy issue in draft articles 12, 13 and 14 had turned on whether to merge the three categories of succession when a predecessor State continued to exist. Such a merger had been questioned by one member but supported by three others. He personally considered that a single article would have the advantage of avoiding unnecessary repetition. Moreover, a separate draft article on succession in the case of newly independent States might possibly reopen the debate. He preferred to keep that category of succession in a merged draft article in view of the conclusion of the International Court of Justice in its advisory opinion on the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* that the process of decolonization of Mauritius had not been lawfully completed when Mauritius had acceded to independence.

In draft article 12 (2), he agreed that the reference to "special" circumstances should be clarified and was prepared to replace "nationals" with "population", as suggested by Ms. Lehto. He concurred that the term "compensation" was inappropriate in draft articles 12 and 14 and should be replaced with another word, because those provisions concerned not a form of reparation from the responsible to the injured State, but rather a settlement or set-off between the predecessor and successor States, or between two successor States. Perhaps the Drafting Committee could consider terms such as "mutual settlement", "arrangement", "repayment", or "equalization". On the other hand, he would prefer to retain the generic term "reparation" elsewhere in those draft articles.

He was sympathetic to the view expressed by Mr. Grossman Guiloff that draft article 12 related only to the right of a State to claim reparation for an internationally wrongful act, but failed to address the potential rights of individuals to do so regardless of any action by a requesting State. However, any such right might have ramifications that transcended the scope of the current topic. Article 33 (2) of the articles on State responsibility already stated that Part Two of those articles was without prejudice to any right arising from the international responsibility of a State which might accrue directly to any person or entity other than a State. While his third report occasionally referred to the practice of some adjudicative bodies, including the United Nations Compensation Commission, which dealt with individual claims, its main focus was diplomatic protection.

Moving on to draft article 15, he noted that several members had spoken in favour of the inclusion of diplomatic protection *qua* part of State responsibility in the current topic. They had also supported allowing an exception to be made to the principle of continuity of claims in order to avoid situations of State succession where an individual would otherwise lack protection. Two members had been against the reopening of the debate on the diplomatic protection regime established in the articles on diplomatic protection and had wished to ensure that the draft articles did not conflict with them. One member had called for caution and had drawn attention to the Western Powers' abuse of diplomatic protection in the past and to the use of force to protect nationals abroad. He personally agreed with that member and thought that the reference in article 1 of the 2006 articles on diplomatic protection to "diplomatic action or other means of peaceful settlement" should be echoed in the commentary to draft article 15. Several colleagues had commented that the latter was consistent with article 5 (2) of the 2006 articles. That had indeed been his intention.

Three members had considered that draft article 15 should expressly include the safeguards against the misuse of exceptions to the continuous nationality rule contained in article 5 (3) and (4) of the articles on diplomatic protection. Two members had suggested that the issue of safeguards could be discussed in the Drafting Committee, while another member had thought that they could be explained in the commentary. He had not replicated article 5 (3) and (4) of the articles on diplomatic protection in draft article 15 for two reasons. First, it was sufficient to refer to other rules of diplomatic protection indirectly in the "without prejudice" clause in paragraph 3. Second, there appeared to be less risk of nationality shopping when a change of nationality occurred involuntarily as a result of State succession. He was, however, open to amendment of that draft article in the Drafting Committee.

As far as the draft articles of a technical nature and the structure of the draft articles were concerned, three members had wondered whether rights and obligations relating to specific categories of State succession could be dealt with in separate articles. One member had made the point that the proposed draft articles would require revision in order to incorporate the interlinked notions of rights and obligations. Other members had supported his own view that the provision on succession of responsibility should remain separate from that on succession of the right of the successor State to reparation for wrongs suffered by the predecessor State. One member had been of the opinion that, if the Commission were to deal with rights and obligations in separate articles, each category of State succession should form the subject of a separate article; scenarios where the predecessor State continued to exist could be merged into one draft article, but specific categories of State succession where the predecessor State no longer existed required separate treatment. He agreed with that member and, in fact, that was the structure of the draft articles as they stood. He would act on the useful suggestion that he should prepare a working document outlining all the draft articles. He was also open to a discussion of the numbering and location of draft articles X and Y and of the addition of further definitions in draft article 2.

Work on the topic should not be completed in too hasty a manner. The Drafting Committee should be allowed plenty of time to examine the draft articles which had been referred to it, in particular draft articles 3 and 4, which should be addressed in the light of the Secretariat's memorandum. His next report would focus on forms of responsibility, in particular restitution, compensation and guarantees of non-repetition, and might also cover procedural issues and those arising in situations where there were several successor States.

However, he still believed that the first reading of the draft articles could be completed by the end of the current quinquennium.

Although almost all members had been in favour of referring all the new draft articles to the Drafting Committee, three members' support for such action had been qualified. He therefore recommended that, taking account of the views expressed in the plenary debate, draft articles 2 (f), X, Y, 12, 13, 14 and 15, as well as the titles of Part II and Part III, as contained in his third report, should be referred to the Drafting Committee.

The Chair said that he took it that the Commission, taking account of the views expressed in the plenary debate, wished to refer draft articles 2 (f), X, Y, 12, 13, 14 and 15, as well as the titles of Part II and Part III, as contained in the third report of the Special Rapporteur, to the Drafting Committee.

It was so decided.

Mr. Šturma (Chair) took the Chair.

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

Ms. Escobar Hernández (Special Rapporteur), introducing her seventh report on immunity of State officials from foreign criminal jurisdiction (A/CN.4/729), said that the report completed the Commission's study of the procedural aspects of immunity of State officials from foreign criminal jurisdiction, that being the final set of issues which had to be examined before the adoption of the draft articles on first reading.

The sixth and seventh reports should be read together and, for that reason, when debating on the topic at the current session members should refer to both reports, as that would enable the Commission to deal holistically with procedural provisions and safeguards, including the draft articles contained in the seventh report. She especially wished to express her thanks for the comments already made by colleagues and States on her sixth report.

