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For participants only

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International Law Commission
Seventy-sixth session

Provisional summary record of the 3707th meeting
Held at the Palais des Nations, Geneva, on Monday, 5 May 2025, at 10 a.m.

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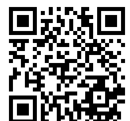

***Present*:**

Chair:	Mr. Paparinskis
Members:	Mr. Akande
	Mr. Argüello Gómez
	Mr. Asada
	Mr. Cissé
	Mr. Fathalla
	Mr. Fife
	Mr. Forteau
	Mr. Galindo
	Ms. Galvão Teles
	Mr. Grossman Guiloff
	Mr. Jalloh
	Mr. Laraba
	Mr. Lee
	Mr. Ma
	Ms. Mangklatanakul
	Mr. Mavroyiannis
	Mr. Mingashang
	Mr. Nesi
	Mr. Nguyen
	Ms. Okowa
	Ms. Oral
	Ms. Orosan
	Mr. Ouazzani Chahdi
	Mr. Oyarzábal
	Mr. Patel
	Mr. Reinisch
	Ms. Ridings
	Mr. Ruda Santolaria
	Mr. Sall
	Mr. Savadogo
	Mr. Tsend
	Mr. Vázquez-Bermúdez
	Mr. Zagaynov

***Secretariat*:**

Mr. Pronto	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.4/771, A/CN.4/771/Add.1, A/CN.4/771/Add.2, A/CN.4/771/Add.3 and A/CN.4/780)

Mr. Ma said that, as a newly elected member of the Commission, he was looking forward to working in a spirit of unity and cooperation to contribute to the progressive development of international law and its codification.

The second report of the Special Rapporteur (A/CN.4/780) demonstrated both theoretical depth and professionalism and provided the Commission with a solid foundation for its deliberations on the topic of immunity of State officials from foreign criminal jurisdiction. However, he had noted that there was a significant divergence of views among Commission members regarding draft article 7. The statements made in the Sixth Committee the previous year and the comments submitted by Governments also showed that there was significant controversy among States concerning the existence and scope of exceptions to immunity *ratione materiae* under international law.

In his opinion, the appropriateness of the term "crimes under international law" in draft article 7 was open to question, since, under general international law, there was no established category of international crimes in respect of which immunity did not apply. Although a series of international treaties did provide for the non-applicability of immunity for specific international crimes, those provisions were applicable only to the contracting States and did not yet constitute customary international law. Moreover, there was currently not enough evidence of widespread State practice or *opinio juris* to determine the existence and scope of exceptions to immunity *ratione materiae* for international crimes. To his mind, draft article 7 should reflect the distinction between crimes under international treaties, which applied only to contracting States, and crimes under customary international law, which were universally accepted by and applied to all States. He therefore proposed that draft article 7 should be amended to read: "Immunity *ratione materiae* from foreign criminal jurisdiction shall not apply to international crimes for which immunity is excluded under the international treaties to which the State concerned is a party or under customary international law as recognized by States." The rest of the draft article, including the list of specific crimes and the list of treaties in the annex, would then be deleted. The commentary to the provision should be amended to reflect the differing views expressed on the scope of international conventions, customary international law and international crimes in respect of which immunity *ratione materiae* might not apply.

He would also like to emphasize the importance of the Commission's adherence to the fundamental principle of consensus; that would enable it to work effectively and show a spirit of unity, which was crucial for enhancing its credibility and authority and thus provided the foundation for its long-term success. If the Commission submitted to the General Assembly a draft article on which its members had not reached consensus, or on which they even sharply disagreed, it would inevitably provoke further debate among Member States. That would reduce the likelihood that the draft articles would give rise to a treaty; it would also undermine the Commission's authority and thus its fundamental purpose of promoting the progressive development of international law and its codification.

Mr. Grossman Guiloff (Special Rapporteur), summing up the debate on his second report on the topic "Immunity of State officials from foreign criminal jurisdiction", said that he wished to thank the Commission members for their comments and suggestions during the fruitful debate on the topic. He would first make general comments concerning those statements before offering some specific remarks on draft articles 7 to 18.

Members had shown overall support for the approach adopted for the second reading and had generally recognized the significant progress that the Commission had made on the topic. They had also noted that States attached high importance to the topic and to ensuring that the outcome of the Commission's work struck a delicate balance between respecting State sovereignty and combating impunity for the most serious international crimes. Members had noted that the comments of States had been adequately taken into account and that the proposed draft articles and their revisions constituted another step towards achieving

that important balance. Although there had been some criticism, he appreciated the view expressed by a number of members that, in his recommendations, he had addressed a variety of concerns in a balanced way and had reconciled a significant number of seemingly intractable conflicting opinions. There had been no opposition among members to the referral of all the draft articles considered in his second report to the Drafting Committee.

Several members had reiterated that the Commission was considering the draft articles on second reading under what was the longest-running topic in the current programme of work, as it had been on the Commission's agenda for almost 20 years. During that time, States had been given ample opportunity to comment on the Commission's progress, and their input and practice over the period up to 2022 was reflected in the draft articles adopted on first reading. He noted with appreciation that the Commission members who had previously expressed concern over his decision not to take into account, in his second report, comments made by States before 2022 had withdrawn their objections.

With regard to the proposed methodology for the second reading of the draft articles, a substantial number of members had agreed that the Commission should follow its usual practice of maintaining the text that had been adopted on first reading and proposing modifications only when there were compelling reasons to do so. Although a smaller number of members had proposed that the draft articles should be reviewed more thoroughly, it had been pointed out that most of the outstanding issues raised by States could be sufficiently addressed in the commentaries, in which additional developments in State practice and legal developments would also be taken into account. He thus stood by his position that the Commission should refrain from embarking on a *de novo* reading of the draft articles.

He shared the view of those members who had noted that the draft articles should take into account State practice from all regions of the world. The references to practice contained in the commentaries, particularly the commentary to draft article 7, would be supplemented accordingly. However, as one Commission member had noted, State practice was limited because the crimes in respect of which immunity did not apply were exceptional crimes and not all States had been in a position to prosecute foreign officials for such crimes. In any case, States in underrepresented regions had been given the same opportunity as other States to express their opinion on the Commission's work. Furthermore, many of them were parties to the treaties enumerated in the annex to the draft articles, whose applicability to the topic was analysed in the commentaries.

There was general agreement among members that the outcome of the Commission's work on the topic should take the form of a set of draft articles, which could be brought to the attention of States for possible use as the basis for a future treaty. Some members had noted that such an outcome was preferable because some of the provisions contained within the draft articles represented progressive development rather than codification of existing law. In particular, it had been argued that some provisions in Part Four, such as draft articles 17 and 18, could be given effect only through the negotiation of a treaty. Furthermore, all of the Commission's work on immunities had been presented in the form of draft articles. Many members had also pointed out that bringing the draft articles to the attention of the General Assembly for States to take note and consider them as the basis for negotiating a treaty on the topic at the appropriate time would create a further opportunity for States to address the most contentious matters.

