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Provisional summary record of the 3484th meeting

Held at the Palais des Nations, Geneva, on Wednesday, 17 July 2019, at 3 p.m.

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Immunity of State officials from foreign criminal jurisdiction (*continued*)

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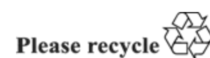

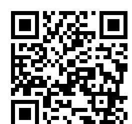

***Present*:**

Chair:	Mr. Šturma
Members:	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. Nguyen
	Mr. Nolte
	Ms. Oral
	Mr. Ouazzani Chahdi
	Mr. Park
	Mr. Ruda Santolaria
	Mr. Saboia
	Mr. Tladi
	Mr. Valencia-Ospina
	Mr. Wako
	Mr. Zagaynov

***Secretariat*:**

Mr. Llewellyn	Secretary to the Commission

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

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

Ms. Lehto said that the Special Rapporteur's seventh report (A/CN.4/729) was very comprehensive and well researched, and, when taken in combination with her sixth report (A/CN.4/722), the previous Special Rapporteur's third report (A/CN.4/646) and the memorandum prepared by the Secretariat (A/CN.4/596 and A/CN.4/596/Corr.1), provided a solid basis for the discussion of the procedural aspects of immunity, a topic that had not previously attracted much scholarly attention or been the subject of codification efforts.

It was easy to agree that an orderly process in the treatment of immunity issues in the various phases of the Commission's work on the topic served the interests of States. Procedural rules such as those presented in the seventh report could contribute to alleviating any tensions that might arise not only from the different interests and objectives of the States concerned, but also from the lack of available information or the unpredictability of the process. Such tensions might arise even where the intention to exercise criminal jurisdiction was *bona fide*; needless to say, clear procedural rules and safeguards were even more important where there was a risk of politicization or abusive proceedings. As the Special Rapporteur pointed out in paragraph 22 of her seventh report, procedural arrangements helped to provide certainty to both the forum state and the State of the official, helped to introduce an element of neutrality into the treatment of immunity from foreign criminal jurisdiction and could assist in building trust between the States concerned.

Concerning the question of whether the seventh report contained, or should have contained, procedural safeguards specific to the exceptions and limitations to immunity *ratione materiae*, as spelled out in draft article 7, she wished to draw attention to the difference between the third report of the previous Special Rapporteur, Mr. Kolodkin, and the seventh report of the current Special Rapporteur. Both reports considered procedural questions related to the determination of immunity, invocation and waiver of immunity, as well as questions of timing. In addition to those classic procedural questions, the seventh report contained a very comprehensive consideration of issues that had particular relevance for exceptions and limitations to immunity *ratione materiae* – without being limited to that context – including mechanisms to facilitate communication between the forum State and the State of the official and the procedural safeguards inherent to the concept of fair trial.

Indeed, as the Special Rapporteur had pointed out in her fifth and sixth reports, the implementation of draft article 7 must be understood in the light of the procedural rules that might be established in the future. The Special Rapporteur had further indicated that although those rules would not modify the content of cases where immunity did not apply, they could establish procedural conditions that protected both States and individuals. The procedural provisions presented in the seventh report could be seen as procedural safeguards linked to exceptions and limitations to immunity *ratione materiae* even though they were not specific to draft article 7 in the sense of being applicable only to that draft article. The provisions clearly sought to address the concerns that had been expressed regarding the application of draft article 7 and they provided a very good basis for further discussions and proposals during the debate and in the Drafting Committee.

Building on those observations, she herself thought it obvious that the proposed draft articles were intended to be applied to the situations referred to in draft article 7. Having listened to the debate, however, she tended to agree that there might be merit in changing the order of the draft articles, given that draft articles 13 and 15, for instance, on exchange of information and consultations respectively, seemed to be relevant to different phases of the process. The interlinkages between different draft articles should also be clarified in the commentaries.

Turning to the proposed draft articles themselves, she said that, with respect to the timing of the consideration of immunity and the acts of the forum State that might be affected by immunity, issues that had also been discussed in the sixth report, she agreed with the conclusions presented in paragraph 26 of the seventh report. She also agreed with draft articles 8 and 9, which reflected the debate that had taken place at the Commission's

seventieth session. As stated in draft article 8, immunity should be considered by the forum State as soon as the competent authorities became aware that a foreign official might be affected by a criminal proceeding, and in any event before taking coercive measures against the official that might affect the performance of his or her functions. The specification "may affect the performance of his or her functions", in draft article 8 (3), was in her view important and reflected the purpose of immunity, which was to permit the effective performance of the functions of persons acting on behalf of States. She also tended to think that the provision could not be read as being limited to officials who were on duty, since being subject to coercive measures in a foreign State might adversely affect the performance of their functions, particularly the confidence placed in the officials in question, even if such measures were taken when the officials were not on duty.

Regarding the determination of immunity, it seemed to her that there was nothing unusual in giving primacy to the competent courts of the forum State. In view of the great variety of internal procedures in different States, however, the possibility that other organs might have a role in that process, and even an important one, could not be excluded. The appropriate wording to capture all such situations could be discussed in the Drafting Committee if draft article 9 (1) was not seen as sufficient.

With regard to the invocation of immunity, she appreciated the thorough consideration of the question in paragraphs 34 to 68 of the seventh report. A number of practical considerations were relevant in that respect and underlined the importance of the early invocation of immunity by the State of the official. She agreed with the need to apply separate rules to immunity *ratione personae* and immunity *ratione materiae*, as proposed by the Special Rapporteur. That approach was supported by the International Court of Justice in the case concerning *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)* and in the case concerning the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, as pointed out in paragraph 51 of the seventh report, and was also consistent with the view that had been taken by the former Special Rapporteur in paragraphs 17, 19 and 22 of his third report.

