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International Law Commission
Seventy-fifth session (second part)

Provisional summary record of the 3678th meeting
Held at the Palais des Nations, Geneva, on Friday, 5 July 2024, at 10 a.m.

Contents

Present:

Chair:	Mr. Vázquez-Bermúdez
Members:	Mr. Akande
	Mr. Argüello Gómez
	Mr. Asada
	Mr. Cissé
	Mr. Fathalla
	Mr. Forteau
	Mr. Galindo
	Ms. Galvão Teles
	Mr. Grossman Guiloff
	Mr. Jalloh
	Mr. Laraba
	Mr. Lee
	Ms. Mangklatanakul
	Mr. Mavroyiannis
	Mr. Mingashang
	Mr. Nesi
	Mr. Nguyen
	Ms. Okowa
	Ms. Oral
	Ms. Orosan
	Mr. Ouazzani Chahdi
	Mr. Oyarzábal
	Mr. Paparinskis
	Mr. Patel
	Mr. Reinisch
	Ms. Ridings
	Mr. Ruda Santolaria
	Mr. Sall
	Mr. Savadogo
	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 3) (*continued*) (A/CN.4/771, A/CN.4/771/Add.1, A/CN.4/771/Add.2 and A/CN.4/775)

Ms. Galvão Teles said that she wished to express her gratitude to the Special Rapporteur for his first report on immunity of State officials from foreign criminal jurisdiction (A/CN.4/775) and to the secretariat for the compilation of comments received from States (A/CN.4/771, A/CN.4/771/Add.1 and A/CN.4/771/Add.2). The report offered valuable information and observations that would allow the Commission to assess the draft articles and the commentaries thereto adopted on first reading in 2022, as contained in the Commission's report on the work of its seventy-third session (A/77/10).

The Special Rapporteur's report followed the Commission's long-standing practice of focusing on the necessary revision of draft articles adopted on first reading, based on comments received from States and new developments in international law. However, it did so in a partial form, addressing only draft articles 1 to 6. She recognized the burden that late submissions from States and the need for translations had posed. She was also aware of the various calls for the Commission to give proper consideration to the topic, which might take some time. In that regard, she could understand the Special Rapporteur's decision to focus on a limited number of draft articles and to place emphasis on carefully considering responses by States and allowing time to properly digest them. At the same time, it would have been preferable for the Commission to have had a concrete overview of the topic as a whole from the start of the second reading.

Moreover, it was clear from the substance of State comments that draft article 7 required the Commission's attention from the outset, in conjunction with the consideration of draft articles 1 to 6, and not just in connection with draft articles 8 to 18. In following the Special Rapporteur's approach, the Commission would lack the benefit of insight into how, if at all, the Special Rapporteur would revise draft article 7 in response to States' comments. However, draft articles 5, 6 and 7 in particular, all of which dealt with immunity *ratione materiae*, were interlinked. Since they belonged together, it was only possible to revise any of them while considering the others in tandem. In other words, the Commission should not work on draft articles 5 and 6 without also considering draft article 7.

Therefore, she was not in favour of delaying the consideration of draft article 7, even if the intention had been to "freeze" the issue in the hope that it would ripen into maturity. As former Commission member Alain Pellet had said in 1998 in respect of the approach taken by the Special Rapporteur on responsibility of States for internationally wrongful acts, it was not by putting fruit or flowers in the freezer that one made them ripen or blossom. The overall approach taken to the second reading of the articles on State responsibility could offer useful inspiration that could guide the Commission's current endeavour. In his first report on State responsibility (A/CN.4/490), Special Rapporteur James Crawford had dealt head-on with the most controversial element of the draft articles on the topic: the distinction between international crimes and international delicts. His report had described the Commission's prior consideration of that issue, discussed States' comments at length and offered five possible approaches to international crimes of States, ranging from maintaining the *status quo* to excluding the notion from the draft articles altogether. All those alternatives had been explained in detail, allowing the Commission to have a rich debate on the most controversial aspect from the very start of the second reading. She hoped that the Special Rapporteur for the current topic would take a similar approach in his next report. In the meantime, she would make some brief comments on draft article 7, and remained hopeful that the Commission would be able to move towards consensus.

Her view, which was supported by a number of comments submitted by Governments, was that draft article 7 should be retained. Although the Commission should, of course, debate the exact form in which the exceptions to immunity *ratione materiae* appeared on second reading, she was convinced that draft article 7 captured an important trend in the development of international law that the Commission could not ignore or simply wish away. Just the previous week, the Paris Court of Appeal had ruled that Bashar Al-Assad, a sitting Head of State, enjoyed no immunity for alleged complicity in crimes against humanity and war crimes.

Several States had submitted that, under customary international law, there was an exception to immunity *ratione materiae* for the commission of the most serious crimes, while other States were of the view that such an exception did not currently exist. As the Commission itself had concluded in 2018, in order to speak of a rule of customary international law, it must be ascertained whether there was a general practice that was accepted as law. At the moment, considering the diverging practices and views of States, it could be debated whether draft article 7 codified customary international law. That, however, did not in any way indicate that draft article 7 was a proposal for "new law". The analysis included in the fifth report of the previous Special Rapporteur (A/CN.4/701) convincingly showed that there was a majority trend towards accepting the existence of exceptions to immunity *ratione materiae*, either because of the gravity of the crimes committed, because they violated peremptory norms or undermined values of the international community as a whole, or because the crimes in question could not be regarded as acts performed in an official capacity. As remarked at the time, the process of formation of customary international law was informal and spontaneous and, as such, could be characterized by the coexistence of diverging practices among States. For example, in 2021 and 2022, German courts had delivered two judgments that had strongly reaffirmed the non-applicability of functional immunities for international crimes. Based on those judgments, the German parliament had amended its criminal statutes to codify the non-applicability of functional immunities for international crimes in domestic criminal proceedings. However, it was also true that, in 2023, a higher court of the Kingdom of the Netherlands had found that no exception to functional immunity currently existed under customary international law. However, the court had not analysed State practice and *opinio juris* but instead had relied on international court decisions that concerned limits to State immunity, not functional immunity of State officials.