Although opinion was split as to whether draft article 7 reflected customary international law, there was broad support among the members for retaining that provision in some form. Most members had acknowledged the existence of a trend in State practice towards the inapplicability of immunity *ratione materiae* in respect of certain international crimes.

Many members had argued that draft article 7 did indeed reflect customary international law, noting that there was sufficient State practice and *opinio juris* recognizing an exception to immunity *ratione materiae* in respect of the gravest crimes under international law. It had been suggested that draft article 7 did not only constitute progressive development, given that the crimes listed in the article were well established and represented codification of customary international law. One member had recalled that many State officials had been prosecuted for international crimes before another country's courts

following the end of the Second World War. Although the States concerned had been well aware of the rules on immunity, they had repeatedly asserted jurisdiction in those cases. The international community's lack of objection to the prosecutions demonstrated that a rule of customary international law on exceptions to the applicability of immunity regarding certain international crimes had come into effect. It had been noted that draft article 7 was consistent with the prior work of the Commission and reflected the development of international criminal law since the judgment of the International Military Tribunal at Nürnberg.

For various reasons, he saw much merit in the position held by some members that the commentary should not state whether draft article 7 constituted progressive development or codification. One reason was that the ultimate purpose of the draft articles was to form the basis of a convention, and the Commission should therefore try to create ample opportunity for States to discuss the scope of each provision.

One member remained opposed to the inclusion of draft article 7 because, in his view, it did not reflect existing law, and the available State practice suggested that support for exceptions to immunity was limited. It had also been pointed out that the draft article had been contentious since its provisional adoption in 2017. However, other members had recalled that, once an agreement on the safeguards in Part Four had been reached, the draft articles as a whole had been adopted without a vote. Ultimately, most members had underlined the need to produce a final outcome after so many years of work. In the light of the broad support shown in the plenary for the inclusion of draft article 7, and the spirit of flexibility displayed by all members, he felt that such a goal was achievable.

There was still no consensus on whether draft article 7 (1) should contain a specific list of crimes in respect of which immunity *ratione materiae* did not apply. Most members were in favour of retaining the list; some had pointed out that States had been considering and commenting on the draft article in its current formulation since 2017. Other members had conceded that, although they might have preferred an alternative formulation of the provision, they were not in favour of making such a fundamental change at the current advanced stage of consideration, as that would deprive States of the opportunity to comment on the revised text. Many members had also noted that including the list of crimes promoted legal certainty. However, a few members had suggested that replacing the list with a general rule would facilitate consensus on the draft article. According to one of those members, international law was permissive of exceptions to immunity *ratione materiae* but such decisions were nuanced and depended on multiple factors, such as whether a determination of immunity in a particular case would amount to impunity. Other members had suggested that the current list of crimes was either too long or too short. Lastly, two members appeared to favour a combined approach comprising a *chapeau* setting out the general rule followed by a non-exhaustive list of core crimes for which immunity was inapplicable and then new language setting out the criteria for the determination of other international crimes for which exceptions to immunity would apply.

Members had generally agreed that the list of crimes in draft article 7 should be non-exhaustive. Some of them had noted that the inclusion of an open-ended list would better preserve the ability of States to further develop international law on the topic. It had also been pointed out that an exhaustive list had the potential to freeze the development of international law or create uncertainty around emerging trends in State practice. He agreed that the list should be non-exhaustive, and he had taken note of the very reasonable suggestion made by one member to make a minor revision to that effect in paragraph 1. He also welcomed the proposals made by members of the Drafting Committee on how the draft article or the commentary thereto could be amended to make the non-exhaustive nature of the list even clearer.

Many members had noted that, as the list of crimes was non-exhaustive, it was especially important to set out clear criteria for inclusion in the list to guard against the risk of political abuse of exceptions to immunity *ratione materiae*. Members had suggested that such criteria could include the existence of relevant State practice, the gravity of the crime, the existence of multilateral conventions related to the crime and the *jus cogens* character of the prohibition of the crime. Members had also proposed the inclusion of crimes directly criminalized under international law and/or international crimes created under treaties where the definition of the prohibited act was explicitly directed at the conduct of State officials or

others who acted in the exercise of official capacity and where it was provided that other States could, or even must, exercise jurisdiction over persons who committed them. Although he believed that all those criteria had already been included in some form in the commentary to draft article 7, he fully agreed that the establishment of clear criteria for inclusion on the list of crimes was vitally important. He would therefore update the commentary to further clarify those criteria.

Most members had supported his proposal to add the crimes of aggression, slavery and the slave trade to the list in draft article 7 (1). Other members, while stating that they were not necessarily opposed to the additions, had questioned whether there were compelling reasons to depart from the text adopted on first reading, especially regarding the addition of slavery and the slave trade. Some members had simply requested further justification for including the additional crimes.

Most members had supported the proposal to include the crime of aggression on the list of crimes. Many members had noted that it was the supreme international crime, that it had been recognized as such at least since the judgment of the International Military Tribunal at Nürnberg and that it should have been included in the list of crimes from the start. Other members had noted that additional safeguards would be required owing to the jurisdictional issues that would arise if a foreign court determined whether the crime of aggression had occurred. The few members who had opposed the proposal had noted that, if the crime of aggression was included on the list, additional safeguards similar to those found in the Rome Statute of the International Criminal Court should be included to prevent political abuse of the provision.

The proposal to include the crimes of slavery and the slave trade on the list had also received broad support. Members had noted that the prohibition of those crimes had long been recognized as a *jus cogens* norm and that both crimes continued to be perpetrated. Some members had nonetheless opposed the proposal either because they did not feel that there were compelling reasons to change the text on second reading or because they did not perceive slavery and the slave trade to be “crimes under international law”, *per se*. Other members had noted that more evidence of State practice would be required in order to justify the inclusion of those crimes. In that regard, he noted that the impact of new developments would be assessed in the commentary, including the recent decision of a British court to jail a United Nations judge of Ugandan nationality under the Modern Slavery Act 2015.

One member had suggested that other crimes, such as summary execution, should be added to the list of crimes. However, other members had opposed that proposal, in part because the crime of summary execution was not the subject of a dedicated international convention. A discussion had also taken place on the extent to which crimes committed by foreign officials in the territory of the forum State were relevant to the topic and whether such crimes should be addressed in draft article 5, draft article 7 or the commentaries. He recommended that the matter should be taken up by the Drafting Committee. He had no objection to the reordering of the crimes on the list in draft article 7, as had been requested by some members.

Many members had expressed appreciation for the thorough review and analysis of recent jurisprudence on exceptions to immunity *ratione materiae* in his second report, even though relevant State practice was limited owing both to the gravity of the crimes included on the list and to the fact that not all States had had the occasion to develop their practice in that regard. Members had noted that his work complemented the extensive review of State practice in the fifth report by Ms. Escobar Hernández (A/CN.4/701), as well as the associated commentary. The review of State practice in his second report was not intended to be exhaustive; its purpose was to bring to light any developments that had occurred since draft article 7 had been adopted on first reading, as well as any State practice that had been omitted from prior reports.