In the case of immunity *ratione personae* of the troika of Heads of State, Heads of Government and Ministers for Foreign Affairs, and of a limited number of other high-ranking State officials, including diplomatic agents, certain consular officials and members of special missions or representatives to international organizations, the forum State could be presumed to be in a position to consider the question of immunity on its own initiative. In the case of immunity *ratione materiae*, however, it might be much less evident that a person enjoyed that form of immunity.

The procedure outlined in draft article 10, on invocation of immunity, reflected those considerations and contributed to the question of immunity being raised at the earliest possible opportunity.

Draft article 10 also had an obvious connection to draft article 12, on notification, as the State of the official might not otherwise be aware of the intention of the forum State to exercise its jurisdiction over the official in question.

Concerning draft article 11, on waiver of immunity, the requirement that waiver must be express, as set forth in paragraph 2 of that draft article, could be justified by requirements of legal certainty and could prevent problems that might arise from misinterpretation of the other State's intention. That requirement also laid a strong basis for the conclusion that waiver must be irrevocable. The current Special Rapporteur was, in that regard, more categorical than her predecessor, who had notably distinguished between serving Heads of State, Heads of Government and Ministers for Foreign Affairs, for whom a waiver of immunity should be stated explicitly, and other State officials. In paragraph 55 of his third report, Mr. Kolodkin had observed that, when applied "to serving officials who are not included in the troika but who enjoy personal immunity, to other serving officials who enjoy functional immunity and to all former officials who also enjoy functional immunity, a waiver of immunity can be either express or implied. An implied waiver in this case can be expressed specifically in the non-invocation of immunity by the State of the official."

It was also interesting to look at the Commission's debate on Mr. Kolodkin's third report in 2011. At that time, the members had stressed that "the standard of certainty implied some *bona fide* duty to inquire with the other State in cases where there were any doubts, as it could not be lightly assumed that certain conduct by another State constituted a waiver of immunity" (A/66/10, para. 179). At the same time, it had been observed that if States wished to claim immunity, they had a duty to express themselves clearly within a reasonable time when they were confronted with a situation that required their response. Those points also seemed very relevant to the current debate.

Regarding draft article 11 (4), she agreed that waiver could be based on treaty provisions provided that the treaty either contained an explicit provision on waiver or that "States parties have an obligation to cooperate in an unrestricted manner to prosecute any person who is subject to their jurisdiction", as stated by the Special Rapporteur in paragraph 87 of her seventh report. The Special Rapporteur pointed out that that view had been defended in the Commission's earlier work and in the literature. Reference could also be made to State practice such as the case of *FF v. Director of Public Prosecutions*, which had been brought in the United Kingdom in 2014 in connection with accusations of torture against Prince Nasser bin Hamad Al Khalifa of Bahrain. The critical question had been whether the Prince enjoyed immunity *ratione materiae* under section 1 of the State Immunity Act of 1978 in his role as Commander of the Royal Guard of Bahrain. When the case had been due to be heard in the High Court of Justice, the Crown Prosecution Service had informed the Court that it did not consider Prince Nasser to have immunity because Bahrain and the United Kingdom were both parties to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and therefore, as had been established in the *Pinochet* case, functional immunity did not apply between them. It was of course open to discussion whether the term "waiver" was the correct one to use in that context.

Mr. Aurescu had proposed the deletion, in draft article 11 (2), of the specifications concerning the information to be provided, so that the provision would read simply "waiver shall be express and clear", thus removing any contradiction or inconsistency with draft article 11 (4). In general, some of the draft articles seemed to contain unnecessary detail, and she was inclined to agree with Ms. Galvão Teles's proposal that some of the detail could be moved to the proposed collection of recommended practices.

She similarly found merit in Mr. Nguyen's proposal to redraft draft article 11 (1), by adding a reference to the most serious international crimes. In that connection, it was worth noting that article II (3) of the 2009 resolution of the Institute of International Law, entitled "Immunity from Jurisdiction of the State and of Persons Who Act on Behalf of the State in case of International Crimes", provided that "States should consider waiving immunity where international crimes are allegedly committed by their agents".

Draft articles 12 and 13, on notification of the State of the official and exchange of information respectively, as well as draft article 15 on consultations, provided a number of opportunities for the States concerned to communicate from the very early stages. Draft article 12 (1) notably laid down the obligation to notify the State of the official from the moment when the competent authorities of the forum State had sufficient information to conclude that a foreign official could be subject to its criminal jurisdiction.

Turning to draft article 14, she said that the possibility of transfer of proceedings to the State of the official was indeed very interesting, as was the corruption case in the Lisbon Court of Appeal that had been brought against a former Vice-President of Angola, which had been raised by Ms. Galvão Teles at the seventieth session and was cited in the Special Rapporteur's seventh report. With regard to the wording of draft article 14 (1), she did not read it as saying that the State of the official could not initiate the transfer by making a proposal to the forum State; rather, it seemed only to say that it was for the forum State to decide whether to agree to the transfer. Some proposals had been made at the previous meeting to amend draft article 14 to include language inspired by article 17 of the Rome Statute of the International Criminal Court, on issues of complementarity. The question raised by Mr. Tladi regarding who would determine whether the State of the official was willing and able to conduct genuine proceedings had also been a critical issue in the negotiations leading to the adoption of the Rome Statute. In that context, she wished

to refer to the established practice, which had been codified in, for instance, the Council of Europe Convention on the Prevention of Terrorism.

