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Held at the Palais des Nations, Geneva, on Tuesday, 23 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. Grossman Guiloff
	Mr. Hassouna
	Mr. Hmoud
	Mr. Huang
	Mr. Jalloh
	Mr. Laraba
	Ms. Lehto
	Mr. Murase
	Mr. Murphy
	Mr. Nguyen
	Mr. Nolte
	Mr. Ouazzani Chahdi
	Mr. Park
	Mr. Rajput
	Mr. Reinisch
	Mr. Ruda Santolaria
	Mr. Saboia
	Mr. Tladi
	Mr. Valencia-Ospina
	Mr. Vázquez-Bermúdez
	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. Ouazzani Chahdi said that he wished to congratulate the Special Rapporteur on the quality of her seventh report (A/CN.4/729) and the variety of legal sources and practice on which it was based.

In her report, the Special Rapporteur stated that the examination of the procedural aspects of immunity of State officials from foreign criminal jurisdiction – an aspect of the topic that she had started to address in her sixth report – was justified for a variety of reasons. First, such immunity was intended to be exercised before a foreign criminal court which, in performing its functions, applied procedural rules, principles and processes that could not be ignored. Second, any such proceeding involved the presence of a foreign national, the State official, which must be taken into consideration. The procedural arrangements should also help to provide certainty to both the forum State and the State of the official, to reduce as much as possible the inclusion of political factors and establish a balance between respecting and upholding the principle of the sovereign equality of States and respecting other legal principles and values of the international community. A balance should also be established between the right of the forum State to exercise its criminal jurisdiction and the need to respect the procedural rights and safeguards pertaining to State officials that might be affected by such jurisdiction.

That approach, based on procedural aspects, could only be relevant if it met all the objectives set. Accordingly, in her seventh report the Special Rapporteur considered the relationship between the concept of jurisdiction and the procedural aspects of immunity before addressing invocation or waiver of immunity, procedural safeguards that operated between the forum State and the State of the official and, lastly, the rights and procedural safeguards pertaining to the official.

He wished first to make a number of general comments before turning to the draft articles themselves.

Invocation of State immunity was presented in the report as a recognized power of the State but not as constituting a procedural requirement for the consideration of the applicability of such immunity by the courts of the forum State. It was observed that there was no clear rule as to whether it was necessary or not necessary for the person concerned to invoke immunity. The Commission's work had been taken up in the Vienna Convention on Diplomatic Relations, the Vienna Convention on Consular Relations and the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character and the Convention on Special Missions. Those conventions, which related to the codification of diplomatic law, provided for diplomatic immunities, which were distinct from those available to other State officials. Diplomatic immunities arose from the accreditation of State officials by the accrediting State, which was thus well aware of their identity. Diplomatic immunities also differed from the jurisdictional immunities of States and their property, as provided for under the relevant 2004 United Nations convention. Diplomatic immunities were also different from those of State officials other than diplomats; the report should pay more attention to the latter immunities, on the basis of draft article 7.

According to the report, immunity should be invoked by the State of the official at the commencement of the proceedings, as soon as it was aware that the authorities of the forum State wished to exercise criminal jurisdiction over one of its officials. As Mr. Hmoud and some other members had said, it should also be specified that such invocation should generally halt the proceedings.

Waiver of immunity must be express and unequivocal, and must be effectuated in an irrefutable form, preferably in writing. Immunity might be waived at any time in the proceedings, and the report clearly noted the absence of practice in the matter.

With regard to procedural safeguards between the forum State and the State of the official, the report responded to proposals that had been made by both members of the

Commission and States regarding the inclusion in the draft articles of specific safeguards related to the possible application of the limitations and exceptions listed in draft article 7. However, it seemed that the report placed greater importance on combating impunity than taking account of the fundamental norms required for the stability of international relations and the international community. In particular, certain formulations contained in paragraph 105 should be reviewed; for example, the use of the word "fraudulently" in connection with the foreign State's invocation of immunity was too strong.

Otherwise, he supported the Special Rapporteur's views on procedural safeguards, while encouraging the use of mutual judicial assistance agreements between States, notably for the exchange of information and the transfer of criminal proceedings. He also agreed that the first procedural safeguard that should be included in the draft articles was the obligation of the forum State to notify the State of the official that it had exercised or intended to exercise criminal jurisdiction in respect of the foreign official; notification should preferably take place through the diplomatic channel.

While he agreed with most of the procedural rights and safeguards laid out in chapter IV, he considered that paragraph 161, on members of a State's armed forces who were made prisoners of war, did not appear to be of direct relevance to the topic.

Turning to the proposed draft articles themselves, he said that he had a number of suggestions for new wording that the Drafting Committee might wish to consider. In draft article 8, the phrase "at an early stage" in paragraph 2 should be clarified and the type of immunity referred to in paragraph 3 should be specified.

Regarding draft article 9, he agreed with Mr. Jalloh that the expression "without prejudice" should be deleted and that more information should be given concerning the other organs of the State referred to.

Regarding draft article 10, paragraphs 5 and 6 required further clarification; he was not opposed to the merger of those paragraphs, as had been suggested by some members. In paragraph 5, the words "including the diplomatic channel" could be added after "all means available to them". He noted that paragraph 6 was limited to immunity *ratione personae*.

With regard to draft article 11 (2), since waiver was irrevocable, it should be specified that it must be given in writing.

In draft article 12 (1), in the French version, the words "*l'État du for le notifie*" should be replaced with "*l'État du for doit le notifier*". In the French version of draft article 13, at the end of paragraph 5, the words "*fourniture des informations*" should be replaced with "*échange d'informations*".

He supported the proposed timetable for future work, which would lead to the adoption of draft articles on first reading at the seventy-second session. He also agreed with the Special Rapporteur's proposals regarding the definition of a dispute settlement mechanism and recommended good practices for the solution of specific problems. However, as Mr. Zagaynov had noted, it would be useful to clarify what was meant by "good practices".

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

Mr. Cissé said that he wished to thank the Special Rapporteur for her seventh report and the progress made by her on the topic to date. In his comments, he would address both the sixth and seventh reports of the Special Rapporteur.

He welcomed the Special Rapporteur's openness to the comments and concerns expressed by members at the previous session and her willingness to reflect those in the seventh report.

He recalled that he had voted in favour of draft article 7 and said that his position with respect to its substantive content remained unchanged. However, he had previously indicated that the question of procedural safeguards should be dealt with; work must continue to ensure that a satisfactory compromise was achieved in that regard. While he shared the concerns of other members that the current draft articles failed fully to provide

the necessary safeguards, he remained confident that the final draft would meet those concerns.

He viewed the current wording of the proposed draft articles as a work in progress, which the Drafting Committee, in the light of comments by members, could further develop with a view to producing formulations that would deal satisfactorily with the issues under consideration. He had two concerns in particular regarding those draft articles that he wished to address: the timeliness of proceedings, and the detention of the State official during the investigative process.

With respect to the timeliness of proceedings, he noted that previous speakers had pointed to variations in States' legal practices, while Mr. Murphy had pointed out that individual State practice should not influence international law. However, in his own view, such practices were indicative of the difficulties States would have in implementing the proposed draft articles. With that in mind, he wished to state his reservations regarding the language of the draft articles in respect of the timeliness of proceedings. The draft articles were aimed at establishing a common and consistent approach to immunity throughout the criminal investigative process; however, that might not be the best approach, in the light of how criminal offences were investigated and prosecuted.

For instance, in the United Kingdom, all cases, regardless of their severity, had to be brought before a magistrates' court within six months from the time when the offence was committed or the matter of complaint arose; after that time, the case could no longer be heard. Delays in communication between States regarding immunity and exchange of information could mean that even justifiable cases, where a successful prosecution was likely, could become time barred.

Furthermore, as Mr. Hassouna had pointed out, the person at the centre of the offence should not be forgotten: the individual was innocent until proven guilty and had the right to a fair trial, which included the requirement of the timeliness of proceedings. The language used in the draft articles relating to procedural safeguards should take account of statutes of limitation and different interpretations in different States of the concept of competent authorities; timeliness of proceedings should be a determining factor.

He was persuaded by Mr. Rajput's suggestion of automatic immunity from the outset. Proceedings would thus be suspended until such time as immunity could be established through either invocation or waiver and jurisdiction could be established through prosecution either in the forum State or in the State of the official. Notice could be initiated by the individual at the outset and his or her release could then be considered, depending on the nature of the act and any possible effect on public security and order.

