

Provisional

For participants only

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International Law Commission
Seventy-first session (second part)

Provisional summary record of the 3485th meeting

Held at the Palais des Nations, Geneva, on Thursday, 18 July 2019, at 10 a.m.

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Visit by the representative of the Asian-African Legal Consultative Organization

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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
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. Rajput said it was unfortunate that the members of the Commission had had so little time to examine the Special Rapporteur's detailed and well-structured seventh report on immunity of State officials from foreign criminal jurisdiction (A/CN.4/729) before discussing it in plenary meeting; the same situation had arisen at the previous session with regard to the sixth report (A/CN.4/722). He did not believe that the Commission could do justice to two such rich and extensive reports in such a limited time. He hoped that the practice of considering a report over two sessions would remain the exception.

In view of the time constraints, he would touch on only some aspects of the report. In the Commission's deliberations, it should keep in mind the positions that Member States in the Sixth Committee had taken on the controversial and politically sensitive draft article 7, as accurately summarized by Mr. Nolte at the Commission's 3483rd meeting. Of course, minor differences of opinion were inevitable on any topic, but draft article 7 was exceptional in that it had divided both the Commission and States, as noted by the Special Rapporteur in paragraph 8 of the sixth report. The Commission should not disregard the request made by several States for greater clarity as to the nature of draft article 7. It should not gloss over the fact that more than a small minority of the Commission members had not supported that draft article and should make every effort to find common ground, as it was precisely that division of the Commission members into a majority and a minority that had attracted criticism from States in 2017 and 2018. He trusted that the members would be able to reach an agreement to clarify the exact nature of draft article 7, which in his view was that of new law. The Commission should consider the suggestion made by France, as reflected in footnote 42 of the sixth report, that it should establish a working group to analyse practice in support of draft article 7.

The sixth and seventh reports addressed several important aspects of procedural safeguards, but overlooked the most critical aspect, namely procedural safeguards in relation to exceptions to immunity *ratione materiae*, as set out in draft article 7. He recalled the Commission's decision, at its sixty-ninth session, to add a footnote to part three (Immunity *ratione materiae*) of the draft articles stating that the Commission would consider the procedural provisions and safeguards applicable to the draft articles at its seventieth session. That footnote had been an integral part of the compromise arrived at in the Drafting Committee in 2017, as had been explained by the Chair of the Drafting Committee at that time. The Drafting Committee had acknowledged, at the outset of its deliberations on draft article 7, the need to consider the close relationship between the question of limitations and exceptions to immunity and the procedural aspects of immunity, and, after having contemplated various ways of reflecting that need in the text of draft article 7, had eventually agreed to do so in a footnote.

It was surprising that the Special Rapporteur had overlooked that important footnote and had made no reference to procedural provisions and safeguards applicable to draft article 7 at the seventieth session. At that time, she had simply noted that the sixth report was provisional in nature and that the seventh report would be more substantive. However, the seventh report also made no mention of the procedural safeguards applicable to draft article 7. Paragraph 19 of the sixth report contained an oblique reference to the matter, stating that only a few States supported a linkage between such safeguards and the limitations and exceptions to immunity. The report did not specify which States had made those comments, but according to his own research, 24 of the 31 delegations that had commented in the Sixth Committee had said that a link between procedural safeguards and draft article 7 was necessary.

While general provisions on procedural safeguards would apply to the entire text, a separate and dedicated provision on procedural safeguards for cases involving exceptions to immunity *ratione materiae* was necessary. The determination of whether immunity existed was generally a procedural and technical exercise and would normally involve identifying the status of the accused person; it could be made at an early stage of the proceedings, without the need for sufficient evidence on the merits of the allegations. The question of

exceptions to immunity *ratione materiae* was of a different nature and could not be equated with normal cases of determination of immunity. A decision by the forum State on exceptions to immunity *ratione materiae* would have to be based on an appreciation of the facts and evidence. Only if there was convincing proof that the foreign official had committed one of the crimes enumerated in the annex to the draft articles could the forum State decide to make an exception to immunity under draft article 7. If a convincing standard of proof was not specified for the invocation of draft article 7, the provision would be susceptible to exploitation for political purposes, and a State could arrest a foreign official simply by alleging that he or she had committed an international crime. Furthermore, in the case of exceptions to immunity *ratione materiae*, the provisions on invocation and waiver of immunity were irrelevant and inconsequential. How could something that did not exist be invoked or waived? In the case of exceptions to immunity *ratione materiae*, the forum State would have to be under a positive obligation to satisfy itself, through convincing proof, that one or more of the international crimes enumerated in the annex had been committed and to inform the State of the official that there were sufficient grounds to make an exception to immunity under draft article 7. Thereafter, if the State of the official was willing to prosecute, the forum State should transfer the proceedings.

He did not agree that the general procedural safeguards proposed in the sixth and seventh reports were sufficient to prevent the politically motivated abuse of draft article 7. Since the proposed procedural safeguards applied only when there was immunity, a State could simply allege that one of the crimes enumerated in the annex had been committed and thus deprive the official of immunity. He hoped that the Special Rapporteur would take that serious omission from her two reports into account and support a provision on procedural safeguards in relation to exceptions to immunity *ratione materiae*. The proposal that Mr. Nolte had made at the previous session and revised at the current one could serve as a good starting point.

Turning to the reports themselves, he said that he agreed with Mr. Hmoud and Mr. Aurescu that, although the arguments they contained were intended to achieve a balance by keeping the sovereign equality of States in mind, in some instances they favoured the rights of the forum State. The Special Rapporteur referred repeatedly to the sovereign equality of States as the theoretical idea underpinning procedural safeguards in relation to immunity. While he agreed with her, the principle of reciprocity should also be taken into account as an equally important theoretical basis for international relations and the law of immunity. In substance he agreed with most of the Special Rapporteur's proposals, but some of them were not consistent with the principle of reciprocity. He agreed with Mr. Nolte and others who had suggested that the structure of the draft articles should be changed. Unlike some members, he agreed with the Special Rapporteur that detailed provisions on procedural safeguards were necessary; shortening them would create an imbalance and reduce the value of the work of the Commission.