It had been proposed that more attention should be paid to deliberate inaction by States in relation to immunity *ratione materiae*, as there might have been cases where a State had not prosecuted a foreign official when it had had the ability to do so because, in the State’s view, immunity *ratione materiae* had prevented prosecution. Other members had argued that it was difficult to draw conclusions from those examples of “negative State practice” because

it was hard to know what political or diplomatic reasons a State might have had for deciding not to prosecute another State's official. In the absence of information in that regard, the Commission had no basis on which to evaluate the legal impact of such decisions on the topic.

Some members had referred to additional recent practice, for instance the decision of the European Court of Human Rights in *Sassi and Benchellali v. France* and that decision's reliance on the reasoning of the International Court of Justice in *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*. He had re-examined those decisions and concluded that they were not decisive for the Commission's discussions of draft article 7. The context of both decisions was critical. In paragraph 91 of the *Jurisdictional Immunities* case, the Court clearly ruled out the use of its decision as a basis for drawing an inference on the application of immunity in respect of foreign State officials. Given that the Court itself had limited its judgment in the case to the issue of State immunity rather than the immunity of State officials, he was of the view that the Commission's treatment of it in the commentary to draft article 7 was sufficient. The interpretation of the decision by the European Court of Human Rights did not distinguish between immunity of the State and immunity of State officials, and was thus of limited relevance to the Commission's work.

Additionally, a few members had questioned the relevance of judicial practice in which immunity was neither invoked nor expressly addressed in determining the existence of exceptions to immunity of State officials. Other members had contested that view, arguing, *inter alia*, that the State's decision to prosecute was itself an expression of *opinio juris* that immunity did not bar the prosecution of the acts in question.

Thus, the retention, in draft article 7, of the non-exhaustive list of crimes, including the three additional crimes, appeared to have the broadest support among members. As always, he remained open to suggestions in the Drafting Committee on how the draft article could be further clarified. Regarding the annex to the draft articles, a few members had suggested that it should include references to other treaties, such as the Geneva Conventions of 12 August 1949; he was open to discussing that proposal in the Drafting Committee.

There had been overwhelming support for the provisions contained in Part Four of the draft articles. Members had highlighted the importance of safeguards in ensuring a balance between accountability and respect for sovereign equality. It had been stressed that Part Four was crucial to ensuring that draft article 7 was enforced without abuse or politicization. Furthermore, it had been recalled that the inclusion of procedural safeguards was a compromise that had made possible the adoption of draft article 7.

At the same time, some members had expressed concern that Part Four overemphasized immunity to the detriment of the right to exercise criminal jurisdiction. It had been stressed that safeguards should not unduly hinder legitimate investigations and prosecutions.

Members had noted that, notwithstanding the usefulness of Part Four, several of the provisions contained therein constituted progressive development. One member had suggested that, where feasible, the Commission should attempt to clarify which provisions constituted *lex lata* and which constituted *lex ferenda*. As stated in his second report, while he agreed that some of the draft articles in Part Four constituted progressive development of international law, other provisions – such as those related to fair treatment and due process requirements – constituted codification of customary international law. In his view, differentiating between progressive development and codification in the draft articles was not appropriate for the reasons stated by numerous members concerning, *inter alia*, the end result of the Commission's work, which would give States the opportunity to negotiate a convention.

He was grateful for the support expressed by a number of members for the proposals he had made in his second report regarding draft articles 8–18. Several articles – notably articles 13, 15,16 and 17 – had not been widely addressed during the plenary debate. While all of the comments made during the plenary debate had been duly noted, he would focus his remarks on the draft articles that had been most commented upon.

Several members had expressed support for the new formulation of draft article 8, noting that it was clearer and more precise. However, a few other members had stated that the revised draft article would introduce ambiguity as to its application. One member had expressed concern that the revised version made it unclear whether Part Four applied to draft article 7. Some members had questioned whether the new formulation expanded or restricted the application of Part Four, including whether the phrase "may affect the immunity of an official of another State" might introduce an "affectedness" threshold. It had been suggested that additional clarification should be provided as to whether Part Four applied from the moment a State authority contemplated any action that could potentially involve immunity or from the moment that authority formally exercised jurisdiction in a way that triggered the procedural safeguards. It had also been proposed that the phrase "at an early stage of" should be inserted before "any instance that may involve the exercise of criminal jurisdiction". According to another member, the commentary should clarify the relationship between Part Four, the different types of immunity and jurisdictional actions such as witness testimony. As stated by the International Court of Justice in its judgment in *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, if a court's invitation to testify did not impose obligations on its addressee, it did not impinge on the immunity enjoyed by a State official.

A number of members had expressed support for the proposal to include the phrase "as far as practicable" in draft article 9 (1), underlining that the phrase would introduce the necessary discretion in urgent or exceptional cases, such as when an official posed an imminent threat to public safety, without compromising the overarching obligation to examine immunity promptly, as was suggested in States' comments. Other members, however, had expressed concern that inclusion of the phrase might lead to uncertainty and had stated that a more precise formulation would be preferable. In order to clarify draft article 9 (1), some members had suggested that the commentary could further elucidate what examination of the question of immunity entailed, including whether it constituted an obligation of means or result. It had also been proposed that the commentary should state that the term "aware" extended to constructive knowledge.

A few observations had been raised in relation to inviolability. As explained by the Commission in its draft articles on diplomatic intercourse and immunities, an official who enjoyed inviolability was "exempted from measures that would amount to direct coercion". That aspect of inviolability was a specific form of immunity from foreign criminal jurisdiction, covering a broader set of jurisdictional acts. As stated by the International Court of Justice in its judgment in *Certain Questions of Mutual Assistance in Criminal Matters*, "the determining factor in assessing whether or not there has been an attack on the immunity of the Head of State lies in the subjection of the latter to a constraining act of authority". Accordingly, acts that did not amount to direct coercion might nevertheless affect the immunity enjoyed by an official entitled to immunity *ratione personae* under international law.

Absent a specific treaty rule to the contrary, State officials enjoying immunity *ratione materiae* would enjoy inviolability only to the extent of such immunity. In other words, another State could not exercise its criminal jurisdiction in respect of acts covered by immunity *ratione materiae*, and thus could not adopt measures of direct coercion against the official in relation to the same acts. An express recognition of that conclusion was contained in article 38 of the Vienna Convention on Diplomatic Relations. However, under specific regimes, a State official enjoying only immunity *ratione materiae* could be afforded a broader scope of inviolability. Such was the case of consular officers under the Vienna Convention on Consular Relations.

He maintained that, absent a more specific legal regime, full inviolability was bestowed only upon State officials enjoying immunity *ratione personae*. Accordingly, in his view, no specific provision on inviolability was required in the draft articles for those State officials who enjoyed only immunity *ratione materiae*. He was also of the view that all such considerations should be duly reflected in the commentary. He was therefore receptive to the suggestion of some members that the references to inviolability contained in draft articles 9 (2) (b) and 14 (4) (b) were unnecessary.