The seventh report was divided into an introduction and five chapters. The introduction described the current status of work on the topic and briefly summarized debates on her sixth report in the Sixth Committee during the seventy-third session of the General Assembly and in the Commission at its seventieth session, in order to remind members of the salient features of that debate. Chapter I, which examined the notion of jurisdiction and its impact on the procedural aspects of immunity, contained draft articles 8 and 9. Chapter II was entirely devoted to a consideration of invocation and waiver of immunity and encompassed draft articles 10 and 11 on those subjects. Chapter III essentially dealt with the procedural guarantees operating between the forum State and the State of the official, in other words notification of the State of the official of the forum State's intention to exercise jurisdiction over the foreign official, the exchange of information between both States, the possibility that the forum State might transfer proceedings to the State of the official and consultations between both States. The analysis of those issues formed the basis of draft articles 12, 13, 14 and 15. Draft article 16 stemmed from the examination of the procedural rights and safeguards pertaining to the official in chapter IV. Those four chapters covered all the procedural issues which had been identified in the sixth report and which, in her view, should be included in the draft articles on immunity of State officials from foreign criminal jurisdiction.

Chapter V looked briefly at the Commission's future workplan and focused on three general issues still in abeyance, namely the relationship between the immunity of State officials from foreign criminal jurisdiction and international criminal courts, the possibility of establishing a dispute settlement mechanism and the inclusion of a recommendation on good practices. The purpose of that chapter was to call the Commission's attention to the need to deal with those matters before completing its consideration of the topic and to encourage an exchange of opinions thereupon.

There were two annexes to the report: annex I contained the draft articles provisionally adopted by the Commission and annex II the draft articles proposed for the Commission's consideration at the current session.

In order to facilitate the debate at the current session, she would focus her presentation on the new draft articles and highlight certain aspects of the report.

Turning first to procedural aspects and the underlying principles thereof, she said that, as she had highlighted in the concept paper that had provided the basis for the informal consultations held during the Commission's sixty-ninth session in 2017, those aspects were plainly important when considering the immunity of State officials from foreign criminal jurisdiction, if only because immunity came into play before a foreign criminal court through the application of procedural rules, principles and procedural processes that could not be ignored. As her sixth report emphasized, the Commission's work would not have its maximum effect unless it provided adequate answers to a number of distinctly procedural questions, such as what was meant by "jurisdiction"; what types of acts of the forum State were affected by immunity from foreign criminal jurisdiction; who determined the applicability of immunity, and what effect that determination had; when immunity from foreign criminal jurisdiction began; whether it was necessary to invoke immunity and who could do so; how and by whom the waiver or lifting of immunity could be effected and what effects the waiver or lifting of immunity had on the exercise of jurisdiction; how to ensure communication between the forum State and the State of the official, and what mechanisms could be used for such communication; whether or not there were mechanisms in place that enabled the State of the official to have its legal position made known and taken into consideration by the courts of the forum State when determining whether or not immunity applied in a specific case; how to facilitate international judicial cooperation and assistance between the forum State and the State of the official; to what extent and through what procedures the obligation to cooperate with an international criminal court should be taken into consideration; and how to transfer proceedings begun in the forum State to the State of the official or an international criminal court, as necessary.

The answers to those questions depended on a combination of factors. First, the need to take into consideration the presence before the court of the forum state of a foreign element having special characteristics, as that element fell into the category of "State official", and whose acts, at least as far as immunity "*ratione materiae*" was concerned, fell into the category of "acts performed in an official capacity". Second, the need to preserve the principle of sovereign equality in relations between the forum State and the State of the official, which meant establishing a balance between the right of the forum State to exercise its jurisdiction and the right of the State of the official to ensure that the immunity of its officials was respected. Third, the need to strike a balance between ensuring respect for the immunity of State officials, the purpose of which was to safeguard the representative nature of those officials and the proper performance of their functions, and not undermining the objective of eliminating impunity for the commission of the most serious crimes under international law. Fourth, the need to ensure that, in all circumstances, a State official who might be affected by the action of a foreign court, including in respect of the determination of his or her immunity, enjoyed the procedural rights and safeguards recognized by international human rights law.

There were numerous advantages to tackling those matters from a procedural angle. In particular, that approach made it possible to identify and suggest procedures which offered both the forum State and the State of the official certainty and reduced as far as possible the eventuality that the exercise of jurisdiction might be abused for political motives. It likewise introduced an element of neutrality into the treatment of immunity from foreign criminal jurisdiction which could help to build trust between the forum State and the State of the official and to mitigate instability in international relations, a recurrent theme in the debates on the limitations on and exceptions to immunity.

The draft articles contained in her seventh report were intended to apply to the whole set of draft articles, including the rules set out in draft article 7, in order to meet concerns expressed within the Commission about the need to establish a certain parallelism in the treatment of exceptions to immunity and the determination of procedural safeguards.

In that context, she wished to draw attention to the importance of receiving feedback from States on a set of issues whose regulation could vary greatly in national legal systems.

Turning to the concept of jurisdiction and its relationship with the procedural aspects of jurisdiction, dealt with in draft articles 8 and 9, she said that draft article 8 referred to the consideration of immunity by the forum State, in particular the point in time at which immunity had to be taken into account by the authorities of that State. It made it plain that immunity must be considered as soon as those authorities were aware that the foreign official might be affected by the exercise of jurisdiction and, in any event, before that person was indicted and before the beginning of a hearing. Although the draft article essentially concerned the judicial phase, it recognized that the existence of immunity might have to be assessed in the preceding phases, especially when it was necessary, either at the investigative stage, or by way of interim measures, to adopt coercive measures which directly affected the official, or might have an impact on the performance of his or her functions.