He was in general agreement with draft articles 8 and 9. In relation to draft article 9 (1), as had been said by some other members, the question of which authority should determine immunity should be left for each State to decide. It was not for the Commission to stipulate that the courts should have primacy and other organs should play only a cooperative role. He had doubts about the content of draft article 9 (2), as the topic concerned the immunity of State officials and not the immunity of the State. In any event, the question of immunity of the State had already been considered by the Commission in its work on jurisdictional immunities of States and their property.

He hoped that the reference to the primacy of the courts in draft article 9 (1) was not based on paragraphs 73 and 74 of the sixth report, in which the Special Rapporteur claimed that immunity *ratione materiae* would apply only when detentions were carried out by the courts and not through purely executive acts. That was an invitation for States to abuse draft article 7. Often it was the police, without the involvement of the courts, that carried out investigations and took the accused into custody before he or she was presented to the court. Criminal codes in several jurisdictions provided for both judicial custody and police custody. In some cases, especially those that involved allegations of serious fraud, executive organs were allowed to take individuals into custody. There was no reason that

procedural safeguards should not be extended to cases of detention pursuant to executive acts.

In relation to draft article 10, he agreed with the Special Rapporteur that the State of the official did not need to invoke immunity in respect of the troika or members of international missions and that the forum State must consider such immunity *proprio motu*. However, he did not agree with the argument advanced in paragraph 48 of the seventh report that the same could not apply to other State officials. Such officials should be afforded equal treatment, and it should be for the forum State to consider their immunity. The report gave the impression that immunity was inapplicable until it was invoked. However, the presumption of the existence of immunity should continue unless immunity was waived; there should be no need to assert immunity in each case. It would not be unreasonably burdensome for the forum State to proceed on the presumption that immunity applied once it became aware of the status of the foreign official. That presumption could end the moment the forum State established that the official did not enjoy immunity or the State of the official informed the forum State that immunity did not apply or had been revoked. A foreign official could be prosecuted before a national court on the basis of an investigation conducted by the police or other law enforcement authorities or of an order issued by a court. In any of those situations, the first task was to determine the identity of the accused. It was inconceivable that any investigating authority would ascertain the identity of the accused without becoming aware of his or her diplomatic status. Even in the case of proceedings started directly before the courts, the complainant would have to establish the identity of the accused and would inevitably refer to his or her official capacity. Once the individual's status had come to the notice of the relevant authorities, they should communicate with the State of the official through the appropriate channels. Paragraphs 1 and 3 of draft article 10 did not take those aspects into account.

In draft article 10 (4) and draft article 11 (3), diplomatic communication should be mentioned first, before any specific arrangements that the States concerned might have with each other.

He supported paragraphs 1 and 2 of draft article 11 on waivers of immunity. Paragraph 4, however, might create unnecessary conflict between the forum State and the State of the official. Unless an agreement expressly waived immunity, it could not be assumed to contain an implied waiver. The effect of paragraph 4 would be to require States to add provisions on immunity to all treaties that might otherwise be deemed to contain an implied waiver; that would be problematic in relation to existing treaties. He also did not support paragraph 6 of draft article 11 on the irrevocability of waivers of immunity. The fact that the revocation of a waiver might create practical difficulties for the forum State was not a sufficient reason to make waivers of immunity irrevocable.

In order to prevent States from bringing politically motivated proceedings, it was essential to include a clear provision on the need for fair treatment of the official and the adoption of a fair procedure during the investigation and trial in the forum State, as those elements were now a part of settled international human rights law and international humanitarian law. The formulation used in draft article 11 of the draft articles on crimes against humanity could serve as a model for draft article 16. As proposed by Mr. Hmoud, the draft article should stipulate that the invocation of immunity should suspend the criminal proceedings in the forum State.

As to the future programme of work, he agreed that a provision on compulsory dispute resolution, preferably before the International Court of Justice, should be included in the draft articles. The provision could be modelled on the wording used in the draft texts on crimes against humanity and peremptory norms of general international law (*jus cogens*). He was not sure what the Special Rapporteur had in mind when she referred to good practices that could help to solve the problems that arose in the process of determining immunity. If she intended to present a draft text or annex, it would have to be discussed and agreed to in the Drafting Committee, and there might not be sufficient time to agree on such proposals in a single year. The Commission could consider following the approach that had been taken on the topic of identification of customary international law, in which it had drawn on the support of the Secretariat. In his view, the Special Rapporteur could have made a proposal on dispute resolution and sought to enable the Commission to finish the

first reading of the draft articles at the current session, with a view to completing its work on the topic during the current quinquennium.

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

Mr. Hassouna said that the Special Rapporteur's well-researched, well-structured and persuasively argued seventh report continued the analysis of procedural aspects of immunity of State officials from foreign criminal jurisdiction that she had begun in the sixth report. The Special Rapporteur had ably responded to the request by many States in the Sixth Committee and members of the Commission for a more thorough analysis of the topic, including the formulation of draft articles, in the light of the importance of the procedural dimension of immunity. In his view, the topic was not only of great legal importance for States, but also very politically sensitive. The Commission's work on the topic would set precedents in respect of some issues on which few rules existed. The Commission should thus adopt a cautious approach that emphasized State practice to the extent possible in order to promote the emergence of a general consensus with regard to the topic's outcome.

One recurrent theme in the discussion of immunity of State officials from foreign criminal jurisdiction was the need to achieve a balance between two core values of international law: the protection of the sovereign equality of States, on the one hand, and the international community's interest in combating impunity for the most serious international crimes, on the other. In his opinion, however, a third legal interest should also be kept in mind, namely the protection of individual State officials from the politically motivated exercise of jurisdiction. The Commission should send a strong signal to States that their officials enjoyed immunity when performing official acts and that their State sovereignty was thus in no way undermined. At the same time, the fair trial guarantees and human rights of State officials themselves must be protected, and politically motivated trials must be prevented.

As the topic was closely related to other topics that were on the Commission's current or long-term programme of work, including crimes against humanity, peremptory norms of general international law (*jus cogens*) and universal criminal jurisdiction, a common approach should be taken to those topics so as to ensure consistency and harmony among them. The draft articles under consideration should therefore not deviate from provisions on similar matters that were already included in another of the Commission's projects and supported by States, unless there was a compelling reason for them to do so.