Three general positions regarding the obligation of notification could be identified based on members' comments on draft article 10. In the light of concerns raised by States that notification could hinder ongoing investigations, one set of members had agreed with his proposal to include the phrase "unless such notification would jeopardize the confidentiality of an ongoing investigation or the proper conduct of criminal proceedings" in draft article 10 (1). A second set of members had indicated that the inclusion of that phrase did not sufficiently address their concerns and that draft article 10 was not sufficiently based on State practice. Various suggestions had been made, such as deleting draft article 10, revisiting it altogether, or replacing it with an obligation to notify the State of the official following the official's detention. A third set of members had opposed the revised formulation, arguing that it could render the provision irrelevant and have a negative impact on due process, as it would mean that the necessity of the notification would be decided solely by the forum State.

The issues raised had been discussed extensively during the Commission's first reading of draft article 10. Bearing in mind those discussions, but also the serious impacts that the draft article could have on criminal proceedings, he had proposed the addition of a qualification. The addition was not without meaning, as the Commission was establishing criteria for action that could create responsibility for the State applying them. He proposed that all those issues should be discussed in the Drafting Committee.

He agreed with the suggestion to change, in the first sentence of draft article 10 (1), the phrase "that may affect an official of another State" to "that may affect the immunity of an official of another State", in line with the language of draft articles 8 and 9. Commission members had expressed different views on whether or not draft article 10 (2) should be retained. He would prefer to retain the paragraph for reasons of legal certainty but would not oppose its deletion. The matter could be discussed in the Drafting Committee. Lastly, members had generally agreed with the deletion of the reference to international cooperation and mutual legal assistance treaties in draft article 10 (3), as well as similar references in draft articles 11, 12 and 13.

Several Commission members had welcomed his recommendation that the commentary to draft article 11 should clarify that invocation was not a prerequisite for the application of immunity. Members had raised a few other issues that could be clarified in the commentary to the draft article, including the value and legal consequences of invoking immunity and the fact that invocation did not give rise to a presumption of immunity. He did not oppose the addition of such clarifications in the commentary to draft article 11.

Another issue concerned the form in which immunity should be invoked. While members had generally agreed that the written form was preferable, a few members were of the view that the provision should be more flexible, so as to allow oral invocation in exceptional circumstances. In order to reflect that flexibility, one member had proposed that the word "shall", in paragraph 2, should be replaced with "should". While he was of the view that the current requirements set out in draft article 11 for invoking immunity provided more certainty to States, a formulation that allowed some flexibility could be discussed in the Drafting Committee.

A few members had noted that the statement "the competent authorities of the forum State must therefore determine immunity in any case" was too sweeping, at least regarding immunity *ratione materiae*. given the reasoning of the International Court of Justice as set out in paragraph 196 of its judgment in *Certain Questions of Mutual Assistance in Criminal Matters*. One member had recommended that the Commission should state that the invocation of immunity was in fact necessary for the consideration of immunity. While that paragraph of the Court's judgment had been interpreted by some as meaning that immunity was applicable only when invoked by the official's State, there was no consensus on such an understanding. Scholars who opposed that interpretation argued that to say that certain conduct was "expected", as the Court had done, was not the same as saying that it was legally required and that, in the context of that case, the existence of an official act had not been entirely apparent. Moreover, that interpretation did not seem to be supported by State practice. In several of the cases currently referred to in the commentary to the draft articles and in some of the case law mentioned in his second report, immunity had been considered by the forum State in spite of the lack of invocation. Additionally, a number of States, including Brazil, Israel, the Russian Federation and the United Kingdom, had stated in their

written comments that invocation of immunity was not a prerequisite for the application of immunity and that the forum State must determine the existence and effect of immunity regardless of its invocation. He would therefore strongly caution the Commission against taking such an approach. He further recalled that, as the International Court of Justice had concluded in its judgment in *Certain Questions of Mutual Assistance in Criminal Matters*, a Head of State enjoyed "full immunity from criminal jurisdiction and inviolability … against any act of authority of another State", and there were "no grounds in international law upon which it could be said that the [other] officials concerned [in the case] were entitled to personal immunities, not being diplomats within the meaning of the Vienna Convention on Diplomatic Relations of 1961".

Members had generally agreed with the proposals presented in his second report in relation to draft article 12. However, a few members had been of the view that, in exceptional cases, it should be possible to revoke a waiver of immunity. While the Special Rapporteur remain unconvinced that such a waiver could be revoked, he reiterated his proposal, which had been supported by some members, to refer in the commentary to the general grounds of invalidity of a waiver equivalent to those foreseen in articles 46 to 53 of the 1969 Vienna Convention on the Law of Treaties.

There had been considerable support for retaining draft article 14 (Determination of immunity). In relation to draft article 14 (2), however, one member had recommended that the Commission should delete the reference to waivers of immunity, as it conflicted with the idea that a waiver removed immunity as an obstacle to the exercise of jurisdiction by the forum State. Another member had suggested that the same paragraph could benefit from further clarification as to whether the list of criteria set out therein was mandatory or advisory.

A few reservations had also been raised in relation to draft article 14 (4). It had been suggested by one member that, as currently drafted, the paragraph could lead to the paralysis of all investigative or prosecutorial acts, even non-coercive ones. Another concern raised had been that, in draft article 14 (4) (b), the phrase "that may affect the official" was too broad and should be replaced with "that may affect the immunity of the official". It had also been suggested that the reference to an exception regarding precautionary measures should be deleted because it departed from the judgment of the International Court of Justice in *Certain Questions of Mutual Assistance in Criminal Matters*. Refinements to the language of those paragraphs could be discussed in the Drafting Committee.

Turning to draft article 18, he said that broad support had been expressed for retaining a provision on the settlement of disputes, in particular given the preference that the draft articles should be recommended as the basis for the negotiation of a treaty. Some of the suggestions made in relation to the draft article included providing for the possibility to opt out of the provision and including time limits regarding any dispute settlement. In response, some members had stated that such issues would be better addressed in the context of future treaty negotiations; he shared that view but again noted that it was a matter that could be further discussed in the Drafting Committee.

Lastly, it had been suggested, again on the basis of paragraph 196 of the judgment of the International Court of Justice in *Certain Questions of Mutual Assistance in Criminal Matters*, that an additional provision should be included, stating that: "The State notifying a foreign court that judicial process should not proceed, for reasons of immunity, against its State organs, is assuming responsibility for any internationally wrongful act in issue committed by such organs." He was uncertain about the advisability of including an entirely new provision on second reading, given that States would not have the opportunity to comment on it until after the draft articles had already been adopted. However, if the Commission decided that a clarification of the sort was necessary, the matter could be addressed in the commentary to draft article 11 on the invocation of immunity.

He was grateful for the members' learned and thoughtful contributions to the debate on the topic and looked forward to continuing the Commission's discussions in the Drafting Committee. In the light of the plenary debate, he wished to request the Chair to recommend that the Commission should refer draft articles 7–18 to the Drafting Committee.

It was time for the Commission to successfully conclude its work on the topic, which sought to achieve a balance between State sovereignty and the fight against impunity for the

most serious international crimes. At stake was the rule of law and its ability to address fundamental issues in a meaningful way, in strict compliance with the Commission's legal tradition and its mandate for progressive development and codification of international law.