One example of the importance of timeliness could be seen in the recent decision of 8 July 2019 by the Holy See to waive the diplomatic immunity of its Apostolic Nuncio to France, thus clearing the way for criminal charges to be brought against him. The decision had come more than six months after the alleged offence; had it taken place in the United Kingdom, the case would have been time barred. He would therefore like to see clearer and more concise language used in the draft articles in respect of the timing of the process and definitions clarified where possible.

Turning to the draft articles themselves, he said that, in draft article 8, the first paragraph should be reworded to read "the forum State must consider immunity". Clearer definitions were also required of the terms "at an early stage" in paragraph 2 and "coercive measure" in paragraph 3. He also thought that, to ensure respect for the sovereign rights of the States concerned, consideration of immunity should be limited to situations in which the performance of the official's functions would be affected by a decision in that regard.

He agreed with draft article 9. As he had mentioned previously, he was in favour of automatic immunity and the competent authority being decided on by the State, preferably at the highest level. In the case of automatic immunity, further proceedings could be taken only if immunity had been waived, obviating the need for the inclusion of paragraphs 2 and 3. He also agreed with other members that it would be preferable to reorder the draft articles to better reflect the sequence of criminal proceedings.

In draft article 10, the only relevant element was the procedure for the invocation of immunity. If automatic immunity was established at the outset, the foreign State would be required to clarify its position before there was any need for the forum State to engage in rigorous and expensive criminal investigative procedures.

Regarding draft article 11 (6), he did not share the view that waiver of immunity, once given, should be irrevocable. Draft article 8 allowed for consideration of immunity as soon as it became known that a foreign official might be affected by criminal proceedings, then again before indictment and the commencement of the prosecution phase, and also when the State intended to adopt a coercive measure against the foreign official that might affect the performance of his or her functions. He therefore suggested that the flexibility of invoking and waiving immunity should be balanced, in the same way as under draft article 8. It should not be forgotten that an official's career was at stake and, even where the evidence might initially seem to point to criminal liability and the State felt compelled to waive immunity, new evidence that could exonerate or otherwise work in favour of the State official might later come to light. Draft article 11 (6) should be amended to reflect the fluidity provided for in draft article 8, which allowed immunity to be invoked at any time up to the point that the competent authority intended to take coercive measures against the foreign official that might affect the performance of his or her functions.

Regarding the fair and impartial treatment of the official, he agreed with other members that the content of draft article 16 should be aligned with the Commission's work on other topics, notably crimes against humanity and peremptory norms of international law.

It was a well-settled principle of general international law that there was a right to liberty and freedom of the person. However, the consequences on the liberty of the individual concerned of the ongoing process of consideration of immunity and the criminal investigation was an aspect that had not been fully explored.

All the cases mentioned by the Special Rapporteur and other members had involved detention of the person: in the case concerning the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* and the *Pinochet* case, the two individuals concerned had been detained for lengthy periods. More recently, in *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Laurent Gbagbo had been detained for seven years prior to the acquittal ruling and, even after his acquittal, the prosecution had still challenged his right to be released. Indeed, he had not been immediately released, as should have occurred in such cases. Although Mr. Gbagbo had not been a serving State official at the time, immunity had been discussed and he had been detained during the investigation and the prosecution phases. The Commission should consider the possible consequences of draft articles 8 to 16 in that regard because they currently contained no reference to any specific time. The question of "reasonable" timing had been discussed, but it should also be remembered that detention should not be arbitrary, should be for a specific reason, and should not be for an unnecessary length of time.

Draft article 16 (3) referred to detention only in respect of the obligation to inform the nearest representative of the State of the official without delay. He noted in that regard that it was clear under current international law that, while immunity was available in criminal matters for State officials in foreign jurisdictions, that did not extend to prescriptive jurisdiction.

Given the nature of potential criminal offences worldwide and the diversity of criminal judicial systems, it was important to consider the possible effect of the consideration of immunity, both *ratione personae* and *ratione materiae*, on the liberty of the person. As immunity was a procedural matter, there was no need to distinguish between those two types of immunity. The Commission had discussed the need to strike a balance between sovereign equality and impunity; he noted in that connection that the Special Rapporteur had invited comments regarding future work on the topic concerning the need for a separate mechanism for the settlement of disputes. He welcomed that idea and suggested that such mechanism could also decide on questions related to liberty of the person.

The Commission should ensure that detention was kept to a minimum and could be effectively monitored and controlled at the international level. That was an area that could

be addressed in the context of recommended good practices. There should be clarity and consistency across the draft articles to favour decision-making on immunity without undue delay.

Procedural safeguards should be put in place not only to prohibit abuse but also to ensure due process in respect of liberty of the person through a special bail mechanism. The rights of the State official could thus be upheld until a conclusive decision on immunity was taken. Although it had been agreed in previous discussions to exclude the matter of family members, it should be recognized that proceedings could have a devastating effect on families and a delay in a decision on immunity might lead to separation or the family being required to leave the forum State.

He agreed with Mr. Nolte's proposal regarding the procedural aspects of draft article 7 and the comments on that subject made by Mr. Murphy, Mr. Tladi and others.

In conclusion, he supported the referral to the Drafting Committee of all the draft articles contained in the seventh report.

Ms. Escobar Hernández, summing up the debate on her sixth and seventh reports on immunity of State officials from foreign criminal jurisdiction and welcoming the rich debate on the topic, said that the number of statements made was testament to the interest the topic had generated, while the content thereof showed that members had examined her reports in great detail. The work of the Commission was a collegial effort undertaken with great commitment on all sides.

Above all, the debate had confirmed the importance the Commission attached to the inclusion of procedural provisions and safeguards in the draft articles. Some members had recalled the reasons behind those provisions, drawing mainly on the argumentation in her sixth report; Ms. Galvão Teles, among others, had noted that the Special Rapporteur's innovative proposals would be of great assistance to States. The interest in procedural provisions and safeguards was reflected in the broad support shown for draft articles 8 to 16, certain comments and criticism on content and wording – most of which would be most appropriately addressed in the Drafting Committee – notwithstanding.

Some members had expressed the view that the draft articles proposed in her seventh report lacked anything that could be considered a safeguard or guarantee, particularly with respect to the application of draft article 7, which for them was a vital aspect of the issue of procedural safeguards. In their view, the safeguards proposed were only partial, protecting the rights and interests of the forum State more than those of the State of the official. She did not share that view. As a number of members had pointed out, procedural provisions and safeguards must be considered as a whole in relation to the application of immunity. Their purpose was not to offer guarantees in specific circumstances but in all instances where the question of immunity arose, providing mechanisms to ensure a balance among the various norms, principles and interests at play. Viewed from that perspective, it was groundless to state that draft articles 8 to 16 contained nothing that could be considered a procedural guarantee, including a procedural guarantee protecting the State of the official. Such criticism was not only inaccurate but biased.

While she fully understood some members' continued concern to ensure that draft article 7 was subject to procedural safeguards, she took issue with claims that the procedural safeguards set out in her seventh report could not apply to draft article 7 because of how it was worded. According to those who made such claims, to state that immunity *ratione materiae* did not apply to certain crimes in international law made it impossible and pointless to take any of the procedural provisions into account: if immunity *ratione materiae* did not apply, then everything was already settled, and quickly. However, as Mr. Šturma had observed, there was more to it than that, and establishing whether immunity applied – even in the case of draft article 7 – would take a certain amount of time.

In fact, as Ms. Lehto, Ms. Galvão Teles, Mr. Jalloh and others had noted, the procedural provisions and safeguards applied to all the draft articles, including draft article 7. The fact that the competent authorities of the forum State might find themselves dealing with possible crimes in international law allegedly perpetrated by State officials would not relieve them of the duty to notify the State of the official, consider immunity without delay,

establish whether it applied to the case and whether it had been invoked or waived, and exchange information with the State of the official; nor would draft article 7 prevent consideration being given to transferring proceedings to the State of the official. She remained unconvinced by the arguments adduced in support of the view that the procedural safeguards did not apply to draft article 7, some of which sailed perilously close to sophistry.

