

Provisional

For participants only

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International Law Commission
Seventy-first session (second part)

Provisional summary record of the 3486th meeting

Held at the Palais des Nations, Geneva, on Friday, 19 July 2019, at 10 a.m.

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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. Hassouna
Mr. Hmoud
Mr. Huang
Mr. Jalloh
Mr. Laraba
Ms. Lehto
Mr. Murase
Mr. Murphy
Mr. Nguyen
Mr. Nolte
Ms. Oral
Mr. Ouazzani Chahdi
Mr. Park
Mr. Rajput
Mr. Ruda Santolaria
Mr. Saboia
Mr. Tladi
Mr. Valencia-Ospina
Mr. Vázquez-Bermúdez
Mr. Wako
Sir Michael Wood
Mr. Zagaynov

Secretariat:

Mr. Llewellyn Secretary to the Commission

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

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

Mr. Zagaynov said that he was grateful to the Special Rapporteur for her seventh report on immunity of State officials from foreign criminal jurisdiction (A/CN.4/729), which had sparked a thorough and engaging debate. At the current session, the Commission faced the challenge of considering a number of procedural issues that played an important role in the application of the immunity of State officials. During the debate, some members, including Ms. Oral, had compared the current Special Rapporteur's approach with that of the former Special Rapporteur on the topic, Mr. Kolodkin. The current and the former Special Rapporteurs agreed on a whole host of issues, but there were others on which they had adopted divergent, if not diametrically opposed positions.

In his statement, he wished first to concentrate on those draft articles that were based on the analysis contained in the seventh report. He would then make some more general comments.

The first question that he wished to address was that of invocation of immunity. The Special Rapporteur noted that, in relation to individuals who enjoyed immunity *ratione personae*, the authorities of the forum State should consider and decide the question of immunity *proprio motu*, without the need for its invocation by the authorities of the State of the official.

The Special Rapporteur noted that "the situation is different in the case of immunity *ratione materiae*, where the fact that an individual possesses all the normative elements of such immunity cannot necessarily be known autonomously by the organs of the forum State". Thus, it was in the interest of the State of the official to claim the immunity that one of its officials might enjoy.

In that regard, the current Special Rapporteur's conclusions were in accordance with those set out in the former Special Rapporteur's third report on the topic (A/CN.4/646), which also dealt with the question of invocation of immunity. He himself was also in full agreement. The proposed approach also aligned with the position of the International Court of Justice, including in its judgment in the case concerning *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*.

Of course, that did not mean that the State competent to exercise jurisdiction could not refrain from exercising it against an official of a foreign State and recognize that he or she enjoyed immunity. That said, it could hardly be said that the forum State had an obligation to refrain from doing so on its own initiative, particularly given that such a decision was connected with the matter of the attribution of the act to the State of the official. It seemed that, if the State of the official did not invoke the latter's immunity *ratione materiae*, despite all the elements being present and its having been duly notified, that fact might be of decisive importance to a conclusion that there was no immunity.

The Special Rapporteur noted that, for such invocation to produce the desired effects, "the State should formulate it as soon as it is aware that the authorities of the forum State wish to exercise criminal jurisdiction over one of its officials".

With regard to immunity *ratione personae*, draft article 10 (6) reasonably provided that: "In any event, the organs that are competent to determine immunity shall decide *proprio motu* on its application in respect of State officials who enjoy immunity *ratione personae*, whether the State of the official invokes immunity or not."

Some members of the Commission, including Ms. Galvão Teles and Mr. Hmoud, had highlighted a contradiction in the wording of draft article 10. The Special Rapporteur emphasized that immunity was invoked on the basis of a right rather than an obligation on the part of the State of the official. However, paragraph 2 of that draft article provided that: "Immunity shall be invoked as soon as the State of the official is aware that the forum State intends to exercise criminal jurisdiction over the official." In his view, the text of those provisions would benefit from redrafting.

With regard to waiver of immunity, the section of the report on the provisions of international treaties that could be considered to be waivers of immunity was noteworthy. The relevant condition set out in paragraph 87 of the report was met “if the text of a treaty contains an express provision on waiver of immunity or on the lifting or non-applicability of immunity from the jurisdiction of the other States parties”.

The Special Rapporteur also noted in that paragraph that the States parties to a treaty could waive an immunity “if it could be clearly deduced from the treaty that the States parties have an obligation to cooperate in an unrestricted manner to prosecute any person who is subject to their jurisdiction or is a national of theirs (including a State official) and the State of the official does not exercise its own jurisdiction”.

In his view, that provision directly contradicted draft article 11, which stipulated that an “express waiver” was a waiver that could be “deduced clearly and unequivocally from an international treaty” and that, as a general rule, waivers must be “express and clear”.

The Special Rapporteur herself had referred to the judgment of the International Court of Justice in the case concerning the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, in which the Court had held that, “although various international conventions on the prevention and punishment of certain serious crimes impose on States obligations of prosecution or extradition, thereby requiring them to extend their criminal jurisdiction, such extension of jurisdiction in no way affects immunities under customary international law”.

Several members of the Commission, including Mr. Murphy, Mr. Nolte, Mr. Rajput and Mr. Tladi, had expressed doubts about the current wording of draft article 11 (4). In that regard, he believed that, if an international treaty to which a State was a party did not contain express provisions on waiver of immunity, it should not be presumed that the State had agreed to the exercise of foreign criminal jurisdiction against its officials.

The Special Rapporteur noted in paragraph 98 of the seventh report that “a waiver must be taken to refer to the criminal process and criminal proceedings as an indivisible whole”. However, in some cases, waiver of immunity was appropriate only for a particular category of acts. For example, a State might waive the immunity of one of its officials in relation to his or her appearance as witness, but it could hardly be said that such waiver automatically encompassed a situation in which charges were subsequently brought against the official concerned.