Draft article 9 was based on the recognition that immunity should be determined by the courts of the forum State, since they would be unable to exercise jurisdiction if immunity applied. Clearly, depending on the forum State's domestic legal system, other institutions or authorities could also take part in determining the existence of immunity. Although domestic law was still highly relevant when it came to defining the procedure for determining immunity, that procedure must always comply with the rules laid down by the draft articles. It must likewise take account of whether the State of the official had invoked or waived immunity and of any other information which the authorities of the forum State and the State of the official might have provided to the competent courts to enable them to rule on immunity.

As noted in her report, invocation and waiver of immunity occupied a prominent place among the procedural rules applicable to immunity of State officials from foreign criminal jurisdiction. Through the two institutions, States could make clear their desire to protect their own rights and interests, the principle of sovereign equality and their own officials. Although both institutions were clearly of a procedural nature and could not be confused with limitations or exceptions to immunity, their invocation could have a significant impact on the application of immunity, since, through them, States exercised their right to have the immunity of their officials respected or waived. The two institutions therefore warranted separate treatment in the draft articles.

Draft article 10 recognized the right of all States to invoke the immunity of their officials before a State that intended to exercise jurisdiction. It was noted that, as with the determination of immunity, the claim of immunity should be made as soon as the State of the official was aware that the forum State intended to exercise jurisdiction. To that end, the draft article contained a set of procedural rules for invoking immunity, the purpose of which was simply to ensure legal certainty by stipulating that immunity should be invoked in writing and that the identity of the official in respect of whom immunity was being invoked and the type of immunity being invoked should be indicated.

It should be pointed out that, in draft article 10, invocation was not identified as a judicial act that should necessarily be performed before the courts of the forum State. On the contrary, it was recognized that, in certain circumstances, the act could not be performed under the procedural laws of the forum State, or that the State of the official might prefer to invoke immunity directly before the diplomatic authorities. The decision to leave both options open reflected the range of national legal regimes that could be applied to the exercise of criminal jurisdiction, and offered sufficient flexibility to ensure that, in any event, the invocation of immunity could be communicated to the competent authorities. To that end, there was an explicit reference to transmitting the communication relating to the invocation of immunity to the judicial organs competent to determine the application of immunity, in cases where the communication in question had been submitted to a different authority. The provision was particularly important since not all national legal systems contained rules on a transmission procedure or on communication between the executive and judicial branches.

It should be noted that the effects of invoking immunity were far from negligible, particularly when it came to the obligation for the competent organs of the forum State to consider and rule on applications of immunity as soon as possible. As a result, draft article 10 was predicated on a distinction between immunity *ratione materiae* and immunity

ratione personae. While, for the former, invocation was viewed as a procedural requirement for the application of immunity, for the latter, the notoriety of the official whose immunity was to be considered made such a requirement unnecessary, and meant that the competent authorities of the forum State should act *proprio motu*.

Draft article 11 was based on the notion that waiver of immunity was a right of the State of the official. For that very reason, waiver should be express and clear, and should mention the official whose immunity was being waived and, where applicable, the acts to which the waiver pertained. In that regard, it should be noted that draft article 11 did not provide for implicit waiver. Thus, even when waiver of immunity derived from an international treaty, it should be deduced "clearly and unequivocally" from an international treaty to which both the forum State and the State of the official must be parties.

The rules on the form and procedures applicable to waiver of immunity were the same as those set out in draft article 10 for invocation of immunity. Regarding the effects of waiver of immunity, it should be emphasized that draft article 11 had been structured on the understanding that waiver of immunity was irrevocable for reasons of legal certainty that could not be ignored in a set of draft articles that affected the exercise of criminal jurisdiction. In any event, the irrevocable nature of immunity was accepted on the basis of two considerations: first, once immunity had been waived, the waiver applied to all acts and all stages of the proceedings, including appeals and arrest or detention orders, that might arise as a result of the exercise of criminal jurisdiction by the forum State; and, second, in any case, the waiver was understood to relate only to the official and the acts referred to in the waiver.

The need to establish procedural safeguards to prevent the politically motivated or abusive exercise of criminal jurisdiction against a foreign official had been highlighted in the debates of the Commission and the Sixth Committee. As noted in her report, such safeguards should be aimed at protecting the interests of both the State of the official and the forum State. Furthermore, they should be understood in a broad sense that allowed, *inter alia*: the State of the official to invoke and waive immunity, which required knowledge of the forum State's intention to exercise jurisdiction; an exchange of information to take place between the authorities of the forum State and those of the State of the official for the purpose of determining the application of immunity; the State of the official to exercise criminal jurisdiction over him or her, which would bypass the issue of immunity; and the establishment of mechanisms for consultation between the forum State and the State of the official on any question relating to the determination and application of immunity. Draft articles 12, 13, 14 and 15 served those purposes.

Concerning those draft articles, it should be noted, first of all, that it was extremely difficult to find uniform State practice, and that international treaties dealing with the subject were very varied and, in many cases, characterized by their own peculiarities, in both substantive and instrumental terms. Consequently, in the formulation of the abovementioned draft articles, particular use had been made of the conventions and other instruments of general scope that were mentioned in the report.

Secondly, the draft articles were clearly examples of *lex ferenda* and fell into the category of the progressive development of international law, which was part of the Commission's mandate. That did not mean, however, that the draft articles were of no interest. On the contrary, they helped to facilitate mutual trust between the forum State and the State of the official, provide legal certainty to both States, especially the forum State, and to eliminate the risk of the determination of immunity becoming a political issue liable to destabilize relations between the States. She would request that the other members of the Commission should take due account of those comments during the debate on the topic.

Draft article 12 constituted an essential guarantee of respect for the immunity of foreign officials by establishing a duty to notify the State of the official of any attempt to exercise jurisdiction over that official. Without such notification, it would be very difficult, in many cases, for the State of the official to invoke or waive immunity, which made the duty of notification the best way of guaranteeing the defence of the right to immunity of State officials from foreign criminal jurisdiction.