Some members considered that more robust safeguards were needed for the application of draft article 7, as evidenced by the new draft article X proposed by Mr. Nolte. While she did not see the need for additional safeguards for that specific purpose, his suggestion nevertheless had merit insofar as it might apply to all cases of immunity, not only those involving draft article 7, and it had enjoyed the support of some members of the Commission. Others had taken a stance closer to her own, partly because the proposal might be understood as calling into question the draft articles already provisionally adopted by the Drafting Committee. Accordingly, the proposal should be considered by the Drafting Committee in the light of the Commission's debate, without diverting attention from the draft articles formally proposed by the Special Rapporteur or overshadowing proposals made by other members of the Commission. Contrary to what Sir Michael Wood had suggested, she felt it was still too soon to determine the form that the draft articles might eventually take. Proposing to the General Assembly that they should become a convention was a decision for the future.

The inclusion and content of draft articles 8 and 9 had enjoyed general support within the Commission. Some members had made specific comments on the terminology used and others on the structure of the two draft articles, while some, particularly Mr. Tladi, had suggested that they should be merged. Ms. Galvão Teles, Ms. Oral and others had queried the expressions "consideration of immunity" and "determination of immunity", which they found unclear. It had been suggested that a single term should be used instead; however, for various reasons, she had deliberately drawn the distinction between the two terms and used both. In her understanding, "consideration", as a more abstract term, referred primarily to the process and "determination" to the result. Although obviously related, the two were separate activities. Moreover, while "consideration of immunity" referred essentially to the "activation" of the issue of immunity by the competent authorities of the forum State, "determination of immunity" involved a decision on whether immunity applied or not in a particular case. The terms used in the original Spanish were entirely clear; if there were problems finding suitable equivalents in other languages, alternative wording might be sought when the draft articles were discussed by the Drafting Committee.

Draft article 8 was largely temporal in nature, while draft article 9 focused on which authority was competent to determine whether immunity applied, what legal elements were to be taken into account by that authority in so doing, and whether there were any determining factors to indicate whether immunity existed, such as whether it had been invoked or waived. In her view, the reasons given for merging them were insufficient. She would prefer them to be kept separate, particularly in the light of other suggestions regarding changing the order in which the draft articles were presented. There was broad agreement that immunity should be considered by the competent authorities at an early stage of the proceedings, as stipulated in draft article 8. Mr. Gómez-Robledo's suggestion of the phrase "without delay" as a clearer alternative to the current wording merited consideration by the Drafting Committee.

Fundamentally, the wording used would not resolve the question of whether immunity should be considered during the investigation phase. Most members of the Commission had expressed support for the flexible, two-fold approach to that issue taken in draft article 8, whereby immunity must be considered not only before the indictment of the official and the commencement of the prosecution phase, but also before any coercive measure was taken against the official that might affect the performance of his or her functions. A small number of members of the Commission had drawn attention to the need for immunity to be considered from the very moment when it became known that a foreign official was involved, even while matters were still being investigated. The debate was closely linked to what acts might be affected by immunity and to the concept of criminal jurisdiction itself, a definition for which she had included in her second report and

reiterated in her seventh, to the satisfaction of various Commission members. It was encouraging that some members, such as Sir Michael Wood, had reversed their initially sceptical positions on whether definitions of the concepts of immunity and jurisdiction were needed, even to the point of making specific proposals. In that regard, the suggestion that "inviolability" should be part of the definition of "criminal jurisdiction" was an important matter that should be considered by the Drafting Committee. Mr. Reinisch's comments on the scope of inviolability would be of particular interest.

Some members had commented on the use of the expression "competent authorities of the forum State", suggesting that it should be altered to "authorities" or simply "forum State" in the interests of flexibility and accommodating different legal systems. Such comments applied both to draft article 8 and draft article 9. She had some doubts as to the technical accuracy of such wording and whether a single term would suffice throughout the draft articles but was content to refer the matter to the Drafting Committee.

In addition to commenting on terminology, members of the Commission had expressed a number of divergent views on draft article 9. Many, including Mr. Saboia, Mr. Ruda Santolaria, Mr. Gómez-Robledo and Mr. Reinisch, had supported her proposal, as contained in paragraph 1 thereof, that it should be for the courts of the forum State to determine immunity, regardless of whether other bodies, particularly within the Ministry of Foreign Affairs, cooperated or assisted in the decision. Others, such as Mr. Zagaynov, Mr. Huang, Sir Michael Wood, Mr. Tladi and Mr. Hmoud, had said that the executive authorities usually determined whether immunity applied, communicating through the diplomatic channel, while a third group, including Ms. Galvão Teles, Mr. Vázquez-Bermúdez and Mr. Nolte, had emphasized the need to take into account variation in legal and political systems, the peculiarities of which should be preserved. They therefore considered that it would be better to reword draft article 9 (1) so as to leave the issue more open. While she maintained her existing view, she also recognized the valid concerns expressed, which should be taken into consideration by the Drafting Committee with a view to arriving at a formula that would encompass as many domestic legal systems as possible. In any event, a decision on whether immunity applied would have legal effects at both the international and the national levels and could not be classed as purely a "political act" or an "act of government" that could be exempted from judicial review. That should be borne in mind by the Drafting Committee and the Commission as a whole and reflected either in the text of the draft article or in the commentary thereto.

Draft article 9 was of particular importance as it dealt with the fundamental question of how to decide whether immunity should apply. She did not share the opinion of some members that it was unnecessary to refer to the draft articles or to the national law of the forum State, or to other norms of international law, as the normative framework in which that decision would be taken. In her view, not to do so would render the Commission's work since 2012 to identify the elements of immunity *ratione personae* and *ratione materiae* useless. Leaving out any reference to international law would be at odds with the Commission's mandate, while failing to mention applicable domestic law would sideline the essential legal framework under consideration – that of the forum State – and prevent the variation in legal systems from being taken into account. The references to national law should therefore be maintained. She was also amenable to Mr. Murase's suggestion of mentioning other norms of international law. For the same reasons, draft article 9 (3), which in her view set a minimum standard to be observed by the authorities responsible for deciding on immunity, should be preserved. The comments of Mr. Tladi and others on the wording of paragraphs 2 and 3 of draft article 9 could be addressed in the Drafting Committee in the light of her remarks. Draft article 9 might also be the most appropriate place for Mr. Nolte's proposals that were intended to create a more direct link between draft article 7 and procedural safeguards, which had received a good deal of support. The various elements of his proposed new draft article should all be taken into consideration in determining that immunity *ratione materiae* was not applicable and should be applied in a general sense in all cases, irrespective of whether draft article 7 was involved.

On the first part of Mr. Nolte's proposal, she had no objection to requiring decisions on immunity to be taken at the highest level or, as suggested by members such as Mr. Tladi, Mr. Grossman Guiloff, Mr. Jalloh, Mr. Saboia, Mr. Hassouna and Mr. Reinisch, to be

subject to appeal, particularly through the courts, if taken at a lower level. The second element of Mr. Nolte's proposal was more problematic, as she considered the phrase "the alleged offence is fully conclusive" not to be entirely compatible with the concept of immunity, which must be taken into account as early as possible, before judicial proceedings began or coercive measures were taken against the official concerned. While the underlying idea had merit, other wording should be explored. A number of members had made comments on that issue, among which she highlighted those of Mr. Grossman Guiloff. The third condition stipulated in Mr. Nolte's proposal should be examined in the context of draft article 9 but might also be incorporated into the draft article on transfer of proceedings, or even both for added emphasis. She welcomed the fact that, since the seventieth session, Mr. Nolte had amended his proposal so as to remove the requirement for the official to be on the territory of the forum State. Such a requirement raised a number of issues, not least because it took no account of differences among national judicial systems, which did not always require the presence of the individual concerned in order for initial steps to be taken, particularly in terms of deciding whether jurisdiction could be exercised and therefore whether immunity applied. Overall, she maintained the view that the conditions set out in Mr. Nolte's proposal could equally well apply to any determination of applicability of immunity and that there was no cause to limit their scope to draft article 7. The Drafting Committee could discuss the matter, taking into account the various views expressed.

The importance of invoking immunity had been highlighted by all those who had spoken. Draft article 10 had generally been welcomed, with most members favouring differentiated procedures for immunity *ratione materiae* and *ratione personae*. Many had noted that the fact that the same solution had been proposed by both Special Rapporteurs for the topic should lend it particular weight. Others, however, had emphasized that immunity should be considered in all cases, *ex officio*, or at least that immunity *ratione materiae* should be considered *ex officio* if the competent authorities of the forum State were definitely aware that they were dealing with a foreign State official, an issue on which Mr. Reinisch and Ms. Galvão Teles had commented. The arguments that both she and her predecessor as Special Rapporteur had put forward should suffice as justification for continuing to draw a distinction between how the two types of immunity were dealt with, but it might be useful for the Drafting Committee to consider Mr. Reinisch's suggestion of establishing similar procedures for invoking immunity *ratione personae* to those laid down in the Vienna Convention on Consular Relations.

