Provisional

For participants only

26 August 2019

Original: English

International Law Commission

Seventy-first session (second part)

Provisional summary record of the 3481st meeting
Held at the Palais des Nations, Geneva, on Tuesday, 16 July 2019, at 10 a.m.

Contents

GE.19-12007 (E) 250719 260819

1912007

Present:

Chair:	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. Hmoud
	Mr. Huang
	Mr. Jalloh
	Mr. Laraba
	Ms. Lehto
	Mr. Murase
	Mr. Murphy
	Mr. Nguyen
	Mr. Nolte
	Ms. Oral
	Mr. Ouazzani Chahdi
	Mr. Park
	Mr. 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

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

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

Mr. Tladi said that he welcomed the Special Rapporteur's detailed and comprehensive seventh report on immunity of State officials from foreign criminal jurisdiction (A/CN.4/729), which contained useful draft articles, even though the Special Rapporteur had had very little material with which to work. He was disappointed that the Commission would not complete its first reading of the draft articles on the topic at its current session. On the basis of the work already carried out, he believed that it could have done so, thereby providing States with an opportunity to comment on a full set of draft articles with a view to completing a second reading by the end of the quinquennium. A Commission made up entirely of new members who were unfamiliar with the intricacies of the topic would scarcely be in a position to adopt the draft articles in the first year of the next quinquennium; however, that would be a matter for the new members to tackle. He hoped, nonetheless, that the draft articles could be adopted on first reading in 2020.

In her report, the Special Rapporteur expressed her intention to return to the issue of cooperation with international criminal tribunals once the International Criminal Court had ruled on the obligation of Jordan to cooperate with the Court in the case of *The Prosecutor v. Omar Hassan Ahmad Al-Bashir*. That ruling, which had been handed down by the Court's Appeals Chamber after the issuance of the Special Rapporteur's report, had rightly been criticized in various quarters, leading the Court to take the unprecedented step of defending its decision in the media. The Appeals Chamber ruling was not necessarily the end point in a long and arduous case: there remained the possibility, political dynamics permitting, that the matter would be referred to the International Court of Justice for an advisory opinion. Thus, it would be unwise for the Commission to pronounce on the content of the judgment. While he welcomed the Special Rapporteur's indication, in her introductory statement at the Commission's previous meeting, that it would not be necessary to return to the issue in the context of the topic under consideration, her statement that she reserved the right to revisit it in a broader sense prompted him to advise caution in that regard. In any event, the draft articles that had already been adopted, and the commentaries thereto, made clear that the draft articles did not concern the law pertaining to international criminal tribunals. If the Commission wished to make that point clearer, it could certainly try, but it should not attempt to prejudge what remained a contentious issue.

Numerous propositions contained in the report were not supported by practice. However, that should not be taken as a criticism of either the draft articles or the report. Many of the important conclusions arrived at therein appeared to be based on comparative reasoning. In several instances, having described or analysed a number of instruments that were not directly related to immunity from criminal jurisdiction, the Special Rapporteur had concluded that the situation must be the same in respect of immunity from foreign criminal jurisdiction. For the most part, the substance of her statements and conclusions seemed to be correct. The lack of relevant practice should therefore not be viewed as an obstacle to the adoption of what he saw as sound procedural rules of reason.

The distinction often made in the report between immunity *ratione materiae* and immunity *ratione personae* was sometimes questionable and was not justified for the purposes of procedural rules. Although the distinction was not generally reflected in the draft articles themselves, the Special Rapporteur had suggested that draft article 9 was based on the assumption that a such a distinction pertained. In paragraph 48 and subsequent paragraphs, she asserted that the logic of assessing immunity without requiring any invocation of immunity could not automatically be transposed to immunity *ratione materiae*. Her argument seemed to be based on the fact that immunity *ratione personae* applied only to a limited number of persons and that there should therefore be hardly any doubt among the authorities of the forum State as to their identity and status. Having noted the differences between the two types of immunity, the Special Rapporteur went on to state that it was difficult to conclude that the authorities of the forum State had an obligation to

assess and decide, on their own, whether an alleged immunity from foreign criminal jurisdiction existed or not.

While the logic of that statement was entirely understandable, he could not agree with it. Once the forum State was aware that a person was a Head of State, Head of Government or Minister for Foreign Affairs, there was very little assessment of immunity left to be done, as that type of immunity was absolute. The mere fact that the applicability of immunity *ratione materiae* was more difficult to determine was not a reason not to require an assessment. Quite the contrary: it provided all the more justification for requiring the forum State to assess whether immunity applied. Of course, the obligation would arise only if the forum State was aware that the person over whom it sought to exercise jurisdiction might be an official of a foreign State. For example, the person concerned might inform the authorities that he or she was a foreign official entitled to immunity, though such a claim would not in itself constitute an invocation, or the authorities might have other reasons to believe that the person might be an official of a foreign State.

The duty to assess did not amount to a duty to recognize. Where there was insufficient information to make a determination, and where the State of the official did not provide such information, the forum State might well conclude that the person in question was not entitled to immunity for the acts over which the forum State wished to exercise jurisdiction. However, it would be going too far to suggest that, in the absence of any invocation, there was no duty to assess whether immunity *ratione materiae* applied, even where the forum State had reason to believe that a person over whom it intended to exercise jurisdiction might be an official of a foreign State and the acts over which it sought to exercise jurisdiction might be official acts.

In the debate on the Special Rapporteur's fifth report (A/CN.4/701), he had cautioned against relying on the South African Foreign States Immunities Act of 1981. Although the Act referred to the Head of State, it did so only in the sense that the Head of State was seen as the embodiment of the State; the Act defined "State" as including the Head of State, but it was not in fact concerned with immunity *ratione personae*, as the Special Rapporteur seemed to suggest. Moreover, it concerned only civil proceedings, yet at several places in the seventh report, its provisions were advanced as addressing the immunity of the Head of State, Head of Government and Minister for Foreign Affairs from foreign criminal jurisdiction.

The report included a discussion of the relationship between the waiving of immunity and the invocation of immunity. In his view, the two were related only insofar as they were the means whereby the State of the official concerned indicated either that it was asserting its rights, by invoking immunity, or that it was not asserting its rights, by waiving immunity.

Both the report and the draft articles suggested that it should be for courts to decide whether immunity existed, with other State organs merely providing input for the decision. While that might be the case in most States, it should not be assumed to be universal, nor should the Commission suggest that it should be so. Except in very specific circumstances, reference should be made to the authorities of the forum State, rather than the courts of the forum State. He shared the views expressed by Mr. Hmoud in that regard.

Turning to the text of the draft articles, he said that draft articles 8 and 9 could be merged and significantly streamlined. Paragraphs 1 and 2 of draft article 8 could also be merged. Whenever a forum State had reason to believe that immunity might be applicable, it should consider that possibility; paragraph 3 of draft article 8, however, seemed to suggest that there might be circumstances in which the forum State did not need to consider it, even when there was reason to believe that immunity might come into play. The paragraph should therefore be deleted. In draft article 9, it would be sufficient to specify that the authorities of the forum State should consider immunity, as in draft article 8. It would not be appropriate for the Commission to determine the internal rules establishing which organ had the primary responsibility for considering and determining whether immunity applied, but draft article 9 should specify that the determination should be made at a relatively high level, particularly if the forum State decided to exercise jurisdiction because, in the decision-maker's view, immunity either did not exist or did not apply by

reason of the exceptions to immunity provided for in draft article 7. There appeared to be an editorial error in draft article 9 (2), which should refer to the immunity of the State official, rather than the immunity of the foreign State.