At the seventieth session, in his statement on the sixth report ([A/CN.4/SR.3439](#)), he had noted that the immunity of a State official should be considered at an early stage before any coercive measures were imposed that might impede the proper performance of his or her State functions. Almost every delegation that had made a statement on the topic in the Sixth Committee had expressed a similar opinion, which was now reflected in proposed draft article 8. Concerning the material element, or "acts affected by immunity", all acts of a coercive character that prevented a State official from performing his or her functions were subject to immunity. He welcomed the inclusion of that view in paragraph 26 (b) of the seventh report. Although "acts affected by immunity" were touched upon to some extent in proposed draft articles 8 and 9, he would have preferred a clearer provision that included examples of which coercive acts by courts or other national authorities were in violation of the immunity of State officials. Such examples would be helpful for domestic courts and authorities that might turn to the Commission's work in the future in order to determine the immunity of State officials. In the absence of such a provision, he would suggest that the commentaries, at least, should include a definition and examples of the "coercive measures" mentioned in draft article 8 (3).

Regarding the question of who should determine whether immunity applied in a particular case, he stood by what he had said at the previous session and supported the Special Rapporteur's conclusions as summarized in draft article 9. The vast majority of States in the Sixth Committee had supported the conclusion that immunity should be dealt with by sufficiently high-level and competent courts, with a few notable exceptions based on particular features of certain legal systems. He wished to reiterate that he was in favour

of clarifying the definitions of “jurisdiction”, “immunity from foreign criminal jurisdiction” and “immunity *ratione personae*” and “immunity *ratione materiae*”, as those terms were fundamental to the project.

Turning to the seventh report itself, he said that a topic of such overall importance should obviously be based on State practice and on customary and treaty law. Every delegation that had commented on the topic in the Sixth Committee had highlighted how important it was for the project to be firmly grounded in international law. Unfortunately, despite those strong calls to take more State practice into account, since the sixty-eighth session fewer than 10 States had responded to the Commission’s request for comments. Even more disappointingly, not a single State in Asia or Africa had replied, and those States that had done so had provided only general answers. Furthermore, during the debate in the Sixth Committee in 2018 only a few States had provided more information on the procedural aspects of immunity. Most of the delegations had criticized the provisionally adopted draft article 7 and had reserved their substantive comments on procedural issues for the next session of the General Assembly. It was thus clear that the procedural aspects of the topic largely fell into the category of progressive development of international law, as had been mentioned by the Special Rapporteur and other members. Accordingly, the Special Rapporteur should attempt to include as much State practice as possible, since that would help to increase support for the draft articles in the Sixth Committee. Given the difficulty of identifying comprehensive and consistent State practice on the topic, the Commission should focus on both *lex ferenda* and *lex lata*, in accordance with its mandate and its previous work. The Special Rapporteur might therefore consider clarifying, in the commentaries, the approach that she had taken to the topic and the methodology that she had followed in the report.

Another issue that had been discussed at the Commission’s seventieth session and had received wide attention in the Sixth Committee was the relationship between the substantive and procedural dimensions of immunity of State officials, particularly in the context of the controversial and much-debated draft article 7. Several Commission members and States had suggested that much of the criticism of draft article 7 concerned the issue of procedural safeguards. In general, he supported the Special Rapporteur’s view that many of the procedural safeguards proposed in the seventh report would prevent the abuse of criminal jurisdiction by the forum State and ensure legal certainty. However, several members of the Commission had voiced the concern that those safeguards might not be sufficient to protect the States of foreign officials and the officials themselves from the abusive and politically motivated use of the exceptions set out in draft article 7. The proposed safeguards might not even apply if an exception to immunity under draft article 7 was found.

While he shared the concerns of some members that the draft articles reflected a certain imbalance in favour of the forum State’s right to exercise jurisdiction, he was convinced that the problem could be remedied through careful consideration of the suggestions made by some members at the Commission’s seventieth and current sessions. It might be necessary to establish a special procedure whereby the application of draft article 7 would be triggered only if the procedure was followed. Helpful suggestions and drafting proposals had already been made in that regard. Mr. Nolte had put forward a modified version of the proposal he had made at the seventieth session, which should be carefully considered, particularly in the light of the debate in the Sixth Committee. It should be made clear that all the procedural safeguards proposed by the Special Rapporteur also applied to cases involving an exception to immunity under draft article 7.

The invocation or waiver of immunity by the State of the official concerned formed an essential element of those procedural safeguards. In chapter II (B) of the seventh report, the Special Rapporteur explained the concept of invocation of the immunity of State officials, with which he largely agreed. While the immunity of State officials enjoying immunity *ratione personae* must be determined and considered *proprio motu* by the forum State, lower-ranking State officials appeared to be dependent on the invocation of immunity by their respective States. Given that draft article 7 primarily concerned exceptions to the immunity of officials covered by immunity *ratione materiae*, draft article 10 seemed to be an insufficient safeguard, as it introduced a rather arbitrary distinction between State

officials who were protected by immunity *ratione personae* and those who were protected by immunity *ratione materiae*. It was not entirely clear why immunity should be considered automatically for those officials who enjoyed a higher degree of immunity anyway, while other State officials must rely on a timely invocation of immunity by their home States. From the point of view of protecting State sovereignty and individual State officials, he did not find that distinction convincing.

In chapter III of the report, on procedural safeguards operating between the forum State and the State of the official, the Special Rapporteur should not have limited her comparative study on cooperation and mutual assistance in criminal matters to European and inter-American examples. Such frameworks also existed among African and Arab States: the Economic Community of West African States Convention on Mutual Assistance in Criminal Matters, the Southern African Development Community Protocol on Mutual Legal Assistance in Criminal Matters and Protocol on Extradition, and the League of Arab States Convention on Mutual Assistance in Criminal Matters were but a few examples of such agreements. In addition, treaties on cooperation and mutual assistance in criminal matters were often concluded on a bilateral basis. All such agreements should be examined so as to ensure an inclusive and comprehensive analysis of the topic.

On the other hand, he commended the Special Rapporteur on her analysis of other issues such as notification, the exchange of information, the transfer of criminal proceedings, consultations, and procedural rights and safeguards pertaining to the official. He largely agreed with that analysis.