Those who favoured differentiated invocation procedures had nevertheless drawn attention to the need to clarify the wording of draft article 10, as the fact that it was unnecessary to invoke immunity *ratione personae* was not mentioned until paragraph 6. The difference emerged clearly from her seventh report, as Mr. Ruda Santolaria had observed, but it might be useful to amend draft article 10 to avoid any misinterpretation. The Drafting Committee could consider the helpful suggestions made in that regard by Mr. Aurescu and Mr. Murase. With regard to draft article 10 (2), the proposal made by Mr. Hmoud, supported by Ms. Galvão Teles and others, to make the provision less prescriptive by altering "shall" to "should" or similar, might allay the understandable concerns of those who had observed that, for many reasons, immunity could not always be invoked immediately.

As to which State authorities were competent to invoke immunity, members had generally supported the principle that it was for the State of the official to decide, depending on its internal structure, and that it might differ from case to case, with the sole exception of the immunity of the Head of State, Head of Government and Minister for Foreign Affairs. There had also been broad support for the position that it was for the State, not the official, to invoke immunity, despite the fact that, if an official did invoke immunity, the authorities of the forum State could not ignore such a claim, even if it could not be considered a genuine invocation of immunity for the purposes of the draft articles. In that regard, her seventh report was in line with the stance taken by the previous Special Rapporteur and had enjoyed wide support. Although Mr. Aurescu had pointed out that nothing would prevent a State from instructing its official to claim immunity, it was difficult to think of cases in which that might be feasible.

Draft article 10 (4) had drawn generalized criticism from a substantial number of members of the Commission, who considered that the diplomatic channel should be preferred over any other for communications relating to invoking immunity, as that was the one most frequently used in practice. It had not been her intention to relegate the diplomatic channel to secondary importance; the wording of the paragraph had simply been modelled on what commonly appeared in the international treaties referred to in her seventh report, the importance of which had been mentioned by Mr. Ouazzani Chahdi. It was also more effective to refer first to procedures established in cooperation and mutual legal assistance agreements to which both States were parties and other procedures commonly accepted by both States as it ensured that, if such procedures were applicable, the courts or other authorities responsible for determining immunity would always be aware that it had been invoked and would consequently be obliged to take it into consideration immediately, which could not be guaranteed if immunity were invoked through the diplomatic channel. In some States, it would be impossible for the executive authorities to provide the judicial or investigating authorities with such information or documents unless specifically requested. She had no objection to the amendments to draft article 10 (4) suggested by Mr. Hmoud and others with a view to prioritizing the diplomatic channel, but such a change should not compromise the obligation of any authority of the forum State to transmit invocations of immunity received from the State of the official through any channel to the authorities competent to determine their applicability. Although Mr. Hmoud and others had suggested deleting the words “all means available” from paragraph 5 of draft article 10 and elsewhere, such a proposal would not take account of how the relationship between the executive and judicial branches might vary from State to State, potentially imposing an obligation with which it would be difficult to comply without amending national legislation.

As indicated in her seventh report, the fact that immunity had not been invoked could not be taken as a waiver, even though it might have some similar effects in the case of immunity *ratione materiae* if the State of the official had been notified in due time of the forum State’s intention to exercise jurisdiction and requested to state its position. Those aspects could be covered in the commentary, if necessary.

A number of the comments that had been made regarding draft article 11 were similar to those relating to draft article 10. While there had been broad consensus within the Commission with regard to the statement in draft article 11 (2) that waiver should be express and clear, there had been some criticism of draft article 11 (4), which referred to the circumstances under which the provisions of a treaty could be deemed to constitute an express waiver. Some members, notably Mr. Nolte, Mr. Reinisch and, to some extent, Sir Michael Wood, considered that it was not possible for waiver of immunity to derive from a treaty since immunity was, by definition, an individual act taken by a State on a case-by-case basis. While the majority of members had supported the notion that a treaty could give rise to waiver of immunity, some had pointed out that the current formulation of the draft article posed some problems, including that the formulation “can be deduced” was incompatible with the requirement that the waiver should be “express and clear”, as stipulated in draft article 11 (2). To avoid that confusion, and in line with the opinion expressed by the majority of members, the Drafting Committee could perhaps examine the alternative proposals put forward by Mr. Vázquez-Bermúdez and Mr. Tladi. It could also consider the proposal made by Mr. Aurescu and supported by Ms. Lehto to simply affirm that waiver of immunity “shall be express and clear”, thereby allowing for the inclusion of the different possibilities contained in draft articles 11 (2) and (4). If that approach was chosen, the commentaries would need to include a more detailed explanation of the issue.

The Drafting Committee could also consider including a specific reference to the fact that waiver could not produce retroactive effects, a position that was fully compatible with the discussion of waiver in her seventh report. The reference could be added in the text itself or, perhaps more appropriately, in the commentaries.

Lastly, the proposal by Mr. Nguyen, in support of an earlier proposal by Mr. Nolte, was intended to strengthen the relationship between draft article 7 and waiver of immunity through the addition of a new paragraph in draft article 11. The new paragraph would stipulate that a State could waive the immunity of one of its officials if he or she had committed one of the most serious crimes under international law. That proposal, which

had been supported by Ms. Lehto, was particularly interesting and could be examined by the Drafting Committee.

Draft article 12 had received widespread support from the members of the Commission, who had expressed the opinion that the notification to the State of the official of the intended or actual exercise of criminal jurisdiction over one of its officials was a basic element for triggering a system of procedural guarantees to protect the State of the official. To that end, it had been stressed that such notification constituted the basis for invocation or waiver of immunity by the State of the official and for the initiation of consultations, exchange of information between the forum State and the State of the official or the transfer of criminal proceedings.

Some members of the Commission, including Mr. Nolte and Ms. Galvão Teles, had spoken in favour of placing draft article 12 before the draft articles pertaining to invocation and waiver of immunity. That proposal seemed reasonable and could be considered in the Drafting Committee.

Although the obligation to notify the State of the official had garnered general support, it should also be noted that some members of the Commission had pointed out that limits should be placed on such an obligation, particularly when the information contained in the notification might affect victims, as Mr. Aurescu had noted, when it might jeopardize the investigation, as Mr. Grossman Guiloff and Mr. Reinisch had noted, or when it might also directly cause the affected official to flee or trigger the adoption of measures to enable him or her to evade the exercise of criminal jurisdiction. The Drafting Committee could consider such limits. Likewise, Mr. Nguyen had proposed the replacement of the words “shall notify” with “should notify”.

Similarly, the Drafting Committee could consider Mr. Nguyen’s proposal that the notification should contain a request to waive immunity. While there was nothing in the current formulation of draft article 12 that prevented such a request being made, she had no objection to the inclusion of a specific reference to the possibility of doing so.

The Drafting Committee could also consider Mr. Jalloh’s proposal to include in draft article 12 (1) a reference to the fact that notification should be made when the exercise of jurisdiction might translate into coercive measures that might affect the performance of the foreign official’s duties.

Lastly, the comments relating to the prioritization of the use of the diplomatic channel also applied to draft article 12.

As to draft article 13, on exchange of information, a number of proposals had been made that might be of interest to the Drafting Committee. Firstly, some members, notably Mr. Hmoud, understood the State of the official to have the unconditional right to refuse to provide information, rendering draft article 13 (4) unnecessary in its current formulation. It would be useful to recall in that regard that the exchange of information constituted an essential element of the system of procedural guarantees that part four of the draft articles sought to establish, and that draft article 13 provided for the possibility of making the transmission of information subject to conditions. She was therefore not entirely convinced of the utility of removing that possibility entirely. If some members of the Commission wished to insist on the deletion of the list of reasons that could justify a refusal to provide information, perhaps they might at least consider using some other formula, such as, for example, defining the obligation to consider in good faith the possibility of responding positively to a request for information.