According to article 21 (3) of the above-mentioned Convention, States parties in general had no obligation to extradite a person if he or she risked being exposed to the death penalty, but an exception could apply “if the requesting Party gives such assurance as the requested Party considers sufficient that the death penalty will not be imposed or, where imposed, will not be carried out, or that the person concerned will not be subject to life imprisonment without the possibility of parole”. While that was of course a different situation, it might have relevance for the Commission’s purposes. In such cases, it was for the requested State to decide whether the assurances were sufficient. That approach was along the same lines as the reasoning of the Lisbon Court of Appeal.

Lastly, while draft article 16 certainly could be drafted in different ways, it was important to specify, as draft article 16 (2) did, that the relevant safeguards would be applicable both during the process of determining the application of immunity from jurisdiction and in any court proceeding initiated against the official in the event that immunity from jurisdiction did not apply.

Turning to the future workplan, she said that the Special Rapporteur had identified in paragraph 35 of her sixth report a number of “distinctly procedural questions”, including “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 future workplan seemed to respond to that passage.

In response to the first of the two questions posed in paragraph 176 of the seventh report, she said that she was not fully convinced of the need for a specific provision on a dispute settlement mechanism. Mr. Tladi had made a relevant point in that regard, namely that such a provision would be more appropriate in a treaty. Regarding the second question, she could see merit in the inclusion of recommended best practices that could provide helpful guidance to States in situations where questions of immunity arose in the context of exercise of foreign criminal jurisdiction.

To conclude, she supported sending all the draft articles to the Drafting Committee.

Mr. Jalloh said that he wished to thank the Special Rapporteur for her excellent sixth and seventh reports. He was grateful for the more timely submission of her seventh report, which had allowed members sufficient time to conduct research and had thus contributed to the high quality of the plenary debate.

By the Special Rapporteur’s own admission, the issue of limitations and exceptions to immunity was the most politically sensitive aspect of the topic. He therefore appreciated all her excellent efforts to carefully study and address the issues. The sixth and seventh reports taken together offered a sound foundation for the debate and the drafting of some proposals for consideration by States. He had expected that the first reading of the topic would be completed at the current session, but nevertheless remained hopeful that the Commission would make the substantial progress required to enable completion of the first reading in 2020.

He had two important reasons for saying that. Firstly, it was extremely vital, on a topic that had understandably aroused great interest, that States should have a full year to consider and submit their written observations on a full set of provisionally adopted draft articles accompanied by commentaries. For their part, African States had for the past several years been associated with the global legal and political debate on the question of immunity, including concerning the issue of immunity of State officials from foreign criminal jurisdiction. The same was true in relation to the exercise of jurisdiction of the International Criminal Court. Various States had submitted written responses to the Commission’s questionnaires and requests for information concerning their practice. However, it was striking that although as a group they had been emphatic about respect for the immunity of State officials from foreign criminal jurisdiction over the previous two decades, and although they were engaged in the political and legal debate, including exploring the possibility of an advisory opinion of the International Court of Justice on the

question, they seemed not to have been as engaged in the Sixth Committee debate or in providing written submissions on the important topic of immunity. The detailed observations the Commission would request from States, including from the African region, on the entire first reading package would provide the necessary feedback to complete the second reading on the topic in 2022.

Secondly, the timely completion of the project might also have implications for other topics, such as universal criminal jurisdiction, which the Commission had decided to add to its long-term programme of work in 2018. That decision, which had been well received by many States, had also drawn some feedback that had apparently been influenced by concern about the immunity of State officials rather than concern about the universality principle itself. For example, States such as Israel and Iran had highlighted the necessity for strong procedural safeguards to address circumstances where a foreign criminal jurisdiction, using the cover of the universality principle, purported to indict a high-ranking government official of another State who might have a claim to immunity under international law. Keeping in mind the *par in parem non habet imperium* rule, under which there were no hierarchies among sovereigns, providing balanced procedural safeguards under the current topic might go a long way in resolving the concerns that had been raised. Clarity, comprehensiveness and consistency in whatever safeguards the Commission developed might help to avoid the types of legal disputes seen in a number of cases, such as the case concerning the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, which had come before the International Court of Justice. With those concerns addressed by the strong safeguards it was developing, the Commission might be in a position to contribute to a highly confused principle of international criminal law without the distractions of the controversial issue of immunity. After all, although the few cases of universality that were perhaps related to immunity attracted a great deal of attention, they reflected a tiny fraction of the potential for achieving accountability for atrocity crimes using the universality principle.

Since he had not spoken in the debate on the topic during the seventieth session, he wished first to make some observations on the Special Rapporteur's sixth report. He would then address the methodology of her seventh report and make some general observations. Lastly, he would share some preliminary reflections on the draft articles she had proposed. For reasons of time, he would reserve his position on some issues and return to them in the Drafting Committee, where he hoped to be able to present modest proposals for discussion by colleagues.

The Special Rapporteur's sixth report included a discussion of the adoption of draft article 7 in 2017 and the views expressed in that connection by States in the Sixth Committee. Draft article 7 provided that no immunity *ratione materiae* applied to a list of some of the most serious crimes under customary international law. That provision had garnered strong support in the Commission. Many members had not considered that crimes such as genocide and crimes against humanity could be official acts in respect of which immunity should apply. However, as the Special Rapporteur noted in paragraph 8 of the sixth report, the debate in the Commission and in the Sixth Committee had at times been "very heated". Not all States had yet had the opportunity to share their views on draft article 7. Those that had shared their views seemed divided. In that context, the Commission should proceed with caution.