With regard to the invocation of immunity once a waiver had been effectuated, the Special Rapporteur noted that the waiver was irrevocable unless the forum State had the intention to exercise criminal jurisdiction in respect of new acts distinct from those to which the waiver pertained. If immunity had not been declared at the pretrial investigation stage, it would seem that it could be invoked at the trial stage. However, in that case, procedural actions that the forum State had already carried out should not be regarded as having violated the rules on immunity.

With regard to draft article 13, he agreed that, for the purpose of exchange of information, the channels and procedures set out in international cooperation and mutual legal assistance treaties could be used. He could also agree with the Special Rapporteur’s statement in paragraph 134 of the report that “the participation of the State of the official in the exchange of information process cannot in any way be construed as recognition of the competence of the courts of the forum State or as an implied waiver of the immunity of its official from criminal jurisdiction”.

However, he did not fully understand the reasons for the Special Rapporteur’s decision to limit the requests that could be refused to those that affected a State’s sovereignty, public order (*ordre public*), security or essential public interests. At the same time, other well-known grounds of refusal, such as the use of jurisdiction for political or discriminatory purposes, were also mentioned in the report.

Draft article 14 concerned the transfer of criminal proceedings from the forum State to the State of the official. In its future work on the topic, the Commission might wish to address the ideas expressed by Ms. Galvão Teles and Mr. Nolte regarding the use of the concept of “subsidiary jurisdiction”.

It would be useful to develop the provisions on fair and impartial treatment of the official, as currently contained in draft article 16. He agreed with the Special Rapporteur's statement in paragraph 156 of the report that "any official who is faced with the exercise of criminal jurisdiction in a State other than the State which has granted him or her the status of 'official', must, like anyone else, enjoy the procedural rights and safeguards recognized under international law, which include the concept of a 'fair and impartial trial'". It was true that such rights and safeguards were widely recognized and firmly established in contemporary international law, including international human rights law, international criminal law and international humanitarian law. However, the establishment of such rights had nothing to do with the problems arising from the proposed exceptions to immunity.

Consideration should not be given to creating a new category of officials with specially protected rights. At the same time, the officials of foreign States should not suffer discrimination or be prosecuted on political grounds. Mr. Murphy's comments regarding the possibility of using the analogous wording that had already been agreed in the context of work on the topic of crimes against humanity deserved consideration. He himself believed that, although there might be differences on certain aspects, it would on the whole make sense to adopt a consistent approach towards the issue.

Turning to more general comments, he said that, in their statements, many members had once again revisited the consequences of the decision to adopt draft article 7 in 2017.

No one could doubt that the interactions between the Commission and the Sixth Committee played a unique role in enabling the former to achieve a successful outcome in its work. The positions expressed by delegations often reflected State practice and *opinio juris*. For that reason, it was important that the positions of States, particularly with regard to especially sensitive issues, were analysed as carefully as possible and were reflected as fully as possible in reports.

As he had in 2018, he wished to note once again that the vote in 2017 and the decision not to take into account the opinion of a significant number of members might have major negative consequences for the Commission's future work. The Commission should pay serious attention to the concern and disappointment expressed by States in the Sixth Committee regarding the manner in which draft article 7 had been adopted and to the request made to the Commission to take a cautious approach towards the formulation of rules.

The diametrically opposed positions of the current and former Special Rapporteurs, the scarcity of available practice and, most importantly, the fact that States belonging to various legal systems and located in various parts of the world had expressed doubts regarding the legitimacy of that practice should give serious cause to pause and think.

The vote in 2017 might have severe consequences not only for the Commission's work, but also for the functioning of the Sixth Committee. The principle of consensus was of paramount importance in the work of the Sixth Committee, and, in that context, he sincerely hoped that the differences of opinion among the members of the Commission would not translate into an insurmountable split in New York.

Several members, including Mr. Aurescu, Mr. Hmoud, Mr. Huang and Mr. Rajput, had noted that the immunity of State officials reflected such a basic principle as the sovereign equality of States. That idea had been affirmed in the seventh report. However, members were divided as to whether draft article 7 was aligned with that principle. He would not rehearse the relevant arguments, which had been advanced several times in recent years. He had understood from the Special Rapporteur's comments that she had discounted the possibility of revisiting the content of draft article 7. That was a pity.

As in 2018, he continued to have doubts that it was possible to counterbalance the exceptions contained in draft article 7 with a range of procedural guarantees. The discussions at the current session had only confirmed those doubts.

The previous week, during the debate on succession of States in respect of State responsibility, it had become something of a tradition to refer to the views expressed by the Chinese delegation in the Sixth Committee. He would continue that tradition by noting that, in relation to the topic of immunity of State officials from foreign criminal jurisdiction, the

Chinese delegation had taken the position that “no procedural safeguards could compensate for the flaw in the provision on exceptions to immunity *ratione materiae* contained in draft article 7”. He shared that position.

The Special Rapporteur noted in her report that neither of those categories, namely invocation and waiver of immunity, affected or modified the normative elements of immunity of State officials from foreign criminal jurisdiction that had already been defined by the Commission and without which there could be no talk of the existence of immunity. Similarly, according to the Special Rapporteur, they did not alter the rules concerning limitations and exceptions to immunity, which were substantive in nature and with which they could not be confused.

That did not mean, however, that procedural safeguards were not important. Many members of the Commission had emphasized their significance. In that regard, he believed that Mr. Nolte’s proposals, which were focused on the consequences arising from draft article 7, were a good basis on which to develop the relevant provisions.

The Special Rapporteur planned to address the issue of international criminal jurisdiction in relation to the topic, in 2020. He had already expressed his disagreement in that regard.

First, as Mr. Huang had rightly noted the previous day, from the outset, ever since the proposal to consider the topic had been included in the Commission’s long-term programme of work, such issues had been explicitly excluded from its scope.