In order to strengthen the position of the State of the official, it might be useful to consider the proposal made by Mr. Park, namely that the information requested by the forum State must not simply be “relevant” but must also be “necessary” or “essential”. Similarly, the Drafting Committee might wish to consider the utility of strengthening the two-way nature of the mechanism.

Lastly, she fully agreed with the comments made by some members of the Commission regarding the notion that refusal to provide information could in no way be considered grounds for declaring that immunity did not apply, as was currently stated in draft article 13 (6). That draft article could be expanded to include an explicit mention of

the fact that the provision of information should in no way be interpreted as a form of waiver of immunity or a form of recognition of the criminal jurisdiction of the forum State, as raised by Mr. Hmoud and Mr. Murase.

Draft article 14 had drawn broad support from the members of the Commission, who considered it a key element of procedural safeguards. The definition of a system for the transfer of proceedings to the State of the official had been considered a useful mechanism in establishing an appropriate balance between the various principles and values that had to be considered with respect to the question of immunity. Several members of the Commission had drawn attention to the principles of complementarity or subsidiarity of the jurisdiction of the forum State as the underpinnings for draft article 14 and indicated that both of those principles could be mentioned explicitly. She shared that view and, as she had clearly indicated in her seventh report, they did indeed form the basis for the draft article. If the State of the official exercised its own jurisdiction to prosecute its official, it seemed logical that such jurisdiction should be given preference over the jurisdiction of the forum State. While she was not fully convinced that an explicit reference to that preference was required, she would be happy to include one if the majority of members believed it to be necessary.

There had also been some critical comments about draft article 14, namely in relation to when the transfer of proceedings could take place, what the conditions for such transfer should be and which State could trigger a transfer. With regard to the first of those issues, some members had pointed out that draft article 14 seemed to be aimed only at cases in which the authorities of the forum State considered that immunity could not apply. However, she did not agree that the draft article gave rise to that interpretation. On the contrary, as indicated in the report, the transfer of proceedings would have an effect irrespective of whether or not the forum State had determined that immunity applied. The transfer of proceedings could be useful in preventing any controversy in relation to the application of immunity.

In terms of the activation of the transfer of proceedings, some members had said that draft article 14 made provision only for the forum State to trigger the transfer and disregarded the possibility that the State of the official could instigate it. Citing the fact that draft article 14 (1) referred only to the decision of the forum State as a basis for transfer, the members in question had concluded that draft article 14 appeared to be designed to protect the interests of the forum State only.

In her opinion, there were no solid grounds for such criticisms. Draft article 14 (1) explicitly stated that the authorities of the forum State could consider declining to exercise jurisdiction and transfer the proceedings to the State of the official, and recognized that, ultimately, the final decision on refraining from the exercise of jurisdiction and on the transfer of proceedings fell to the forum State. That position was fully aligned with the very nature of the institution of transfer of proceedings and indeed was reflected in the various international instruments listed in the seventh report. In accordance with those instruments, it was the State that intended to exercise jurisdiction that should take the decision on the transfer of proceedings, since its authorities had possession of all the relevant elements of the initial investigation and any evidence that had been gathered. Furthermore, it was that State's authorities that would in principle be competent to exercise the jurisdiction that they were declining to exercise.

However, that could not be understood to mean that only the forum State could trigger a transfer; on the contrary, there was nothing to prevent the State of the official from directly requesting the right to exercise its own jurisdiction after it had received notification, as referred to in draft article 12, an act which could trigger the procedure that could lead to the transfer of proceedings. Draft article 14 left that possibility entirely open, as Ms. Lehto and Mr. Ruda Santolaria had pointed out. However, if those members who had raised the issue continued to have concerns, the commentaries to the draft article might be the best place to address it. She was open to other formulations that would reflect their concerns, and the matter could be examined further by the Drafting Committee.

The question of the conditions that needed to be met for the transfer of proceedings to take place had been addressed in her report. Regarding the comments made by some

members, she was in full agreement with them that transfer of proceedings must not become a tool to be used for the sole purpose of exempting the official from prosecution. She fully shared the concerns expressed by Mr. Aurescu, Mr. Hmoud, Mr. Tladi, Mr. Nolte, Ms. Galvão Teles and Mr. Park in that respect, namely that transfer of proceedings should be subject to the condition that the State of the official was genuinely able and willing to exercise jurisdiction, and actually did so.

That conditionality underpinned the principle of subsidiarity raised by Ms. Galvão Teles and Mr. Nolte, the importance of which should not be overlooked. The condition that the exercise of jurisdiction by the State of the official had to be effective was contained in draft article 14 (2), which explicitly indicated that the authorities of the forum State should suspend the proceedings until the State of the official had made a decision; however, it was by no means intended to refer to shelving or dismissing a case. She shared the concern of some members that the condition should be made explicit, and was willing to consider that question and make the corresponding proposals in the Drafting Committee. To that end, the Drafting Committee could consider Mr. Park's proposal to add a fourth paragraph to draft article 14 and Mr. Nolte's proposal to insert a new paragraph between draft articles 14 (1) and (2) that would take account of the relationship between draft article 7 and procedural guarantees.

Making the procedure for the transfer of proceedings subject to the jurisdiction of the forum State and the international instruments on cooperation and mutual legal assistance to which both States were parties was crucial since it allowed for the full range of existing legal orders to be preserved. It also took into account a number of elements that were essential in most legal regimes, to which Ms. Galvão Teles had made reference when she had raised the principle of separation of powers. It could also be useful to consider the proposal made by Mr. Jalloh regarding draft article 14 (3).

Lastly, she wished to draw attention to the fact that transfer of proceedings could occur also in respect of international criminal courts, as had been noted by Mr. Nolte and Mr. Hmoud. That form of transfer, if accepted by both the forum State and the State of the Official, would undoubtedly also be a useful instrument for resolving disputes on the applicability of immunity.

Draft article 15, on consultations between the forum State and the State of the official, had garnered a great deal of support, with some members pointing out that it was a key instrument in the context of procedural guarantees and provisions. During the debate, there had nevertheless been a number of comments on the need to establish a clear relationship between consultations, notification and the exchange of information between the forum State and the State of the Official; those comments could be reflected by changing the order of the draft articles. She herself agreed with many of those comments and would take them into account in her proposals to the Drafting Committee.

Some members had also noted that the concept and function of consultations needed to be referred to more broadly, either in the draft article itself or in the commentaries. Those comments were also very useful and she would take them into account in her subsequent work. She was of the opinion that, owing to the multiple functions of consultations, they warranted individual treatment; therefore, she did not agree with Mr. Tladi's proposal to merge draft articles 13 and 15 or to move draft article 13 to a different position in the text.

Draft article 16 had gained support from the majority of Commission members, who believed that it was especially important in protecting the rights of the official and ensuring that he or she would receive fair treatment in all circumstances. Some members had said that they did not consider draft article 16 to be vital but that they were not opposed to its inclusion. Only one member of the Commission, Sir Michael Wood, was opposed to its inclusion, since he was of the opinion that it was unrelated to the issue of immunity of State officials from foreign criminal jurisdiction. She herself, together with the majority of members, continued to believe that draft article 16 was essential in order to make explicit the right of the official to fair treatment. In that respect, she took note of Mr. Reinisch's proposal to refer only to the rights of the official in draft article 16 and to exclude any reference to the procedural safeguards that would apply only to the relationship between the

State of the official and the forum State. The Drafting Committee could examine that question.

Mr. Murphy, supported by, among others, Mr. Vázquez-Bermudez, Mr. Gómez-Robledo and Mr. Reinisch, had proposed that the wording of draft article 16 should be modelled on that used by the Commission in draft article 11 on crimes against humanity. She fully understood the desire for consistency in the Commission's work, an aspiration that had been expressed by various members, and would be happy to consider alternative formulations that might help to align the text of the two draft articles. However, as a matter of principle, she wished to place on record that maintaining consistency did not mean using identical wording. If that was the case, draft article 11 on crimes against humanity would have had to follow the same model that had been used for the articles on the expulsion of aliens, when in fact it was quite far removed from that model. It was not her intention to criticize the wording of draft article 11 on crimes against humanity, nor did she wish to bar the Commission from considering draft article 11 on crimes against humanity and draft article 16 of the current topic in parallel; rather, she wished to highlight the fact that draft articles produced in relation to a given topic always presented specificities that had to be taken into account. For example, the specific provisions on the rights of detainees in draft article 11 on crimes against humanity would be difficult to reproduce fully in the case of immunity or in the specific provisions on consular assistance, even though they had been taken up *mutatis mutandis* in draft article 16 (3). The Drafting Committee could consider that question, as well as the proposal for alternative wording of draft article 16 that had been submitted by Mr. Aurescu.