While he agreed with the substance of draft article 10, it could also benefit from significant streamlining. Paragraphs 1 and 2 could be merged without much difficulty, and might read "A State may invoke the immunity of any of its officials from foreign criminal jurisdiction as soon as it becomes aware that another State intends to exercise jurisdiction over such an official". If the division of that rule into two separate paragraphs was intended to emphasize that the invocation of immunity was a right while the timing of such invocation was a duty, that interpretation would not be precluded by his proposal. The Commission should be careful not to create the impression that invocation must be immediate in the absolute sense of the word. A State could not be under an obligation to invoke immunity immediately, as it might need time to assess whether the act in question had been committed in the performance of official functions, to consider waiving the immunity, or to consult the authorities of the forum State in order to determine whether or not to permit the exercise of that State's jurisdiction. It might also wish to assess whether it could exercise its own jurisdiction over the official.

Communication in relation to the invocation of immunity generally occurred through the diplomatic channel, via notes verbales, but draft article 10 (4) and other paragraphs in subsequent draft articles concerning channels of communication seemed to treat the diplomatic channel as a secondary means of communication. Draft article 10 (5) reflected a certain ambivalence, owing to the contrast between the Special Rapporteur's view that the primary assessors of whether immunity applied ought to be the courts and the reality that ministries of foreign affairs generally played a larger role. He would prefer to leave the question open and refer to "the authorities of the forum State", "the authorities competent to determine the application" or simply "the State", with additional explanation in the commentary. The same approach should be taken in draft article 11 (5).

He did not share the view that the non-invocation of immunity *ratione materiae* should be interpreted as a waiver of such immunity. There was no basis, either in logic or in law, for distinguishing between immunity *ratione materiae* and immunity *ratione personae* for the purposes of waivers of immunity. Although that distinction was not reflected in the draft articles, his view was that it should also be omitted from the commentary. Draft article 11 (1) should state that such a waiver could take place at any time. His comments in respect of draft article 10 (4) also applied to draft article 11 (3). Draft article 11 (4) could be formulated more succinctly. One possibility would be "A treaty provision applicable between the forum State and the State of the official may, in certain circumstances, amount to a waiver of immunity". The nature of those circumstances could then be explained in the commentary. Draft article 12 could also be shortened, with the first sentence of paragraph 1 perhaps reading "The forum State shall notify the State of an official that it intends to exercise criminal jurisdiction over such an official as soon as it becomes aware that the person over whom it intends to exercise jurisdiction may enjoy immunity". The second sentence of that paragraph was unnecessary.

Draft articles 13 and 15 could be subsumed into a single draft article of two or three paragraphs, presented as an overarching provision designed to cover all forms of consultation and exchange of information, including in relation to the invocation or waiving of immunity, decisions on immunity, decisions on transfer of proceedings, etc. Any provision setting out rights or duties that were dependent upon the exchange of information could then state that such an exchange of information or consultation must take place within the framework of the overarching article. Restructuring the draft articles along those lines would make them more reader-friendly.

As noted in the report, the transfer of proceedings was an important means of balancing the rationale behind the rules on immunity – sovereign equality and the stability of international relations – with the need to ensure accountability and prevent impunity. However, once again, there was not necessarily a reason to distinguish between immunity *ratione materiae* and immunity *ratione personae* for the purpose of transferring proceedings. Assuming that the transfer of proceedings took place in cases where the forum State was barred from exercising jurisdiction over a person, there was nothing to prevent

the forum State, under the consultation proceedings discussed earlier, from requesting the State of the official to exercise any jurisdiction it might have. Of course, the State of the official might refuse, either because its domestic rules prevented it from exercising jurisdiction or because it was simply unwilling to do so. In some States, including South Africa, nothing prevented the Head of State from being prosecuted. The fact that the forum State might have no margin of discretion in determining immunity did not mean that it could not request the State of the official to exercise jurisdiction over a Head of State or that the latter State could not exercise such jurisdiction.

The same was true in respect of cases concerning immunity *ratione materiae*. Where it was established that an act of an official over whom the forum State wished to exercise jurisdiction was subject to immunity, the forum State could not exercise jurisdiction. As in the case of immunity *ratione personae*, the State would have no margin of discretion in determining immunity. However, it could still request the State of the official to exercise jurisdiction over the official for the act in question, even though the rules relating to immunity precluded the forum State itself from exercising jurisdiction.

On the other hand, where the forum State was able to exercise jurisdiction, having determined either that there was no immunity *ratione materiae* or that any of the exceptions provided for in draft article 7 applied, it might do so. The situation would be no different from a case in which an individual, or the State of the individual, claimed that he or she was entitled to immunity *ratione personae* but the forum State determined that such immunity was not applicable.

It was unlikely, but not impossible, that States might differ as to whether immunity *ratione personae* applied. Relying on the International Court of Justice ruling in *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, a State might take the view that persons other than the Head of State, Head of Government and Minister for Foreign Affairs were also covered by immunity *ratione personae*, even though draft article 3 of the Commission's draft articles limited the scope of such immunity to those three individuals. Paragraph 51 of the judgment in *Arrest Warrant* had been read as suggesting that the reference to those individuals was merely illustrative of the genus of "certain holders of high-ranking office" and that all such high-ranking officials enjoyed immunity *ratione personae*. He did not support such a reading; in his view, even extending immunity *ratione personae* to Ministers for Foreign Affairs, as in draft article 3, was going too far. The question of whether deputies to those three officials were entitled to immunity *ratione personae* might also arise. Finally, the immunity of a person who was entitled to immunity *ratione personae* might, in theory, be waived, permitting the exercise of jurisdiction by the forum State. In any event, in cases where it was determined that an individual who was allegedly entitled to immunity *ratione personae* did not in fact enjoy such immunity, the forum State could exercise jurisdiction. In such cases, the forum State and the State of the official might agree to transfer proceedings to the State of nationality, notwithstanding the fact that the forum State might, as a matter of law, be entitled to exercise its own jurisdiction.

Like other provisions, draft article 14 could be streamlined. It seemed to presuppose that the transfer of proceedings would take place only in cases where the forum State was entitled to exercise its jurisdiction; in other words, cases where there was no immunity or the immunity that existed was subject to the exceptions identified in draft article 7 or elsewhere, as was clear from the phrase "may consider declining to exercise their jurisdiction". However, proceedings might also be transferred if the forum State determined that it could not exercise its jurisdiction by reason of the rules on immunity. Nothing would prevent such a State from requesting the State of the official to exercise any jurisdiction that it might have over the individual and the conduct in question. Such a request would be made in the context of the consultation and information-sharing procedures already provided for in the draft articles.

Some members of the Commission would undoubtedly take the view that the procedural provisions contained in the seventh report were insufficient as procedural guarantees to guard against problems that might arise from the application of draft article 7. In his view, procedural rules should not apply only to exceptions; moreover, procedural guarantees must not undermine the content of draft article 7. He could not agree to a

procedure that would permit the State of the official to "block" proceedings in the forum State. Nonetheless, the Commission could attempt to identify some rules of reason of a procedural nature with a view to ensuring that the application of its draft articles did not threaten the stability of international relations.

A number of provisions might be added to the already useful catalogue proposed by the Special Rapporteur, such as a provision specifying that a decision by the authorities of the forum State to exercise jurisdiction, notwithstanding an invocation or claim of immunity, should be acted upon only if it was confirmed by a relatively high authority of the organ that made that determination. A decision not to recognize immunity or to declare that exceptions to immunity were applicable should not be taken by a country's lowest court or most junior bureaucrat.

The draft articles proposed by the Special Rapporteur correctly placed the consultation process at the centre of procedures to address any difference of views between the parties. However, the possibility remained that the consultation process would not result in agreement between the parties. In such cases, subjecting the exercise of jurisdiction by the forum State to the consent of the State of the official would not be acceptable. It would also be undesirable, at least from the perspective of the stability of relations, for the exercise of jurisdiction to proceed without some amicable understanding.