Second, provisionally adopted draft article 1 (1) established that the draft articles applied to “the immunity of State officials from the criminal jurisdiction of another State”. The commentary to that draft article offered an explanation of their limited scope: “the Commission decided to confine the scope of the draft articles to immunity from ‘foreign’ criminal jurisdiction, that which reflects the horizontal relations between States. This means that the draft articles will be applied solely with respect to the immunity from criminal jurisdiction ‘of another State’. Consequently, the immunities enjoyed before international criminal tribunals, which are subject to their own legal regime, will remain outside the scope of the draft articles” (A/68/10, p. 54). Later in the same paragraph of the commentary, the Commission considered that the exclusion of international criminal tribunals from the scope of the draft articles must be understood to mean that none of the rules that governed immunity before such tribunals were to be affected by the content of the draft articles.

Third, international criminal jurisdiction was of a fundamentally different legal nature from national criminal jurisdiction. Mr. Kolodkin had emphasized that point, which had been supported by the Commission. As had already been mentioned, that was reflected in the commentary to draft article 1.

The Special Rapporteur seemed to have agreed with the position expressed by Mr. Kolodkin. In her second report (A/CN.4/661, para. 27), she had noted, in that connection, that “there is also another obvious and equally important reason: immunity before international criminal courts has already been specifically regulated by the international instruments that established and regulated the functioning of the international criminal courts. Therefore, there is no need for the Commission to revert to [this] matter”.

In addition to those general comments, he wished to join those of his colleagues who had expressed doubts regarding the desirability and relevance of a consideration of the issues arising from a specific decision of the Appeals Chamber of the International Criminal Court.

With regard to the future workplan, as set out in paragraph 176 of the seventh report, if the decision was taken to prepare a draft article on a mechanism for settling disputes between the forum State and the State official, the Commission should not opt to reproduce the provisions of draft conclusion 21 on the topic of peremptory norms of general international law (*jus cogens*). He would not repeat the doubts that he had expressed during the debate on those provisions. In any case, before considering whether to reproduce them, it would make sense to wait until States had at least given an initial reaction to the Commission’s previous proposals.

With regard to the possibility of preparing recommendations on good practices, he would be grateful if the Special Rapporteur could provide further information on exactly what she had in mind.

Concerning possible areas of future work, there were certain issues that, as far as he understood, might not be addressed in the Commission's work on the topic. If his understanding was not correct, he would be grateful to hear the Special Rapporteur's response. One example was the issue of the acts of an official *ultra vires*, which were not currently mentioned in the draft articles. It was noted in the commentary to draft article 2 that the question whether or not acts *ultra vires* could be considered as official acts for the purpose of immunity from foreign criminal jurisdiction would be addressed at a later stage, together with the limitations and exceptions to immunity.

It seemed that the matter of the so-called "territorial tort exception" as a ground for the absence of immunity had also yet to be addressed. On that point, the former Special Rapporteur had noted in his second report (A/CN.4/631, para. 85) that: "If a State did not give its consent to the presence of a foreign official and his activity, which led to the commission of a criminally punishable act, in its territory, there would appear to be sufficient grounds for assuming that the official does not enjoy immunity *ratione materiae* from the jurisdiction of that State." Examples of that type of situation included espionage, acts of sabotage and kidnapping. The members of the Commission had supported that conclusion. Commission members had also noted that those kinds of situations merited further discussion.

The Special Rapporteur had come back to the question and had included that situation in draft article 7 as a basis on which immunity would not apply. However, the relevant provision had subsequently been deleted from draft article 7. Did that mean that the Commission had finished with the issue? It seemed that, if such a serious aspect was not addressed, whenever such situations arose in practice, States would face difficulties in determining whether immunity as such applied in respect of the officials concerned.

In conclusion, he hoped that, in their future work on the topic, including in the Drafting Committee, the members of the Commission would be able to resolve their disagreements, if only partially, by carefully taking into account the views of States. In that context, he was in favour of referring all the proposed draft articles to the Drafting Committee on the understanding that it would not merely be permitted to rework them significantly in the light of the proposals made by members, but would actively take the opportunity to do so.

Mr. Vázquez-Bermúdez said that he was grateful to the Special Rapporteur for her excellent seventh report on immunity of State officials from foreign criminal jurisdiction, which, together with her sixth report, provided a comprehensive consideration of procedural aspects and safeguards in relation to immunity.

As the Special Rapporteur noted in those reports, the consideration of the procedural aspects of immunity was justified insofar as immunity was sought from the criminal jurisdiction of the forum State, which exercised that jurisdiction on the basis of its national legislation and applicable international law. As several States and members of the Commission had noted, the consideration of procedural aspects was also necessary in order to help to ensure the proper balance in safeguarding various legal principles and values of the international community, including the proper balance between upholding the principle of the sovereign equality of States and respecting other legal principles and values of the international community that reflected the objective of combating impunity, particularly with regard to crimes under international law. Safeguards were also important to the forum State and the State of the official to prevent the abusive exercise of jurisdiction on political grounds and safeguard the stability of international relations. Those and other considerations underpinned the draft articles, particularly those proposed in the seventh report, and should be set out in an introductory commentary.

He wished to express his general support for the draft articles proposed in the seventh report. They offered an excellent basis on which the Drafting Committee could build by taking into account the various suggestions made in the course of the debate.

The draft articles proposed on procedural aspects and safeguards applied to all situations of immunity. However, the Drafting Committee might wish to consider drafting proposals to offer additional safeguards in the context of limitations and exceptions to immunity. In that regard, it would be useful to consider Mr. Nolte's proposal regarding the reference to conclusive evidence. Although Mr. Nolte had made a more detailed proposal at the current session, the proposal made in 2018 might serve as a better basis.

Draft article 8 stipulated that the competent authorities of the forum State should consider immunity as soon as they were aware that a foreign official might be affected by a criminal proceeding. It was of course appropriate that the authorities of the forum State should do so. However, no such reference was included in draft article 9 on determination of immunity.