He recalled that draft article 7 had been adopted only provisionally. However, he saw no need to reopen the debate on that provision, its status or the infamous recorded vote. He valued the atmosphere of collegiality that reigned among the members of the Commission, even when they might disagree; their sense of common purpose, even when they sometimes perceived that purpose slightly differently; and their efforts to work on the basis of consensus, even if it was sometimes necessary to resort to voting, which was a perfectly legitimate means of decision-making, if all other options had been exhausted. Those features helped the Commission to discharge its mandate, the object of which was defined in article 1 of its statute as the promotion of the progressive development of international law and its codification. He hoped that the Commission would maintain that wonderful sense of camaraderie, particularly in its work on a topic that was highly sensitive for some colleagues.

The Commission should seek to strike a balance between, on the one hand, sovereignty, the exercise of criminal jurisdiction and the procedural limits imposed by the institution of immunity and, on the other, the contemporary demands of justice, individual accountability and the ongoing efforts of the international community to combat impunity. In 2017, he had been one of those members of the Commission who, as Mr. Murphy had recalled in his statement the previous day, had supported draft article 7 on the understanding that the Commission would address the question of procedural safeguards in that connection. As he had emphasized at the time, procedural safeguards were essential in ensuring that the core goal of fighting impunity, which was the essence of draft article 7, did not become a cover for politically motivated prosecutions, particularly those by the courts of powerful States against the officials of weaker States. That point had been repeatedly stressed both by States themselves and by members of the Commission. If the Commission addressed those concerns, its work on the topic should be capable of making an important contribution to international law.

With regard to procedural aspects, he believed that the Special Rapporteur had generally satisfied the concerns that he and other members of the Commission had raised, particularly with regard to the need to associate strong procedural safeguards with draft article 7, including through invocation and waiver of immunity. To that end, he appreciated the Special Rapporteur’s efforts to solicit proposals from members, both formally and informally, with a view to finding a way forward. He hoped that all those proposals would be carefully examined, particularly in the Drafting Committee.

Turning to the Special Rapporteur’s seventh report, he wished to begin by making two points concerning methodology. First, he would like to thank the Special Rapporteur for her responsiveness to the views expressed by members of the Commission and by States in the Sixth Committee. He appreciated the Special Rapporteur’s efforts to compile relevant State practice. As noted by many members, it was important that, to the extent possible, the Commission’s work should complement the regime of international criminal law established under the Rome Statute and other treaties and instruments.

Second, it had been suggested that the Special Rapporteur should signpost which of the provisions were exercises in the progressive development of international law and which constituted its codification. Similar suggestions had been made in the debate on the topic of succession of States in respect of State responsibility. In his view, the Commission should bear in mind the potential implications of deviating from its well-settled practice in that regard. Soon after its establishment, the Commission had concluded that a clear distinction could not be maintained between the progressive development of international law and its codification. In 1996, the Commission had recommended to the General Assembly that the apparent distinction between the two could be eliminated in any future review of its statute. As he had noted in 2017, the Commission should avoid the tendency to prioritize one over the other. Indeed, the Commission was more likely to achieve an outcome on the topic that was acceptable to all members and the Sixth Committee if it bore in mind the near impossibility of distinguishing between the two. For that reason, regardless of the topic at hand, he did not – as a general matter – favour identifying specific draft articles as belonging to the progressive development of international law and or to its codification.

Turning to the seventh report and the proposed draft articles themselves, he said that he favoured the idea of drafting detailed articles on some aspects of procedural safeguards, particularly if the Commission could provide sufficient content grounded in practice so as to assist States. At the same time, there were other aspects that the Commission should approach with great caution in order to strike the right balance and avoid excessive prescriptiveness. There was an immense and diverse body of domestic criminal and procedural laws that the Special Rapporteur would not have been able to study in its entirety. It was not for the Commission to dictate that States should harmonize those laws, which tended to reflect different legal traditions and even constitutional frameworks, including the manner in which powers were separated among the executive, legislative and judicial branches of government. A one-size-fits-all solution would be unworkable.

He generally agreed with arguments put forward in the sixth and seventh reports in support of draft article 8. In his view, the substance of that draft article seemed to be

supported by the international case law supplied by the Special Rapporteur. The International Court of Justice had asserted, as a "generally recognized principle of procedural law", that questions of immunity were preliminary issues that must be expeditiously decided *in limine litis*. Furthermore, in the case concerning the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, the International Court of Justice had ruled that immunity protected the individual against any act of authority of another State that would hinder him or her in the performance of his or her duties. The Court had further ruled that the determining factor in assessing whether or not there had been an attack on the immunity of a Head of State lay in "the subjection of the latter to a constraining act of authority". In their joint separate opinion in the case, Judges Higgins, Kooijmans and Buergenthal had observed that commencing an investigation on the basis of which an arrest warrant might later be issued did not of itself violate the principle that a Minister for Foreign Affairs enjoyed immunity. He agreed with that proposition and wondered whether the reasons set out in that opinion should not be taken into account.

The formulation of an obligation for the courts of the forum State to consider immunity at an early stage of the proceeding, before any coercive or binding decision had been taken *vis-à-vis* the State official, was more in line with State practice and jurisprudence than the full, automatic application of immunity at the investigation stage. The obligation to consider immunity, as formulated in draft article 8, avoided the paradoxical situation described by the Special Rapporteur in paragraph 60 of the sixth report.

Overall, he was relatively satisfied with the Special Rapporteur's proposed text, although he had a number of modest drafting suggestions that he would share at a later stage.

He wished to express his cautious support for draft article 9, as its substance was supported by some practice. However, the draft article raised several difficulties. Paragraph 1 might have to be reconsidered so as to accommodate the wide differences that existed in State practice. In the United States of America, for example, the Department of State, which was part of the executive branch of the Federal Government, often made suggestions regarding immunity in the context of cases against foreign officials, whether civil or criminal. The courts naturally played a vital role in determining the question of immunity, but they were not necessarily the only "competent authorities". Often, depending on the context, determinations or suggestions by the Department of State regarding the immunity of foreign officials were considered binding or were treated with presumptive weight by the courts. Furthermore, as the executive branch was exclusively responsible for foreign affairs, in accordance with the Constitution of the United States, the determination of immunity was typically treated as binding on the courts and was not even subject to judicial review.