Concerning the text of the draft articles, he said that a definition of “competent authorities” and “awareness” should be included in draft article 8, or at least in the commentary thereto. In some cases, the Special Rapporteur referred to “authorities” instead of the more frequently used term “competent authorities”. Either the usage should be standardized or the reason for the variation should be clarified in the commentary.

Draft article 9 seemed to contain an error: paragraph 2 should refer not to the “immunity of the foreign State”, but to the “immunity of the foreign State official”. In that regard, he agreed with others that, depending on the domestic legal system concerned, not only courts but also other authorities might be involved in determining the immunity of a State official. In any case, such a delicate matter should be dealt with only at the highest level of the competent authorities.

The problematic distinction between invocation of immunity *ratione personae* and immunity *ratione materiae*, while not directly reflected in draft article 10, was at least implied in paragraph 6 thereof. He suggested that the paragraph should be redrafted to obviate the issue.

Draft article 11 should specify that a waiver of immunity must be express in all cases. As the acts of a State official could be separable, the waiver might apply to some but not all of them.

Regarding the procedural mechanisms introduced in draft articles 12, 13, 14 and 15, he generally supported the suggestion that the provisions should be streamlined and perhaps merged into a single draft article. It was important to stress the central role that ministries of foreign affairs played in all such situations through their various diplomatic channels, either formally or informally. In cases concerning the immunity of any official of a foreign State, the respective Ministry of Foreign Affairs was involved and the issue was discussed at the highest level. Information exchange, consultation, cooperation or any other act under draft articles 12 to 15 must under no circumstances be interpreted as an express or implied waiver of immunity.

It was important to consider how draft article 16 (1), which provided that all fair treatment safeguards should be extended to an official whose immunity from foreign criminal jurisdiction was being examined, related to draft article 7, under which the examination of immunity was precluded in specific circumstances. A literal reading of the text as proposed might allow for unfair treatment of foreign officials who had been accused but not yet convicted of any of the crimes specified in draft article 7. The Special Rapporteur should provide more context in the commentary on whether safeguards should

nonetheless apply in cases where immunity was not examined. Draft article 16 could also be modified to require the application of safeguards regardless of whether immunity was being examined in a particular case.

Concerning the future programme of work, while he supported the Special Rapporteur's efforts to make progress, many States in the Sixth Committee had urged the Commission not to rush through a vitally important topic at the expense of consensus. While he agreed that consensus was the preferred way to proceed, it might set an unnecessarily high threshold for the adoption of texts. In the early days of the Commission, decisions had usually been taken by vote, although the practice had subsequently changed in favour of adoption by "common understanding" or by consensus. The Commission had discussed the issue of voting in 1996 and had concluded that, if consensus proved impossible to achieve in the time available, a vote might have to be taken. He recommended such an approach, while keeping in mind that the minority opinion should always be duly reflected in the Commission's work.

He agreed with the Special Rapporteur and others that the topic did not require closer examination of the judgment handed down by the International Criminal Court's Appeals Chamber on 6 May 2019 concerning the appeal filed by Jordan in relation to *The Prosecutor v. Omar Hassan Ahmad Al-Bashir*. However, he would not be opposed to a general examination of the relationship between immunity of State officials from foreign criminal jurisdiction and immunity before international criminal courts and tribunals.

He welcomed the Special Rapporteur's intention to study possible mechanisms for dispute settlement in her final report. That idea should be explored in more detail, as it seemed to be of practical value, especially as consultations might occasionally become deadlocked. An alternative dispute settlement mechanism should at least be available. He also supported further analysis of recommended best practices, while reserving his position on the final form that examples of such practices should take and how they should be included in the next report.

Thanking the Special Rapporteur for her outstanding work, he emphasized the importance of the topic and its practical value for the conduct of State relations, and expressed support for the referral of all the proposed draft articles to the Drafting Committee. He urged the Commission not to shy away from fulfilling its progressive development mandate, even on difficult and politically sensitive topics.

Mr. Huang, noting that his remarks would refer to both the sixth and seventh reports of the Special Rapporteur on immunity of State officials from foreign criminal jurisdiction, said that the topic had again generated intensive debate, demonstrating both its importance and the serious divergence of views that remained on core issues of principle.

With regard to the review of previous deliberations on the topic by the Commission and the Sixth Committee, he agreed with Mr. Nolte and other members that the Special Rapporteur's summary of the views expressed in the Sixth Committee was partial, selective and not factual. The sixth report stated that, in general, States were in favour of listing crimes in respect of which immunity *ratione materiae* did not apply, while the seventh claimed that the inclusion of draft article 7 and its content had received broad support from States. The Special Rapporteur seemed to have ignored the fact that the opposition expressed in the Sixth Committee was significant in terms of both the number of States concerned and their geographical representation.

In addition, the Special Rapporteur appeared to have been selective, instead of impartial, in quoting States' opinions. While acknowledging that the adoption of draft article 7 by vote instead of by consensus had aroused concern among many Member States, she nonetheless argued that voting would not compromise the Commission's reputation. When States that supported her view were in the minority, she tended to overstate the minority view. When the minority view was in opposition to her own, however, she mentioned it only briefly and dismissively. In fact, the number of States that had taken an opposing view had not been negligible: of the 45 delegations that had made statements on the topic in the Sixth Committee in 2017, 26 had directly or indirectly expressed concerns or reservations about the adoption of draft article 7 by vote. Furthermore, the different views expressed by members of the Commission were not fully reflected in the seventh

report. As Mr. Murphy had pointed out, several members had expressed valuable opinions on procedural safeguards at the Commission's seventieth session, but the Special Rapporteur did not seem to have taken them into consideration, which was disappointing.

Commission members devoted particular attention to procedural safeguards because due process had a unique value in criminal proceedings. It supplemented other values, such as seeking international justice and eliminating impunity, and should not be neglected. International law required both substantive and procedural justice. The aim of eliminating impunity must be achieved through due process. Justice without procedural safeguards could not stand firm; substantive justice could not be sought at the expense of procedural justice, which was an inherent requirement of the rule of law and had been affirmed in international and national judicial practice.