Although State practice remained somewhat inconsistent, it fell squarely within the Commission's mandate to preserve the progress made over the last few decades in international criminal law and to consolidate efforts to combat impunity for the commission of the most serious crimes. Since the purpose of making exceptions to immunities was precisely to ensure that they were not synonymous with impunity, the retention of draft article 7 was of the utmost importance, as it brought within reach, through national courts, the possibility of holding officials accountable for the most serious crimes.

The same should be true of the crime of aggression, which had not been included in the text of draft article 7 on first reading. Eighteen States, including the Nordic countries, Ukraine, Switzerland, Sierra Leone, Spain and Portugal, had expressed the view that draft article 7 was incomplete. That concern arose precisely because the article seemed to offer an exhaustive list of crimes. Consequently, many States had advocated the inclusion of the crime of aggression in that list. Nevertheless, she was open to revisiting the criteria employed in selecting the crimes listed in draft article 7 and its formulation. In addition, although the presence of the annex had value insofar as it provided important reference points for the understanding and interpretation of the crimes referred to in draft article 7, it might need to be revisited as well. What was crucial was to preserve the inapplicability of functional immunity in criminal proceedings for crimes under international law.

In the Commission's 2022 annual report (A/77/10), it was noted that the Commission had not yet decided on its recommendation to the General Assembly regarding the draft articles. The door had thus been left open to either simply commend the draft articles to the attention of States or to recommend their use as a basis for the negotiation of a future treaty. It was true that when the Commission had drafted articles in the past, it had not always decided in advance what its recommendation would be, nor had it always intended those articles to form the basis of a treaty. However, on a sensitive topic such as immunity of State officials, it was imperative that the Commission should offer as much clarity as possible, and as soon as it possibly could, on the final form that it envisaged for the draft articles. As noted by France, that decision would necessarily guide the way in which the Commission proceeded with its work. Her view was that the Commission should "recommend to the General Assembly that the draft articles … should be recommended to Member States with a view to the conclusion of a convention", as it had done in the case of its 1958 draft articles on diplomatic intercourse and immunities.

There were three reasons for doing so. First, all of the Commission's previous work in relation to immunities had been codified in conventions. Second, such an approach offered the Commission more freedom to differentiate between provisions that fell within the realm of progressive development and those that represented codification of customary international law, as requested by a number of States. Third, most States that had commented on the final form of the draft articles had suggested that they should form the basis of a convention. Mexico, for example, had reaffirmed "the need for the community of States to have a binding legal instrument that regulates immunity from criminal jurisdiction".

Turning to the draft articles discussed in the Special Rapporteur's report, she said that she was in favour of the deletion of the phrase "as between the parties to those agreements" from draft article 1. That phrase could be read as calling into question the jurisdiction of the International Criminal Court, as pointed out, for example, by Switzerland in its comments.

Concerning draft article 2, she agreed with the Special Rapporteur that no amendments were necessarily required, but that the commentaries should offer some further clarification on the issues raised by States. She was flexible on the question of whether draft article 2 should refer to "current and former" State officials. A possible solution could be to revise the phrase "who represents the State or who exercises State functions" to read "who represents or has represented the State or who exercises or has exercised State functions".

She also supported the Special Rapporteur's decision not to amend draft article 3. The States that had submitted that there was a need to include other high-ranking officials had not justified their position on legal grounds.

In the light of the comments received from States, she agreed with the Special Rapporteur that no substantial amendments should be made to draft article 4. She could also support the decision to expand on the expressions "term of office" and "the fact of being in office" in the commentary without changing the text of draft article 4. Disputes might indeed arise over whether an official's "term of office" had ended. However, disputes could also arise over whether an individual was in fact in office. The appropriate place to discuss those issues was in the commentary.

She was also flexible with regard to the proposed amendment of draft article 4 (3), on the understanding that the commentary would clarify and make a direct reference to the customary rules of international law concerning immunity *ratione materiae* that had been mentioned in the previous version of that paragraph. In addition, in response to some States' suggestions to specify the link between draft article 4 (3) and draft article 6 (3), the phrase "in accordance with draft article 6" could be added at the end of draft article 4 (3). That also made sense in the light of the Special Rapporteur's recommendation to explicitly refer to draft article 4 in draft article 6 (3).

The Special Rapporteur had made a similar proposal in reaction to some States' specific comments on the interlinkage between draft articles 5 and 6. She agreed that it was useful to retain a separate draft article addressing the personal scope of immunity *ratione materiae*. She also supported the proposal to delete "acting as such" from draft article 5, as it had raised a number of questions and was rather vague, and to insert "in accordance with draft article 6" at the end of the paragraph.

She agreed with the Special Rapporteur that it was not necessary in draft article 5 to incorporate a reference to the set of limitations or exclusions listed in draft article 7. Draft article 5 concerned persons enjoying immunity *ratione materiae*; it did not purport to address the scope of such immunity, and the Special Rapporteur's proposed addition to draft article 5, "in accordance with draft article 6", was a sound and sufficient revision.

Lastly, she supported the referral of draft articles 1 to 6 to the Drafting Committee, taking into account the plenary discussions. She would also welcome a broader discussion on the whole set of draft articles and its future form during the current session in order to better prepare the Commission's future work on such an important topic.

Ms. Mangklatanakul said that she would like to thank the Special Rapporteur for his excellent first report. With his legal expertise and experience, she trusted that the Commission would continue to make good progress at both the current and future sessions.