Another example was the State Immunity Act 1978 of the United Kingdom, which stated that a certificate by or on behalf of the Secretary of State was conclusive evidence on any question as to the "person or persons to be regarded as the head or government of a State". That, of course, applied to State immunity.

The "without prejudice" clause in paragraph 1, which provided a role for authorities other than the national courts, might not be entirely adequate. It seemed to set out a general rule and then carve out an exception. However, he was concerned that the clause could be interpreted as leaving to the national laws of States the matter of the participation of other organs of the State. The Commission should not seek to regulate such detailed matters, which differed significantly among legal systems. It should leave such issues to the wide variety of approaches present in different national systems. However, he noted the comments made by Ms. Lehto regarding the case of Prince Nassar of Bahrain in the United Kingdom.

The phrase "competent to exercise jurisdiction" in paragraph 1 could also be problematic. In the United States, the federal courts were required to satisfy themselves that they had jurisdiction over a case. The assessment of whether a court had jurisdiction entailed an assessment of whether immunity exceptions were available that could defeat the exercise of that jurisdiction. If such immunities existed, the courts were not considered as

having the competence to exercise criminal jurisdiction over the case. In other words, in some national legal systems, the exercise of jurisdiction presupposed that immunities did not exist.

Overall, he wished to express his cautious support for the draft article, as he believed that it had been drafted in a way that could be accommodated, and revisited, in the Drafting Committee. He had some drafting suggestions that he would make in the Drafting Committee. He had taken note of the concerns raised by several members, including Mr. Murase, regarding the need to define the terms “foreign State” and “forum State”.

He wished to express his strong support for draft article 10, as its substance seemed to be based on international case law and State practice, particularly in relation to immunity *ratione personae*, as discussed in paragraph 49 of the report. Some members of the Commission had noted further nuances, and Mr. Aurescu and Mr. Tladi had made various points relating to the distinction between functional and personal immunities, with which he could agree.

He generally agreed with the provision itself, although he had some difficulties with the conclusions on the issue of competence, fewer difficulties with those on the issue of timing and some degree of doubt in relation to the effects of invocation. That said, he appreciated that the Special Rapporteur had sought to provide a wide array of treaty law and municipal law relating to the issue. Various cases had been discussed as examples, including the case concerning *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, in which the International Court of Justice had asserted that the requirement to invoke immunity did not place an undue burden on the State of the official. Furthermore, there existed wide agreement that the immunity of State officials from jurisdiction existed for the benefit of the State and not the individual himself or herself. Those aspects were uncontroversial.

State practice might provide support for some of the Commission’s general propositions and offer examples of unusual circumstances that should be borne in mind. The *Samantar v. Yousuf* case, in the United States, was of particular interest in that regard. The Department of State had suggested that the absence of any recognized government to claim immunity on behalf of a former official could be a legitimate reason for refusing functional immunity in a civil case. The Department of State had submitted a statement indicating that any immunity claim was undermined by the fact that the defendant was “a former official of a State with no currently recognized government to request immunity on his behalf”. In other words, there might be scenarios in which the answer to the question was not as self-evident as the Commission was assuming it to be.

Furthermore, he concurred with the Special Rapporteur’s conclusion, in paragraph 34 of the seventh report, that, logically, immunity had to be raised before the competent organ of the forum State in order to be considered. That position had been shared by the former Special Rapporteur on the topic, Mr. Kolodkin. At the same time, he recognized that, as a practical matter, it was sometimes the official of the State, often in contexts in which constraining measures were being or were about to be taken, who claimed the existence of an immunity. In the end, as different views had been expressed on the draft article, particularly with regard to the need to find a better balance between the forum State and the State of the official, he looked forward to hearing the position of the Special Rapporteur in her summing-up. He had found the suggestions made by Mr. Aurescu, Mr. Murase and Mr. Park particularly interesting. At the same time, he was open to considering the suggestions made by other members, including Mr. Hmoud, even if he did not fully agree with them.

In short, he would like once again to express his support for draft article 10. He hoped that the provision and all attendant proposals would be examined in the Drafting Committee.

He agreed with the basic thrust of draft article 11, which was supported by international case law, treaty law, regional and international instruments and some State practice. Waiver of immunity had been dealt with in previous instruments on immunity, including the Commission’s draft articles on diplomatic intercourse and immunities, in particular draft article 30. Other examples included the *Arrest Warrant* case and a whole host of national jurisprudence, including a case of the Supreme Court of Spain, *Gustavo JL*

and Another, and a case of the Court of Appeal of Paris, *Nzie v. Vessah*, in which the Court had stated that the waiver made by a diplomatic agent who was sued before a court "must always be expressly authorized by the Government". Moreover, in 1987, in the case of *In re Grand Jury Proceedings, Doe No. 700*, the United States Court of Appeals for the Fourth Circuit had held that, by analogy with article 32 of the 1961 Vienna Convention on Diplomatic Relations, the current Government of a State also had the power to revoke or waive the immunity of a former Head of State.

The Special Rapporteur cited examples of provisions on waiver of immunity, including the United Nations Convention on Jurisdictional Immunities of States and Their Property. Overall, he therefore found there to be sufficient support for proposed draft article 11, even if there were elements that could be streamlined. Some members, including Mr. Park, had proposed that certain provisions should be merged, and others, including Mr. Nguyen, had made further interesting and thoughtful proposals, for example a proposal for a broader reference to crimes of concern to the international community as a whole.