If he had understood the Special Rapporteur's logic correctly, there might be other factors that could prevent immunity from being considered as early as was desirable. As Mr. Jalloh had noted, the International Court of Justice had stated in its advisory opinion on the *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* that, as a "generally recognized principle of procedural law", questions of immunity were "preliminary issues which must be expeditiously decided in *limine litis*".

It seemed appropriate to retain the first sentence of draft article 9 (1), which established that it was for the courts of the forum State that were competent to exercise jurisdiction to determine the immunity of State officials from foreign criminal jurisdiction, as courts performed that role in the majority of countries. However, a reference should be added to the other competent authorities that might perform that role in a particular State's legal order. Paragraph 1 appropriately reflected the fact that other organs of the State might participate in the determination by the courts and other competent authorities, for example through suggestions or recommendations on immunity.

It was his understanding that paragraph 2 should refer to "immunity of the foreign official", not "immunity of the foreign State", which must have been introduced by error.

It had been suggested that immunity should be determined by a high-level court. However, that would necessitate complicated reforms to the legal systems of many States in order to ensure that every new case relating to immunity from foreign criminal jurisdiction was brought before a high or supreme court, rather than being resolved by a court of first instance, whose decisions could be appealed before a higher court.

With regard to draft article 10, on invocation of immunity, there could be occasions where the State of the official took its time analysing the facts and legal considerations in order to be able to decide whether to invoke the immunity of the official. For that reason, in draft article 10, paragraph 2, it would be preferable to replace the word "shall" with "should", as suggested by Mr. Hmoud. As the Special Rapporteur herself stated in paragraph 64 of the report, one could conclude that there was no rule that limited the point in the proceeding when the State of the official could invoke immunity for one of its officials, but that for such invocation to be useful and to produce the desired effects, the State should formulate it as soon as it was aware that the authorities of the forum State wished to exercise criminal jurisdiction over one of its officials. Paragraph 4 rightly identified the diplomatic channel as the residual or default channel for the invocation of immunity. There was no need for the plural form "diplomatic channels"; if two or more States were involved, the singular "diplomatic channel" could continue to be used. The diplomatic channel should also be the residual channel for the application of draft articles 11, 12 and 13.

Paragraph 6 of draft article 10 imposed an obligation on the competent organs to decide *proprio motu* on the application of immunity in respect of officials who enjoyed immunity *ratione personae*. The Special Rapporteur adequately justified that proposal, recalling that immunity *ratione personae* applied to a limited number of officials, namely the Head of State, the Head of Government and the Minister for Foreign Affairs, whose identity was known and whose status as international representatives of the State was well known. She also recalled that such immunity was absolute, therefore its normative elements could hardly be the subject of any doubt among the authorities of the forum State.

According to draft article 10, the same did not apply in the case of immunity *ratione materiae*, where the situation was considered to be different, since whether an individual possessed the normative elements of immunity *ratione materiae* could not necessarily be known autonomously by the organs of the forum State, which were not equipped to know whether an individual was a foreign official, whether the individual had such status at the time he or she had committed the acts being considered by the court of the forum, or whether such acts had been carried out in an official capacity. In such cases, the Special Rapporteur considered that the State of the official should be required to invoke immunity, in application of due diligence.

Those and other related arguments put forward by the Special Rapporteur in that regard seemed reasonable. They should also be considered in relation to draft article 12, which provided for the notification of the State of the official by the forum State where the latter's competent authorities had sufficient information to conclude that a foreign official could be subject to its criminal jurisdiction. In addition, draft article 13 provided that the forum State could request from the State of the official information that it considered relevant in order to decide on the application of immunity. A change in the order of those draft articles had been suggested; that proposal seemed appropriate.

Draft article 11 was rightly based on the premise that since the immunity of State officials from foreign criminal jurisdiction was recognized for the benefit of the rights and interests of the State of the official and to ensure the proper performance of the official's functions, it was obvious that the State could waive that immunity, thereby consenting to the exercise of foreign criminal jurisdiction over one of its officials. Just as the State of the official had the power to invoke the immunity of the official, the same State, as the ultimate holder and beneficiary of that immunity, could waive its right to claim it. In view of the need for legal certainty, it should be made clear in draft article 11 that any waiver should be express and clear, not implied. In paragraph 4, the words "that can be deduced" [*la que se pueda deducir*] should be replaced with "that is stated" [*la que conste*]. Furthermore, the non-invocation of immunity should not be considered as an implied waiver of immunity. For reasons of legal certainty, waiver of immunity, once made, should be considered irrevocable.

As some members had already suggested, it should be made clearer in draft article 14 that both the forum State and the State of the official could initiate the transfer of criminal proceedings. As alluded to by Mr. Aurescu and Ms. Galvão Teles, among others, it was important to consider, for the purposes of the transfer of proceedings to the State of the official, the principle of achieving justice, in the sense that the State should be willing and able to pursue criminal proceedings against its official and not simply seeking to secure impunity.

In draft article 15 on consultations, which could be immensely useful in certain cases, it might also be appropriate to mention explicitly that consultations could also be carried out through the diplomatic channel.

Draft article 16 referred in a general way to the fair treatment safeguards, including procedural rights and safeguards relating to a trial, that should be afforded to the foreign official. It would be useful to review the draft article in the light of the corresponding draft article recently adopted by the Commission in the context of the topic of crimes against humanity.

With regard to the future workplan, although it would have been desirable to have completed the first reading of the entire set of draft articles at the current session, he nonetheless supported the Special Rapporteur's objective to do so in 2020. With regard to the inclusion of the two new issues mentioned in paragraph 176, a guide to best practices could be useful, but its formulation could prove complicated and, in any event, it should not be allowed to unduly delay the adoption of the entire set of draft articles. Although the proposal regarding dispute settlement would make more sense in the context of a draft convention, such as that being proposed in the context of the topic of crimes against humanity, he would not oppose a recommendatory dispute settlement clause for interested States. Lastly, in the light of the Special Rapporteur's introduction of the report, he was not

of the view that the Commission should consider the issue of the obligation of States to cooperate with an international criminal court as part of the current topic.