Lastly, she was in full agreement with the proposal made by a number of members regarding the possibility of changing the order of the draft articles. Subject to a review by the Drafting Committee, she wished to propose the following new order for the draft articles: 8, 12, 10, 11, 13, 9, 14, 15, 16.

Turning to the issue of future work, she said that in her view the relationship between national and international criminal courts with respect to immunity warranted specific treatment. That proposal had been opposed by some members, including Mr. Zagaynov, Sir Michael Wood, Mr. Murphy, Mr. Huang, Mr. Rajput and Mr. Tladi, but supported by others, including Mr. Saboia, Mr. Ruda Santolaria, Mr. Grossman Guiloff, Ms. Galvão Teles, Ms. Lehto and, in particular, Mr. Jalloh. She herself believed that an analysis of that relationship could be interesting. However, as she had pointed out in her presentation of the seventh report, she did not believe that such an analysis should be linked to the ruling by the International Criminal Court in the case of *The Prosecutor v. Omar Hassan Ahmad Al-Bashir*. While she did not share the position of Sir Michael Wood that the ruling was completely unrelated to the topic, she did believe that focusing the analysis of the relationship between international criminal courts and internal criminal jurisdictions on that particular ruling would be of little use to the work of the Commission and could even give rise to other problems. That did not mean, however, that the ruling should be disregarded completely, especially given that some members, notably Mr. Nolte, had referred to the possibility of a case being transferred to an international court as an alternative to the exercise of jurisdiction by the forum State. Her intention was therefore to undertake a brief general analysis of that relationship and then present a specific formulation that could be included in the draft articles. It would likely take the form of a "without prejudice" clause, such as that she had referred to on various occasions and Sir Michael Wood had mentioned the previous day.

Concerning the settlement of disputes, she had taken note of the interest shown by some members of the Commission regarding the possibility of incorporating a reference to dispute settlement mechanisms in the draft articles. Various proposals had been made, including, for example, taking the model used in the draft conclusions on peremptory norms of general international law (*jus cogens*) and Mr. Reinisch's idea of introducing some form of third-party intervention as a precondition for the effective exercise of jurisdiction. She had also taken note of the comments of some members who did not consider it necessary to include a draft article on the settlement of disputes in the topic, particularly, as Mr. Tladi had highlighted, given that such mechanisms were typical of draft treaties. While it was still premature to make any concrete proposal in that connection, it was clear from the debate

that there was strong interest in making a closer analysis of the question of dispute settlements, which she intended to do in her next report.

While many members had supported the possibility of including recommended good practices in the draft articles, others had been more reserved in that regard or had even questioned what was meant by good practices in that context. Although it was neither possible nor desirable to provide a quick answer to that question, she wished to note that in referring to good practices she was essentially referring to elements that were of an operational rather than a normative nature and that could help States to ascertain whether or not immunity should apply in a given case. In the light of the debate, she would also examine that question in her next report.

Lastly, some members had drawn attention to the fact that some pending issues that had been raised in the debates had not yet been resolved. For instance, Mr. Zagaynov had referred to the issue of *ultra vires* acts. Her intention was to continue working on all the issues that remained pending and make proposals in her next report where appropriate; however, in her view most of those issues would be best dealt with in the commentaries to the draft articles.

In conclusion, she would take into account in the work of the Drafting Committee all the valuable comments that had been made during the debate. She wished to request that the Commission should refer to the Drafting Committee draft articles 8 to 16 as contained in the seventh report, on the understanding that, in line with the Commission's usual practice, the Drafting Committee would analyse the draft articles alongside all the comments made in the plenary and in the light of the various proposals for new articles or new paragraphs of articles, including those put forward by, among others, Mr. Grossman Guiloff, Mr. Jalloh, Mr. Murase, Mr. Nguyen, Mr. Nolte, Mr. Park and Mr. Tladi. That list was intended only as indicative and did not seek to establish a hierarchy among the proposals; neither was it intended to exclude the consideration of other proposals made in the plenary or in the Drafting Committee.

It was her belief that the Commission had a great opportunity to achieve consensus on the issue of procedural safeguards and provisions. She had no doubt that the members would do their utmost to achieve that consensus in a way that was acceptable to all, which would of course require compromise. She herself intended to make every necessary effort to achieve that goal.

The Chair said he took it that the Commission wished to refer draft articles 8 to 16 to the Drafting Committee, taking into account the views expressed and proposals made in the plenary debate.

It was so decided.

General principles of law (agenda item 7) (A/CN.4/732)

Mr. Vázquez-Bermúdez (Special Rapporteur), introducing his first report on general principles of law (A/CN.4/732), said that, in his view, general principles of law were an important component of the international legal order that deserved attention. As nearly 100 years had passed since the inclusion of general principles of law in Article 38 of the Statute of the Permanent Court of International Justice, the elucidation by the Commission of various aspects of that source of international law would represent a useful and valuable contribution. As Special Rapporteur, he would strive to address the topic with the greatest possible dedication, seriousness and caution, always in a spirit of collegiality and cooperation with all the members of the Commission and States in the Sixth Committee.

He wished to begin his presentation with four general observations. First, in 2017 and 2018, States in the Sixth Committee had generally welcomed the inclusion of the topic in the Commission's long-term programme of work. Many delegations had congratulated the Commission on its decision to address the topic, which, they had noted, would complement existing work on the sources of international law. Various delegations had expressed the view that the Commission could provide authoritative clarification of the nature, scope and functions of general principles of law, as well as of the criteria and methods for their identification. Only one State had voiced doubt about the topic, namely

that there might not be enough State practice for the Commission to reach any helpful conclusions on the topic.

He fully shared the position of those States that had expressed support for the topic. In his view, by virtue of its close collaboration with States in the Sixth Committee, the Commission was in a unique position to clarify various aspects of general principles of law as a source of international law that gave rise to different understandings in practice and above all in the literature on the topic. By adopting a cautious and rigorous approach, the Commission would be able to offer guidance to States, international organizations and courts, and anyone else called upon to use general principles of law as a source of international law.

Second, since its inclusion in the Commission's long-term programme of work, the topic had generated considerable interest. A study group of the International Law Association, for example, had concluded its work on the "Use of domestic law principles for the development of international law" in 2018 and had recommended that a new committee should be established with the objective of contributing to the work of the International Law Commission "on the broader topic of general principles of law (including other potential sources from which general principles could be derived)". In addition, various academic works on general principles of law had been published in the previous two years, and he understood that others were currently in preparation. Academic and government institutions had organized conferences and workshops on the topic in a number of cities, and further events were being planned. His intention as Special Rapporteur was to continue participating in activities of that kind so as to raise awareness of the Commission's work on the topic and exchange ideas and points of view.

Third, the final edited version of his first report in English and the versions in the other official languages of the United Nations contained a number of inaccuracies and errors, most of which were minor. He would submit a list of corrections to the Secretariat so that the necessary amendments could be made as soon as possible.

One issue that had arisen in relation to the Spanish and French versions of the report concerned the translation of the term "general principles of law". The term "*principios generales del derecho*" was used in the Spanish version of the report, whereas reference was made in Article 38 (1) (*c*) of the Statute of the International Court of Justice to "*principios generales de derecho*". The same applied to the expressions used in the French.

In his view, those differences were insignificant, and the terminology currently used in the French and Spanish versions of the report, including in the title of the topic, could be retained. The same terminology was used in some instruments concluded since the adoption of the Statute of the Permanent Court of International Justice, such as the International Covenant on Civil and Political Rights and the Rome Statute of the International Criminal Court, as well as in the literature on the topic and by the Commission itself.

Fourth, following the Commission's extensive consideration of treaties and customary international law, its consideration of the topic of general principles of law would complete its work on the three main sources of international law as set out in Article 38 (1) (*c*) of the Statute of the International Court of Justice. The question of sources was essential for the international legal system and, by addressing that question and clarifying various aspects of it, the Commission would certainly be providing a valuable service to States and all those concerned with international law.