With regard to draft article 12, he would strongly agree that there was a need to impose an obligation on the forum State to notify the State of the official of its intention to exercise criminal jurisdiction in relation to the foreign official. In his view, that would be a first step that opened the door to a possible cooperation between States, although it should be borne in mind that there would be many cases in which States might not wish to notify others of ongoing confidential criminal investigations. In other, simpler cases, of course, States would be able to share information, as described in paragraph 116 of the report. He was not convinced that the confidential nature of such exchanges was sufficiently accounted for in the report. Nor was he convinced that the Commission had accommodated the broad range of possible relationships that States might have with one another, which might help or hinder cooperation.

In that connection, he was thinking in particular of the relationship between France and Rwanda in the context of the establishment of the potential responsibility of individuals for the 1994 Rwandan genocide. Some investigations of individuals alleged to have perpetrated that crime had been launched in France. Diplomatic relations between France and Rwanda had been so strained at the time that he could not imagine a situation in which the Rwandan authorities would have been notified, even though some of their officials had allegedly been involved. The same could be said of the series of cases involving Rwandan officials before the Spanish courts. Thus, the broad range of specific scenarios that might arise and the circumstances in which there could be tensions between States would have to be taken into account.

With regard to notification requirements, he found draft article 9 (3) interesting and believed that a link could be drawn between it and draft article 10 and article 18 of the Rome Statute, which required the prosecutor to notify the State that would normally exercise jurisdiction over the crimes concerned, in default of which the jurisdiction of the International Criminal Court would be triggered under the admissibility requirements of article 17.

With regard to draft articles 13 and 15, he wished to thank the Special Rapporteur for the examples of treaties that she had provided, including the Inter-American Convention on Mutual Assistance in Criminal Matters, the European Convention on Mutual Assistance in Criminal Matters and the Model Treaty on Mutual Assistance in Criminal Matters.

As the Special Rapporteur had mentioned in her introductory statement, State practice on articles 13 and 15 was inadequate, which had led her to rely on available treaty law. It would be wise to assume that the unavailability of State practice was not based on the lack of State conduct in that area, but perhaps on the confidentiality of such interactions. The Special Rapporteur had noted that point, as had Israel in a statement delivered in the Sixth Committee in 2018 under the agenda item "The scope and application of the principle of universal jurisdiction". He agreed with the Special Rapporteur that there might be circumstances in which there was no obligation to communicate and the refusal to exchange information did not produce any means of culpability or waiver of immunity.

He broadly agreed with draft article 14. He would suggest that the Commission should conduct further discussions on the relationship between the forum State and the

State of the official. In that regard, the Commission could look at the United Nations Convention against Transnational Organized Crime and some of the work of the United Nations Office on Drugs and Crime for inspiration, as the machinery of inter-State cooperation with respect to transnational crimes was fairly well advanced. He had found Mr. Park's proposals with regard to the draft article interesting.

As far as he understood it, the intention of draft article 16 was to ensure the fair and impartial treatment of the official throughout the investigation and potential prosecution process. That draft article aimed to ensure that coercive measures were not taken against the official during the determination of immunity process. As noted in the sixth report, coercive measures could include the seizure of property belonging to the official. Some members had not supported the inclusion of the proposed provision, but he saw a need for it, although he was open to the possibility of it being reformulated.

Overall, he supported the inclusion of draft article 16, as the rights of the alleged perpetrator had been addressed in multiple treaties, such as the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, and the Rome Statute, which distinguished between the rights of suspects in the course of an investigation and the rights of suspects at trial. He agreed with Mr. Murphy that the Commission should consider the possibility of ensuring greater consistency between the project and the draft articles on crimes against humanity, provided that the specificities of the former were taken into account.

Turning to future work, he said that he fully supported the decision to consider the possibility of including a mechanism for the settlement of disputes between the forum State and the State of the official, as had been suggested by one State during the debate in the Sixth Committee. It should be noted that African States had been calling for a similar type of mechanism since 2009 in the context of the discussion of universal jurisdiction and its intersections with the immunity of officials. African States, in other words, had been calling for an international regulatory body that would serve as a mechanism for the settlement of disputes between States in circumstances in which the question of immunity might arise in relation to a foreign official.

He was also favourable to the idea of creating a guide on recommended practices for States. He would be grateful if the Special Rapporteur could clarify the intended aim of such a guide and how it would benefit States more than the draft articles. He was a little concerned that, if the Commission addressed the scenarios already dealt with under national criminal procedure laws, its approach might become too prescriptive. That said, if the Commission exercised due caution, a draft guide to practice that was not binding on States could be very useful for State officials.

It would not be the first time that the Commission had created a guide for States. The Guide to Practice on Reservations to Treaties offered a previous example. It should be made clear that it would be for States to decide how to use any guide that the Commission produced.

Lastly, he was of the view that the Special Rapporteur should examine the intersection of the topic with the work of international criminal tribunals. He understood that some members might believe that, as a specific regime, the work of such tribunals could be excluded. However, the difficulty that he saw was that the International Criminal Court was an entity *sui generis*, as the entirety of the Rome State was predicated on the complementarity principle. The primary responsibility to prosecute rested on national jurisdictions. The States parties to the Rome Statute had a responsibility to prosecute genocide, war crimes, crimes against humanity and the crime of aggression. He could imagine many scenarios in which the exercise of that jurisdiction could implicate a foreign official. The Commission thus risked creating a gap by not addressing the matter. That said, the court itself would have to interpret its authority and the principle of complementarity in practice. In the context of the Rome Statute, article 27 covered the question of irrelevance of official capacity. In any case, it would be useful to explore the potential intersections between the Commission's work on national criminal jurisdictions and the treaty regime of the International Criminal Court.