Procedural safeguards under the topic at hand should serve three fundamental objectives. First, they should ensure that the basic principles of immunity of State officials from foreign criminal jurisdiction were respected by States, in order to maintain normal relationships and smooth interaction among States. Whether exceptions existed or not, courts should consider the issue of immunity from the very beginning of proceedings and should notify the State of the official in a timely manner. Second, such safeguards should represent a procedural means of ensuring that exceptions to immunity under which jurisdiction could be exercised over foreign officials were not abused, so as to preclude the potential risk of politically motivated prosecutions. States could address that shared concern by respecting the primacy of the jurisdiction of the State of the official, setting a high threshold for initiating criminal proceedings, communicating fully with the State of the official during proceedings, and so on. Third, procedural safeguards should ensure that the legitimate rights of State officials alleged to have committed serious crimes were fully protected.

As some members had stressed, safeguards lay at the core of the draft articles concerning procedural matters. Thus far, despite the Special Rapporteur's analysis of issues such as the consideration, invocation and waiver of immunity, the exchange of information and the transfer of proceedings, no sufficient procedural safeguards had been proposed for the immunity of State officials from foreign criminal jurisdiction. In particular, no specific draft article had been put forward to provide safeguards in relation to the exceptions listed in draft article 7. Mr. Murphy, Mr. Hmoud, Mr. Nolte and Ms. Oral had drawn attention to the issue, and he fully agreed with their views.

The direct effect of draft article 7, which had caused considerable controversy both within the Commission and in the Sixth Committee and to which he had been strongly opposed, was to deprive State officials of the immunity that they should enjoy under traditional international law. The Commission must consider how to establish sufficient procedural rules to ensure that draft article 7 was not abused, and should thus depart from the usual pattern in which substantive issues took precedence over procedural ones. After the provisional adoption by vote of draft article 7 at the sixty-ninth session, he had urged the Commission to set it aside for review at a later stage, in conjunction with procedural safeguards, yet neither the sixth nor the seventh report included specific procedural safeguards in that respect. It appeared that the proposed draft articles concerning procedural safeguards would not be applicable once draft article 7 had been invoked in order to exercise jurisdiction over foreign officials. Mr. Nolte had proposed three conditions that States should be required to meet in order to exercise jurisdiction on the basis of draft article 7, together with a draft article specifically designed as a safeguard, while Mr. Hmoud had proposed an additional draft article that would allow criminal proceedings to be suspended for a reasonable period while consultations took place between the forum State and the State of the official. Those proposals should be considered carefully by the Commission and discussed in detail by the Drafting Committee.

The Special Rapporteur had failed to strike a balance between the right of the forum State to exercise jurisdiction and that of the State of the official to invoke immunity. The seventh report indicated that the forum State had the right to consider and determine immunity and to transfer legal proceedings, but placed less emphasis on the rights of the State of the official. In that respect, he also shared the views of Mr. Nolte, Mr. Murphy, Mr. Hmoud and others.

He agreed with the Special Rapporteur that the forum State should start considering the issue of immunity at an early stage. However, the sixth report seemed to suggest that, if the forum State simply initiated an investigation without taking binding measures against a foreign official, imposing obligations on that person or impeding the discharge of the official's duties, immunity did not need to be considered at that stage because it was not yet affected in practice. Yet the purpose of immunity was not only to guarantee that State officials could discharge their duties, but also to uphold the fundamental principle of "no jurisdiction between equals" under international law, which embodied respect for State sovereignty. Thus, the initiation of legal proceedings by the forum State had the potential to violate the official's immunity and, by extension, to infringe upon the sovereignty of the State of the official, and the issue of immunity must therefore be considered at that time.

With regard to which organ of the forum State had the authority to determine whether immunity was applicable, he disagreed with the Special Rapporteur's view, expressed in the sixth report and reflected in draft article 9, that the courts were the competent organs of the forum State to determine immunity, through procedures established in domestic law. While the courts had a significant role in determining questions of immunity once a case entered the judicial phase, the political and legal systems of States varied considerably, and immunity was connected with relations among States and with foreign affairs, meaning that the administrative authorities often played a significant or decisive part in its determination. The Commission's focus should be on whether a State respected the immunity of foreign officials, as that concerned the overall assumption by a State of its international rights and obligations. The Commission should avoid establishing any rules on which organ was ultimately competent to determine immunity and should leave that decision to the State concerned.

Given that the invocation of immunity was a prerogative of States, draft article 10 (1) should be worded more forcefully. The Special Rapporteur had considered immunity *ratione personae* separately from immunity *ratione materiae*, believing that the courts of the forum State must consider the former *proprio motu* but the latter only if it was invoked by the State of the official. In his view, both types of immunity should be considered by the courts *proprio motu*. When a forum State intended to initiate criminal proceedings against a foreign official, it normally confirmed the official's identity with his or her State. At that stage, the State of the official had not yet become aware of the case, let alone invoked immunity, whereas the forum State was already considering the element of immunity. The invocation of immunity should in no case be regarded as a precondition for the application of immunity.

While he supported the Special Rapporteur's general rule that waivers of immunity must be explicitly stated, as stipulated in treaties such as the Vienna Convention on Diplomatic Relations and as commonly observed in State practice, the indication, in paragraph 87 of the seventh report and in draft article 11 (4), that a waiver that could be deduced from an international treaty should be deemed an express waiver was somewhat dubious. In his opinion, the essential issue was whether a State was willing to exercise its right to waive immunity. Even if the State voluntarily accepted the provisions of relevant treaties from which a waiver of immunity could be deduced, the matter fell within the domain of treaty law and had nothing to do with the general rules on immunity that were addressed under the topic at hand. He therefore suggested that paragraph 4 of draft article 11 should be deleted.

Communication, consultation and transfer of proceedings between the forum State and the State of the official were important issues. In striking a balance between the exercise of jurisdiction by the forum State and the claim of immunity by the State of the official, and to prevent the politically motivated abuse of litigation, smooth communication between the two States was key, as was the establishment of a mechanism for that purpose. The Commission should seriously consider Mr. Hmoud's suggestions in that regard, including the suggestion that consultations should have a suspensive effect on criminal proceedings in the forum State. On the issue of transfer of proceedings, he agreed with the members who had taken the view that both the forum State and the State of the official were entitled to request such a transfer. He also agreed with Mr. Nolte and Ms. Galvão Teles that emphasis should be placed on the complementarity or subsidiarity of the forum

State's exercise of criminal jurisdiction over foreign State officials and that the primacy of the jurisdiction of the State of the official should be respected. The draft article proposed by Mr. Nolte could serve as a basis for discussion in the Commission and the Drafting Committee.