A third-party dispute settlement provision might be considered, but it would necessarily, by definition, operate as a treaty provision. Such a solution would not work unless the draft articles became a treaty. More importantly, such a provision might undermine draft article 7 by lending credence to arguments that had already begun to appear in the academic literature to the effect that, in draft article 7, the Commission was not putting forward a rule of general international law but rather proposing a treaty text that would be applicable only as between the parties to such a treaty. For that reason, among others, he would not support a third-party dispute settlement mechanism as a solution to the problem.

Draft conclusion 21 of the Commission's draft conclusions on peremptory norms of general international law (*jus cogens*) (A/CN.4/L.936) set out procedural rules that did not constitute a third-party dispute settlement procedure *per se* but instead provided a mechanism for enabling the parties to a dispute to resolve the dispute themselves. Such a mechanism could be adapted to suit the draft articles under consideration. In such a scenario, if the State of the official offered to submit the matter for third-party adjudication, the forum State would be entitled to exercise jurisdiction only in accordance with a decision under such adjudication. If the State of the official did not offer to submit the matter for adjudication, that State could exercise its jurisdiction without third-party adjudication. Such a procedure would serve to ensure and promote good faith in consultations between the parties. The Special Rapporteur might prefer to await the views of States on the draft conclusion in question before proposing such a solution, but it might strike an appropriate balance.

Lastly, while he supported the content and inclusion of draft article 16, it should be made more simple and straightforward. It should provide for the application of fair trial rights under international human rights law and the domestic law of the forum State in any criminal procedure initiated against a foreign official, but without its current level of detail. One or two short paragraphs would suffice.

Mr. Park said that, as he had been unable to present his general comments on the Special Rapporteur's sixth report (A/CN.4/722) in 2018, he would proceed to present his combined comments on both the sixth and seventh reports. He appreciated the Special Rapporteur's efforts to thoroughly examine relevant jurisprudence, doctrine and State practice concerning the procedural aspects of immunity.

The reports dealt with issues concerning procedural safeguards, which were highly important to the topic and were intended to guarantee immunity and prevent the forum State from abusively exercising jurisdiction over foreign State officials. Such safeguards were particularly important because immunity *ratione materiae* did not apply to foreign State officials who committed any of the crimes under international law that were referred to in draft article 7, which the Commission had provisionally adopted. As the members

were all aware, it was necessary to maintain a proper balance between the different and even conflicting interests of the forum State and the State of the official.

He wished to make two general comments. First, some of the nine new draft articles presented by the Special Rapporteur dealt with detailed issues that were likely to arise in the course of criminal proceedings against foreign State officials before the courts of the forum State, and were thus closely related to the matter of mutual legal assistance and cooperation. While he fully understood the Special Rapporteur's wish to provide sufficient procedural safeguards to meet the requests made by some members, it might be more appropriate to deal only with issues that were directly related to the question of immunity of foreign State officials, leaving other issues to be regulated by separate agreements or existing treaties on the matter. Alternatively, as Mr. Tladi had proposed, the Drafting Committee might wish to shorten or merge the relevant draft articles.

Second, in paragraph 28 of the seventh report, the Special Rapporteur recalled that the Commission would have to consider the definitions of "jurisdiction", "immunity from foreign criminal jurisdiction" and "immunity *ratione personae* and immunity *ratione materiae*". The Commission had in fact defined only the terms "State official", in draft article 2 (e), and "act performed in an official capacity", in draft article 2 (f). Given that the adoption of definitions of the other terms mentioned might be time-consuming, the Commission might wish to consider them after it had completed its first reading of the draft articles.

Concerning the timing of the consideration of immunity, which was addressed in draft article 8, the previous and current Special Rapporteurs had both stated in their respective reports that the question of immunity must be considered as early as at the pretrial stage. The current Special Rapporteur mentioned in her sixth report, starting at paragraph 49, that the specific timing of the consideration of immunity could not be established definitively and that it was not easy to define the meaning of "an early stage", a term that could apply to all cases involving issues of immunity, mainly because of the differences between States in terms of legislation or practice concerning criminal proceedings. On that point, he wished to share examples of relevant domestic rules that were in force in the Republic of Korea, as well as bilateral agreements concluded by its Government.

The Criminal Procedure Act of the Republic of Korea, which was a general law, did not address the question of immunity. However, the guidelines issued by the Supreme Prosecutors' Office of the Republic of Korea relating to the processing of cases involving diplomats and others who enjoyed immunity from criminal jurisdiction set forth offences that were subject to immunity. It also specified the actions that should be taken when a case involving immunity arose. Article 3 of the guidelines indicated that offences subject to immunity should be processed promptly, and prior to other offences, in order to prevent any unnecessary misunderstandings or complaints that might arise in the context of diplomatic relations. The guidelines also required law enforcement authorities to report such cases without delay to the prosecutor's office that had jurisdiction and to notify the Ministry of Foreign Affairs. The relevant authorities were to verify whether the foreign State official in question enjoyed immunity by requesting a written statement from the State of the official. As a result of those requirements, the question of immunity was considered as soon as the forum State became aware of the case, as stipulated in the Commission's draft article 8 (1).

The 2007 Treaty on Mutual Legal Assistance in Criminal Matters between the Kingdom of Belgium and the Republic of Korea was also relevant. Article 1 (1) of the Treaty provided that, for the purposes of the Treaty, "proceedings" meant all aspects of the proceedings in criminal matters, including investigations, prosecutions and judicial inquiry. That wording demonstrated that the Republic of Korea interpreted the meaning of criminal "proceedings" broadly in comparison to other States.

The exact timing of the "indictment" of an official or the "commencement of the prosecution phase" referred to in draft article 8 (2) might vary from one country to another. Each State established its own timetable for the consideration of immunity, either in its national criminal law or in practice. Therefore, the Commission should propose the timing of the consideration of immunity in general terms only and should encourage each State to

establish the timing in accordance with its national circumstances. Consequently, while he supported draft article 8 (1), he wished to propose that draft articles 8 (2) and (3) should be combined into a single provision, which would read "Immunity shall be considered at an early stage of proceedings, before a coercive measure against the foreign official that may affect the performance of his or her functions is taken".

Turning to acts of the forum State that were affected by immunity, he said that, in paragraph 67 of the sixth report, the Special Rapporteur divided acts of States that affected either a foreign official or his or her immunity from criminal jurisdiction into three groups, the first of which encompassed acts of the forum State that were essentially of an executive nature rather than an exercise of criminal jurisdiction. In her explanation of detention in paragraph 69 of the sixth report, she indicated that State officials who enjoyed immunity *ratione personae* were protected either by immunity as customary international law or by inviolability, even though the detention itself was a purely executive act. On the other hand, the Special Rapporteur stated that foreign State officials who enjoyed immunity *ratione materiae* were not protected by inviolability.

Consequently, the range of protection granted to foreign State officials who enjoyed immunity *ratione materiae* needed to be considered in detail, in light of the fact that the main purpose of considering the principle of immunity was to prevent any politically motivated or abusive exercise of jurisdiction over foreign State officials. It was likely that the forum State might prefer, for practical reasons, to institute criminal proceedings against foreign State officials who enjoyed immunity *ratione materiae* rather than against those who enjoyed immunity *ratione personae*. Insofar as the Commission had provisionally adopted draft article 7, officials who enjoyed immunity *ratione materiae* were more likely to become suspects or defendants in criminal proceedings before tribunals of the forum State. For that reason, it was especially critical to articulate a guide on procedural aspects of immunity for foreign State officials who enjoyed immunity *ratione materiae*, with the aim of avoiding abusive criminal proceedings against such officials.