In conclusion, he was in favour of referring all the proposed draft articles to the Drafting Committee for further consideration.

Ms. Oral said that the Special Rapporteur's seventh report provided a very thorough overview of the many issues underlying procedural matters relating to the topic of immunity of State officials from foreign criminal jurisdiction. She would confine her comments to the seventh report as she had already commented on the Special Rapporteur's sixth report at the Commission's previous session.

She fully supported the objectives of the proposed draft articles, as stated by the Special Rapporteur in her oral introduction, namely to introduce an element of neutrality into the treatment of immunity, to build trust between the forum State and the State of the official and to mitigate instability in international relations. The Special Rapporteur had further explained in her introduction that the proposed procedural rules applied generally to all situations. However, like Mr. Hmoud and Mr. Murphy, when reading the report she had noted the lack of any specific procedural safeguards for the application of draft article 7.

While she continued to fully support draft article 7 and understood that the procedural safeguards for immunities in general were intended to apply to all situations, including the exceptions addressed in that draft article, the potential for abuse in its application should be recognized. It would further strengthen the general objectives of the draft articles to have specific safeguards in relation to draft article 7.

It was her understanding that, as provided in draft article 9, the competent courts of the forum State had the exclusive authority to decide questions of immunity, and that would also apply in the case of draft article 7. For that reason, draft article 7 would not automatically be applied by the unilateral decision of the prosecutor, a concern that had been expressed by Mr. Murphy. She nonetheless remained of the view expressed the previous year that there should be an express provision that applied to the exceptions set out in draft article 7, especially since draft article 9 as it currently stood had certain shortcomings.

Mr. Murphy had cited a number of proposals that had been made by colleagues in 2018 that should be considered. Mr. Nolte, in his statement at the previous meeting, had also reiterated his proposal, which, although it might benefit from some modification, provided a good basis for discussion. It should be made clear that the application of exceptions to immunity in the forum State was subject to mandatory judicial review that could also be appealed to the highest courts. There should be an evidentiary hearing.

The two Special Rapporteurs who had made such valuable contributions to the work on the topic had similar views in many areas: they agreed on the principle that immunity belonged to the State and not the official; the principle of sovereign equality; the need for early invocation of immunity by the State of the official *in limine litis*; and the principle of differentiation between immunity *ratione personae* and immunity *ratione materiae*, a point on which there was a difference of views within the Commission. They also agreed that each State should determine its own internal procedure. The concurrence of views between the two Special Rapporteurs on those key principles was, in her view, important.

Regarding the draft articles in general, she agreed with other members of the Commission that, in some cases, they could be streamlined, simplified and consolidated. Furthermore, given the variety of State practice, the Commission could not be overly prescriptive in respect of internal procedures concerning immunity, which were the prerogative of the States concerned. The objective of the draft articles should be only to provide a common procedural framework and a set of standards for States to adopt in their national legislation.

The option of merging draft articles 8 and 9, as suggested by Mr. Tladi, was worthy of consideration. The first purpose of those two articles was to ensure that the forum State considered any issue of immunity at an early stage. While she agreed with Mr. Murphy that the expression "to consider" was somewhat vague, she understood it to mean that procedural safeguards should be implemented as soon as the forum State became aware of the possibility that immunity of a State official might apply in a criminal case.

The need for *in limine litis* determination of the immunity of a State official had been recognized as a general rule of procedural law by the International Court of Justice in its advisory opinion on *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* and highlighted by the previous Special Rapporteur in his third report. Additional safeguards were provided in draft article 8 (3), by extending its application to all coercive measures. While the draft article was, in principle, perfectly acceptable, Mr. Hmoud and Mr. Murphy had raised the valid point that it should refer simply to "the State" as having the obligation to initiate the procedural process *in limine litis*.

The second purpose of draft articles 8 and 9 was to identify the national bodies competent to decide questions of immunity. Draft article 9 recognized the competent domestic courts of the forum State as having the authority to do so, while also foreseeing cooperation with other organs of the State. While, in most jurisdictions, it was probably the courts that would make the final determination on questions of immunity, practice on the issue was varied, as had been recognized in the Secretariat's 2008 memorandum. The possibility that other branches, such as the executive, might decide on such questions in some States was not recognized in the current draft article 9 and should be reconsidered. The draft articles should take the different practice of States into account and adopt a broader and more flexible approach.

In the case of Turkey, all Turkish permanent members of diplomatic and consular missions, *ad hoc* missions and international missions were issued an identity card specifying their status, and thus implicitly indicating the type of immunity they enjoyed. Heads of diplomatic missions and their family members received one type of identity card, while members of staff received another. The Ministry of Foreign Affairs also had the discretion to issue special identity cards indicating a limited status for other categories of foreign State officials, on the basis of the principle of reciprocity. Foreign State officials who visited Turkey for a short period of time did so with the consent of the Turkish State, which was thus aware of the purpose, duration and plan of the visit. However, the extent of their immunities was not always explicitly known, which left a margin of discretion for the local authorities. If such a foreign official allegedly committed a crime, the relevant departments of the Ministry of Foreign Affairs would be consulted, in accordance with the principle of reciprocity and depending on the relations with the State of the official. The procedure to be followed in such cases was laid out in a circular, which stipulated that the prosecutor should request and make a copy of the person's identity card, but not interrogate him or her. The prosecutor could collect evidence and request an expert examination or investigation, if necessary, and would then communicate the situation to the Ministry of Justice, which would ask the Ministry of Foreign Affairs whether the suspect enjoyed jurisdictional immunities or not. The Ministry of Foreign Affairs could consult the State of the official through diplomatic channels, and would then communicate its opinion to the prosecutor through the Ministry of Justice. If it appeared that the suspect enjoyed immunities, the proceedings would end and all relevant documents would be sent to the Ministry of Justice. Otherwise, the criminal proceedings against the suspect would continue.