The duty of notification as such was not laid down in any international instrument of general scope that might be applicable to immunity of State officials, but mechanisms that could serve as models – and which she had used in preparing draft article 12 – were to be found in several international legal cooperation instruments.

Notification should be given as soon as the presence of the foreign official was known, and should contain all the elements needed for the State of the official to assess whether or not it wished to act in defence of the immunity of the official.

The proposed form and procedure of notification followed a model similar to that used for invocation and waiver of immunity. It should be borne in mind that recourse to diplomatic channels was the default option in the absence of other appropriate channels of notification, but reference was made, in draft article 12, to international cooperation and mutual legal assistance treaties, which were well known and well established in international practice.

Draft article 13 related to the exchange of information between the forum State and the State of the official. It was premised on the forum State requesting information, on the understanding that its authorities would need the information to decide on the application or otherwise of immunity, especially in cases of immunity *ratione materiae* in which it was not easy, without information from the State of the official, to determine whether the individual was a foreign official, whether he or she had been a foreign official at the time of the acts that might give rise to the application of immunity and whether the acts had been carried out in an official capacity.

Although the exchange of information was framed as a right of the forum State to request information from the State of the official, the mechanism provided for in draft article 13 was expected to function as a two-way procedural safeguard that benefited both the forum State and the State of the official. The two-way nature of the mechanism was emphasized, from the perspective of the State of the official, in paragraphs 4, 5 and 6, which provided for the right of the State of the official not to provide information in certain circumstances, for example, when it considered that the request for information affected its sovereignty, public order, security or essential public interests, offered the State the possibility of making the transmission of the information subject to certain conditions and, lastly, established that "refusal by the State of the official to provide the requested information cannot be considered sufficient grounds for declaring that immunity from jurisdiction does not apply". The form and procedures for requesting information followed the same model as that proposed in relation to invocation, waiver and notification.

Draft article 14 concerned a special example of cooperation and mutual legal assistance: the transfer of proceedings to the State of the official in order for the State to exercise its own criminal jurisdiction over its official. The mechanism was envisaged in the draft article as a right of the forum State, whose authorities "may consider declining to exercise their jurisdiction in favour of the State of the official", rather than as an obligation. The transfer would therefore be subject to the national laws of the forum State and, if applicable, to international legal assistance agreements that were binding on both States. The effect of the transfer would be to "suspend" the exercise of the forum State's jurisdiction until the State of the official had decided on whether or not to exercise its own jurisdiction.

It should be noted that, although the transfer of proceedings was a right of the forum State and not an obligation, it could be a useful measure in some circumstances to avoid the issue of immunity or to resolve problems that might arise among the States concerned with regard to the determination of immunity. In any case, it could serve as a helpful tool in preventing the politically motivated or abusive exercise of criminal jurisdiction by the forum State by allowing the State of the official to exercise its own jurisdiction.

Lastly, draft article 15 governed a two-way – forum State/State of the official – mechanism, namely consultations, that made it possible to look for solutions when problems of any kind arose in the process of determining the applicability of immunity in a specific case.

It was a flexible mechanism that was well established in the framework of international law and international relations and that, as stated in her report, could take a number of different forms and serve as an instrument for solving problems or, if that was not possible, for agreeing on a way of overcoming controversies in contemporary international law.

As noted in her sixth report (A/CN.4/722) and in the concept paper that had served as the basis for informal consultations in 2017, a thorough analysis of the procedural aspects of immunity of State officials from foreign criminal jurisdiction should include the issue of the procedural safeguards recognized as pertaining to the foreign official throughout the process of determining immunity and in relation to any act of the forum State that might affect that immunity. That was the case because, although the immunity of a foreign official was a right of the State, and the official was merely the direct beneficiary of that right, it was no less true that the internationally recognized rights of the official might be affected if there was an intention, on the part of the forum State, to exercise criminal jurisdiction, even if it did not ultimately do so.

Draft article 16 responded to precisely that concern by recognizing, first and foremost, that foreign officials had a right to "benefit from all fair treatment safeguards, including the procedural rights and safeguards relating to a fair and impartial trial".

Although the recognition of that right could have been approached in a different way, the formula chosen for draft article 16 was the most flexible of those used to date by the Commission in its work on the topic, and had been applied, most recently, in the draft articles on crimes against humanity.

Following the same model, the draft article contained a general reference to fair treatment, identified, in paragraph 3, certain types of protection that belonged to that general category and established that "applicable international rules and the laws and regulations of the forum State" were the normative frame of reference to be applied when determining, on a case-by-case basis, the content of the concept of "fair and impartial treatment".

Regarding the Commission's future workplan, in her sixth report, she had referred to the need to address, in a subsequent report, the possible impact on immunity of State officials from foreign criminal jurisdiction of certain international standards, including the obligation to cooperate with international criminal courts. In her seventh report, she mentioned that the issue of immunity had been debated before the International Criminal Court, in the appeal lodged by Jordan against the decision of Pre-Trial Chamber II to refer to the Assembly of States Parties the non-compliance by Jordan with its obligation to cooperate with the Court in the arrest and surrender of the then President of the Sudan, Omar Hassan Ahmad Al-Bashir. Since, at the time of finalizing the report, the subject had been *sub judice*, she had not considered it appropriate to pronounce herself. Following the issuance of the judgment of the Appeals Chamber of the International Criminal Court, she continued to believe that it was neither necessary nor useful for the current work of the Commission to enter into a debate on the judgment, which might only be of partial interest in addressing the procedural aspects of immunity of State officials from foreign criminal jurisdiction. In addition, it should be noted that the decision of the General Assembly of the United Nations on the agenda item concerning a request for an advisory opinion from the International Court of Justice on the issue of immunity of Heads of State and its relation to the duty to cooperate with the International Criminal Court was still pending. Therefore, she did not deem it necessary to submit any specific proposals to the Commission at that stage. She did, however, reserve the possibility of returning to the issue at the Commission's seventy-second session from a broader perspective, where the focus was not necessarily exclusively on either exceptions to immunity or the procedural aspects, including due process, of the topic at hand.