As a separate matter, the Special Rapporteur opined, starting at paragraph 90 of the sixth report, that precautionary measures taken against the property of officials who enjoyed immunity *ratione personae* were admissible, and referred in that context to the 2001 resolution of the Institute of International Law on immunities from jurisdiction and execution of Heads of State and of Government in international law. However, a foreign State official might possess a certain asset not for its pecuniary value but for its intelligence value in relation to his or her official capacity. For example, an electronic data storage device, such as a USB flash drive possessed and used by a foreign State official enjoying immunity *ratione personae* to store top-secret information, would be inviolable because of its intelligence-related nature. The possibility that the provisional measures deemed necessary by the forum State to maintain its control over such assets might result in a loss of control of the device or a leak of the confidential intelligence stored in it might in itself prejudice the official function or mission of the foreign State official.

It was therefore possible that the mere fact of the asset's being in the possession of the forum State would in itself be detrimental to the foreign State official or the State of the official. Such a situation would result from the precautionary measures taken by the forum State to deprive the foreign State official of the right to control the assets in his or her possession. Consequently, precautionary measures against the assets of officials who were subject to immunity *ratione personae* should, in his view, be prohibited.

In the sixth report, the Special Rapporteur analysed various mechanisms used by States to determine immunity, with a particular focus on the competent authorities that determined immunity and the procedures they used when consulting with other organs of government. He agreed with the opinion, expressed by the Special Rapporteur and other Commission members during the seventieth session, that the courts of the forum State were competent to consider and decide on the applicability of immunity from criminal jurisdiction.

Regardless of which mechanism a State opted to use, the most critical issue, as mentioned in the sixth report, was the validity of the additional information provided by other organs of the forum State or by the State of the official with respect to the normative

elements that came into play in the determination of the immunity of the foreign State official in question in cases involving immunity *ratione materiae*. When the competent tribunal of the forum State did not have sufficient information concerning such normative elements, it had no choice but to rely on the additional information provided by other organs of the forum State or by the State of the official.

In particular, the verification of the validity and credibility of information provided by the State of the official would be important in such cases. The tribunal of the forum State needed accurate information in order to determine whether the foreign State official had immunity. In that vein, the forum State might request information from the State of the official relating to, for example, the status and the official capacity of the individual concerned, which would enable the forum State to evaluate in detail whether or not the foreign State official had been acting in his or her official capacity in the case in question.

However, since the sovereignty of the State of the official might be infringed, a balance should be pursued. Draft article 13, on exchange of information, dealt only with procedural aspects. He therefore proposed that draft article 13 (1) should specify the scope of the information to be exchanged, which should be limited to information that was necessary in order to enable the forum State to decide on the application of immunity. The word "relevant" in draft article 13 (1) inappropriately broadened the scope of the information that might be requested; the word "necessary" or "essential" would be a better choice.

At the Commission's seventieth session, some members had emphasized the role of ministries of foreign affairs. There was no doubt that the two competent Ministries of Foreign Affairs, namely that of the forum State and that of the State of the official, had an important role to play in determining whether the foreign State official in question enjoyed immunity. In particular, an *amicus curiae* brief provided by the Ministry of Foreign Affairs of the forum State would be of importance in the consideration of immunity. The guidelines in effect in the Republic of Korea required law enforcement authorities to report cases to the prosecutor's office that had jurisdiction as they occurred and to inform the Ministry of Foreign Affairs immediately.

Draft article 9 concerned the factors to be considered by organs of the forum State that were competent to determine immunity. Paragraph 1 provided that it should be for the courts of the forum State to determine immunity "without prejudice to the participation of other organs of the State which, in accordance with national laws, may cooperate with them". Two important conclusions could be drawn from that provision: first, that the ultimate power to determine whether or not a given foreign State official enjoyed immunity should be left to the courts; and second, that the participation of other organs of the State should be guaranteed by national laws.

With respect to the first point, the Special Rapporteur mentioned, in paragraph 9 of the seventh report, that at the seventieth session some members had drawn attention to "the need to limit prosecutorial discretion". It was true that in some countries prosecutors had wide discretion in the determination of immunity: the courts were vested *de jure* with the power to determine immunity, but the prosecutors or the Ministry of Justice exercised that power *de facto*. Limiting the courts' role to the endorsement of decisions on immunity that had already been taken by the prosecutor would not be consistent with the object and purpose of draft article 9 because that draft article made provision for the courts, which were not subordinate to the executive branch, to determine immunity in order to prevent the forum State from exercising its jurisdiction in an abusive or politically motivated manner. It should be noted, therefore, that competence, in the substantive sense of the word, to determine immunity should be exercised by courts independently from the executive branch, including investigation authorities, the prosecutor's office and the Ministry of Justice.

Second, as he had already noted, the Special Rapporteur indicated that the possible participation of organs other than the courts should be regulated by national laws. However, it was not clear whether a State was obliged to pass national legislation governing the procedures and measures for the participation of other organs in the determination of immunity if no such legislation was already in force. Furthermore, draft article 9 (2) stated

that “the immunity of the foreign State shall be determined … through the procedures established by national law”.

The “national laws” referred to in draft articles 9 (1) and (2) should be construed without prejudice to the object and purpose of the institution of immunity. The question was whether national laws must be amended if they were incompatible with that object and purpose. Since draft article 9 presupposed that national laws helped to regulate the procedural aspects of immunity, States needed to make efforts to enact or amend the relevant national laws in accordance with the draft articles. Consequently, he proposed the addition of a new provision, to be numbered draft article 9 (4), which would read “If national laws of a State related to the procedural aspects of immunity are not existent or in contradiction to the present draft articles, the State should make efforts to enact or amend national laws in accordance with the present draft articles”.

Furthermore, he would appreciate clarification from the Special Rapporteur regarding the relationship between draft articles 9 (1) and (3). According to draft article 9 (1), other organs of the State could participate in the determination of immunity in accordance with national laws. Such participation was guaranteed only where the relevant national laws already existed. Meanwhile, draft article 9 (3) set forth the obligation of the courts to consider information provided by other authorities of the forum State and by the authorities of the State of the official. He was unsure whether the obligation to consider information was an obligation under international law; in other words, whether the courts of the forum State had an obligation to consider information provided by other authorities regardless of whether or not relevant national laws existed.

Concerning the invocation of immunity, in the seventh report the Special Rapporteur distinguished immunity *ratione personae* from immunity *ratione materiae*, arguing in paragraph 49 that immunity *ratione personae* should be considered by the courts of the forum State *ex officio*. Conversely, with regard to immunity *ratione materiae*, she stated in paragraph 50 that the State of the official must invoke the immunity of the official in question. The International Court of Justice judgments mentioned in paragraph 51, including the one handed down in *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, were not consistent with the Special Rapporteur’s argument.

However, the problem with regard to the invocation of immunity was that the forum State could not readily identify which organs of the State of the official were competent to exercise that power. As the Special Rapporteur mentioned in paragraphs 56 and 57 of the seventh report, competent bodies varied from one legal system to another and were obliged to abide by the national legislation of each State. Nevertheless, the Special Rapporteur correctly pointed out that international instruments and national legislation paid little or no attention to the issue. Although it was impossible to provide that the same organ in every State should be competent to invoke immunity, it might be advisable for each State to at least stipulate, in its national legislation, which competent body had that power. Such legislation would enable the forum State wishing to exercise criminal jurisdiction to ascertain, expeditiously and precisely, which competent organs had such power.

As the Special Rapporteur mentioned, the invocation of immunity was not a procedural requirement for immunity *ratione personae*; invocation was required only for immunity *ratione materiae*. Draft article 10 (2) nonetheless provided that “immunity shall be invoked as soon as the State of the official is aware that the forum State intends to exercise criminal jurisdiction over the official”. That provision did not distinguish immunity *ratione personae* from immunity *ratione materiae* in the context of invocation. A distinction should be made between those two forms of immunity, and the provision should stipulate that only immunity *ratione materiae* had to be invoked as soon as the State of the official became aware of a case. That reading was in line with draft article 10 (6), which provided that the application of immunity *ratione personae* should be determined *proprio motu*, whether or not the State of the official invoked immunity. In that regard, the question of whether or not a failure by the State of the official to invoke immunity *ratione materiae* could be regarded as an implied waiver of immunity should be examined very carefully, as the Special Rapporteur indicated in paragraph 95 of the seventh report.