Overall, she agreed that the draft articles should make clear that, as soon as the forum State became aware that immunities might apply in a criminal process, the procedure laid out in the draft articles should be applied *in limine litis* and decisions taken by the competent organ in accordance with the national laws and procedures of the State. It was important that, in all cases, questions of the application of any exceptions to immunity should be decided by a court.

Regarding draft articles 10 and 11, there were two common key principles underlying the procedure for both invocation and waiver of immunity. Firstly, in both cases, the authority to exercise those two acts belonged exclusively to the State of the official and not the person of the official. Although Mr. Aurescu had raised an interesting point concerning the procedure to be followed if a foreign official, and not the State, invoked immunity, the reality was that invocation of immunity solely by the official concerned had no effect unless affirmed by the State. Secondly, rules relating to immunity applied differently to immunity *ratione personae* and immunity *ratione materiae*. The Special Rapporteur provided a very convincing analysis in the report as to why different

considerations should apply to those two types of immunity. However, as Mr. Tladi and Mr. Aurescu had noted, that differentiated approach was reflected only in draft article 10 (6). The commentaries should further develop that aspect.

With regard to the question of whether the forum State had the obligation to consider immunity *proprio motu*, she agreed with the approach of the Special Rapporteur, who made a distinction between immunity *ratione personae* and immunity *ratione materiae*. In the case of immunity *ratione personae*, when a member of the troika was the subject of a criminal process, the forum State was under a duty to invoke immunity *proprio motu*. The status of the troika was quite different from that of other foreign officials, including in regard to the effect on diplomatic relations between States. Where other foreign officials were concerned, there were different reasons why the State of the official would not invoke immunity *ratione materiae*, such as not wishing to be implicated in the alleged criminal conduct. Thus, the forum State should not presume that the official enjoyed immunity unless so notified through official channels.

As the Special Rapporteur pointed out in her seventh report, the previous Special Rapporteur was also of the view that there was no obligation for the forum State or court to raise the issue of immunity *proprio motu* in the absence of invocation of immunity by the State of the foreign official; the forum State could thus proceed with the criminal prosecution without considering the question of immunity. She herself would agree with the view of the two Special Rapporteurs that, in the case of immunity *ratione materiae*, the burden fell on the State of the foreign official to invoke immunity, and that there was no need for the forum State or court to consider it *proprio motu*. The competence to invoke and waive immunity rested ultimately with the State of the official, which would make a case-by-case assessment, as noted in the report.

In respect of draft article 11, while she recognized that there were sound reasons for the requirement that waiver of immunity should be express, she wondered, like Mr. Aurescu, about the relationship between non-invocation of immunity and waiver. If waiver of immunity must be express, it seemed that, in the case of functional immunities, the failure of the State official to invoke immunity could eventually result in an implicit waiver of immunity. The previous Special Rapporteur had concluded in his third report that waiver of immunity should be express for the troika, but could be either express or implied for others who enjoyed personal or functional immunity. Furthermore, as stated in the current Special Rapporteur's seventh report, a waiver of immunity could not have retroactive effect and would only be effective from the time it was claimed; a waiver was also irrevocable. The latter point was important for the stability of international relations and of judicial proceedings in the forum State. Mr. Hmoud had made some suggestions on draft article 11 that could be considered in the Drafting Committee.

In respect of draft articles 12 to 15, she agreed that, although the proposals on procedural safeguards for the forum State and the State of the official were *de lege ferenda*, as the Special Rapporteur admitted, they were crucial to the work of the Commission in building the necessary safeguards. She supported those draft articles, although they could perhaps be streamlined.

One point that she wished to address concerned draft article 13 (4), which provided grounds for the State of the official to refuse a request for information from the forum State. Mutual legal assistance agreements, in general, allowed the requested State to refuse compliance with a request for information if, in the opinion of the requested State, compliance would prejudice its sovereignty, security, public order (*ordre public*) or other essential public interest. Similarly, under some such agreements, the requested State could refuse compliance if the offence was regarded by it as being of a political nature, or for reasons that essentially violated human rights. Draft article 13 (4), however, allowed for refusal by the requested State only if the request affected its sovereignty, security, public order or other essential public interest. She did not think that the Commission could, through those draft articles, exclude the other reasons if they were part of existing mutual legal assistance agreements between States. Moreover, existing cooperation and mutual legal assistance agreements might not necessarily be adequate to apply to immunity situations as envisaged in those proposed draft articles. Although she agreed with the proposed approach of using existing procedures, its implementation needed to be discussed.

She therefore supported the permissive and flexible language used in draft article 13 on exchange of information. It might even be preferable for the set of articles to be couched in more recommendatory or hortatory language, rather than obligations.

With respect to draft article 14, she found Mr. Aurescu’s proposal sound; consideration should be given to the idea of including the language of the Rome Statute concerning the circumstances in which transfer of the criminal proceedings to the State of the official could be restricted.

In regard to draft article 16 and specific safeguards for the State official, she was in favour of the inclusion of a draft article affirming the right of the State official to fair and impartial trial and treatment, but she did not understand why paragraphs 1 and 4 were separate. The draft article should be reworded. She found convincing Mr. Tladi’s proposal to include a dispute settlement provision similar to that in draft conclusion 21 of the Commission’s work on peremptory norms of general international law (*jus cogens*).

Regarding future work on the topic, she did not believe that further work was necessary and she looked forward to the completion of the first reading in 2020.

In conclusion, she supported the referral of all the draft articles to the Drafting Committee.

The meeting rose at 4.35 p.m.