Concerning the relationship between the topic and the International Criminal Court, he recalled the Commission's agreement, reached at its sixty-fourth session, that the discussion should be limited to the immunity of State officials from criminal jurisdiction in foreign States. The topic did not cover the immunity of State officials from the jurisdiction of international criminal courts or tribunals, nor did it include either the immunity enjoyed by certain types of official, such as diplomatic and consular staff, or the determination of exceptional circumstances concerning immunity through treaties between States. In the sixth report, the Special Rapporteur expressed the view that the Commission should analyse the effect that the obligation to cooperate with international criminal tribunals might have on the immunity of State officials from foreign criminal jurisdiction; however, the immunity of State officials from the jurisdiction of international criminal courts or tribunals and from the criminal jurisdiction of foreign States formed two parallel lines that did not intersect. The purpose of the topic was to discuss general rules relating to immunity of State officials from foreign criminal jurisdiction. Even though some States had treaty obligations to cooperate with international criminal courts or tribunals, which might affect the immunity of foreign officials from criminal jurisdiction, the matter was one of treaty law and had no direct relationship with the topic.

Finally, he thanked the Special Rapporteur for her work and agreed to refer draft articles 8 to 16 to the Drafting Committee.

The meeting was suspended at 11.25 a.m. and resumed at 12.10 p.m.

Cooperation with other bodies (agenda item 10) *(continued)*

Visit by the representative of the Asian-African Legal Consultative Organization

Mr. Gastorn (Secretary-General of the Asian-African Legal Consultative Organization (AALCO)) said that AALCO deeply cherished its long-standing and mutually beneficial relationship with the Commission and fully recognized the valuable contributions that the latter had made over the previous 71 years in pursuance of its mandate, namely the promotion of the progressive development of international law and its codification. As members were aware, in addition to its role as a consultative body, AALCO was statutorily mandated to examine topics that were under consideration by the Commission, to forward its views on those topics to its member States and to make recommendations to the Commission based on input from the member States.

AALCO had had the privilege to host members of the Commission at its annual sessions. For instance, Mr. Hassouna, Ms. Lehto, Mr. Murase, Mr. Nguyen and Mr. Valencia-Ospina had attended the fifty-seventh annual session of AALCO, held in Tokyo in October 2018, and had briefed member States on the deliberations that had taken place during the Commission's seventieth session and on its current programme of work.

At that session of AALCO, the discussion under the agenda item "Topics on the Agenda of the International Law Commission" had yielded a number of comments from member States. On the topic "Immunity of State officials from foreign criminal jurisdiction", Japan had expressed the view that the Commission's work on the topic had not clarified how the focus on procedural aspects of immunity would be beneficial in reducing the risk of abuse of the exceptions to immunity and that a deeper analysis of State practice was imperative. The delegation had also expressed the hope that all the draft articles would be adopted by consensus. India had stated that it would prefer immunity to be examined as a concept, without reference to questions of immunity that arose in relation to the International Criminal Court. China had said that the forum State should consider the immunity issue as soon as legal proceedings were instituted so as not to affect the exercise of the foreign official's functions. It had also indicated that the choice of which State organ should be competent to determine immunity fell outside the scope of international law and that the Commission should therefore refrain from setting a uniform rule on that matter.

On the topic “Peremptory norms of general international law (*jus cogens*)”, the Islamic Republic of Iran, commenting on draft conclusion 10 (1) as contained in the third report of the Special Rapporteur on the topic (A/CN.4/714), had stated that the language “does not create any rights or obligations” should be clarified or the sentence should be deleted as being redundant. With respect to draft conclusion 13, it had stated that the mere existence of a *jus cogens* rule in a treaty, including a compromissory clause, did not render reservations to it invalid, as had been reaffirmed by the International Court of Justice in numerous cases, such as *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*. Regarding draft conclusion 17, the delegation was of the view that, while the importance of Security Council resolutions and the necessity of an express reference thereto were undisputed, resolutions and decisions of other international organizations should be taken into account with due care. It had suggested that the word “including” in both paragraphs should be replaced with the words “in particular” and that the word “resolutions” should be accompanied by the words “decisions, directives and other instruments as appropriate”.

Referring to draft conclusion 17, Viet Nam had stated that, in addition to binding resolutions, intergovernmental organizations could also produce binding decisions or guidelines or take other binding actions. The Special Rapporteur might wish to clarify whether that draft conclusion covered all binding acts by international organizations.

China had expressed the view that the definition of “an offence prohibited by a peremptory norm of general international law (*jus cogens*)” was still vague and ambiguous. It did not support the incorporation of any offence prohibited by *jus cogens* into the scope of the exceptions to immunity *ratione materiae* of State officials from foreign criminal jurisdiction, as enumerated in draft article 7 of the draft articles on that topic. In general, China considered that the Commission should be extremely prudent in its approach to the topic of peremptory norms of general international law (*jus cogens*) and that its work must be based on the relevant provisions of the 1969 Vienna Convention on the Law of Treaties and on sufficient State practice. The focus should be on the codification of *lex lata* rather than the formulation of new law. Similarly, the Republic of Korea had taken the view that, given the exceptional characteristics of peremptory norms of international law, the analysis of relevant State practice and judicial precedents should be more rigorous and thorough than in the case of other items on the Commission’s agenda.

On the topic “Succession of States in respect of State responsibility”, Viet Nam had expressed reservations to paragraphs 154 and 155 of the Special Rapporteur’s second report (A/CN.4/719) in relation to the manner in which the 1995 agreement that had been concluded between the United States of America and Viet Nam to settle land expropriation claims was interpreted. Furthermore, with respect to draft article 6 (1), it had expressed its view that the rule of non-succession to State responsibility still applied and had therefore suggested that the wording of the paragraph should be revised to read “Obligations arising from an internationally wrongful act committed before the date of succession of States shall be attributed to the predecessor State unless the successor State accepts to be bound by such obligations”.