She would be interested to hear the views of the other members of the Commission on the two issues mentioned in paragraph 176 of her report, namely: the definition of a mechanism for the settlement of disputes that went further than the mere reference to consultations in draft article 15; and the inclusion, in the draft articles, of recommended good practices that could help to solve the problems that arose in the process of determining

immunity, such as the preparation of guides or manuals intended for the various State organs that might have contact with foreign officials, and whose staff, in many cases, lacked sufficient relevant training. Some members of the Commission had already commented, at the seventieth session, on recommended good practices, and she would welcome any further input on the matter and on any of the issues that she had raised. That input would be extremely useful to her in finalizing her work on the topic, perhaps in a short additional report that she could submit to the Commission in 2020.

To conclude, she wished to formally request the referral of draft articles 8 to 16 to the Drafting Committee, and recalled that certain definitions were still pending before the Committee, including that of the concept of "jurisdiction". The Committee might wish to revisit those definitions in the light of the draft articles that she had just presented.

Programme, procedures and working methods of the Commission and its documentation (agenda item 8) (*continued*)

Report of the Study Group on sea-level rise in relation to international law

The Chair invited the Co-Chairs of the Study Group on sea-level rise in relation to international law to present the report of the Study Group.

Ms. Galvão Teles (Co-Chair of the Study Group on sea-level rise in relation to international law) recalled that, at its 3467th meeting on 21 May 2019, the Commission had decided to include the topic "Sea-level rise in relation to international law" in its programme of work on the basis of a recommendation from the Working Group on the long-term programme of work. Noting that the Commission had also decided to establish an open-ended study group on the topic to be co-chaired, on a rotating basis, by Mr. Aurescu, Mr. Cissé, Ms. Oral, Mr. Ruda Santolaria and herself, she said that the Group had since held its first meeting, on 6 June 2019, the purpose of which had been to discuss an informal paper on the organization of its work and a road map for the period 2019–2021.

The focus of the discussion had been on the Study Group's membership, its proposed calendar and programme of work and its methods of work. Consensus had been reached on having a membership-based study group, with members being asked to register for participation each year. The Study Group was thus open to all members, and its composition could evolve from one year to the next.

With regard to the calendar of work, the Study Group would dedicate the upcoming two years to the three subtopics identified in the syllabus prepared in 2018, namely law of the sea-related issues in 2020, under the co-chairship of Mr. Aurescu and Ms. Oral, and issues of statehood and the protection of persons affected by sea-level rise in 2021, under the co-chairship of Mr. Ruda Santolaria and herself. Members of the Commission had generally expressed support for that approach. It had also been noted that the Study Group's proposed programme of work might require adjustment in the light of the complexity of the issues to be considered.

Ms. Oral (Co-Chair of the Study Group on sea-level rise in relation to international law) said that prior to each session, the Co-Chairs would prepare an "issues paper", or Co-Chairs' report, which would be edited, translated and circulated as an official United Nations document. The "issues paper" would serve as the basis for the discussion and the yearly contributions of the Study Group members, as well as for subsequent reports of the Study Group on each subtopic. Members of the Study Group would be invited to put forward "contribution papers" commenting on or complementing the Study Group's "issues papers" with regard to regional practice, case law or any other aspects. The format of the outcome of the Study Group's work would be the subject of recommendations to be made at a later stage. It was anticipated that approximately five meetings of the Study Group would take place per annual session. The knowledge and expertise of technical experts and scientists would continue to be considered, possibly through side events organized during the coming sessions of the Commission. At the end of each of the Commission's session, the work of the Study Group would be reflected in a substantive report, which would take due account of the Co-Chairs' "issues papers" and the members' related "contribution papers" and which would summarize the discussion of the Study Group. That report would be agreed upon in the Study Group and would be presented by the Co-Chairs to the plenary

so that a summary could be included in the Commission's annual report. The Study Group would also take advantage of the opportunity to receive the input of the Governments of Member States in their responses to one or more questions to be included in chapter III of the Commission's annual report. The possibility of requesting a study from the Secretariat and other relevant units of the United Nations, such as the Division for Ocean Affairs and the Law of the Sea, had also been discussed in the Study Group. With the assistance of the Secretariat, the Study Group would keep the Commission updated on new literature on the topic and related meetings or events that might be organized in the coming two years.

Ms. Galvão Teles (Co-Chair of the Study Group on sea-level rise in relation to international law) said that she hoped that the Commission would be in a position to take note of the foregoing report, which served as the Study Group's first progress report, and that it would be reflected in the Commission's annual report. She wished to express the Co-Chairs' appreciation for the members' interest and for their contributions in the Study Group.

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

Mr. Hmoud said that he wished to thank the Special Rapporteur for her well-researched and comprehensive seventh report on immunity of State officials from foreign criminal jurisdiction, which dealt mainly with the procedural and jurisdictional aspects of immunity. National and international case law, State and treaty practice and views from literature had been thoroughly discussed in order to arrive at the suggested conclusions on various aspects of procedural safeguards and guarantees. While such issues were generally not codified in instruments pertaining to the immunity of State officials from foreign criminal jurisdiction, and while it could be argued that there currently existed no customary rules on such procedural aspects, the Special Rapporteur had, through her reasoning, deduced normative elements that could be proposed as *lex ferenda*. The underlying purpose in proposing such rules or procedures was to assist States in dealing with the substantive aspects of immunity and to facilitate the creation of a balance of legal interests, including respect for sovereignty and sovereign equality, the right to exercise lawful jurisdiction and the need to ensure criminal accountability. The proposed draft articles went towards achieving such goals and such balance.