Concerning draft article 11 (6), he wished to seek clarification of the statement that a waiver of immunity was irrevocable. In paragraph 100 of the seventh report, the Special Rapporteur concluded that that was the case "although there is no practice in this regard". As her rationale for that position, the Special Rapporteur cited the nature of waivers of immunity and the need to guarantee respect for the principle of legal certainty. Given that immunity might be waived at any time, as noted in paragraph 99, it seemed that the State of the official could waive immunity at any time after having invoked it. On the contrary, the State of the official could not invoke immunity after having waived it. Providing that waivers of immunity produced unchangeable effects would make States more reluctant to waive immunity and would, in turn, make the institution of waivers less useful. Therefore, he wished to propose that the irrevocability of waivers of immunity should be reconsidered. For example, the Commission might provide that a State could revoke a waiver of immunity in cases where a vital national interest would be endangered if it failed to do so.

Paragraph 107 of the seventh report listed four activities that were regarded as procedural safeguards: notification of the State of the official that the authorities of the forum State intended to exercise criminal jurisdiction; requests for and exchange of information; transfer of criminal proceedings to the State of the official; and consultations between the States concerned. Safeguards relating to each of those contexts were proposed in draft articles 12, 13, 14 and 15, respectively. However, he had doubts as to whether all of the elements presented by the Special Rapporteur were directly related to immunity, since they were more relevant to mutual legal assistance mechanisms.

In general, the Special Rapporteur's analysis of each procedural safeguard seemed appropriate. As was noted with respect to the transfer of criminal proceedings, in cases where the forum State exercising criminal jurisdiction referred the proceedings to the State of the official at the latter's request, the State of the official might delay the proceedings intentionally or make fraudulent use of immunity in order to avoid imposing due criminal responsibility. Such a situation could not but give rise to impunity.

As the Special Rapporteur mentioned in paragraph 150 of the seventh report, a means of preventing impunity was provided for in the Rome Statute of the International Criminal Court, in particular article 20, entitled "*Ne bis in idem*", paragraph 3 of which stipulated that the Court would regain jurisdiction in such cases if the proceedings in the other court "were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court" or if they "were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice". It would be desirable for draft article 14, concerning the transfer of criminal proceedings, to reflect that language by providing that the forum State would regain its criminal jurisdiction when there was a risk of impunity in cases where the forum State had transferred the proceedings to the State of the official. He thus wished to propose the addition of a new paragraph 4, which would read "If the proceedings transferred to the State of the official were for the purpose of shielding the person concerned from criminal responsibility or conducted in a manner which, in the circumstances, was inconsistent with an intention to bring the official concerned to justice, the official shall be retried before the courts of the forum State".

Turning to procedural rights and safeguards pertaining to the State official, which were addressed in draft article 16, he said it was patently obvious that, as in other criminal cases, such rights and safeguards should not be ignored in the context of the question of immunity of State officials from foreign criminal jurisdiction. The Commission had dealt expressly with that matter in its previous work on topics such as "Expulsion of aliens" and "Crimes against humanity". However, the question of whether the issue should be included in the Special Rapporteur's report was a different matter. As the Special Rapporteur asserted in paragraph 159 of the seventh report, "it is generally agreed that the right to a fair trial and the right to a defence are part of a set of rules and principles that are well established in contemporary international law".

It was evident that foreign State officials whose offences were not covered by immunity should be given the same right to a fair trial and other procedural safeguards in criminal proceedings as defendants who did not have the status of officials. Unless there were any special and additional rights based on the official capacity of foreign State

officials, he saw no reason to address the procedural rights and safeguards that applied to all defendants in criminal proceedings as a separate provision in the draft articles. International treaties such as the International Covenant on Civil and Political Rights, to which the Special Rapporteur referred starting at paragraph 165 of the seventh report, did not provide any additional protections to foreign State officials. Therefore, he wondered whether draft article 16, even though it was a no-harm provision, was really necessary.

With regard to the future workplan, the Special Rapporteur had repeatedly mentioned the judgment of the Appeals Chamber of the International Criminal Court on the appeal filed by Jordan against the decision on its non-compliance with the Court's request for the arrest and surrender of Omar Al-Bashir. In paragraph 175 of the seventh report, she noted that "various issues arising in that case could be of relevance to the topic and should therefore be considered in due course". However, at first glance, the judgment did not seem to be directly related to the topic, as it mainly concerned the question of whether, under customary international law, Heads of State enjoyed immunity *ratione personae* before international courts. The judgment seemed to focus more on the supposed conflict between articles 27 and 98 of the Rome Statute.

With regard to a mechanism for the settlement of disputes between States, which was mentioned in paragraph 176 of the seventh report, he was not sure that disputes involving the immunity of State officials would be settled in a different manner from other disputes. Moreover, the draft articles would impose an excessive constraint on the exercise of criminal jurisdiction by the forum State if they established a mechanism for the settlement of disputes concerning immunity issues.

As for the inclusion of recommended good practices in the draft articles, such information might be useful to States, but should perhaps be provided in another way. Useful guides or manuals could be distributed in the form of *amicus curiae* briefs, if necessary. Alternatively, the Commission might consider including such information in the commentaries to the draft articles.

Mr. Murase, noting with satisfaction that the Commission's work on the topic had reached its final stage with a thorough analysis of procedural safeguards, said that he would begin by offering a number of general comments on the Special Rapporteur's excellent seventh report.

First, the topic concerned not only the trial phase of criminal procedure, but also the investigation phase. The Special Rapporteur focused mainly on the trial phase, but there were aspects of the investigation phase, such as arrest and detention, that should not be overlooked.

Second, a clear distinction should be drawn in the proposed draft articles between immunity *ratione personae* and immunity *ratione materiae*. Some of the provisions proposed by the Special Rapporteur related to one but not the other. In that regard, he welcomed the proposal that the draft articles should include definitions of the terms "jurisdiction", "immunity from foreign criminal jurisdiction" and "immunity *ratione personae* and immunity *ratione materiae*". It might also be necessary to define the terms "forum State" and "State of the official".

Third, in comparison to the substantive provisions in draft articles 1 to 7, the procedural provisions in draft articles 8 to 16 were extremely detailed and might thus create an imbalance. He was in favour of simplifying some of the newly proposed draft articles.

Turning to the proposed draft articles themselves, he said that, first, the use of the term "foreign official" in draft article 8 (1) and (3) did not seem to be entirely appropriate, as that draft article covered not only immunity *ratione personae* but also immunity *ratione materiae*. The latter also applied to individuals who had ceased to be State officials, according to draft article 6 (2). The last few words of draft article 8 (3), "that may affect the performance of his or her functions", might have to be amended for the same reason.

Second, the relationship between paragraphs 2 and 3, which seemed to deal with the trial and investigation phases, respectively, was not entirely clear. In general, criminal procedure began with the investigation phase, which was completed when the competent authorities referred the case to the prosecutor. The trial phase began when a prosecutor

decided to indict the alleged offender. If that understanding was correct, the words "at an early stage of the proceeding", in paragraph 2, would refer to the investigation stage. Thus, it appeared that the competent authorities of the forum State were to consider immunity first if they intended to take a coercive measure and again if they intended to indict the official. Since different procedures were generally stipulated for the investigation and the trial phases, the draft article should reflect the two stages at which immunity might be considered.