On the topic “Subsequent agreements and subsequent practice in relation to the interpretation of treaties”, China had noted that subsequent practice could be regarded as an authentic means of treaty interpretation under article 31 (3) of the 1969 Vienna Convention only if it reflected the parties’ true and common understanding of how the treaty was to be interpreted. Other subsequent practice could play only a limited role as a supplementary means of treaty interpretation under article 32 of the Convention.

Concerning the topic “Protection of the environment in relation to armed conflicts”, Viet Nam had expressed full support for the continuation of the Commission’s work on the topic, which involved the definition of State responsibility for dealing with remnants of war, including environmental damage. The delegation had expressed a preference for the use of the words “occupying Power” instead of “occupying State” in the draft principles on the topic, and had taken the view that different forms of occupation and the environmental protection obligations corresponding to each form should be elaborated upon further. On the topic “Provisional application of treaties”, the delegation had noted that, although draft guideline 9 (3) provided that that draft guideline was without prejudice to the application of

relevant rules set forth in part V of the 1969 Vienna Convention, part V of that Convention dealt only with treaties that were already in force, whereas the draft guidelines governed treaties that were being provisionally applied. That led to an uncharted area of difficulty concerning the legal consequences of serious violations of provisionally applied treaties. Therefore, the Special Rapporteur and the Commission should carefully evaluate that issue in order to determine the applicability *mutatis mutandis* of the 1969 Vienna Convention.

With respect to the topic “Protection of the atmosphere”, Japan had noted that the understanding on the topic that the Commission had reached in 2013, which served as a condition and guiding principle for the topic’s consideration, had been duly respected. It had questioned, however, whether the content of the understanding needed to be repeated in the draft guidelines. The Commission should therefore discuss, when it considered the draft guidelines on second reading, whether all wording to that effect, including the final preambular paragraph and draft guideline 2 (2) and (3), should be deleted. India had stated that, while it appreciated the Special Rapporteur’s suggestion on cooperative compliance mechanisms, it understood that the obligations under international law referred to in the draft guidelines meant, for each State, the ones agreed to in international instruments to which that State was a party. The draft guidelines thus did not in themselves create binding international law. The Republic of Korea had noted that the draft guidelines should not interfere with relevant political negotiations on other environmental issues and should not seek to fill gaps in existing treaty regimes.

On the topic “Identification of customary international law”, China had stated that a rigorous and systematic approach should be taken and that widespread State practice must be examined comprehensively and thoroughly in the identification of customary international law, which was an important source of international law. It had emphasized the unacceptability of the selective identification of such law or the lowering of the threshold for identification in the interest of a particular country. Viet Nam had pointed out that, while conclusion 8 stated that the relevant practice must be general but that no particular duration was required, that wording could prove to be problematic in the case of the persistent objectors referred to in conclusion 15, when the specific time required in order for a customary international rule to arise was open to dispute. Viet Nam had therefore requested the Special Rapporteur to elaborate further on the matter.

At its fifty-seventh session, AALCO had congratulated all the Special Rapporteurs and the Commission in general for their work and had acknowledged the importance of the topics under consideration. As always, AALCO had been an important advocate of the Commission’s work and would continue to follow the latter’s activities and endeavour to further strengthen the relationship between the two bodies in the years to come.

On the occasion of its seventy-first anniversary, the Commission should endeavour to increase the number of special rapporteurs who came from the regions represented by AALCO, namely Asia and Africa, in order to better reflect its current composition and the reality on the ground. He also wished to invite the members of the Commission to attend the upcoming fifty-eighth annual session of AALCO, which was likely to be held in Dar es Salaam, United Republic of Tanzania, in October 2019. An official invitation would follow once the related logistical arrangements had been finalized. Lastly, he reiterated the commitment of AALCO to cooperating with the Commission, in keeping with the mandate entrusted to it by its member States.

Mr. Huang said that the statement made by the Secretary-General of AALCO attested to the continuous attention paid by that organization to the Commission’s work and the efforts that AALCO had made to support that work. As the sole intergovernmental legal consultative organization operating in the Asia-Pacific region, AALCO worked diligently to promote exchanges of views and cooperation between its member States and to make their voices heard in the field of international law, while making a key contribution to that field in its own right. Pursuant to its mandate, AALCO had put forward many proposals and recommendations and had made it easier for the Commission to draw upon the views of Asian and African States on the development of international law. He trusted that AALCO would continue to play a prominent role in encouraging Asian and African States to participate in that endeavour. Given that AALCO would be represented at an upcoming colloquium in Beijing on the role of developing countries in advancing international law, a

subject that the Commission itself had begun to discuss, he would like to hear more about what AALCO perceived that role to entail.

Mr. Hassouna said it was timely that the fifty-seventh annual session of AALCO had taken place just before the Sixth Committee had met in New York, as that had provided AALCO member States with an opportunity to deepen their understanding of the topics under consideration by the Commission and to better coordinate their approach to the ensuing Sixth Committee debate. He hoped that a similar schedule could be followed in 2019 and beyond, with a view to increasing the involvement of Asian and African States in the progressive development of international law and its codification. The Commission had discussed the need to increase the number of special rapporteurs from Asian and African countries in the context of its discussions on methods of work, and it was prepared to take steps in that direction. He understood that issues relating to the Commission's work were also discussed by specific working groups within AALCO. It would be helpful to know which topics they discussed and to learn more about their activities in general.

The fifty-seventh annual session of AALCO had also provided Asian and African countries with an opportunity to discuss legal issues that were not on the Commission's agenda but were nonetheless significant for those regions, such as the issue of free trade agreements in Africa and their relationship with the legal framework of the World Trade Organization following the launch of the African Continental Free Trade Area. He encouraged AALCO to continue to discuss contemporary legal issues.

Mr. Murase said that, in the 1970s and early 1980s, AALCO had played an impressive role in international law-making, having developed new concepts such as the exclusive economic zone, which had later been codified in the United Nations Convention on the Law of the Sea. AALCO should, however, consider stepping up its efforts to encourage its member States to ratify any conventions that might be drafted on the basis of the Commission's outputs, such as the draft articles on the protection of persons in the event of disasters, especially in view of the susceptibility of Asia and Africa to natural disasters, and the draft articles on the prevention and punishment of crimes against humanity. AALCO should not allow its focus on the development and codification of international law to detract from the follow-up action required in respect of the Commission's final products.