Having commented on the sixth report at the Commission's seventieth session, he would concentrate on the issues and proposals contained in the seventh report, while taking into account the connection between the two reports, the discussion that had taken place within the Commission in 2018 and the reactions in the Sixth Committee. He would first make a few general comments on the report before turning to his observations on the specific issues contained therein and on the proposed draft articles.

He was concerned that the report did not discuss, at least not directly, or propose texts on the most important issue concerning procedure and procedural guarantees, namely how to provide guarantees against the politically motivated prosecution of foreign officials in the national courts of foreign States. Doing so might be a difficult task, but it was central to the issue of limitations on or exceptions to immunity *ratione materiae*. Although a forum State might have the discretion to block the exercise of jurisdiction if the relevant authorities in that State concluded that a prosecution was politically motivated, the situation differed from one State to another. Some States might have the necessary legal guarantees in place, while others might be forced to prosecute either due to the lack of proper mechanisms or to limited prosecutorial discretion in their legal system. While the proposed draft articles in the report – such as on invocation of immunity, notification of the State of the official, the exchange of information and consultations – might indirectly assist in the prevention of political prosecutions, they were not sufficient. He therefore urged the Special Rapporteur and the Drafting Committee to look into specific proposals that were directly related to, or that directly tackled, the issue of politically motivated prosecutions.

Another matter that was not tackled in the report was the procedure and procedural guarantees specific to limitations on or exceptions to immunity *ratione materiae*. That issue went beyond the avoidance of political prosecutions. While he understood that the application of draft article 7, which contained substantive rules, was a separate matter from

the issue of procedural guarantees, the debates in the Commission and the Sixth Committee over the previous two years had shown that there was a near consensus on the need for a specific procedure and guarantees for the application of the exceptions set out in draft article 7. He had been among the members who had supported draft article 7 as provisionally adopted in the Commission in 2017, but, like other colleagues on both sides of the debate, he realized that the absence of specific procedures and guarantees associated with its application could have serious implications. While most of the crimes under international law listed in the draft article were not easily prosecutable, others could be subject to frequent prosecutions; that would not serve the goals of international justice and would undermine the stability of international relations. The Commission should therefore consider proposals for specific procedures and guarantees, including the proposal made by Mr. Nolte in the Drafting Committee in 2017. While draft article 14, on the transfer of proceedings to the State of the official, was a useful tool, it fell short of balancing the jurisdictional and sovereign rights of the forum State and the State of the official. Nonetheless, it was a good basis on which to build a specific procedure for the application of draft article 7.

His third general comment concerned the underlying premise of the draft articles proposed in the report. While the Special Rapporteur emphasized, in paragraphs 21 to 23, the goals of balancing and preserving essential legal interests, it seemed that the proposed procedural aspects placed more weight on the right of the forum State to exercise jurisdiction than on the right of the State of the official to immunity. The proposed procedures did not contain any mechanism that allowed the State of the official to block the exercise of jurisdiction by virtue of the assertion of immunity, and it seemed that the courts and prosecutors of the forum State would have the final say. While it was well understood that it might be difficult under many national legal systems to restrict the competence of such authorities in exercising jurisdiction, they nevertheless acted on behalf of the State and were subject to its international law obligations. If immunity was lawful but not adhered to by the prosecutors and courts of that State, the latter would incur international responsibility. It was therefore important that the proposed procedures should preserve the balance between the right of the forum State to the lawful exercise of jurisdiction and the right of the State of the official to invoke the immunity of its official, and that the discretion of national courts and prosecutors should be subject to the normative procedures contained in the draft articles, not the other way around.

Turning to more specific issues, he said that he would first address the question of the consideration of immunity by the forum State. He agreed with the Special Rapporteur's conclusions that immunity should be considered at an early stage of the proceedings and once the relevant authorities of the forum State became aware that the immunity of the official might be affected, and that, in any case, immunity must be considered if the State intended to take coercive measures that could affect the performance of the official's duties. Those conclusions were in line with the practice described in the sixth report and purported to place a positive obligation on the forum State when considering immunity. He could therefore accept the content of draft article 8, albeit with some observations. The obligation to consider immunity should be on the "forum State" itself, not only its "competent authorities". The 1961 Vienna Convention on Diplomatic Relations, for example, did not address the relevant or competent authorities of the receiving State in terms of the provision of privileges and immunities, but the receiving State itself. While the procedures indeed involved the competent authorities of the forum State, the obligation should be placed on the State itself to ensure that the latter did not escape such an obligation. With regard to paragraph 3 of the draft article, consideration of immunity should take place not only if the coercive measures might affect the performance of the official's function, but at any time such measures were intended, since immunity *ratione materiae* applied even when the official was not on duty, for example, if he or she was on vacation when coercive measures were about to be taken.

With regard to draft article 9, on determination of immunity, as he had mentioned during the Commission's debate on the topic in 2018, it was not always the case that only the courts of the forum State determined the immunity of the State official. The executive might have the authority to do so under certain national legal systems, or there might be a division of competence between various State bodies in that regard. It was perhaps unwise

to take a prescriptive approach and interfere in the national legal and constitutional systems of States by providing that it was only the courts of the forum State that determined the immunity of the foreign official. The wording of the second part of paragraph 1 was vague and lacked the necessary deference to the internal legal systems of the forum State in the determination of the immunity of the foreign official. Draft article 9 should therefore be reformulated to make it clear that it was without prejudice to the national laws of the forum State and that other organs, such as the executive, might be competent to determine the immunity of the State official. In addition, paragraph 3 of the draft article should not limit the consideration of the invocation of immunity to the competent courts of the forum State; it should also include the "competent authorities".