Mr. Patel said that a lack of consensus on draft article 7 persisted not only within the Commission but also among States, as evidenced by their comments and objections, including in the Sixth Committee. Draft article 7 was not supported by widespread, consistent State practice and therefore did not reflect customary international law. There was insufficient State practice and jurisprudence to support the proposition that exceptions to immunity existed under international law for the list of crimes provided in the draft article or even that there was a trend towards the recognition of such exceptions. States representing all the world's regions, as well as Commission members and practitioners, had urged the Commission to exercise caution in examining the sensitive issue of exceptions to immunity from criminal jurisdiction; every effort must therefore be made to reach a consensus on that issue. He was concerned that, given the current lack of consensus, referring draft article 7 to the Drafting Committee would be an unproductive use of the Commission's precious time. He continued to have reservations about draft articles 2, 7 and 10; while draft article 2 had already been referred to the Drafting Committee, he was of the view that a working group should be established to examine draft articles 7 and 10.

Mr. Zagaynov said that the Special Rapporteur's summing-up of certain members' views and comments had not been sufficiently nuanced. For instance, although at least 10 members had expressed doubts as to whether draft article 7 reflected the current state of international law, those doubts had been ignored in the Special Rapporteur's statement. He hoped that members' opinions would be given due regard in future. He shared Mr. Patel's concerns regarding the proposed referral of draft article 7 to the Drafting Committee.

Mr. Jalloh, thanking the Special Rapporteur for what he considered to be a fair and balanced summing-up of the Commission's debate on the draft articles, said that a number of members had taken the view that draft article 7 was supported by sufficient State practice and therefore reflected international law. In that connection, he supported the analysis of the issue by Mr. Akande at the preceding meeting, which accurately described the state of international law in support of draft article 7. In terms of the Commission's procedure, he could not recall a time when the Commission had reopened a debate after its summing-up by the Special Rapporteur. While explanations of position were welcome, points of substance in respect of which there was disagreement should be discussed in the Drafting Committee. He urged the members not to magnify the appearance of disagreement within the Commission. Indeed, he had observed a great deal of effort on the part of all the members to make progress on the topic, given its importance to States and the significance of the Commission's contribution in that regard.

Mr. Fathalla said that the referral of draft article 7 to the Drafting Committee concerned not only the text of that draft article as proposed by the Special Rapporteur but also all the proposals made in relation to it during the plenary debate, including the valuable proposal made by Mr. Ma. The Drafting Committee would be able to identify which proposals could serve as the basis for a compromise. The Commission should present a compromise text to the General Assembly, without resorting to voting, and leave any political issues to the Sixth Committee.

The Chair recalled that, in accordance with the Commission's usual practice, when it referred draft provisions to the Drafting Committee, it did so on the understanding that the comments and observations made during the plenary debate would be taken into account.

Ms. Oral said that it was not uncommon for a special rapporteur's summing-up to refer to most but not all of the views expressed by members during the plenary debate. It would be highly regrettable if the Commission decided not to refer draft articles 7 and 10 to the Drafting Committee. Although draft article 7 had been provisionally adopted by a vote, at the end of the first reading it had been adopted, along with the other draft articles, by consensus. Members who had harboured concerns in that regard had been able to put them on record. No State had recommended that work on draft article 7 should be discontinued, and the Drafting Committee was the only setting in which that work could proceed. Any decision by the Commission to revisit that method of work would reflect poorly on it.

Mr. Fife said that, in his statement at the preceding meeting, he had supported the inclusion of a list of crimes in draft article 7 but had also supported the approach of not specifying what constituted codification in that context. In his view, it was important to leave scope for future clarification and development of the law. His aim had been not to avoid the question but to create space for the Drafting Committee to find the appropriate compromise, perhaps in the commentaries. It would not be possible to make further significant progress on draft article 7 without focusing on specific points of drafting. He agreed with other members that the Commission's current time constraints were an additional reason to move forward with the work in the Drafting Committee. It was well known that draft article 7 addressed a very sensitive issue. His support for referring the draft article to the Drafting Committee did not mean he believed that there was only one way to interpret the nature of the text.

Mr. Akande, thanking the Special Rapporteur for an excellent summary of the debate, said that, if the Commission omitted draft article 7 from the text that it ultimately adopted, it would be addressing immunity *ratione materiae* without any consideration of exceptions thereto. That would be an extremely radical step, as the Commission would be overturning or at least proposing to overturn the provisions of widely ratified treaties that did provide for such exceptions. The Commission therefore had no choice but to address the issue. As far as he had understood, Mr. Patel had been suggesting not that the Commission should discontinue its work on exceptions to immunity *ratione materiae* but that it should work on that issue in a different way. However, the continuation of the substantive debate in the Drafting Committee was an established procedure and there was no reason to depart from it.

Mr. Cissé said that the Commission needed to move forward. In 2017, he had voted in favour of the provisional adoption of draft article 7 on the understanding that the Commission's mandate included the progressive development of international law. He therefore saw no reason why the Commission could not refer that draft article to the Drafting Committee at the second-reading stage. If the Commission continually revisited its previous decisions, it would stop making progress and would lose its relevance. Moreover, the Commission was guided by a spirit of compromise and consensus. He had been in favour of including maritime piracy in the list of crimes in draft article 7, but that view had not been supported by the Commission. He had accepted that outcome in the interest of consensus, to allow progress to be made. All the draft articles should be referred to the Drafting Committee so that the Commission could conclude its work on a topic of vital importance to the international community.

Mr. Ouazzani Chahdi said that States had not been fully satisfied by the Commission's decision to resort to voting for the provisional adoption of draft article 7, as members had been elected to work towards consensus. The central problem raised by the topic was that of limits and exceptions to immunity. If the Commission reopened the discussion on the substance of draft article 7, it would have to revisit the entire discussion of those limits and exceptions, which would greatly impede its progress. The Commission had been working on the topic for many years and could not reverse course on what had already been discussed and accepted. Moreover, most States were in favour of the inclusion of limits and exceptions to immunity. The draft article should be discussed in the Drafting Committee and not in an informal working group.

Mr. Patel said that consensus was the cornerstone of the Commission's work and was greatly appreciated. However, no consensus had been reached on draft article 7. The Commission was now being asked to proceed despite that lack of consensus. He was unable to recommend the referral of draft articles 7 and 10 to the Drafting Committee. He was proposing that the draft articles should be discussed in a working group so that agreement on them could be reached before their referral to the Drafting Committee.

Mr. Cissé said that the compromise found for draft article 7 had been to include draft articles on procedural safeguards.

Mr. Jalloh said that, given the Commission's established procedures, draft article 7 should be referred to the Drafting Committee, which was the proper setting for further discussion. The Commission should refer all the draft articles to the Drafting Committee, particularly in view of the limitations that the Commission was facing.

Mr. Forteau said that, as all the draft articles had been adopted on first reading, he saw no reason why they should not be referred to the Drafting Committee at the second-reading stage. All the provisions of the draft articles were interlinked, and there was an overall balance among them that would be upset if only some of them were referred. Before the Commission could determine whether there was a consensus, it needed to have a text to consider. The first step was thus to work on a text in the Drafting Committee. Consequently, he was in favour of referring all the draft articles to the Drafting Committee.