The draft articles and commentaries represented a crucial effort to combat impunity while ensuring respect for the principle of sovereign equality, which served as the fulcrum of international peace and security. It was in that spirit that the Commission must continue its work to strike the right balance between those two important objectives.

While she was satisfied with the quality of the draft articles and commentaries, certain points might benefit from further reflection and refinement. First, as a general comment, she took note of the concerns expressed by several States on the need to distinguish between elements in the draft articles that codified customary rules and those that represented the progressive development of international law. Distinguishing between the two was an issue with which the Commission had grappled on many occasions in its work. As noted by the Special Rapporteur in paragraph 36 of his report, the issue of distinguishing between customary rules and progressive development was addressed in the general commentary to the draft articles, and she would encourage the Commission to continue with that approach, which would ensure the transparency that must govern its work.

Second, regarding the final outcome of the work on the topic, her initial position was that the Commission should prepare draft articles that could form a basis for future negotiations on a convention. Significant progress had already been made on the draft articles and the commentaries thereto, and she would encourage the Commission not to prolong its work unnecessarily to allow States to fully benefit from the outcome of its work as soon as possible.

With respect to draft article 1, she supported its current scope, which applied only to foreign criminal jurisdiction and had no bearing on the jurisdiction of international criminal courts and tribunals. She also saw no need to define immunity or to distinguish between criminal and other types of jurisdiction under the draft article. As mentioned in paragraph 44 of the Special Rapporteur's report, the Commission had already explained in the commentary to draft article 1 adopted on first reading that it did not consider it necessary to define what immunity and criminal jurisdiction meant, following its extensive practice in other projects where it had dealt with immunity from criminal jurisdiction.

Moreover, regarding draft article 1 (3), she had considered with interest the comments made by some States calling into question the relevance of the paragraph to the current context. As noted in the eighth report of the previous Special Rapporteur (A/CN.4/739), "the present topic has nothing to do with immunities before international criminal tribunals". However, given that the purpose of the paragraph was to make clear the separation between the regimes of immunity before foreign national criminal courts and before international criminal courts and tribunals, she supported the retention of the paragraph, which provided clarity on that relationship.

She supported the reformulated text of draft article 1 (3) proposed by the Special Rapporteur, which duly addressed States' comments by clarifying that the rights and obligations of States under both treaties and Security Council resolutions establishing international criminal courts and tribunals were unaffected by the draft articles. However, she was concerned that, in paragraph 3 (b), the term "binding resolutions" could be interpreted as covering resolutions issued by any organization, not just the United Nations. She wondered whether that was the Special Rapporteur's intention. Moreover, the omission of the qualifying language "as between the parties to those agreements", which appeared in paragraph 3 (a), from paragraph 3 (b) might be taken to suggest that the latter provision was to be applied more broadly than the former. It was her view that, while the resolutions referred to in paragraph 3 (b) were not necessarily limited to those of the United Nations, that provision should apply only to those States for which the resolutions were binding. That point could perhaps be discussed further in the Drafting Committee.

She agreed with the definition of "State official" set forth in draft article 2 (a), which was based on two key criteria: the representation of a State and the exercise of official functions. Given the variety of positions held by individuals to whom immunity *ratione materiae* could apply and the diversity of national legal systems, it would not be appropriate to include in that definition a list of persons who might qualify as State officials. Nonetheless, in the commentaries the Commission could provide practical guidance on how to determine whether an individual was a State official. As the criteria set out in draft article 2 (a) focused

on the existence of a specific link between the State and its official, it was possible to establish such a link by examining whether the individual had been appointed in accordance with the State's internal procedure. In addition, in the conduct of foreign relations it was common practice for States to formally identify their representatives in diplomatic correspondence or through the submission of documents such as credentials.

The Commission might also wish to further clarify, in the commentaries, issues relating to the nationality of a State official in cases where he or she served as an official for a State other than the State of which he or she was a national. She concurred with the Special Rapporteur's view that the key elements in determining the applicability of immunity *ratione materiae* were the representation of a State and the exercise of official functions, and that such an individual would thus be granted immunity, which would be for the benefit of the State in whose interests the official was acting.

Furthermore, she agreed with the United Kingdom and the United States of America that the status of *ultra vires* and unlawful acts should be further clarified in the commentaries. In general, the commentaries lacked sufficient clarity on the question of what acts constituted "acts performed in an official capacity", what rules of attribution applied in the context of immunity from foreign criminal jurisdiction and to what extent the attribution rules established in the Commission's articles on responsibility of States for internationally wrongful acts could be applied. States had expressed different views on that issue, which was perhaps a matter of policy. In dealing with the issue, the Commission should consider the extent to which its principal objective of balancing immunity with accountability was relevant in determining the status of *ultra vires* and unlawful acts.

She agreed with the premise of draft article 3 that the personal scope of immunity *ratione personae* should be limited to the Head of State, Head of Government and Minister for Foreign Affairs (the "troika"). While she had taken note of the argument put forward by some States that high-ranking officials other than the members of the troika might also be entitled to such immunity, she concurred with the Special Rapporteur that no legal grounds had been adduced to justify expanding the scope of the persons covered. In *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, the International Court of Justice, in dealing with the question of immunity of other high-ranking officials of Djibouti, namely the Attorney General and the Head of National Security, had observed that there were "no grounds in international law upon which it could be said that the officials concerned were entitled to personal immunities".

Concerning draft article 4, she agreed that the temporal scope of such immunity lasted only while the members of the troika were in office and that its substantive scope covered all their acts, both private and official, whether performed before or during their term of office. She concurred with those Commission members who had noted that the reference to a "term of office" might not accurately reflect situations in which members of the troika did not have fixed terms of office. She agreed that the issue could be dealt with in the commentaries.