With regard to the invocation of immunity, existing treaty practice, including the Vienna Convention on Diplomatic Relations, the Vienna Convention on Consular Relations and the Convention on Special Missions, as well as the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property, indicated that invocation of immunity was not a prerequisite for its application. The same could be inferred from the examples of national laws contained in the report. The right of the State of the official should therefore not be contingent on such invocation. That fact should guide the Commission's approach to the issue in order to make it clear that invocation, which was a procedural matter, did not establish immunity, which was a substantive matter. The court of the forum State should not, especially with regard to immunity *ratione materiae*, be placed in a detrimental situation because the State of the official had refrained from declaring its position on the existence of immunity. Such a situation could occur if the crime that the official stood accused of had been carried out in an official capacity and his or her State did not wish to incur responsibility by declaring that the act was "official" and invoking the official's immunity. Therefore, if the State of the official was aware of the criminal proceedings intended or under way in a case involving immunity *ratione materiae* and failed to invoke immunity, there should be a presumption that the State was not invoking immunity. Nonetheless, if at any stage of the proceedings the State invoked immunity, the legal effects of that invocation should be triggered. Furthermore, if the court reached the conclusion that immunity *ratione materiae* might be applicable, the lack of invocation of such immunity by the State of the official should not be considered as a waiver of immunity.

In paragraphs 48 to 53, the Special Rapporteur explained that there should be differentiated treatment between immunity *ratione personae* and immunity *ratione materiae* with regard to invocation *proprio motu* by the court of the forum State. Despite her explanation, he was of the view that the court should consider immunity *proprio motu* even if the State of the official did not invoke immunity *ratione materiae*. As mentioned earlier, the existence of both types of immunity, *ratione personae* and *ratione materiae*, was not contingent on invocation. But, if the court had evidence that the official might indeed enjoy immunity *ratione materiae* and presumed that such immunity was not applicable because the State of the official had not invoked it, then that would amount to making invocation of immunity a procedural condition for its applicability. However, in that case, the lack of invocation of immunity *ratione materiae* could serve an evidentiary purpose, that is to say, it might be evidence that the person was not an official or that the act had not been carried out in an official capacity. It was important to make such a distinction with regard to the value of the lack of invocation. Put simply, first, invocation of immunity should not be a condition for its applicability; second, the court of the forum State should consider immunity *proprio motu*, whether the immunity in question was *ratione personae* or *ratione materiae*; and, third, the lack of invocation of immunity *ratione materiae* might serve as evidence that the official did not enjoy immunity.

With regard to the competence to invoke immunity, he agreed that it was the State of the official, not the official him or herself, that was entitled to formally invoke immunity. Nonetheless, if the official indicated that he or she enjoyed either type of immunity, the competent authorities of the forum State should take that into account when determining whether the official enjoyed immunity. With regard to the question of the organ in the State of the official that was entitled to invoke immunity, he agreed that the troika was so entitled, as were the heads of diplomatic missions, acting within their diplomatic competence in the host State, and any other organ of the State of the official that was so authorized, on a case-by-case basis.

Unfortunately, there was no practice that could support any proposition regarding the timing of invocation. He therefore did not see it as obligatory for the State of the official to invoke immunity "at an early stage" of the proceeding. And in line with the position he had set out earlier, the State of the official should not be obliged to invoke immunity as soon as it became aware that the forum State intended to exercise jurisdiction. He therefore proposed the replacement, in draft article 10 (2), of the word "shall" with "should". In addition, draft article 10 (5) should state that the forum State was required to transmit communications relating to invocation to its courts, rather than just state that it must "use all available means" to do so. He had other suggestions for the remaining paragraphs of draft article 10 in line with his position as described earlier, but he would bring them forward during the discussion in the Drafting Committee.

As noted in the report, waiver of immunity had been codified in certain treaties that were relevant to immunity, as well as in several national laws. Therefore, practice existed on which the Commission could rely in proposing provisions on waiver of immunity and deducing elements for such provisions. One such element was that waiver was a right, not an obligation on the State of the official. It should also clearly express the will of that State. There was no obligation on the State of the official to waive immunity, notwithstanding the severity of the wrongdoing or the crime.

As in the case of invocation, waiver could be effectuated by the organs of the State authorized to represent it in foreign relations and to act on its behalf. Thus, an act of waiver by a member of the troika should produce legal effects, unless it could be established that such act fell outside his or her scope of competence to do so under the national law of the State of the official. That applied even if the member of the troika waived his or her immunity, and the presumption of validity should continue to apply. In addition, heads of diplomatic missions, within their scope of representation in the host State, and other organs of the State of the official could validly waive immunity if the national law of the State of the official provided the organ with the competence to do so.

He agreed with the Special Rapporteur that the general rule was that waiver must be express. That was supported by the relevant treaty practice, national laws and national and international jurisprudence. Waiver could therefore not be implicit. The will of the State of the official must be clear and unequivocal. Appearing before a foreign court should not be interpreted as express waiver; nor was an obligation to cooperate in the prosecution of crimes under treaties an express waiver of immunity. In that regard, he disagreed with the proposition set out in paragraph 87 of the report. He would also be very hesitant to accept that non-invocation of immunity or silence could be a valid waiver of immunity. Apart from the serious policy abuse implications that arose from that proposition, it simply ran counter to the rule that waiver must be express. Even if one accepted that the threshold should be the "clear" and "unequivocal" expression of the will of the State, silence and inaction did not meet that threshold. That applied whether the immunity in question was *ratione personae* or *ratione materiae* and even if the State of the official refrained from invoking his or her immunity or from providing information as to whether the person was an official and whether the act was official. Again, the court of the forum State could use that as evidence when determining the existence of immunity *ratione materiae*, but it should not be considered as an official act of waiver. He therefore proposed, first, that draft article 11 should be reformulated to make it clear that waiver was a right of the State of the official; second, that the reference to "deduced" waiver in paragraph 4 should be deleted, since it contradicted the proposition in paragraph 2 that waiver must be express; third, that the forum State was required to transmit a communication of waiver to its courts, not just to "use all available means" to that end; and, fourth, that waiver should be presumed to be non-retroactive, unless the State of the official indicated otherwise.