Mr. Reinisch said that, as Mr. Forteau had emphasized, the Commission should bear in mind that it was at the second-reading stage. Some details of the draft articles might remain controversial. However, with regard to draft article 7, as many members had noted in their statements, there was a surprising consensus among the members of the Commission and among States in the Sixth Committee that the most serious crimes gave rise to exceptions to immunity *ratione materiae*, although there might not be full agreement as to what those crimes were. He agreed with Mr. Akande that it would be strange if the Commission's draft articles on the topic addressed functional immunity without dealing with the question of exceptions. He strongly supported the referral of draft article 7 to the Drafting Committee.

Mr. Lee said that he was grateful for the Special Rapporteur's balanced and detailed summing-up of the debate. He was also grateful to other members of the Commission, including Mr. Patel and Mr. Zagaynov, who had expressed their views. While he had some reservations regarding draft article 7, they could be addressed satisfactorily and fully in the context of the Drafting Committee. In the light of Mr. Akande's comments, he wondered whether there were any compelling reasons why members' reservations could not be addressed in the Drafting Committee.

Mr. Ruda Santolaria, thanking the Special Rapporteur for his excellent work, said that he supported the referral of all the draft articles to the Drafting Committee. On first reading, the Commission had adopted the draft articles by consensus. Beyond the legitimate views that members might hold regarding individual draft articles or the full set thereof, there was a balance among the draft articles. To refer only some of them to the Drafting Committee would disrupt that balance, affecting members' ability to assess them in the Drafting Committee, which was the proper forum for discussing the issues raised.

Mr. Vázquez-Bermúdez said that he was grateful to the Special Rapporteur for his tremendous work on a sensitive topic. The Commission was at the second-reading stage and, as Mr. Forteau had noted, the draft articles formed a balanced whole. The Drafting Committee was the proper forum for the discussion and refinement of the draft articles, taking the various positions and suggestions of members into account.

Mr. Nesi, thanking the Special Rapporteur for his excellent summary of the debate, said it was somewhat surprising that certain members had expressed reservations regarding the follow-up. The Commission could not pre-empt the debate that would be held in the Drafting Committee. He was strongly in favour of referring the draft articles to the Drafting Committee, which could decide how best to proceed.

Ms. Okowa said that she recommended referring the full set of draft articles to the Drafting Committee. With regard to draft article 7, she had noted at the preceding meeting that it would be prudent to add methodological guidelines so as to leave the door open for the possible inclusion of additional crimes in the future.

Mr. Mingashang said that the aim of the Special Rapporteur's summing-up was not to reproduce the views expressed word for word but to capture the spirit or basic thrust of the debate, and the Special Rapporteur had succeeded in doing so. In his own statement at the preceding meeting, he had supported the referral of draft article 7 to the Drafting Committee, albeit with a number of reservations, which were nonetheless not incompatible with further discussion in the Drafting Committee. On the contrary, as the topic was highly sensitive, and consensus was the only way forward, the referral of the draft articles to the Drafting Committee could lead to an enriching discussion that would help to reconcile members' views. It would be impossible to achieve a consensus if the process was short-circuited before it had even begun.

As Mr. Jalloh had noted, the Commission's procedures did not include an intermediate step, such as an informal working group, between the plenary debate and the Drafting Committee. The rules of the game should not be changed mid-play. As Mr. Forteau had argued, referring only some draft articles to the Drafting Committee would create an imbalance. He was therefore in favour of referring all the draft articles and the annex thereto to the Drafting Committee, where all details and sensitive issues could be dealt with in a manner that would allow for a consensus to emerge.

Mr. Asada said that he supported the referral of all the proposed draft articles to the Drafting Committee. He agreed with Mr. Akande that, if the Commission did not refer draft article 7 to the Drafting Committee, it would be ignoring the fact that exceptions to immunity *ratione materiae* were provided for in many widely ratified treaties. He also agreed with Mr. Forteau that there was a balance among the draft articles. Draft article 7 and Part Four, in particular, were interlinked. He further agreed with Mr. Jalloh that the purpose of the Drafting Committee was to discuss the divergent views of members.

Ms. Orosan said that the Special Rapporteur had successfully summed up all the important ideas that had been put forward. The purpose of such a summary was not to reproduce all the statements made during the debate. All the draft articles should be referred to the Drafting Committee for further discussion in the light of the plenary debate and the comments and observations received from States. It would not be reasonable to select only certain draft articles for referral to the Drafting Committee. The aim of the plenary debate was not to reach a consensus but to analyse the proposed draft articles with a view to offering guidance to the Drafting Committee so that it could further discuss and clarify the underlying points of law. In the same way, when States commented on the Commission's work, their aim was to encourage – rather than to prevent – further discussion in accordance with the Commission's methods of work. She would strongly oppose any informal discussions on draft articles 7 and 10 of a kind not envisaged in the Commission's methods of work.

Mr. Galindo, supported by **Mr. Tsend**, said that he was fully in favour of referring the set of draft articles to the Drafting Committee. At the second-reading stage, compelling reasons were needed to change what had been approved by the Commission on first reading. That applied not only to the content of draft provisions but also to questions of procedure. According to the tenth edition of *The Work of the International Law Commission*: "The Drafting Committee may be entrusted not only with purely drafting points but also with points of substance which the full Commission has been unable to resolve or which seemed likely to give rise to unduly protracted discussion. However, issues which proved difficult to overcome in the Drafting Committee may be transferred to a more informal setting such as a working group." Accordingly, only if it proved difficult to find consensus in the Drafting Committee could the possibility of transferring issues to a working group be considered.

Mr. Mavroyiannis said that, as Mr. Galindo had noted, some of the difficulties raised by the topic and differences of opinion among members could be addressed in the context of the Drafting Committee. At the second-reading stage, the Commission could not select only certain draft articles for referral to the Drafting Committee. Indeed, such an approach would prevent the Commission from finishing its work on the topic at the current session. He therefore supported the Special Rapporteur's proposal that the full set of draft articles should be referred to the Drafting Committee.

Ms. Mangklatanakul said that she supported the referral of the set of draft articles to the Drafting Committee. The topic was a difficult one, which was why it had been in the Commission's programme of work for so many years. States were counting on the Commission to find a solution. That was why she had suggested, at the 3705th meeting, that the possibility of adding a qualifier to draft article 7 should be seriously considered.

Mr. Patel said that, as was stated in the same paragraph of the tenth edition of *The Work of the International Law Commission* quoted by Mr. Galindo: "The Commission has noted that premature referral of draft articles to the Drafting Committee, and excessive time-lags between such referral and actual consideration of draft articles in the Committee, have counter-productive effects." He requested the Chair to clarify what should be done in such circumstances, as consensus on referral to the Drafting Committee remained elusive. Referral without such a consensus would undermine the Commission's working procedures.

Mr. Fife said that the notion of prematurity could not be used to describe the Commission's work on the topic, which had been under way for almost two decades.