While she fully supported the principles laid down in draft articles 5 and 6, she shared the view of some States that the two draft articles and the commentaries thereto needed further refinement. Overall, the suggestions made by the Special Rapporteur provided a good basis for further work by the Drafting Committee. To maintain consistency between the draft articles dealing with immunity *ratione personae* and those dealing with immunity *ratione materiae*, any changes made to the structure or text of draft articles 5 and 6 might need to be replicated in draft articles 3 and 4. She supported the referral of draft articles 1 to 6 to the Drafting Committee.

Mr. Zagaynov, thanking the Special Rapporteur for his clearly structured first report, said that it would allow for a thorough and substantive discussion of the topic at hand. He supported the Special Rapporteur's phased approach to the consideration of the comments submitted by States and agreed with many States that the Commission should take the time it needed to properly digest those comments and not rush to complete its second reading of the draft articles. The topic was a particularly sensitive one, as it affected States' fundamental interests in relation to sovereignty. Any objections raised by delegations to specific provisions should therefore be taken seriously and such provisions should be further refined

with a view to reaching consensus. As in the case of other topics, the deadline for completing the work should not be an end in and of itself.

Many States had questioned whether specific draft articles amounted to codification of rules of customary law or progressive development of the law. Moreover, States in different regions of the world such as Israel, Malaysia, the Russian Federation, the United Arab Emirates and the United Kingdom considered that some of the draft articles contained elements of new law going beyond progressive development. The Special Rapporteur had recalled that the issue was explicitly addressed in paragraph (12) of the general commentary to the draft articles adopted on first reading, which stated that:

> As is usual in the work of the Commission, the draft articles contain proposals for both the codification and the progressive development of international law. Reference is made to this question as appropriate in the commentaries to the draft articles, with a view to providing States with enough information in this regard and ensuring the transparency that must govern the work of the Commission.

However, since some States found such references to be insufficient or unclear, the Commission would do well to revisit the issue with a view to further clarifying in the commentary which elements represented *lex lata* and which represented *lex ferenda*. The Commission should pay particular attention to the comments stating that progressive development needed to be based on an emerging or developing rule and that it should respond to the needs of States.

He maintained that a decision on the final outcome of the Commission's work on the topic should be taken once the project was complete. Paragraph (13) of the general commentary to the draft articles mentioned two possible recommendations that could be made to the General Assembly: to commend the draft articles to the attention of States or to use them as a basis for the negotiation of a future treaty on the topic. The Commission should not, however, limit itself to those two options. Given the differing views of States on the issue, it was hardly realistic to speak of drafting a convention at the current juncture. Some States had noted that, at least for Part Four of the project, which addressed procedural provisions and safeguards, draft guidelines would be the most appropriate outcome, as some of those draft provisions were clearly not based on established State practice. That point of view warranted consideration.

Regarding draft article 1, he wished to emphasize that the clear definition of the scope of draft articles was a basic task. Requests by States such as Germany and the Russian Federation for further clarification in the commentaries of the boundaries of criminal jurisdiction, including in relation to civil and administrative jurisdiction, should be given due consideration, as should the suggestion by some States that the Commission should define the concept of immunity in the text itself while specifying in the commentaries how it related to the concept of inviolability. He thus welcomed the Special Rapporteur's intention to expand appropriately on the topic in the commentaries.

As paragraph 2 enjoyed broad support from States, he saw no need to modify it. States had paid closer attention to paragraph 3, which dealt with the relationship of the draft articles to the rules governing the exercise of international criminal jurisdiction. As a matter of principle, he maintained that there was no need to include such a provision in the text of the draft articles and that the related commentary was sufficient.

If the reformulated version of paragraph 3 proposed by the Special Rapporteur was retained, it should make clear that the rights and obligations of States under international agreements establishing international criminal courts or tribunals applied as between the parties to those agreements. The submission from Brazil usefully noted that "while the articles do not affect treaty obligations related to international tribunals, these international agreements do not affect immunity of officials from non-party States. In relations between a State bound by concurring treaty and customary obligations and a State bound only to the latter, the rule by which both States are bound governs their mutual rights and obligations".

He welcomed the proposal to replace the term "agreements" with "treaties" in draft article 1 (3) (a). However, the proposal by the Special Rapporteur to make separate reference to binding resolutions establishing international criminal courts and tribunals in draft

article 1 (3) (b) merited further reflection, as such a reference struck him as unnecessary. If, however, the Commission decided to include a reference to such resolutions, it could do so in the commentary. The term "binding resolutions", while frequently used, was not found, for example, in the Charter of the United Nations in relation to Security Council resolutions. Article 25 of the Charter provided that the Members of the United Nations agreed to accept and carry out the decisions of the Security Council. In principle, there could be confusion over whether a resolution of a particular body fell within the proposed definition and for whom such a resolution was binding. In any event, the proposed language did not cover all courts and tribunals with an international component. So-called hybrid courts or tribunals remained outside the scope of draft article 1 (3) (b). Spelling out all the options in the text of the draft article itself would be a difficult task.

Moreover, the proposed revision of draft article 1 (3) appeared to contrast international criminal courts and tribunals established by treaty with those established by resolution. While there was admittedly a significant difference between the two, ultimately, in both cases, the competence of the court or tribunal was established and the question of immunity was regulated by the international treaty on the basis of which the decision to establish the court or tribunal had been taken. It was well known that the binding nature of Security Council resolutions under Chapter VII of the Charter derived precisely from the provisions of the Charter itself. Instead of introducing a new subparagraph, it might be better to adjust the text adopted on first reading to refer to "treaties serving as a legal basis for establishing criminal courts and tribunals". The provision would then cover both treaties establishing international judicial bodies and treaties such as the Charter of the United Nations. However, he maintained that the best solution would be to clarify the issue in the commentaries without mentioning it in the draft articles themselves.