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

Mr. Gómez-Robledo, after having congratulated the Special Rapporteur on her seventh report, said that he was relieved that the debate surrounding the topic had been calmer than in 2017. He hoped that such serenity was a sign that the members of the Commission were no longer questioning the decision that had been taken on draft article 7. It was of course perfectly legitimate for those who had had concerns about the tenor and spirit of draft article 7 to ensure that it would not be interpreted in bad faith. The various proposals that had been made in relation to draft articles 8 and 16 contained in the seventh report should be understood in that context. Nonetheless, three considerations should be borne in mind.

First, the decision taken on the adoption of draft article 7 was not in any way less legitimate solely because it had been the result of a vote. He had already expressed his views on the supposed added value of so-called consensus, and would not insist on that point. He fully concurred with what had been said by Mr. Hassouna in that regard. With that in mind, he did not agree that disproportionate weight should be given to the views of persistent objectors. The Commission was not in the process of identifying a rule of customary international law. It had already been made clear, at least as far the draft articles that had been proposed by the Special Rapporteur in 2019 were concerned, that the Commission was engaged in the progressive development of international law. Secondly, the referral of draft articles to the Drafting Committee could not be conditional on so-called understandings, whose interpretation generated more problems than they aimed to resolve. The rules were very clear: in the Drafting Committee, members could make the proposals that they saw fit, and it was for the Drafting Committee to decide on those proposals in accordance with the rules that governed the Commission. Thirdly, when all was said and done, the draft articles would result in a balanced package in which some members would be compensated in certain areas for concessions that they had had to make in others, and those who had obtained satisfaction on issues that were most important to them would moderate their appetite in relation to slightly less important issues. Such was the nature of negotiation.

Before addressing the content of the report, he wished to share a doctrinal opinion on the methodology that had been followed in the handling of the topic since its inclusion in the Commission's programme of work, which might partly explain the prevailing lack of understanding between the two extreme positions on the issue of exceptions to the immunity of State officials from foreign criminal jurisdiction. The thesis was that the intellectual framework of the topic was founded on a false dichotomy between, on the one hand, the immunity of the official, which had been established as a principle of general international law as the corollary of the sovereignty and legal equality of States and, on the other hand, exceptions that must necessarily be proven to form part of the practice of States. For that reason, since there was no general and uniform practice in relation to such exceptions, the evidentiary threshold demanded by custom had not been reached, and the topic had fallen into the sphere of progressive development. The criticism was that the principle of immunity had never been subjected to verification in the same way as the exceptions, when, in reality, the principle of immunity was *per se* an exception to the exercise of the national jurisdiction that also derived from State sovereignty. It could even be said that immunity was also an exception to the right of access to justice, seen from the perspective of international human rights law. It was necessary to make that comment because it seemed to him that, on more than one occasion, disproportionate weight had been attached to the verification of State practice in the consideration of possible exceptions. Moreover, it had been inappropriate to disregard other forms of immunity. Although Mr. Huang had insisted the previous day that there was no way of establishing intersections between the various regimes of immunity established in treaties and the general regime of immunity that was the subject of the current topic, such regimes were not self-contained, and operated in a wider context in which the international community of all States tended to place accountability above the prerogatives of the sovereign State. For those reasons, and

despite what various other members had said, the Commission could not ignore the recent decision of the Appeals Chamber of the International Criminal Court in the case of *The Prosecutor v. Omar Hassan Ahmad Al-Bashir*, as part of the context that determined the direction that the consideration of the topic of immunities *lato sensu* should take, both in the Commission and, subsequently, in the General Assembly.

Turning to the seventh report and the draft articles proposed therein, he said that he supported the point of view of those members who, in the light of the proposal made by Mr. Nolte, had spoken in favour of strengthening the procedural safeguards and guarantees that operated between the forum State and the State of the official in order to avoid politically motivated and abusive judicial proceedings. The stricter those guarantees, the better. However, care should be taken to ensure that such safeguards were not understood as operating solely in relation to the application of draft article 7, since it could not be excluded that, in other situations, it might be in the interest of both the forum State and the State of the official for the official to be prosecuted in the forum State. With that reservation, he concurred with the three requirements that had been suggested by Mr. Nolte, namely that the presence of the official in the forum State should be considered, that the investigation carried out by the forum State should provide conclusive evidence that the State official had allegedly committed the offence, and that the decision concerning the immunity of the State official should be taken at the highest possible level of government. That said, he was sure that the Special Rapporteur had acted with intellectual honesty and the necessary legal rigour and had in no way put the interests of the forum State above the interests of the State of the official.

Draft article 8 clearly reflected the moment at which the forum State should consider the immunity of State officials, namely before the trial, before indictment and the commencement of the prosecution phase, and before the adoption of coercive measures that directly undermined immunity, as indicated by the International Court of Justice in the case concerning *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*. In addition, measures of constraint, by their very nature, prevented the State official from performing his or her official functions, something that should be avoided at that stage. Paragraph 2 of the draft article established that immunity should be considered “at an early stage” of the proceeding, before the indictment of the official and the commencement of the prosecution phase. In his view, the wording of the paragraph was too general and could lend itself to different interpretations. A formulation that could bring legal certainty to the draft article was “without delay” [*sin dilación*]. That term, which was found in article 36 (1) (b) of the 1963 Vienna Convention on Consular Relations, had already been interpreted jurisprudentially by the International Court of Justice in the case concerning *Avena and Other Mexican Nationals (Mexico v. United States of America)* in 2004. In the judgment in that case, the Court had established that the authority’s duty to notify foreign detainees of their right to receive consular assistance “without delay” “arises once it is realized that the person is a foreign national, or once there are grounds to think that the person is probably a foreign national”. The Court had recently reaffirmed that criterion in the case concerning *Jadhav (India v. Pakistan)*, although it had also established in both cases that “precisely when this may occur will vary with circumstances”. He therefore proposed that, in draft article 8, paragraph 2, the words “at an early stage” should be replaced with “without delay”. In addition, it was noteworthy that paragraph 2 made no reference to the investigation phase as the moment at which immunity should be considered. That was positive, since, as some States had underlined in the Sixth Committee, a criminal investigation as such did not violate immunity because it did not have a strictly jurisdictional nature.