Third, while the obligation of the State of the official to invoke immunity in cases of immunity *ratione materiae* was acknowledged in the report and the proposed draft articles, the report also indicated that the State of the official did not need to invoke immunity *ratione personae* and that the forum State should assess such immunity *proprio motu*. If that was the case, the timing of the consideration of immunity by the forum State might vary depending on whether the immunity at issue was *ratione personae* or *ratione materiae*. In the latter case, immunity would be invoked at a later stage than in the former, as invocation was required under proposed draft article 10 (2). It was therefore debatable whether immunity *ratione materiae* could be considered by a prosecutor at the pretrial stage or whether it could be considered in a timely manner. If the Commission decided that the State of the official should be obliged to invoke immunity *ratione materiae*, the fact that immunity *ratione materiae* was treated differently by the forum State would need to be addressed in draft article 8.

Fourth, the consideration of immunity *ratione personae* and *ratione materiae* required a careful examination of the question of control over prosecutorial discretion, to which he had referred at the Commission's seventieth session (A/CN.4/SR.3438). That aspect of the topic should be elaborated upon in the commentary.

With regard to draft article 9, which seemed to reflect a very reasonable position, the determination of immunity was sometimes subject to a decision by an international organization, such as the International Criminal Court, or to the provisions of an international treaty to which the forum State was a party. He would welcome a discussion of that point in the Special Rapporteur's eighth report.

Draft article 9 (1) should not neglect the role of the prosecutor in determining immunity at the indictment stage. As the Special Rapporteur noted in footnote 91, the prosecutor might decide not to prosecute a foreign official because of his or her immunity. In that context, too, he wished to reiterate that the Commission should consider control over prosecutorial discretion.

In draft article 9 (2), the word "official" was missing after the words "foreign State". In addition to the reference to "national law", that paragraph should include a reference to the international legal obligations of the foreign State. The paragraph might thus be amended to read "The immunity of foreign State officials shall be determined in accordance with the provisions of the present draft articles as well as other applicable rules of international law, and through the procedures established by national law". Such language would make clear that the forum State must comply with international legal instruments to which it was a party.

He had several comments on draft article 10. First, as the Special Rapporteur believed that immunity *ratione materiae* should be clearly invoked, whereas immunity *ratione personae* did not need to be invoked by the State of the official, that draft article should specify that it addressed immunity *ratione materiae* only, since it set out compulsory requirements for the invocation of immunity. Second, the opening two words of paragraph 1, namely "A State", should be replaced with "A State of the official". The same applied to paragraphs 2 to 4. If those drafting suggestions were duly implemented, paragraph 1 would begin "A State of the official may invoke the immunity *ratione personae* ...". Paragraphs 2 to 4 would each begin "A State of the official may invoke the immunity *ratione materiae* ...".

Third, with regard to paragraph 2, he was not sure which State was to take the initiative to invoke immunity. In accordance with proposed paragraph 3, as soon as the State of the official was aware that the forum State intended to exercise criminal jurisdiction, it was to invoke immunity *ratione materiae*. But the question remained as to

how the State of the official would be made aware of that intention. In the case of immunity *ratione materiae*, the State of the official would not know that the forum State intended to exercise criminal jurisdiction over an individual who had ceased to be a State official. For that reason, the paragraph should be linked to draft article 8 and draft article 12 (1). The primary obligation to consider immunity lay with the forum State. Once that State had notified the State of the official of its decision to exercise criminal jurisdiction, the State of the official incurred a secondary obligation to invoke immunity *ratione materiae*.

Fourth, concerning paragraph 3, in the case of immunity *ratione materiae*, the acts of the foreign official should be regarded as separable; in other words, the State of the official should be able to invoke immunity for some of the official's acts but not others. The problem of separability should therefore be addressed in relation to the invocation of immunity. Fifth, the idea that States were obligated under customary international law to invoke immunity *ratione materiae* "in writing", as stipulated in draft article 10 (3), was debatable. While the International Court of Justice referred to that requirement in its judgment in the case concerning *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, he doubted that such a requirement was established in customary international law.

Sixth, while it was clear enough that the invocation of immunity *ratione materiae* was obligatory for the State of the official, it was not entirely clear whether draft article 10 (4) was applicable to the addressee of that invocation. Draft article 10 (4) and (5) did not require the State of the official to invoke immunity *ratione materiae* before the courts of the forum State; indeed, it could invoke immunity through any procedure accepted by the States concerned, in accordance with draft article 10 (4). That provision did not appear to provide a useful instruction and might be confusing for States. If the mandatory language in that paragraph was retained, it should be simplified. Seventh, he would suggest that the words "through the diplomatic channel" should be replaced with "through diplomatic channels". The original formulation implied only one channel, between two States. However, diplomacy could also be conducted through third-party channels, as was the case between the United States of America and the Islamic Republic of Iran, which used Switzerland and Pakistan, respectively, as intermediaries.

Eighth, he wondered why the Special Rapporteur had not considered the effect of non-invocation of immunity *ratione materiae*. As invocation of immunity *ratione materiae* was obligatory for the State of the official under draft article 10, the consequences of failing to comply with that obligation must be considered.

Lastly, as demonstrated by the recent assassinations of Kim Jong-nam at Kuala Lumpur International Airport and Jamal Khashoggi at the consulate of Saudi Arabia in Istanbul, Turkey, even if a State ordered one of its officials to commit a crime, which would constitute an act performed in an official capacity, the State itself often denied that it had been involved and did not invoke immunity. The question then arose as to whether the official could himself or herself invoke immunity before the courts of the forum State. It was explained in paragraph 55 of the report that, given that the rights protected by immunity did not belong to the official, his or her claim of immunity could not be viewed as a true invocation of immunity, but only as an allegation, which the authorities of the forum might assess as a fact and which, in any event, they might request the State of the official to confirm or deny. However, the Special Rapporteur might wish to clarify whether the forum State should consider immunity in cases in which the official himself or herself invoked immunity while the State of the official denied it.

With regard to draft article 11, the words "of the official" should be inserted after "A State" in paragraph 1. Concerning the appearance of a representative of the State of the official before a court of the forum State, he would draw attention to the United Nations Convention on Jurisdictional Immunities of States and Their Property, which dealt with the question explicitly in article 8 (1) and (2). A similar provision could be found in article 3 of the European Convention on State Immunity. Such provisions implied that the question was significant and should therefore be dealt with explicitly in relation to the topic.

Draft article 13 (6) dealt with the refusal by the State of the official to provide information. In his view, a paragraph 7 should be added to address the participation of the State of the official in the exchange of information process, which, as noted in paragraph 134, could not be construed as an implied waiver of the immunity of its official from criminal jurisdiction.

In draft article 14 (2), the words "by the State of the official" should be added after "Once a transfer has been requested" for greater clarity.

With regard to draft article 16, he welcomed the reference to the fair and impartial treatment of the official. Nonetheless, the draft article should state clearly that such treatment should be measured "in light of international human rights standards". In addition, greater emphasis should be placed on consular assistance, to which reference was made in paragraph 168 of the report. As the Special Rapporteur rightly pointed out in paragraph 50, in cases of immunity *ratione materiae*, the organs of the forum State were not equipped to know whether an individual was a foreign official. That was especially true when the forum State intended to exercise criminal jurisdiction over an individual who had ceased to be a State official, as the State of the official could not be made aware of the situation without consular assistance. That matter should be addressed, at least in the commentary.

With regard to the future workplan, he would be pleased if the Commission completed the first reading of the draft articles at the current session, but did not believe that it should rush to do so without taking a number of pressing issues into account, including the relationship with the International Criminal Court.

In conclusion, he said that he was in favour of referring all the draft articles to the Drafting Committee.