The Commission should give due consideration to the request by some States for it to reconsider its decision not to include, in draft article 2, definitions of the terms "criminal jurisdiction" and "immunity". He welcomed the Special Rapporteur's intention to clarify in the commentary that, for the purposes of the draft articles, the "State of the official" should be understood to be the State in whose interests the official was acting and not the State of which he or she was a national.

Several States had requested clarification as to whether *ultra vires* acts could be considered "acts performed in an official capacity" for the purposes of immunity from foreign criminal jurisdiction. The views of the previous Special Rapporteurs for the topic had diverged on that issue. Mr. Kolodkin had argued that State officials did enjoy immunity *ratione materiae* for acts performed in an official capacity because those acts, including unlawful and *ultra vires* acts, were attributed to the State. Ms. Escobar Hernández, while noting the contradictory nature of the jurisprudence on the subject, had taken the opposite view. The current Special Rapporteur had stated his intention to further clarify the issue in the commentary to draft article 2. He would await those clarifications with interest. In his view, immunity *ratione materiae* should extend to acts of an official which, on the face of it, might appear to be *ultra vires* but which the State in whose interests the official was acting recognized as having been carried out in an official capacity. Immunity, as a procedural limitation on the exercise of jurisdiction, prevented a foreign State from determining for itself whether certain acts carried out by an official fell within the scope of his or her official powers.

Concerning draft article 3, the comments received from States indicated broad support for the Commission's conclusion that the "troika" of the highest-ranking State officials enjoyed immunity *ratione personae*. However, the Commission could perhaps revisit the scope of such immunity and consider in a more nuanced manner the special cases of officials who, despite not occupying the position of Head of State or Government, occupied *de facto* a comparable position in the national hierarchy. Two approaches emerged from States' comments: some States had insisted that other high-ranking officials who were not members of the troika could not claim immunity *ratione personae*, whereas others had cited examples where, owing to the specific features of a given country's constitutional order and political system, it would be reasonable to extend personal immunity to persons other than the members of the traditional troika. He believed that it was necessary, at the very least, to modify the overly categorical wording in paragraph (15) of the commentary to draft article 3,

according to which "the Commission considers that 'other high-ranking officials' do not enjoy immunity *ratione personae* for the purposes of the present draft articles". That assertion did not reflect existing State practice, comments by States or the Commission's own discussions on the subject.

He supported the Special Rapporteur's proposal to delete the words "the rules of international law concerning" from draft article 4 (3) and to clarify the phrase "term of office" in the commentary.

He likewise agreed with the Special Rapporteur's proposed changes to draft articles 5 and 6, which reflected the views of several States. Moreover, he saw no reason why draft articles 3 and 4 and draft articles 5 and 6 could not be combined, as doing so would make for a more streamlined document.

He wished to reiterate that the topic "Immunity of State officials from foreign criminal jurisdiction" was of practical interest to many States. As he saw it, the Commission's future work on the topic, including in the Drafting Committee, could lead either to a deepening of the emerging division among States and the adoption of a divisive final product or to the achievement of consensus and the development of guidance with practical value. He hoped that the Special Rapporteur would lead the Commission down the latter path.

In preparing his statement on the topic, he had been guided by the Special Rapporteur's decision to focus only on draft articles 1 to 6 at the current session. He had therefore refrained from commenting on the most controversial draft article, namely draft article 7. He thus did not agree that the Commission should discuss issues linked to that provision at the current session in the absence of a report. However, since the issue had been raised, he wished to refer to his previously stated position, including with regard to exceptions to functional immunity.

Ms. Ridings said that the Special Rapporteur's first report on immunity of State officials from foreign criminal jurisdiction was both concise and thorough. Great care had been taken to engage with the views of the various States that had made written submissions after the Commission's first reading of the draft articles. At the second-reading stage, it was expected that the Commission would assess the need to modify the draft articles and their commentaries on the basis of the observations received and any new developments, given the time that had elapsed since many of the draft articles and commentaries had been prepared. She supported the Special Rapporteur's approach of taking the necessary time to review the draft articles and commentaries, which would allow a more representative range of States to submit their views on the draft articles. Like Mr. Paparinskis and Mr. Nguyen, she was in favour of drawing on the comments made by States in prior years if doing so would allow the Commission to obtain more broadly representative views. Similarly, it was imperative to draw on a wide range of actual State practice on immunity from foreign criminal jurisdiction. In that regard, she noted that some of the examples of practice cited in the commentaries did not address immunity from the exercise of criminal jurisdiction but rather sovereign immunity or immunity from civil jurisdiction. Such citations risked conflating immunity in the context of the draft articles with other forms of immunity. The Commission should ensure that it provided appropriate explanations for each such citation. It should also be noted that, contrary to what was implied in the commentary, immunity had not been invoked in the 1985 New Zealand High Court case of *R. v. Mafart and Prieur*.

With regard to the future outcome of the work on the topic, States and members of the Commission had expressed different views on whether the draft articles should be commended to the attention of States in general or used as a basis for the negotiation of a treaty on the topic. She did not agree with the proposal by some States to separate Part Four from the rest of the draft articles. Regardless of the Commission's preferred outcome, its priority should be to provide clarity and consistency in the draft articles and their commentaries, so as to assist either plenipotentiaries negotiating a future treaty or States seeking to apply the draft articles outside the framework of a dedicated treaty. She wished to join Mr. Oyarzábal in emphasizing the politically sensitive nature of the topic and the resulting need for clarity and consistency.

In her view, the draft articles and the commentaries required clarification on two fundamental issues: first, the decision not to define immunity from criminal jurisdiction, and

the intersection of that concept with inviolability; and second, the approach taken in respect of the Commission's articles on responsibility of States for internationally wrongful acts.