The conclusions contained in the sixth report and cited by the Special Rapporteur in the seventh report in relation to draft article 8 explained in detail the possible situations in which the immunity of the foreign official should be considered by the forum State, including situations involving summons to appear, appearance as a witness, the requirement to provide documents and precautionary measures. In his view, a formulation could be arrived at in the Drafting Committee that addressed the concerns expressed by some members of the Commission relating to the various practices for determining immunity that existed in different legal systems and the best way to reflect them in the draft articles.

Draft article 9, paragraph 2, mistakenly referred to the “immunity of the foreign State”, which should be corrected to “immunity of the foreign official”. The separation of draft articles 8 and 9 was appropriate for reasons of clarity and structure; he did not agree with Mr. Tladi’s proposal that those draft articles should be merged. However, the matter could be considered in greater depth in the Drafting Committee.

While draft article 9 (1) recognized that other organs of the State could cooperate with the courts in the determination of immunity, the participation of those organs should not be given secondary importance. The involvement of ministries of foreign affairs, which tended to have more knowledge regarding the regime of immunities than national courts, could help to avoid the politicization of the exercise of the jurisdiction of the forum State and, on occasion, media attention that might undermine proceedings. For that reason, he agreed with Mr. Tladi and Mr. Hmoud in that the draft articles in general should afford greater relevance, or even primacy, to the diplomatic channel, in line with common practice.

Draft article 10 correctly specified who, when, how and before whom immunity should be invoked. It also rightly distinguished between invocation of immunity *ratione personae* and invocation of immunity *ratione materiae*. While immunity *ratione personae* must be assessed *proprio motu* by the forum State, immunity *ratione materiae* must be invoked by the State of the official, as was clear from the case law of the International Court of Justice in *Djibouti v. France*. That approach took into account the special nature of both regimes of immunity. With regard to paragraphs 4 and 5 of draft article 10, he wished to reiterate the importance of strengthening the diplomatic channel as a mechanism for the invocation of immunity. It did not seem appropriate to provide that immunity should be invoked “preferably” through “the procedures established in cooperation and mutual judicial assistance agreements to which both States are parties”, because, in many cases, the central authorities for such treaties were ministries of justice, not ministries of foreign affairs. The diplomatic channel was used in practice and had proven very effective as a result of its speed, confidentiality and the fact that it did not affect the proper performance of the functions of the foreign official. He thus concurred with Mr. Tladi and Mr. Hmoud regarding the need to afford greater prominence to the use of the diplomatic channel in the context of the invocation of immunity.

Draft article 11, paragraph 4, provided that a waiver that could be deduced clearly and unequivocally from an international treaty to which both the forum State and the State of the official were parties constituted an “express waiver”. Such was the case of article 27 (2) of the Rome Statute of the International Criminal Court, which established that: “Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.” For the purposes of paragraph 4, it was also relevant to note that the Appeals Chamber of the International Criminal Court, in its judgment in the *Al Bashir* case, had considered that “a direct consequence of article 27 (2) of the Statute, to which all States Parties to the Rome Statute have consented” was the fact that a “State Party could not refuse to comply with the request [for cooperation] on the ground that its Head of State enjoys immunity, be it under international or domestic law”. Although he would not oppose Mr. Nolte’s proposal to address the issue in a “without prejudice” clause, he considered that making reference solely to international treaties, rather than opening the door to other possibilities, was the right thing to do. In that regard, he did not support the interpretation by the International Criminal Court’s Pre-Trial Chamber II of the United Nations Security Council’s referral of the situation in Darfur to the Court, to which Mr. Aurescu had made reference, as an “implied waiver”, since waiver of immunity must always be express, and cases involving the referral of a situation to the International Criminal Court by the Security Council should be resolved with reference to the Statute of the Court itself or, if in doubt, to Article 103 of the Charter of the United Nations and the case law of the International Court of Justice in *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie*, without it being necessary to consider whether the Security Council had to pronounce itself on issues of immunity.

As the Special Rapporteur had stated in her oral presentation of the seventh report, draft article 12 constituted an essential guarantee for the State of the official and protected

the right of that State to invoke immunity when the authorities of the forum State had “sufficient information to conclude that a foreign official could be subject to its criminal jurisdiction”. The broad approach adopted in the wording of draft article 12 (1) therefore provided a real and effective guarantee for the State of the official. With regard to draft article 12 (3), he wished to reiterate the need to strengthen the diplomatic channel.

With respect to draft article 13, the fact that it made provision for a two-way mechanism between the forum State and the State of the official was particularly relevant in fostering cooperation and seeking peaceful solutions to disputes in matters relating to immunity of State officials from foreign criminal jurisdiction. Although the Special Rapporteur had made reference to the two-way nature of the mechanism in the oral presentation of her report, that approach was not immediately obvious in the report itself. As Mr. Hmoud had also indicated, it would therefore be useful to clarify the two-way nature of the application of draft article 13, since it was essential in enabling the competent authorities to determine the proper application of immunity.