Mr. Murphy said that the Special Rapporteur's sixth and seventh reports provided a rich array of information that was quite helpful for the Commission's consideration of the procedural aspects of the topic. He appreciated the Special Rapporteur's candid recognition that many of the proposed draft articles fell within the realm of the progressive development of international law, a fact that, in his view, gave the Commission ample scope to think creatively as to how best to craft them.

As noted in the seventh report, the Commission's adoption of draft article 7 in 2017 had continued to feature prominently in the Sixth Committee's debates in 2018. A number of States had noted the link between procedural safeguards and draft article 7. Indeed, many States had acknowledged that procedural safeguards were needed in order to reduce the risk of politicization and abuse of criminal jurisdiction over foreign State officials. At the same time, the Iranian delegation had expressed the view that the substantive flaws of draft article 7 were such that they could not be remedied through procedural safeguards.

During the Commission's debate in 2017, many of the members who had expressed support for draft article 7 had noted that procedural safeguards were required in order to protect against its abuse.

In light of the views expressed by States and by members of the Commission, he had expected that the draft articles proposed in the seventh report would include procedural safeguards for foreign State officials whose immunity had been stripped away pursuant to draft article 7. However, he was having difficulty finding any such safeguards. In many respects, the only thing being "safeguarded" seemed to be the jurisdiction of the forum State.

The basic problem was that the proposed draft articles were designed principally to allow the forum State to consider immunity and determine whether it existed in a given case. Yet that question was already answered in draft article 7: anyone who was alleged to have committed any of the crimes listed in that draft article and who was not a Head of State, Head of Government or Minister for Foreign Affairs had no immunity. Thus, in any case involving a foreign State official alleged to have committed a crime such as torture, the "consideration" of immunity under draft article 8 would not take long. Pursuant to draft article 7, unless that person was part of the troika, he or she had no immunity.

Indeed, he wondered whether any of the subsequent draft articles would apply, once the forum State had "considered" that there was no immunity pursuant to draft article 7. The situation could be compared to one in which the forum State "considered" that a particular person could not claim immunity under international law because he or she was a national of the forum State. However, even if the subsequent draft articles were assumed to be relevant to a person alleged to have committed a crime listed in draft article 7, they appeared not to provide any meaningful safeguards for the State of the official.

While draft article 9 on the "determination" of immunity did not specify exactly when the court should make its determination, that process also would not take long. If the official was alleged to have committed a war crime, for example, the court would automatically determine that there was no immunity. He did not see how such a determination provided any kind of safeguard for the State of the official.

Draft article 10 on the "invocation" of immunity also appeared not to provide any such safeguard; the invocation of immunity in the face of allegations of any of the crimes listed in draft article 7 was pointless unless the person was part of the troika. Draft article 11 on the "waiver" of immunity added nothing with respect to draft article 7, as the State of the official could not waive an immunity that did not exist.

Draft article 14, which established that the forum State could request a transfer of proceedings to the State of the official, also appeared not to offer a procedural safeguard for the State of the official; it was merely an acknowledgement that the State exercising criminal jurisdiction could consider transferring the matter to the State of the official. Likewise, draft articles 13, on exchange of information, and 15, on consultations, did not seem to provide any meaningful safeguards in the face of an allegation of one of the crimes listed in draft article 7.

The Special Rapporteur had indicated that one of the purposes of having a debate on procedural safeguards in 2018 had been to ensure that the views expressed by members could inform the seventh report. However, several important proposals made by members in 2018 were not reflected in the proposed draft articles. For example, the Special Rapporteur had not taken up Mr. Murase's idea of obliging States to adopt national laws or regulations designed to ensure that prosecutors did not use their powers arbitrarily or aggressively against foreign State officials. In that context, Mr. Murase had referred to the Guidelines on the Role of Prosecutors, which were not mentioned in the seventh report.

Mr. Nolte's proposals for possible safeguards had attracted considerable support from other members during the debate. They included a provision stipulating that the exercise of national criminal jurisdiction based upon an exception to immunity *ratione materiae* as described in draft article 7 would be permissible only if, *inter alia*, the foreign official was present in the forum State; the evidence that the official had committed the alleged offence was "fully conclusive"; and the decision by the forum State to pursue criminal proceedings was taken at the highest level of government or prosecutorial authority. However, none of those ideas could be found in the proposed draft articles.

The Special Rapporteur had also not pursued Ms. Galvão Teles's proposal that consideration should be given to whether the State of nationality should have preference in exercising jurisdiction over its officials and whether the person in question should be extradited, upon request, for that purpose. In support of that idea, Ms. Galvão Teles had cited national laws of Germany and Spain that essentially required their national courts to defer to foreign national prosecutions in the State where the crime had occurred, unless there existed an obstacle, whether of will or of capacity, to the effective prosecution of the crime in that State. Further proposals had been made, as he recalled, by Mr. Grossman Guiloff and Mr. Šturma. None of those proposals were analysed in the seventh report, and they had certainly not been included in the proposed draft articles. The proposals ultimately put forward in the report seemed not to offer any procedural safeguards in relation to draft article 7.

It therefore seemed that a prosecutor who wished to prosecute a foreign State official and to circumvent any serious scrutiny of the possible existence of immunity *ratione materiae* could simply include one of the acts listed in draft article 7 as one of the allegations against the official, and all issues concerning immunity would essentially

disappear. Rather than balancing the interests of the forum State and the State of the official with respect to allegations of crimes under draft article 7, the Special Rapporteur's proposals appeared to strongly favour the forum State's exercise of jurisdiction. In general, the proposed draft articles did not seem to offer any protection for a foreign State official from the politically motivated or abusive exercise of national criminal jurisdiction. Instead, they simply assumed that the forum State would act in good faith.

Both in the report and in her introductory statement, the Special Rapporteur had said that, in the case of immunity *ratione personae*, the immunity of State officials should be appraised and assessed *proprio motu* by the competent authorities of the forum State, but that, in the case of immunity *ratione materiae*, the authorities would need to do so only when immunity was invoked expressly by the State of the official. However, draft article 8 did not seem to contain any such rule. Furthermore, he wondered whether that rule meant that a forum State could detain and interrogate any foreign State official other than a Head of State, Head of Government or Minister for Foreign Affairs because it did not have to "consider" any issue of immunity *ratione materiae* until such time as the State of the official invoked such immunity. He also wished to know what was meant by the requirement that the forum State should "consider" immunity, whether such consideration was to be guided by the draft articles and whether "consideration" alone, as opposed to the "determination" referred to in draft article 9, had any practical consequences, such as requiring the State to refrain from arresting a person who was "considered" to have immunity *ratione personae*. The rule adopted by the Institute of International Law in its 2001 resolution on immunities from jurisdiction and execution of Heads of State and of Government in international law, which provided for inviolability *ab initio* and was quoted in paragraph 42 of the report, was not reflected in draft article 8. If the consequences of "consideration" of immunity included an obligation to proceed immediately to the "determination" referred to in draft article 9 and the "notification" required under draft article 12, there should be some connection among those draft articles. In the absence of such a connection, the "consideration" referred to in draft article 8 did not appear to have any particular consequences.

In draft article 9, the status of the foreign official prior to the determination of immunity was not obvious, nor was it clear at what stage the determination should be made. If the foreign State official was presumed to be immune from coercive measures such as detention during the period before the determination was made, that element should be captured in the draft articles; if the official was not presumed to be immune, the timing of the determination should be specified, as an excessively long period prior to determination could place the foreign State official in great jeopardy.

Turning to draft article 10, he said he agreed with Mr. Hmoud that channels of communication relating to mutual legal assistance were not obviously the correct channels for issues concerning immunity. In the United States, for example, mutual legal assistance was addressed largely by the Department of Justice, while issues of immunity were addressed largely by the Department of State. The decision on the most appropriate channel for communication in a particular case should be left to the States concerned. Mr. Hmoud's proposal that a State's invocation of immunity in respect of its official should automatically have a suspensive effect on the proceedings in the forum State, for a reasonable time period during which consultations would take place, including on a possible transfer of the proceedings to the State of the official, was thoughtful and deserving of consideration.