On the issue of definitions, States such as Czechia and France had suggested that the Commission should define what it meant by immunity from foreign criminal jurisdiction. The Special Rapporteur had indicated that such a definition was unnecessary, as the commentary to draft article 1 stated that the decision not to define immunity from criminal jurisdiction was based on the Commission's practice in other projects. However, in the current project, the immunity of State officials from foreign criminal jurisdiction was the central theme. It was therefore natural that the Commission should attempt to define the concept in the context of the draft articles, either in the text of the draft articles themselves or in the commentaries. While drafting a definition might present the Commission with some difficulty, such difficulty was, as Mr. Paparinskis had noted, all the more reason for the Commission to embark on the exercise. Moreover, in paragraph (5) of the commentary to draft article 1, the Commission appeared to have articulated a working definition of immunity from criminal jurisdiction, albeit "for merely descriptive purposes". According to that paragraph, the draft articles addressed "cases in which, by virtue of immunity, criminal jurisdiction is blocked, criminal jurisdiction being the power of States to perform acts of varying nature whose ultimate purpose is to contribute to the determination of the criminal responsibility of an individual". In her view, the paragraph was not entirely satisfactory, as it raised various interpretative ambiguities concerning, for example, the kind of acts that would be covered, whether they included measures of constraint, what was encompassed by the reference to the "ultimate purpose" of the acts and whether the draft articles covered administrative offences that entailed procedures and penalties similar to those applicable to criminal offences, a question that had been raised by the Russian Federation.

The Special Rapporteur, supported by certain members of the Commission, had emphasized the need to clarify how the concept of immunity related to inviolability. She agreed that a clearer articulation of the scope of immunity from foreign criminal jurisdiction and its relationship to inviolability would assist States in better understanding the draft articles.

Regarding the second general issue she had raised, a number of States had queried the interaction of the draft articles, particularly draft article 2 (b), with the articles on State responsibility. For example, Austria had requested the Commission to more closely align the definition of an "act performed in an official capacity" with article 5 of the articles on State responsibility, which referred to "elements of governmental authority" rather than "State authority". On the other hand, the Russian Federation had suggested that the two terms carried the same meaning.

Several members of the Commission had highlighted the question of whether "acts performed in an official capacity" encompassed *ultra vires* acts. The Special Rapporteur was of the view that the issue was addressed in the commentaries, particularly paragraphs (32)–(34) of the commentary to draft article 2. Yet, while those paragraphs cited national case law that apparently excluded *ultra vires* acts from immunity *ratione materiae*, the Commission itself did not take a clear position on the issue. The question at hand was how the meaning of "State authority" and "official capacity" might intersect with or differ from analogous principles in the articles on State responsibility. The Special Rapporteur had cautioned that the draft articles addressed the immunity of individuals rather than the responsibility of States and had referred to paragraph (25) of the commentary to draft article 2, which stated that the application of the articles on State responsibility to the current context "should be examined carefully" and that "the criteria for attribution set out in articles 7–11 of the articles on responsibility of States for internationally wrongful acts do not seem generally applicable" for the purposes of immunity. Such cursory treatment was not, in her view, particularly helpful, as the Commission had not given any substantive reasoning as to why it believed that articles 7–11 of the articles on State responsibility were not pertinent to the current project, nor had it "examined carefully" how specific provisions of the articles on State responsibility might impact the draft articles. Furthermore, as Mr. Jalloh had pointed out, State responsibility and individual responsibility could be concurrent. The immediate disassociation of the draft articles from the articles on State responsibility was therefore questionable.

The Commission's treatment of the articles on State responsibility was also inconsistent with its approach to other regimes of international law. In paragraph (10) of the commentary to draft article 7, the Commission referred to "such important sectors of contemporary international law as international humanitarian law, international human rights law and international criminal law". In the same paragraph, the Commission emphasized that the issue of immunities existed "within an international legal order whose unity and systemic nature cannot be ignored". The contrast between the Commission's approach to other regimes of international law and its approach to the articles on State responsibility risked creating the impression that its reference to the systemic nature of international law was selective – a risk that would not be advisable to assume in such a politically sensitive context. The Commission should carefully consider the implications for the draft articles of particular principles of the articles on State responsibility.

Turning to the wording of the draft articles, she said she agreed that draft article 1 (3) needed to be reformulated to clarify that the draft articles did not affect the rights and obligations of States in relation to tribunals established by Security Council resolutions, such as the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda. Regarding the proposed use of the term "binding resolutions", she, like other members, noted the lack of clarity on the subjects bound by the resolutions, and she shared Mr. Forteau's view that the term "binding resolutions" should be rephrased to clarify that such resolutions were binding only on the relevant States, thus reaffirming the consent-based character of international law. In the proposed phrase "binding resolutions establishing international criminal courts and tribunals", the verb "establishing" should be replaced with "relating to" so as to include successive resolutions dealing with such courts.

In respect of draft article 2, she noted that some States had proposed that the phrase "both current and former State officials" should be removed from the definition of "State official" on the grounds that the situation of former officials was pertinent only for immunity *ratione materiae*, as covered in Part Three. However, she did not support that proposal, since the term "State official" was used again in Part Four on procedural provisions and safeguards, particularly in draft articles 12 and 14. Part Four applied to all State officials who enjoyed immunity, whether immunity *ratione materiae* or *ratione personae*. As it was important that the definition of "State official" should apply to the draft articles as a whole, the reference to former officials should be retained in its existing form. She also opposed the proposal to move the definitions from draft article 2 to draft articles 5 and 6, for the same reason, namely that the definitions were pertinent not only for immunity *ratione materiae* but also for the safeguards articulated in Part Four. She supported Mr. Nesi's suggestion that the provisions containing definitions should be preliminary and separate from the other draft articles.