Mr. Jalloh said that the Commission's work on the topic reflected its core values. At the first-reading stage, it had moved from division to consensus, while accommodating differing points of view. Those differing views had been reflected in the commentaries so that States could consider them but would be removed at the final stage, as the Commission spoke with one voice. Particularly in view of the reduced length of the current session, a decision on the draft articles should be made without further delay. All the draft articles should be referred to the Drafting Committee.

Mr. Nguyen said that the Drafting Committee was the appropriate forum for a further exchange of views on the draft articles. He therefore supported the referral of all the draft articles.

The Chair said that he wished to thank Mr. Patel for his procedural suggestion, which had led to a rich debate on issues of importance. However, he had not heard strong support for that suggestion. Rather, there appeared to be strong support for referring the draft articles to the Drafting Committee in the light of the plenary debate. Given that the plenary debate was on public record, he wondered whether Mr. Patel would accept, in the spirit of flexibility and collegiality, the referral of all the draft articles to the Drafting Committee, on the understanding that they would be referred together with the comments and observations made during the plenary debate.

Mr. Patel said that he was unable to join the consensus on the referral of the draft articles to the Drafting Committee. If there was to be a working group formed within the Drafting Committee to deal exclusively with draft articles 7 and 10, that would be a different matter.

The Chair said he took it that the Commission wished to refer draft articles 7 to 18 and the draft annex, as contained in the Special Rapporteur's report, to the Drafting Committee, taking into account the comments and observations made during the plenary debate.

It was so decided.

General principles of law (agenda item 4) (A/CN.4/779 and A/CN.4/785)

Mr. Vázquez-Bermúdez (Special Rapporteur), introducing his fourth report on the topic "General principles of law" (A/CN.4/785), said that, as one of the sources of international law enumerated in Article 38 (1) (*c*) of the Statute of the International Court of Justice, general principles of law merited comprehensive and careful treatment. The Commission's approach to the topic had always been to maintain a balance between rigour and flexibility, as it had done when dealing with the other sources of international law. That approach should continue. He was pleased to note that States and legal scholars had continued to show interest in the topic since the adoption of the draft conclusions on first reading.

In response to the Commission's request for comments, a number of States had provided comments and observations in writing (A/CN.4/779). In the Sixth Committee, States had welcomed the Commission's work on the topic and there had been general recognition that the Commission was well placed to carry out that work adequately. In general, State delegations had taken a positive view of the draft conclusions and commentaries, seeing them as texts that could facilitate the work of those called upon to identify and apply general principles of law. Several delegations had also commented in detail on the texts adopted on first reading and had made suggestions for improvement. There was also ample support for the form that the Commission intended to give to the final outcome of its work on the topic, namely draft conclusions accompanied by commentaries, which was consistent with its work on other topics related to the sources of international law.

In his view, the Commission was in a position to conduct its second reading of the draft conclusions. Because of the limited time available for meetings in 2025, however, it was unrealistic to expect that the commentaries could be adopted at the current session. That part of the Commission's work could be taken up and completed in 2026.

With regard to draft conclusion 1, from the outset, States had endorsed the Commission's approach of limiting the scope of the draft conclusions to general principles of law as a source of international law and to clarifying the methodology for their identification, their functions and their relationship to other sources of international law. It was generally emphasized that the starting point of the Commission's work was Article 38 (1) (*c*) of the Statute of the International Court of Justice, which referred to "the general principles of law recognized by civilized nations", analysed in the light of practice, jurisprudence and teachings. States had not expressed major concerns regarding draft conclusion 1, since it was of a general and introductory nature. Some States had emphasized the importance of paying careful attention to the terminology used in practice, as the use of the term "principle" did not always refer to general principles of law in the sense of Article 38 (1) (*c*). Some States had suggested that it might be useful to include an illustrative list of general principles. Others, such as India and Poland, had suggested that the Commission should insert a new draft conclusion containing a definition of the term "general principles of law".

He did not consider it necessary to make the changes to draft conclusion 1 proposed by some States. The question of an illustrative list of general principles had been discussed before, and the majority position, both in the Commission and in the Sixth Committee, was that such a list was not necessary as it would be incomplete and could create the erroneous impression that there were no other general principles outside the list. In any event, there had been support among States for the examples of general principles of law referred to in the commentaries. Moreover, he did not consider it necessary to insert a new draft conclusion defining "general principles of law". The draft conclusions as a whole already gave a general indication of what was to be understood by that term; thus, inserting a new draft conclusion in that regard could be repetitive and also confusing. Regarding the question of terminology, it could be useful to expand the commentary to draft conclusion 1 to emphasize that care should always be taken to determine whether uses of the word "principle" in practice did indeed refer to a general principle of law.

There was broad support for draft conclusion 2, which dealt with the essential requirement of recognition in order for a general principle to exist. States had generally reaffirmed that the use of the term "civilized nations" was anachronistic and should not be used by the Commission in the draft conclusions. Most States had expressed support for the use of the term "community of nations", which appeared in the International Covenant on Civil and Political Rights. Some States had proposed, however, the use of other terms, such as "international community", "community of States" or "international community of States". Some States had pointed out that general principles were recognized essentially by States, to the exclusion of other actors, while others had indicated that the role of international organizations in such recognition should also be considered.

A fundamental question that must be answered was which actors were capable of "recognizing" general principles and contributing to their formation. Taking into account existing practice, he had noted in the fourth report that while recognition by international organizations was also possible, it was recognition by States that contributed primarily to the formation of general principles. Accordingly, he proposed the addition of three new paragraphs in draft conclusion 2. Those new paragraphs would indicate that "it is primarily the recognition by States that contributes to the formation of general principles of law", that "in certain cases, the recognition by international organizations may also contribute to the formation of general principles of law", and that "while the positions of other actors may be relevant in providing context and for assessing recognition by the community of nations, these positions do not, in and of themselves, form part of such recognition".

Some delegations, notably that of the European Union, had also referred to examples of general principles with an apparently narrower scope of application. Such general principles would not be of a universal but of a regional or other nature. He had already referred to that issue in his first report (A/CN.4/732), but the Commission had not been of the view that it merited further consideration. After conducting research and identifying examples in practice of principles with a more limited scope of application, including principles applied by the Caribbean Court of Justice, he had decided to propose the addition of a new draft conclusion, draft conclusion 12, containing a "without prejudice" clause in

relation to such principles. It would read: "The present draft conclusions are without prejudice to the existence of general principles of law with a limited scope of application."

As in previous years, the first category of general principles of law mentioned in draft conclusion 3, namely those that were derived from national legal systems, had been unanimously supported by States, subject to some specific questions concerning the methodology for identifying them. As for the second category, general principles formed within the international legal system, many States had affirmed that such a category existed, while others had continued to express concerns and doubts in that regard. In his view, general principles of law falling under the second category were rooted in both State practice and the jurisprudence of international courts and tribunals and were also supported by teachings, as had been amply shown in the Commission's work to date. Moreover, as some States had pointed out, Article 38 (1) (*c*) was drafted in broad terms; nothing in that provision indicated that general principles of law were limited to those originating in national legal systems. International law itself, like any legal system, had the capacity to generate principles specific to it, without the need to borrow from other legal systems.