His first report was preliminary and introductory in nature. As noted in paragraph 4, its main purpose was to lay the foundation for the future work of the Commission on the topic, as well as to obtain the views of members of the Commission and States in that regard. While he addressed certain basic aspects of the topic in some depth, particularly in part four of the report, he had taken the complexities of general principles of law into account and had been careful not to jump to conclusions on a topic that required careful thought. The three proposed draft conclusions reflected an initial approach to the topic based on his studies over the previous year. He believed that the debate in the Commission, including in the Drafting Committee, would help to define future work on the topic.

The report was divided into five parts. Part one addressed some basic points. In particular, it proposed the issues that, in his opinion, the Commission should study; the form that the final outcome of the Commission's work should take; and certain questions of methodology. Part two addressed the previous work of the Commission related to general principles of law. Part three provided an overview of the development of general principles of law over time. Part four, the most substantial, offered an initial analysis of the elements of Article 38 (1) (*c*) of the Statute of the International Court of Justice and of the possible origins or categories of general principles of law. Lastly, part five proposed a future programme of work.

Part one (I) set out, in essence, the scope of the topic, and four aspects related to general principles of law were proposed for the Commission's analysis: (1) an explanation of the legal nature of general principles of law as a source of international law and of the meaning of Article 38 (1) (*c*) of the Statute of the International Court of Justice; (2) the origins or categories of general principles of law; (3) the functions of general principles of law and their relationship with other sources of international law; and (4) the identification of general principles of law. Those aspects of the topic were essentially the same as those proposed in the 2017 syllabus.

Clearly, and as explained in the report, those aspects of the topic were all closely interrelated, and if the members of the Commission agreed that they should all be studied, that fact would have to be taken into account.

Part one (II) addressed certain questions of methodology, of which he wished to highlight only two. First, as mentioned in paragraph 38, one of the main challenges was how to select the relevant materials for the study of the topic, as the terminology found in practice and in the literature tended to be unclear and thus likely to give rise to confusion. Terms such as "principle", "general principle", "general principle of law", "principle of international law", "general principle of international law" and "fundamental principle of international law" were used frequently without a clear indication as to the sources of such principles. However, the use of the word "principle" did not necessarily indicate a general principle of law in the sense of Article 38 (1) (*c*) of the Statute of the International Court of Justice. Depending on the context, that word might refer to a conventional or customary norm or to a general principle of law, and a degree of caution was thus needed. The question that arose was how to make that distinction and how to select the relevant materials. That was why he was proposing certain factors that should be taken into account when deciding whether particular materials were relevant to the topic.

The second question of methodology that he wished to emphasize was that, as in the Commission's work on the topic of peremptory norms of general international law (*jus cogens*), examples should be provided for illustration only, and the substance of general principles of law should not be addressed. However, he did not believe that the preparation of an illustrative list of general principles of law was appropriate. Although that approach might have been appropriate in the context of the topic peremptory norms of general international law (*jus cogens*), owing to the relatively small number of norms that the Commission had identified as belonging to that category, general principles of law were a source of international law, like treaties and custom, and could therefore generate all kinds of international rights and obligations.

Part two of the report addressed the Commission's previous work related to general principles of law. As the report made clear, general principles of law had featured in the Commission's work from its earliest years. On certain topics, such as the law of treaties and the responsibility of States for internationally wrongful acts, it could be said that the Commission had codified certain general principles of law. Additionally, on topics such as the fragmentation of international law, the identification of customary international law and peremptory norms of general international law (*jus cogens*), some aspects of general principles of law had been studied or discussed, albeit generally in a cursory fashion. As noted in the report, the Commission's previous work should be taken into account in the appropriate manner.

Part three of the report had two main objectives. First, it briefly set out the development of general principles of law over time so as to contextualize the topic. In

essence, it addressed three aspects: practice relating to general principles of law prior to the adoption of the Statute of the Permanent Court of International Justice in 1920; their inclusion in Article 38 of the Statutes of the Permanent Court of International Justice and of the International Court of Justice; and practice relating to general principles since the adoption of both Statutes. Second, it sought to provide members with relevant materials for the study of general principles of law.

He wished to highlight two points relating to chapter III, which was divided into section A, focused on references to general principles of law in international instruments, and section B, dedicated to general principles of law in the jurisprudence of international courts and tribunals.

First, as noted in paragraph 126 of the report, the fact that chapter III (B) focused on litigation did not imply that general principles of law did not apply in other contexts. If such principles were a source of international law, and existing practice and their inclusion in Article 38 (1) of the Statute of the International Court of Justice left no doubt that they were, they would apply in the relations between subjects of international law in a general way. They could thus not be limited to the context of litigation before international courts and tribunals; nor did they depend solely on that context for their application. Although that point was quite evident, it was worth mentioning, as certain opinions in the literature seemed to suggest the opposite.

Second, the materials mentioned in that section were not exhaustive, and many other examples could be given. In June 2018, for instance, Switzerland had invoked the admissibility of indirect evidence as a general principle of law in the *M/T "San Padre Pio" Case (Switzerland v. Nigeria)* before the International Tribunal for the Law of the Sea and had referred to Article 38 (1) (*c*) of the Statute of the International Court of Justice. In April 2018, in the case *Russia – Measures Concerning Traffic in Transit*, a panel established by the Dispute Settlement Body of the World Trade Organization had referred to the principle of good faith as a "general principle of law" and a "principle of general international law". In addition, in oral statements before the International Court of Justice in the case concerning the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)*, the parties had referred to *lis pendens* and the equality of arms as general principles of law, although the Court had left the matter to be decided at a later stage. The United States of America had invoked the principle of abuse of process and the "clean hands" doctrine in the case concerning *Certain Iranian Assets (Islamic Republic of Iran v. United States of America)*.

In summary, there was sufficient practice, both of States and in international jurisprudence, for the Commission to deal with the topic in an appropriate way. He would continue to make every effort to gather all relevant practice and hoped that any concerns about the lack of such practice could be swiftly dispelled.

In paragraphs 137 and 138 of the report, brief reference was made to practice in relation to what could be considered general principles with a regional scope, as well as to the practice of international administrative tribunals. For reasons of time and space, that practice was not examined in detail in the first report. However, the Commission should analyse it to the extent that it was relevant for the purposes of the topic, and it would be very useful to hear the views of members in that regard.

Part four of the report included an initial analysis of certain basic aspects of the topic: first, the elements of the term "the general principles of law recognized by civilized nations" in Article 38 (1) (*c*) of the Statute of the International Court of Justice were analysed; second, the origins or categories of general principles of law were addressed. Lastly, some terminological clarifications were provided.

There were two reasons why it had seemed essential to provide an initial analysis of those aspects. First, as the Commission had taken Article 38 (1) (*c*) of the Statute of the International Court of Justice as the point of departure for its work, its initial approach should logically and sensibly include an attempt to elucidate the precise meaning of each of those terms. That had led him to separate Article 38 (1) (*c*) into three elements: (1) the term "general principles of law"; (2) the requirement of recognition; and (3) the term "civilized

nations". Those elements were clearly interrelated, and they had been separated in the report for the sole purpose of imposing some order on the analysis.

Second, in his view, the question of the origins of general principles of law, which could also be framed as the question of the categories of principles covered by Article 38 (1) (*c*) of the Statute of the International Court of Justice, was decisive and would have an effect on the way in which the Commission addressed the topic, which was why it had seemed necessary to consider it in the first report.

Part four (I) (A), addressed the question of whether the term "general principles of law" revealed anything about the possible characteristics, origins, functions or otherwise of that source of international law. The analysis in that regard was largely interpretative and, as noted in paragraph 145 of the report, any conclusions drawn in that manner needed to be further assessed in the light of existing practice.

One of the questions that had arisen during the preparation of the report was whether general principles of law in the sense of Article 38 (1) (*c*) of the Statute of the International Court of Justice shared some characteristics with the general principles that existed in domestic legal systems. At first glance, it seemed that they did. For example, if one of the functions of general principles in international law was to fill gaps, that feature might be something that they had in common with general principles within domestic legal systems. However, as mentioned in paragraph 144 of the report, general principles of law in the sense of Article 38 (1) (*c*) of the Statute were a source of international law and were therefore likely to have their own unique features, owing to the structural differences between the international legal system and national legal systems. In any case, the possible affinities between them could be studied in a future report, if the Commission so wished.

Another question that had arisen during the preparation of the first report was whether a "principle" was qualitatively different from a "norm" or "rule" of international law. If so, could it be said that all general principles of law in the sense of Article 38 (1) (*c*) of the Statute shared certain characteristics that distinguished them from customary and conventional norms?