Mr. Tladi said that he always appreciated the input that AALCO provided and found the summary of the views expressed by its member States to be particularly useful. He agreed that there was a need for the representation of a wider variety of regions among the members of the Commission who served as special rapporteurs. Upon studying the verbatim record of the statements made at the fifty-seventh session of AALCO, he had noted that statements by African member States were few and far between. He wondered whether AALCO was aware of that issue and how it intended to bolster the participation of that group.

Mr. Valencia-Ospina said that he appreciated the invitation that he, as Chair of the Commission during its seventieth anniversary year, and four other members of the Commission had received to take part in the fifty-seventh annual session of AALCO. He also wished to congratulate AALCO for its significant contribution to the Commission's work, as exemplified by the important role that it had played in the adoption of the Vienna Convention on the Law of Treaties. He looked forward to receiving input from AALCO in relation to the topics "Protection of persons in the event of disasters", which the General Assembly had included in the provisional agenda of its seventy-fifth session, to be held in 2020, and "Crimes against humanity". In respect of both of those topics, the Commission had recommended that the outcome of its work should be used to draft an international convention.

It was particularly opportune that the annual sessions of AALCO were held shortly before those of the General Assembly. The former not only served as a dress rehearsal of sorts, but also provided an opportunity to begin a dialogue and to clarify the member States' positions on the various topics considered and recommendations made by the Commission.

Mr. Rajput said that he welcomed the fact that AALCO was conducting training sessions for officials from its member States. Noting that, despite an increase in the

participation of African and Asian States in the work of the Sixth Committee, the Commission continued to receive comparatively few written submissions from such States, he asked how AALCO might use its position to encourage greater involvement.

Mr. Hmoud said that cooperation between the Commission and AALCO was extremely important. With that in mind, he would be interested in knowing what further steps AALCO could take to follow up on the Commission's work.

Mr. Park, noting that relatively few States had commented on the Commission's work during the most recent annual session of AALCO, said that AALCO member States should be encouraged to make written submissions, particularly if they chose not to make statements at the annual sessions.

Mr. Jalloh, noting that it would be helpful for AALCO to engage with the topics considered by the Commission at all stages of the Commission's work, particularly those topics that were of special relevance to African and Asian States, such as "Protection of persons in the event of disasters" and "Expulsion of aliens", said that AALCO should take advantage of the willingness of Commission members to share their expertise.

Ms. Oral said that she wished to congratulate the Secretary-General of AALCO on the excellent work that he had carried out since assuming the leadership of that organization. The Commission's decision to include the topic "Sea-level rise in relation to international law" in its programme of work provided an opportunity for AALCO and the Commission to strengthen their cooperation and dialogue.

Ms. Escobar Hernández, noting that, at the most recent annual session of AALCO, four member States had commented on the topic "Immunity of State officials from foreign criminal jurisdiction", and that there had been little response from AALCO member States to questions put to them by the Commission in relation to the topic, asked whether AALCO had considered circulating questionnaires of its own, or requesting member States to submit reports, and whether it could urge those States to make written submissions to the Commission in order to explain their practice and positions with regard to the topic.

Mr. Cissé said that he would appreciate an explanation of why no African States had participated in the debate on the Commission's work during the most recent annual session of AALCO, even though some of the topics were of great relevance to Africa, such as crimes against humanity, the protection of the environment in relation to armed conflicts and the immunity of State officials from foreign criminal jurisdiction.

Mr. Gastorn (Secretary-General of the Asian-African Legal Consultative Organization) said that he had taken note of the comments and recommendations made by members of the Commission, which would help him to define some of the future activities of AALCO.

Regarding the colloquium that he would be attending in Beijing on 29 July 2019, he was of the view that it was important to identify and respond to emerging trends in international law, which was a dynamic body of law. Certain emerging issues were of particular interest to African and Asian States. One example was the role of non-State actors, who were key players in many of the 42 ongoing conflicts worldwide.

State practices and regional organizations could play a part in defining and shaping understandings of existing norms of international law. While the role of international law was being challenged in some circles, it was being supported and reinforced in others. The colloquium would provide AALCO with a valuable opportunity to hear the views of other stakeholders.

One of the strategies that AALCO implemented to help to fulfil its mandate was to establish open-ended working groups on specific topics. There were currently two active working groups, one on customary international law and the other on international law in cyberspace, and there would soon be a third, on marine biodiversity beyond national jurisdiction. One of the aims of the working groups was to reach common ground on important issues. The working group on international law in cyberspace would be holding its fourth meeting from 2 to 4 September 2019, at which it would discuss the responses received to a questionnaire that it had circulated among the member States.

AALCO had experience in drafting guidelines and instruments on issues that were of interest to its member States. However, in general, it sought to complement, rather than duplicate, the efforts of other international organizations.

The fact that, at the most recent annual session of AALCO, no African States had made statements under the agenda item on the work of the Commission should not be interpreted as indicating a trend. On other occasions, quite a few African States had expressed interest in particular topics. Nevertheless, he would continue to encourage all member States to stay involved in the work of AALCO and to respond to questions that were put to them.

AALCO appreciated the participation of members of the Commission in capacity-building activities and would continue to count on their support in that regard. It took advantage of opportunities to strengthen its links with the Commission whenever possible. With that in mind, it looked forward to cooperating with the Commission on the topic “Sea-level rise in relation to international law”. In 2018, AALCO had organized a special session in New York on the impact of sea-level rise on sovereignty.

AALCO would be happy to circulate questionnaires on any topic among its member States. In order to boost the likelihood of receiving responses, the Commission might wish to provide up-to-date information on its work in advance of the fifty-eighth annual session of AALCO. At the fifty-seventh session, he had received a mandate from the member States to propose topics of interest to African and Asian States for inclusion in the Commission’s programme of work. That mandate demonstrated the significance that AALCO attached to the Commission’s work.

The meeting rose at 1.20 p.m.