He welcomed the fact that draft article 13 (4) did not include any reference to the possibility of defining acts related to immunity as political or related offences in order to refuse information requests. As the Special Rapporteur pointed out in paragraph 131 of her report, that possibility could apply “only to a limited range of situations, especially given the trend in contemporary international law”. It was also commendable that draft article 13 (6) stipulated that refusal to provide information did not imply waiver of immunity, thereby providing a specific safeguard for the rights of the State of the official.

Turning to draft article 14, he said that he agreed that transfer of proceedings to the State of the official was a useful instrument in maintaining a balance between the principle of sovereign equality and stable international relations. The notion of transfer of proceedings, as contained in draft article 14, was a power of the forum State, whose authorities could decline to exercise their jurisdiction in favour of the State of the official. He therefore regarded as a positive step the fact that draft article 14 (3) reiterated that any transfer of proceedings should be undertaken in accordance with the national laws of the forum State and any international cooperation and mutual judicial assistance agreements to which the forum State and the State of the official were parties.

Regarding draft article 16, he said that, as stated in the Special Rapporteur’s report, while the State was the holder of the right to immunity, the procedural guarantees applicable to the foreign official enjoying the benefits of that right should be addressed in the draft articles in order to reiterate the international human rights obligations of all States in the context of immunity. He welcomed the broad and flexible approach of the draft article and the fact that it was based on the draft articles on crimes against humanity. Nevertheless, in his view, the list of procedural safeguards applicable to the State official should include the right to consular assistance, in accordance with the 1963 Vienna Convention on Consular Relations. The words “and impartial” should be inserted between the words “fair” and “treatment” in draft article 16 (1) to align it with the title and content of the draft article.

In conclusion, he supported sending the draft articles to the Drafting Committee.

The meeting was suspended at 11.15 a.m. and resumed at 12.10 p.m.

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

Visit by representatives of the African Union Commission on International Law

The Chair welcomed the representatives of the African Union Commission on International Law (AUCIL), Ms. Ayensu and Ms. Sichone, and invited them to address the Commission.

Ms. Ayensu (African Union Commission on International Law (AUCIL)) said that AUCIL was enjoined by article 25 (3) of its statute to establish close collaboration with the International Law Commission in order to promote international law on the African continent. All the meetings between the two Commissions had proved fruitful and edifying for AUCIL, the younger of the bodies. AUCIL was looking forward to celebrating its tenth anniversary in 2020. The AUCIL delegation which had attended the activities to

commemorate the International Law Commission's seventieth anniversary could attest to the success of that event and the wide support the International Law Commission had received during it.

Ms. Sichone (African Union Commission on International Law (AUCIL)) said that, in many respects, AUCIL had been modelled on the International Law Commission. Its activities in furtherance of its mandate, which was to contribute to the development and evolution of international law and African Union law, included not only its deliberations with the International Law Commission but also its participation in the Sixth Committee of the General Assembly. Furthermore, various Commissioners had interacted with the Inter-American Juridical Committee, the African Union Advisory Board on Corruption, the United Nations Human Rights Council and the International Committee of the Red Cross.

AUCIL studies of the jurisprudence of regional economic communities were continuing as planned and progress was being made towards the compilation of a digest of African law. The preparation of a model law for the domestication of the Maputo Protocol to the African Charter on Human and Peoples' Rights on the rights of women in Africa had reached an advanced stage. Steps had also been taken to draw up a similar model law for the domestication of the African Charter on the Rights and Welfare of the Child. Much headway had been made on producing a draft convention on judicial cooperation and mutual assistance in criminal matters and a double taxation convention. The topic of a comparative study of mineral and petroleum laws in Africa had been revisited.

Ms. Ayensu (African Union Commission on International Law (AUCIL)) said that AUCIL had astutely encouraged a revived dialogue to promote the implementation of various African Union instruments concerning the maritime sector. The African Union Legal Counsel had taken the lead in that matter in pursuance of an Executive Council decision adopted in 2014.

The approval in 2018 by African Union Heads of State and Government of the model law for the implementation of the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention) had been a high point for AUCIL, as it had produced the original draft. AUCIL was determined to have the Convention domesticated by States in 2019, the Year of Refugees, Returnees and Internally Displaced Persons. It had therefore worked with the sponsors of the Convention, namely the African Union Department of Political Affairs and the Office of the United Nations High Commissioner for Refugees (UNHCR), to disseminate its contents to States.

Ms. Sichone (African Union Commission on International Law (AUCIL)) said that, during its seventeenth session, AUCIL had finalized its second strategic plan for the period 2019-2022, in which it identified key stakeholders and the various ways in which they could engage in the work of AUCIL.

The eighth annual forum of AUCIL on international law was scheduled for 2 and 3 December 2019. Its theme was constitutional democracy, the rule of law and the struggle against corruption. Its tentative venue was Luanda, Angola.

AUCIL invited the members of the International Law Commission to take part in the celebration of the tenth anniversary of AUCIL. It was expected that that event would open up new perspectives for AUCIL and offer an opportunity for new contacts and channels of cooperation as well as for enhancing the visibility of AUCIL. It would also see the first award of a prize for a doctoral thesis on African Union law. It would further be an occasion for establishing a formal framework for collaboration with the International Law Commission through the signing of a memorandum of understanding.

Ms. Ayensu (African Union Commission on International Law (AUCIL)) said that AUCIL fervently hoped that the International Law Commission would support it during its tenth anniversary celebration in 2020.

Mr. Hassouna said that the International Law Commission welcomed its close relationship with AUCIL, as the two bodies dealt with issues of common concern. Perhaps it might be useful to hold a joint seminar in 2020 to exchange views on the development of international law in general and, more specifically, on the African continent. In the past, African States had often been at the forefront of developing many areas of international law.

AUCIL could therefore play an important role in helping African delegations to the United Nations to gain a better understanding of current issues and thereby contribute actively to the progressive development of international law.