Draft article 3 should remain unchanged, since immunity *ratione personae* was enjoyed only by the troika. However, she wished to highlight an apparent inconsistency. According to paragraph (2) of its commentary to draft article 3, the Commission considered that immunity *ratione personae* had both a "functional" and a "representational" basis, whereas immunity *ratione materiae* had only a functional basis. Draft article 2, on the other hand, defined a State official as "any individual who represents the State or who exercises State functions", the word "or" suggesting that individuals might disjunctively enjoy immunity on the sole basis of their representing the State, which would imply immunity *ratione personae* – a category that should be limited to the troika, in line with draft article 3. Moreover, in paragraph (12) of the commentary to draft article 2, the Commission argued that the reference to representation of the State might also be applicable to State officials other than the troika. To avoid any confusion, the Commission should clarify the commentaries on that point.

She agreed that the reference to the rules of international law should be removed from draft article 4 (3) in order to make the provision clearer and simpler. She also supported the proposal to replace the phrase "term of office" with "period of office", in line with the wording used in the International Court of Justice judgment in the case concerning the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, although, as Mr. Zagaynov had suggested, the phrase could instead be clarified in the commentaries.

With regard to draft article 5, she joined other members in supporting the proposed deletion of the phrase "acting as such". She understood that such a deletion raised the

question of whether it would be appropriate to merge draft article 5 with draft article 6 (1), as suggested by the Nordic countries. Insofar as the change remained an editorial preference and did not modify the substance, she would not oppose it. Lastly, she agreed with the Special Rapporteur's proposal to specify that the immunity mentioned in draft article 6 (3) was immunity *ratione materiae*.

In conclusion, she thanked the Special Rapporteur for his efforts and said that she supported the referral of draft articles 1 to 6 to the Drafting Committee.

Ms. Oral said that, on the whole, she agreed with the proposals made by the Special Rapporteur in his clear, concise first report on the topic "Immunity of State officials from foreign criminal jurisdiction", a topic that was of paramount importance for States. Although a good number of States had made comments on the draft articles adopted on first reading, there was insufficient geographic balance among those States to ensure that, as indicated in paragraph 13 of the report, the comments of States were treated equally. The question facing the Commission was how it should interpret the silence of States that had not submitted comments. Mr. Galindo had made an important point regarding the care that the Commission must take in examining evidence of State practice, particularly in the light of the fact that the majority of cases referred to in the commentary to the draft articles adopted on first reading were from Europe or the United States. She would reserve her comments on draft article 7 until the Commission's following session, in part because of the continuing developments in the relevant State practice.

The draft articles adopted on first reading had been the product of several years of in-depth discussions. In the draft articles, the Commission sought to balance the interests of States, particularly the principle of sovereign equality, which, as noted in paragraph (5) of the general commentary to the draft articles, was "the very foundation of immunity of State officials from foreign criminal jurisdiction", against the need to ensure that immunity did not translate into impunity for some of the most heinous crimes. The Commission had taken great care to ensure that the exceptions to immunity carved out in the draft articles were balanced with procedural safeguards to protect against abuse by States. It should take care not to alter that balance as it embarked upon the second reading. Revisions to the draft articles should be made only if there were sound reasons for them; for example, to reflect developments in State practice or to enhance the clarity of the text.

With respect to draft article 1, some States had asked the Commission to clarify the distinction between criminal immunity and inviolability, and France had suggested that the Commission should do so by defining immunity in the commentary. The previous Special Rapporteur had put forward a definition of "immunity from foreign criminal jurisdiction" in her eighth report (A/CN.4/739), but the Commission had decided at that time not to define the term. She agreed that the term should not be defined, even in the commentary. The distinction between inviolability and criminal liability was already addressed in the commentary to draft article 9 and could perhaps also be reflected in the commentary to draft article 1, with a reference to the inviolability provisions contained in articles 29 and 30 of the Vienna Convention on Diplomatic Relations.

The Commission should defer to States on the issue of whether the draft articles should, as suggested by the Russian Federation, more clearly distinguish between criminal jurisdiction and other types of jurisdiction. However, in some cases, it could be difficult to draw such a distinction. For example, the European Court of Human Rights had found that certain administrative offences could be considered to fall within the scope of criminal law. The point could perhaps be addressed in the commentary. She supported the Special Rapporteur's proposed reformulation of draft article 1 (3) and could also accept the proposal made by some members to replace the word "treaties" with "agreements".

She agreed with the Special Rapporteur, for the reasons he had given in his report, that no revisions should be made to draft article 2. She would support retaining the phrase "and refers to both current and former State officials" – which the United States had suggested should be moved to draft article 6 – in draft article 2 to make clear to readers at the outset that the draft articles would apply to acts carried out by both current and former State officials.

She fully agreed with the Special Rapporteur that the list of persons enjoying immunity *ratione personae* contained in draft article 3 should not be expanded. There were no legal grounds for such an expansion, and the rationale for the restrictive approach taken in the draft article was explained in depth in the commentary. The issue of *de facto* Heads of Government could, as suggested by the Special Rapporteur, be addressed in the commentary.

When the Commission had adopted the draft articles on first reading, it had considered the right of Heads of State to immunity to be uncontroversial. Indeed, the commentary noted that the statement that Heads of State enjoyed immunity *ratione personae* was not subject to dispute, referring to several conventions that supported that assertion. However, recent decisions of national courts had upheld arrest warrants issued for Heads of State, and the commentaries should reflect those developments.

She agreed with the Special Rapporteur that, in draft article 4, the clear, widely used expression "term of office" should not be replaced with a reference to the fact of being in office, although that decision should perhaps be explained in the commentary. She supported the deletion of the phrase "the rules of international law concerning" from paragraph 3 of the draft article, which made the sentence clearer and more concise without sacrificing the essential legal point being made. The interaction between immunity *ratione personae* and immunity *ratione materiae* should be addressed in the commentary. She saw no compelling reason to merge draft articles 3 and 4, as some States had suggested, but was agnostic on that point.