He would not wade into the lengthy debates to which that question had given rise in the literature; there was such a diversity of opinion that it was difficult to find any real consensus among academics. He would recall only that, as mentioned in paragraphs 151 and 152 of the report, both the International Court of Justice and the Commission had taken the position that the term "principle" referred to a more "general" and "fundamental" norm than other norms of international law. However, Article 38 of the Statute of the Court seemed to treat all those terms as synonyms and, as indicated in paragraph 154, references to a great variety of general principles of law, some of which might not be considered "general" or "fundamental", could be found in practice.

For that reason, the preliminary conclusion drawn at the end of the section was that, although general principles of law might have a general and fundamental character, it could not be excluded that some such principles might not have that character.

Another issue briefly addressed in that section was the relationship between general principles of law and the term "general international law". He did not believe that the conclusion drawn on that point was particularly controversial: the term "general international law" clearly included general principles of law. That position had recently been restated by the Commission in its commentaries to the draft conclusions on the identification of customary international law and implied that general principles of law were universally applicable.

Of course, that did not mean that every use of the term "general international law" was a reference to general principles of law. Each case had to be analysed in context so as to determine whether it was a reference to a conventional or customary norm or to a general principle of law.

Chapter I (B) included some general observations on the use of the term "recognized" in Article 38 (1) (*c*) of the Statute of the International Court of Justice. Given the importance of the requirement of recognition, he wished to highlight some points made in the report.

As noted in paragraph 165 of the report, recognition could be considered the essential condition for the existence of a general principle of law as a source of international law. That position followed from the text of Article 38 (1) (*c*) of the Statute of the International Court of Justice, which established that general principles were recognized by "civilized nations". It also followed from the *travaux préparatoires* of the Statute of the Permanent Court of International Justice that recognition was an essential condition. The drafters of Article 38 (3) of the latter Statute had agreed that the formal validity of general principles of law depended on their recognition by civilized nations; in other words, their existence had to have an objective basis. One of the drafters' concerns had been to avoid granting judges overly broad discretion in determining the law or even the power to legislate. That could only be achieved by means of a condition that did not depend on the subjective view of the judge, or any particular State, but could be determined by observing the recognition accorded by States in general.

Clearly, the essential condition of recognition, for general principles of law, differed from the essential conditions for customary norms, namely general practice and its acceptance as law (*opinio juris*). The possible forms that recognition for the purposes of Article 38 (1) (*c*) of the Statute of the International Court of Justice could take were addressed only briefly in the first report.

Chapter I (C) addressed the term "civilized nations". It dealt with the question of how to determine whose recognition was necessary for the emergence of a general principle of law.

He did not believe that the term would cause great difficulties for the Commission's work. As noted in the report, while it might have had a particular meaning at some point in the past, it no longer did. There was broad consensus, both in practice and in the literature on the topic, that it was anachronistic and should therefore be avoided. In any case, in the light of existing practice and the principle of the sovereign equality of States, the term "civilized nations" should now be understood as referring to all the States that made up the international community.

That conclusion did not exhaust all the issues that arose in relation to the question of who should recognize a general principle of law. One of the issues that needed to be considered, for example, was the degree of recognition required for the emergence of a general principle of law. Moreover, the question might arise as to whether international organizations could contribute to the formation of general principles of law. In addition, the Commission might consider the special role that international courts and tribunals could play in relation to the recognition of general principles of law. In that regard, he would listen carefully to the comments made by members.

Part four (I) of the report ended with draft conclusion 2 on the requirement of recognition, which took into account the points developed previously.

Part four (II) addressed the origins of general principles of law or the categories of general principles of law covered by Article 38 (1) (*c*) of the Statute of the International Court of Justice. That issue was of fundamental importance to the topic, as it would to a large extent determine the Commission's future work. It would be a great achievement if a consensus could be reached on that issue at the current session.

The report addressed what were, in his view, the two most significant categories of general principles of law, both in practice and in the literature: general principles of law derived from national legal systems and those formed within the international legal system. If the Commission decided that both categories existed, it would be important to find the appropriate terminology to describe them, and he would appreciate suggestions from members in that regard.

Besides those two categories, other categories of general principles of law were sometimes proposed in the literature on the topic. Examples included the principles of legal logic or those intrinsic to the idea of law. However, such categories tended to be rather vague, might offer excessive discretion and seemed not to enjoy enough support in practice, at least not overtly. They had therefore not been addressed in the first report. He would listen carefully to the comments of the members in that regard.

As explained in detail in the report, the category of general principles of law derived from national legal systems found support in practice prior to the adoption of the Statute of the Permanent Court of International Justice; in the *travaux préparatoires* of that Statute; in the broad current practice of States; and in international jurisprudence. It also found widespread support in the literature on the topic. In his view, it should therefore not be too difficult to confirm the existence of that category.

However, the recognition of the existence of general principles of law derived from national legal systems was only the first step. Various questions remained to be resolved in future reports. One of the main ones was how to identify such principles and what forms their recognition could take. As noted in paragraph 30 of the report, in order to identify general principles of law derived from national legal systems, a two-step analysis might be required: first, identifying a principle common to a majority of national legal systems; second, determining whether that principle was applicable in the international legal system, a process that some termed "transposition".

Various authors were of the opinion that the requirement of recognition was met when a principle or norm existed within the national legal systems of States. That would require, in principle, a comparative study of national legal systems, and the Commission would have to establish, among other things, how best to carry out such a study and how wide it should be in scope.

The second stage of the analysis – the determination of whether a general principle common to national legal systems applied internationally, or transposition – also raised various questions. For example, whether it was necessary to have recourse to certain criteria, or a kind of compatibility test, in order to determine whether a general principle common to national legal systems applied at the international level. Those were complex issues that would have to be analysed in a future report on identification.

The second category discussed in the report consisted of general principles formed in the international legal system.

As explained in the report, the existence of that second category of general principles of law was based on various arguments. There was nothing in the *travaux préparatoires* of Article 38 (3) of the Statute of the Permanent Court of International Justice or of Article 38 (1) (*c*) of the Statute of the International Court of Justice, or in the text of that provision, that suggested that general principles of law were limited to principles derived from national legal systems. Although the members of the Advisory Committee of Jurists had by and large agreed that general principles of law could derive from national legal systems, they had not excluded the possibility that they might have other origins. In that regard, it was worth noting the comments made by de Lapradelle and Fernandes in the Committee.

Second, as one author had noted, if it was agreed that general principles of law served to fill gaps in international law, the drafters of the Statute must have also had in mind the use of general principles proper to international law. Indeed, difficulties might arise if, when looking for a general principle of law to fill a gap in international law, a common principle could not be found in national legal systems. It therefore seemed logical that resort could also be had to the general principles of law formed within, or originating in, the international legal system.

Third, that category of general principles of law found support in the literature. Its existence was also supported by State practice and international jurisprudence.

On the basis of the research and analysis carried out in the first report, he was submitting three draft conclusions to the Commission for consideration. He requested that, following the debate, they should be submitted to the Drafting Committee.

He wished to conclude by touching briefly on the Commission's future work on the topic. It was proposed in part five of the report that the functions of general principles of law and their relationship with other sources of international law should be addressed in the second report. The third report, to be submitted in 2021, would be dedicated to the identification of general principles of law. He was flexible with regard to the order in which

those issues were addressed, and he would be grateful to members for any suggestions that they might have in that regard.

Organization of the work of the session (agenda item 1) (*continued*)

Mr. Grossman Guiloff (Chair of the Drafting Committee) said that, for the topic "Immunity of State officials from foreign criminal jurisdiction", the Drafting Committee was composed of Mr. Argüello Gómez, Mr. Aurescu, Mr. Cissé, Ms. Galvão Teles, Mr. Gómez-Robledo, Mr. Hmoud, Mr. Huang, Ms. Lehto, Mr. Murase, Mr. Murphy, Mr. Nolte, Ms. Oral, Mr. Park, Mr. Rajput, Mr. Reinisch, Mr. Ruda Santolaria, Mr. Saboia, Mr. Tladi, Mr. Vázquez-Bermúdez, Sir Michael Wood and Mr. Zagaynov, together with Ms. Escobar Hernández (Special Rapporteur) and Mr. Jalloh (Rapporteur), *ex officio*.

The meeting rose at 1.05 p.m.