With regard to chapter III on procedural safeguards operating between the forum State and the State of the official, he recalled his earlier general comments, particularly those concerning the need to include specific safeguards that were applicable to draft article 7. He had noted that the draft articles proposed in chapter III placed more weight on the right of the forum State to exercise jurisdiction than on the right of the State of the official to block the exercise of such jurisdiction by reason of immunity. There was also undue deference to the courts of the forum State in matters which might involve the forum State's

international obligations, on the presumption that such courts faced difficulties in dealing with immunity of foreign officials. In fact, national courts took into account the international law obligations of their State, including those which might be proposed under the draft articles. The Commission should therefore avoid sending the wrong message by creating procedures that favoured the prerogative of the courts of the forum State.

Concerning the notification of the State of the official of the intention to exercise criminal jurisdiction, it was imperative that such notification should be linked to the consultation process, which was proposed in draft article 15, as well as to the process of invocation of immunity. He therefore proposed that a reference to suspensive effect should be introduced, so that the invocation of immunity would trigger consultations between the two States concerned and suspend the criminal proceedings for a reasonable period while consultations were ongoing. Obviously, consultations could not go on forever, and the State of the official should not be able to abuse the process. Therefore, the suspension of proceedings for a "reasonable period" might be a suitable element to include in the text of the relevant provisions. He was also open to the suggestion, contained in paragraph 176, regarding the referral of disputes to a dispute settlement mechanism in the event that consultations between the forum State and the State of the official did not resolve matters related to the immunity of the official. The linkage of notification, invocation, suspensive effect, consultation for a reasonable period and the possible referral to a dispute settlement mechanism could be discussed in the Drafting Committee.

With regard to the content of draft article 12, he found the text acceptable; however, it should be made clear that the communication of the notification through "means provided for in international cooperation and mutual legal assistance treaties" was valid only if such means were authorized for the purpose of making a determination of immunity under such judicial cooperation and mutual assistance agreements. Put simply: how was the central authority for mutual legal assistance in the State of the official relevant in terms of receiving notifications of the intention of the forum State to exercise jurisdiction over the official? It was usually the government of the State of the official or its foreign ministry that decided whether to invoke his or her immunity, not the judiciary of that State or its designated central authority. He was also not aware of any mutual legal assistance and judicial cooperation agreements that tasked the central authorities of a State with communicating notifications related to the immunity of that State's officials.

Although the content of draft article 13, on exchange of information, was generally acceptable, he wished to propose some amendments. First, the obligation, set out in paragraph 3, on the authorities of the forum State to transmit to its courts the information that it received from the State of the official should not be made subject to the domestic law of the forum State. As he saw no reason to dilute the obligation to transmit information, the words "in accordance with domestic law" in paragraph 3 should be deleted. Second, in paragraph 6, the word "sufficient" in the phrase "cannot be considered sufficient grounds" should be deleted. Third, the State of the official should have the right to refuse a request for information for any reason, without the need to give a reason. To provide that the State of the official could refuse a request for information only if it considered that the request affected its sovereignty, public order, security or essential interests was again favouring the prerogative of the forum State's courts at the expense of the State of the official. Fourth, an additional paragraph should be added to the draft article, providing that the transmission of the requested information could not in any way be considered an implicit waiver of immunity, in line with the Special Rapporteur's conclusion in paragraph 134 of the report.

The Special Rapporteur's proposal with regard to the transfer of criminal proceedings was very useful and constructive. The concept served the goal of accountability while respecting sovereign equality. However, the State of the official should not be able to abuse the mechanism to shield its official through sham criminal proceedings. Draft article 14 should therefore provide that the State of the official was under an obligation, in the event of the transfer of proceedings to its authorities, to conduct such proceedings in good faith and in accordance with the highest recognized international judicial standards. As he had mentioned earlier, he also wished to suggest that the proposal made by Mr. Nolte in 2017 should be considered either as an alternative to or in conjunction with the provisions on transfer of proceedings contained in draft article 14. The

text of the draft article was formulated in a manner that indicated that it was only the forum State that could request the transfer of proceedings to the State of the official; it should expressly provide that requests for the transfer of proceedings could be initiated by either the State of the official or the forum State. It should also provide that, in both cases, such a request had a suspensive effect on the criminal proceedings in the forum State until the requested State decided on it.

With regard to chapter IV on the procedural rights and safeguards pertaining to the official, although it was not strictly necessary to provide for fair trial and fair treatment guarantees in the draft articles, the Commission had done so in previous projects. In addition, the inclusion of such rights was a guarantee against politically charged or politically motivated criminal proceedings against the official.

Concerning the future workplan and the possibility of revisiting the issue of the relationship between immunity of State officials from foreign criminal jurisdiction and international criminal courts, the Special Rapporteur had indicated her position in that regard and on the judgment of 6 May 2019 of the Appeals Chamber of the International Criminal Court in her introduction of the report that morning. Since he had acted as counsel for Jordan in that case, he would refrain from stating his position at the current stage. However, he reserved his position on the matter in case the issue was brought up again later in the session or at the seventy-second session. With regard to the second point regarding which the Special Rapporteur had requested the members' views in paragraph 176 of the report, he did not have a position on the matter. The Commission did not usually work on the basis of good practices. Nonetheless, if the Special Rapporteur was of the view that such an approach would be useful, he would support her in that regard.

He wished to commend the Special Rapporteur on the tremendous task she had completed by producing a defensible set of procedural guarantees. Despite his criticisms of certain provisions and approaches contained in the draft articles, he considered them to be a strong basis on which to continue to build. He recommended that draft articles 8 to 16 should be sent to the Drafting Committee.

The meeting rose at 5.55 p.m.