The statement in the commentary to draft article 5 that the phrase "acting as such" referred to "the official nature of the acts of the officials, emphasizing the functional nature of immunity *ratione materiae* and establishing a distinction from immunity *ratione personae*", explained why a majority of Commission members had favoured the inclusion of that phrase in the draft article. However, the revised text proposed by the Special Rapporteur for the draft article perhaps brought greater clarity. She supported the revision proposed by the Special Rapporteur to draft article 6, which clarified that Heads of State, Heads of Government and Ministers for Foreign Affairs whose terms of office had come to an end continued to enjoy immunity *ratione materiae*. Lastly, she supported the referral of draft articles 1 to 6 to the Drafting Committee.

Mr. Forteau said that, three days earlier, an appeal had been filed with the French Court of Cassation against the Paris Court of Appeal ruling that had affirmed the validity of an arrest warrant issued against the President of the Syrian Arab Republic and thus had not recognized that official's personal immunity. The Commission would need to await the decision of the Court of Cassation before it could discuss the case in relation to the draft articles.

Although several members had referred to the possible need for a definition of criminal jurisdiction, it was, in his view, more important for the Commission to clarify what it meant by the "exercise" of criminal jurisdiction, as both draft articles 3 and 5 used the phrase "exercise of foreign criminal jurisdiction". It was the exercise of criminal jurisdiction, and not criminal jurisdiction generally, against which immunity could apply. The Drafting Committee should pay close attention to that issue.

Mr. Reinisch said that the Special Rapporteur's first report on the topic of immunity of State officials from foreign criminal jurisdiction provided an impressive overview of States' views on draft articles 1 to 6 as adopted on first reading. He hoped that earlier deadlines would be set for the submission of States' comments in the future, as the December 2023 deadline set in the case at hand had left the Special Rapporteur little time to evaluate the comments received before the deadline for the submission of his report. Written comments from States were vital to the Commission's work. However, the Commission must not base the second reading solely on those comments, but should also review recent developments in national jurisprudence and doctrine to determine whether there were signs that State practice was hardening in a certain direction. In his view, the Commission should, as the outcome of its work on the topic, recommend that the draft articles should be used as a basis for the negotiation of a convention.

In draft article 1, the Special Rapporteur had proposed the addition of the phrase "binding resolutions establishing international criminal courts and tribunals" as

subparagraph (b) of paragraph 3 in order to ensure that the rights and obligations of States in relation to *ad hoc* criminal tribunals established by the Security Council would not be affected by the draft articles. However, such an abstract reference to binding resolutions could potentially be understood to include tribunals established by regional organizations, and the omission of a reference to the members of such organizations could be read to imply that regional organizations would also have the power to impose rules derogating from the immunity of State officials from criminal jurisdiction and could affect States that were not members of those organizations. To avoid such implications and prevent uncertainty, the Commission should either refer in subparagraph (b) to "binding resolutions of the United Nations Security Council", as suggested by Mr. Galindo, or address the issue in the commentary to draft article 1.

In order to take account of hybrid or internationalized criminal courts and tribunals such as the Extraordinary Chambers in the Courts of Cambodia and the Special Court for Sierra Leone, an additional subparagraph on other legal instruments that established international criminal courts and tribunals should perhaps be inserted after subparagraph (a). He shared the doubts expressed by Mr. Paparinskis as to whether the phrase "as between the parties to those agreements" in proposed subparagraph (a) might not be superfluous.

With respect to the suggestion by States to include a list of State officials in the definition of "State official" in draft article 2, such a list was already found in the commentary to the draft article and did not need to be incorporated into the provision itself. In order to keep the draft articles as concise as possible, explanations regarding *ultra vires* acts should also remain in the commentary. However, it could be worthwhile to develop definitions of crucial concepts such as "immunity", "jurisdiction", "exercise of jurisdiction" and "inviolability", since they continued to cause confusion.

He agreed with the Special Rapporteur that the Drafting Committee should consider the suggestion from States that draft articles 3 and 4 should be merged. He also agreed that the scope of draft article 3 should not include State officials other than members of the troika. There was insufficient State practice on the extension of immunity *ratione personae* to other State officials, and it was preferable from a policy perspective to limit immunity *ratione personae* to the troika.

He supported the Special Rapporteur's proposal to delete the words "the rules of international law concerning" from draft article 4 (3). Any attempt to make the draft articles more succinct should be supported.

He welcomed the Special Rapporteur's proposal to delete the potentially misleading phrase "acting as such" from draft article 5 and to add the phrase "in accordance with draft article 6". However, the addition of the latter phrase could prove to be superfluous, particularly given the structure used for draft article 3. If the purpose of the phrase was to delimit the scope of immunity *ratione materiae*, draft article 5 could be merged with draft article 6 (1) to achieve the same purpose while avoiding redundancy. The resulting draft article would furthermore parallel the approach suggested for draft articles 3 and 4, thus avoiding any confusion that might arise if the rules on immunity *ratione personae* were structured differently from the rules on immunity *ratione materiae*. The matter could be discussed in the Drafting Committee.

With respect to draft article 6, the Special Rapporteur's proposal to insert the term "*ratione materiae*" after the word "immunity" in the phrase "immunity with respect to acts performed in an official capacity" in paragraph 3 would bring that phrase into line with the wording used in paragraph 2. However, it would perhaps be preferable to delete the term "*ratione materiae*" from paragraph 2 instead of adding it to paragraph 3, given that paragraph 1 implicitly defined immunity *ratione materiae* as immunity enjoyed only with respect to acts performed in an official capacity. Using the term "*ratione materiae*" and the phrase "with respect to acts performed in an official capacity" together could appear tautological and fail to add any substantive value to either paragraph 2 or paragraph 3. Lastly, he supported the referral of the draft articles to the Drafting Committee.

The meeting rose at 12.35 p.m.