Another aspect referred to in the fourth report was the distinction between general principles of law formed within the international legal system and customary international law. That distinction was based on the method for their identification. For a rule of customary international law to exist, there must be a general practice accepted as law, accompanied by *opinio juris*. General principles of law formed within the international legal system, by contrast, must be recognized by the community of nations as intrinsic to that system. For the identification of customary rules, State practice in the international community was examined to establish whether a rule was general and whether it was accompanied by a sense of legal right or obligation (*opinio juris*). By contrast, the identification of general principles of law formed within the international legal system involved, first, an inductive analysis of the international legal framework itself, both conventional and customary, taking into account all available evidence, such as international instruments; and second, once the principles had been identified, a deductive process to ascertain whether they were intrinsic to the international legal system – in other words, whether they reflected and regulated its basic features. His position remained that principles formed within the international legal system existed and were covered by the topic. He had not, therefore, proposed any changes to draft conclusion 3.

Draft conclusion 4 had not been the subject of any further comments by States; he had not therefore proposed any changes to it.

Draft conclusion 5 had received general approval in the Sixth Committee. Notably, the delegation of Brazil had suggested indicating in the draft conclusion that the comparative analysis should include linguistic diversity as a factor. In addition, the delegation of Israel had indicated that it would be useful to refer to "hybrid legal systems". Those were constructive suggestions that could be reflected in the commentary to the draft conclusion.

Draft conclusion 6 had been the subject of further comments and observations. In particular, some States had expressed concern about the apparent lack of clarity as to the meaning of the term "compatible" and the notion of implicit recognition. Such issues could be addressed in the commentary to the draft conclusion in the light of the Commission's plenary debate. In the current commentary to draft conclusion 6, it was clarified that a principle *in foro domestico* could be considered compatible with the international legal system "if it is suitable to apply within" that system. Further clarification could be provided regarding those criteria. For example, it could be clarified that a principle common to the various legal systems of the world was suitable to apply within the framework of the international legal system if it served a regulatory function that was equivalent, to some degree, to the regulatory function that it served at the domestic level and was appropriate to the international legal system. It could also be mentioned in the commentary that a principle *in foro domestico* must also be able to operate in the international legal system when conditions existed that were equivalent, to some degree, to the conditions under which it applied domestically. That would avoid any distortion or misapplication of the principle as recognized in the various legal systems of the world. If, for example, the application of a principle *in foro domestico* required specific procedural and institutional arrangements that did not exist at the international level, transposition would be precluded.

With regard to draft conclusion 7, the notion of general principles formed within the international legal system had been the subject of various comments by several State delegations. One criticism of draft conclusion 7, as noted in previous years, was that the proposed identification methodology was too vague and could be used to circumvent the consent that was required for the formation of international rules. As indicated in paragraphs 133 to 153 of the fourth report, the methodology for the identification of that category of general principles, as it appeared from an analysis of practice, essentially involved both inductive and deductive assessments, in a way that did not differ significantly from the methodology for the identification of general principles derived from national legal systems. Those aspects could be clarified in the commentary to the draft conclusion. The Kingdom of the Netherlands supported the existence of two categories of general principles of law but considered that draft conclusions 3 and 7 had been formulated too cautiously and that it would be better to speak of "general principles of law formed within", as opposed to "that may be formed within", "the international legal system". The Nordic countries had made a similar proposal, noting their preference for consistency in the formulation of subparagraphs (a) and (b) of draft conclusion 3.

Regarding draft conclusion 7 (2), which contained a "without prejudice" clause regarding the possible existence of other general principles formed within the international legal system which were not necessarily intrinsic thereto, some States had suggested that it should not be retained. However, the Kingdom of the Netherlands had indicated that since such legal principles had evolved within international law and had a very limited scope of application or were specific to certain areas of international law, the "without prejudice" clause in draft conclusion 7 (2) was merited. That country therefore supported the development of a more comprehensive taxonomy of general principles of law formed within the international legal order, including general principles of law that were not necessarily intrinsic to the international legal order, as alluded to in draft conclusion 7 (2).

There had been few comments on draft conclusion 8, which had received general support from States. No changes to it were proposed in the fourth report, although some clarifications could be made in the commentaries following the suggestions of several States.

Draft conclusion 9 as adopted on first reading had been generally accepted. However, one State – Cameroon – had expressed doubts about the term "the most highly qualified publicists". Following the example of the Commission's work on subsidiary means for the determination of rules of international law, he proposed to use broader language to ensure diversity.

As for draft conclusion 10, he proposed reversing the order of paragraphs 1 and 2 so as to give paragraph 1 less prominence, as it was a statement of fact of what mainly, but not always, occurred. That paragraph dealt with the fact that general principles of law were mainly resorted to when other rules of international law did not resolve a particular issue in whole or in part. The proposed change was in response to the observation by several States that general principles of law were not limited to such a "gap-filling" role.

He had not made any proposal to amend draft conclusion 11, as it was generally supported by States. In paragraphs 198 to 202 of the fourth report, he made some suggestions for further clarifications that could be made in the commentary, in response to the comments of some State delegations in the Sixth Committee. The lack of a hierarchy between general principles of law and the other sources of international law was broadly supported and in line with the position taken by the Commission in its work on the fragmentation of international law. Furthermore, given the clear text of Article 38, general principles of law must not be confused with "subsidiary means for the determination of rules of law". Therefore, the wording "subsidiary source" should be avoided. Regarding the suggestion of adopting the notion of "formal hierarchy", as opposed to "hierarchy", he considered that such wording could suggest that an "informal hierarchy" existed between the sources, which was unsupported by State and judicial practice and contrary to the views of the majority of States in the Sixth Committee. Furthermore, as suggested by the text of Article 38, and as widely accepted by States, general principles of law were an autonomous source of international law. The fact that they often played a supplementary role in relation to the other two sources was due to the operation of the *lex specialis* principle. As general principles of law were usually *lex generalis* relative to the norms of the other two sources on the same subject, the latter

would take precedence over the former. That position was consistent with the conclusions reached in the Commission's work on the fragmentation of international law.

He requested the Commission to refer the 12 draft conclusions to the Drafting Committee, taking into account the plenary debate.

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

Mr. Oyarzábal (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. Akande, Mr. Argüello Gómez, Mr. Asada, Mr. Fife, Mr. Forteau, Mr. Galindo, Mr. Jalloh, Mr. Lee, Mr. Ma, Ms. Mangklatanakul, Mr. Mavroyiannis, Mr. Nesi, Ms. Okowa, Ms. Oral, Ms. Orosan, Mr. Ouazzani Chahdi, Mr. Paparinskis, Mr. Patel, Mr. Reinisch, Ms. Ridings, Mr. Ruda Santolaria, Mr. Sall, Mr. Vázquez-Bermúdez and Mr. Zagaynov, together with Mr. Grossman Guiloff (Special Rapporteur) and Mr. Fathalla (Rapporteur), *ex officio*.

The meeting rose at 1.10 p.m.