In connection with draft article 11 on waivers of immunity, he did not understand why waivers were described in the report as a "first-level safeguard", unless they were a safeguard designed only to protect the forum State in the exercise of its criminal jurisdiction. He agreed with the Special Rapporteur, however, that a waiver of immunity "must be express and must be reflected in an irrefutable form, preferably in writing"; he also agreed to a large extent with the reasons mentioned in paragraphs 87 to 91 as to why it was difficult to deduce the existence of waivers of immunity in various types of treaties. However, like Mr. Hmoud, he took the view that the wording of draft article 11 (4), which appeared to mean that a waiver could be implied by a treaty, did not follow that logic. If a waiver was not expressly provided for in a treaty, it could not be "deduced clearly and unequivocally"; rather, it must be implied by the treaty and discerned through a process of

logical inference. However, all the authorities cited in the report seemed to call for an express, rather than implied, waiver. Furthermore, in such a situation, an implied waiver could not be "deemed an express waiver". Paragraph 4 was thus confusing and incorrect, and should be deleted.

Given that notification of the State of the official seemed to be a prerequisite for other actions, such as a decision to invoke immunity (mentioned in draft article 10) or to waive immunity (mentioned in draft article 11), and that the courts of the forum State must be informed of such actions before they made their determination of immunity under draft article 9, draft article 12, on notification, should be placed immediately after draft article 8. It was unclear why the point at which notification should occur, as provided for in draft article 12 (1), was not the same as the point at which immunity should be considered, as mentioned in draft article 8 (1). The two steps might rather be triggered at the same time.

The report noted some practical problems with any such notification requirement, such as the absence in some States of any obligation on the part of the courts concerned to inform the executive branch about a person against whom coercive action was being taken, while the executive branch might not have the right to seek information from the courts. Furthermore, a prosecutor would normally not want to inform a foreign State of the intention to exercise criminal jurisdiction over an official of that State, if doing so might prompt the person to flee the jurisdiction of the forum State. As no solutions were offered to those problems, draft article 12 might be unworkable.

He found the analysis relating to draft article 12 to be unpersuasive and did not think that it should be included in any commentary. For example, he did not agree that, as stated in paragraph 113, treaties such as the Vienna Convention on Diplomatic Relations addressed only immunity *ratione personae*. The notification provisions in the treaties cited in paragraph 115 were not pertinent, as they concerned notification of various States, not just the State of nationality of the alleged offender, with a view to the possible exercise of those States' national criminal jurisdiction, not for the purpose of determining whether immunity existed or was being invoked or waived.

Draft articles 13 and 15 would be better placed earlier in the draft articles. While cooperation and consultation among the States concerned was to be encouraged, draft article 13, in particular, seemed to provide for safeguards that benefited only the forum State.

Draft article 14 concerned only a situation where the forum State decided to request a transfer of proceedings to the State of the official; there was no safeguard giving the State of the official an opportunity to seek a transfer of proceedings from the forum State. He would welcome clarification on whether the forum State could decide to request such a transfer only when the official of the foreign State had been determined not to have immunity. The related analysis seemed to refer to situations where the official of the foreign State had immunity, but, in that case, the forum State should not be able even to open, let alone transfer, any proceedings against the official.

Draft article 16 contained several references to safeguards, but each was worded differently and it was thus unclear whether they all referred to the same concept. He wondered whether they referred to safeguards under the law of the forum State, safeguards under international law or both. Paragraph 3 was especially problematic, as there was no absolute obligation to give consular notification, except as might be provided for in individual bilateral agreements among States. The Vienna Convention on Consular Relations, which codified customary international law, required consular notification only upon the request of the detained individual. Furthermore, paragraph 3 misstated the consular notification obligation: consular officials were not obligated to assist nationals of the State concerned, and there was no entitlement to assistance under international law. As the wording of draft article 16 had drawn inspiration from a similar draft article in the Commission's project on crimes against humanity, the wording of the latter should perhaps be used, particularly as it had been largely welcomed by States, and the Commission must not appear to be calling the propriety of that draft article into question.

While the practice of any particular State should not dictate the Commission's decisions, he wished to point out that in the United States, an internal process of approval

was followed before investigations and prosecutions for war crimes, torture or genocide were undertaken. Such prosecutions involved significant foreign relations and complex legal issues, particularly because they often involved investigating foreign government actors. Nevertheless, the internal process of approval made no explicit reference to considerations of immunity, and it was thus unclear whether the process described in draft article 8 (1) and (2) was actually employed by United States prosecutors. Moreover, there did not appear to be any requirements regarding notification of the State of the foreign official or any exchange of information. Whether such notification took place probably depended on the circumstances, including the Government's relationship with the foreign Government concerned. Apparently, an internal review process was required before a prosecutor was authorized to share evidence with a foreign Government.

Concerning the future workplan and the suggestion that the next report might provide an analysis of the relationship between the immunity of State officials from foreign criminal jurisdiction and surrender to international criminal courts and tribunals, he supported the decision not to address the recent judgment of the International Criminal Court Appeals Chamber concerning the appeal filed by Jordan in relation to the *Al-Bashir* case. However, he had doubts about the usefulness of even a broader analysis, given the multiplicity of international criminal courts and tribunals operating at different levels and under different constituent instruments that bound States in different ways. The Commission's topic was focused on background rules, rather than special rules of international law.

It might be worthwhile to define a mechanism for the settlement of disputes between the forum State and the State of the official, but its value would depend on the form that it took. The Commission's draft article 15 on the topic of crimes against humanity concerned dispute resolution and could be of use, as it had garnered support from States.

The advisability of including best practices in the area of immunity in the draft articles would depend on their proposed content. Following a number of International Court of Justice judgments against the United States in cases concerning the death penalty, the federal Government had engaged in a very robust campaign of educating law enforcement officials at the state and local levels regarding the country's obligations under the Vienna Convention on Consular Relations. The manuals and other materials developed in that context might be of interest.

He recommended that the draft articles should be referred to the Drafting Committee, where he hoped they would be amended to improve procedural safeguards for the State of the official, on the basis of the proposals made by members of the Commission during the previous and current sessions.

Mr. Tladi said that he would be interested in hearing why Mr. Murphy particularly wanted to link procedural rules and guarantees with draft article 7, as he thought that they also applied to other issues dealt with earlier in the draft articles, such as whether an act was an official act. He agreed that the procedural safeguards proposed in the report could have been expanded, particularly in view of the ideas that had been put forward during the Commission's debates in 2018. However, he thought that the argument that, once an exception to immunity had been determined, nothing further in the draft articles could apply was an overstatement. For instance, even where the forum State determined that one of the exceptions to immunity under draft article 7 applied, consultation with the State of the official concerned could lead to an agreement that the latter State would exercise jurisdiction.

Mr. Murphy said that the acts concerned seemed to fall into three categories: those covered by immunity *ratione personae*, which was comprehensive in granting immunity; those covered by immunity *ratione materiae*, which concerned certain circumstances where immunity existed only for official acts; and a third category, defined by the wording of draft article 7, in respect of which there was no possibility of invoking immunity and no distinction was drawn between official and non-official acts. Meaningful procedural safeguards that were specific to each of those three cases should be provided. His concern with regard to draft article 7 was that, although the Special Rapporteur had indicated that the subsequent draft articles would be applicable to cases under draft article 7, the current

wording was unclear in that respect. Since immunity could not be invoked for the alleged commission of any of the acts listed in draft article 7, the procedural draft articles might be interpreted as placing no obligations on the States concerned to consider or determine whether immunity existed, or to consult or to exchange information in that regard.

The meeting rose at 1 p.m.