Given that it was part of the mandate of AUCIL to provide legal advice to the African Union, he wished to know if it had offered such advice with a view to reaching a settlement of the crises in Libya and the Sudan.

Mr. Jalloh said that the members of the International Law Commission closely followed developments in international law in the African region. For example, the ample references to the Maputo Protocol and Kampala Convention in the second report of the Special Rapporteur on the topic “Protection of the environment in relation to armed conflict” showed that African instruments served as source material for the debates of the International Law Commission. It was therefore gratifying that AUCIL was making progress on developing model laws for the implementation of the aforementioned Protocol and Convention at the domestic level. The work of AUCIL on a draft convention on judicial cooperation and mutual assistance in criminal matters was also of great interest at a time when the International Law Commission was debating the topic “Immunity of State officials from foreign criminal jurisdiction”. It might be helpful for the two secretariats to exchange some information on the two bodies’ work in that field. He wished to know what support AUCIL could give African States to help them to provide feedback in the Sixth Committee on proposals for topics to be taken up by the Commission, to respond to the latter’s questionnaires on topics under consideration and to make written submissions between the first and second readings of the Commission’s output on a topic.

Mr. Tladi said that he wondered whether there was any possibility of AUCIL including the topics of the International Law Commission as a standing item on its agenda. He was also curious to know the types of issue on which AUCIL could provide advice to the various organs of the African Union. Was AUCIL engaged in the process of providing advice with regard to certain impediments to the ratification of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol), such as uncertainty about how to deal with unconstitutional changes of government? Lastly, he wished to know if AUCIL was or could be engaged in advising on matters related to the African Integrated Maritime Strategy.

Mr. Nolte said that the International Law Commission welcomed input from all regions and from Africa in particular. He therefore wondered whether it might be possible for AUCIL to give some priority to examining topics on which the International Law Commission had reached the first reading stage in order that it might express an opinion which would be of assistance to the Commission at the second reading stage.

Ms. Escobar Hernández said that, in her capacity as Special Rapporteur for the topic of immunity of State officials from foreign criminal jurisdiction, she had encountered difficulties in finding information on relevant State practice in Africa. She would be grateful for any support AUCIL could provide in urging African Union States to submit comments on the work of the Commission. It would be very helpful to be able to ascertain the issues that were of greatest interest or concern to States in the region.

In addition, it would be interesting to hear more about the current status of the work on the draft convention on judicial cooperation and mutual assistance, including whether there were any plans to make provision in that instrument for a mechanism for the transfer of criminal proceedings from one State to another.

Mr. Cissé said that he would be interested to learn whether AUCIL had identified any priority areas in connection with maritime issues. Several areas were of urgent concern, including illegal and unregulated fishing and maritime piracy, issues that few countries in the region had the legislation to tackle. The demarcation of maritime boundaries was also a concern, since it had sometimes led to conflicts in the past. Lastly, the sharing of revenue, as addressed in article 82 of the United Nations Convention on the Law of the Sea, was an issue that was currently the subject of much debate in international forums, including the International Seabed Authority.

Ms. Ayensu (African Union Commission on International Law) said that while AUCIL welcomed the idea of holding joint sessions with the Commission, it was currently facing budgetary constraints. The development of a memorandum of understanding between the two bodies would provide a springboard to take their collaboration a step further.

In order to encourage greater engagement by African States in the Sixth Committee, where AUCIL had only observer status, it would be necessary to develop an arrangement through the Permanent Representatives' Committee of the African Union Commission. AUCIL also experienced difficulties in obtaining responses from States to questionnaires on the topics it was considering. During the preparation of the most recent draft of the Maputo Protocol, AUCIL had received just five responses from the 54 States to which it had sent its questionnaire. The bureau of AUCIL was now able to deal directly with the standing technical committee rather than having to go through intermediaries, and as such would be able to convey any concerns of the International Law Commission to the relevant parties.

The secretariat of AUCIL was located within the Office of the Legal Counsel of the African Union. While AUCIL was not a fast-moving body, owing to its obligation to undertake consultations, the Office was able to convene meetings of permanent representatives and achieve results in a more timely manner. In connection with the question of the Chagos Archipelago, the Office had requested input from AUCIL, but the latter had been unable to respond within the required time frame. However, when the matter of the crisis in Libya and the related United Nations Security Council resolution had been referred to AUCIL, it had been able to react quickly and play an advisory role. AUCIL had also had significant involvement in the technical body set up to advise on the implementation of proposals for institutional reform of the African Union.

With respect to Mr. Tladi's remark that the Asian-African Legal Consultative Organization had included topics on the agenda of the International Law Commission as a standing item on its own agenda, AUCIL would examine the possibility of taking a similar step.

In the area of maritime issues, piracy and security were the main issues of concern to AUCIL. Agenda 2063, a blueprint for the development of Africa, encompassed a number of issues pertaining to maritime affairs, inland bodies of water and the blue economy in general. The Charter on Maritime Security and Safety and Development in Africa had been signed immediately by 53 States; however, domestic legal departments were making slow progress in developing the relevant legislation. If the Office of the Legal Counsel could draft a number of model laws, the momentum in that area could be sustained. With regard to the demarcation of maritime boundaries, Ghana and Côte d'Ivoire had demonstrated that disagreements over such matters could be resolved amicably. Ghana was also engaged in bilateral discussions with Togo over the maritime boundary between the two countries. However, the dispute between Cameroon and Nigeria had come before the International Court of Justice, and it seemed that the same might happen with some other disputes in the region.

Mr. Wako said that he wished to highlight the fact that for the first time, the delegation of AUCIL was led by two women. Furthermore, three of the body's four newly elected commissioners were women; the International Law Commission should emulate that example.

The Chair said that he wished to thank the AUCIL representatives for their statements and the valuable information that they had provided on the work of their organization. The Commission looked forward to continued and improved cooperation with AUCIL in the future.

The meeting rose at 1.05 p.m.