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International Law Commission
Seventy-second session (first part)

Provisional summary record of the 3523rd meeting
Held at the Palais des Nations, Geneva, on Monday, 17 May 2021, at 11 a.m.

Contents

Present:

Chair:	Mr. Hmoud
Members:	Mr. Cissé
	Ms. Escobar Hernández
	Mr. Forteau
	Ms. Galvão Teles
	Mr. Gómez-Robledo
	Mr. Grossman Guiloff
	Mr. Hassouna
	Mr. Jalloh
	Mr. Laraba
	Ms. Lehto
	Mr. Nguyen
	Ms. Oral
	Mr. Ouazzani Chahdi
	Mr. Park
	Mr. Peter
	Mr. Petrič
	Mr. Rajput
	Mr. Reinisch
	Mr. Tladi
	Mr. Vázquez-Bermúdez
	Sir Michael Wood
	Mr. Zagaynov

Secretariat:

Mr. Llewellyn	Secretary to the Commission

The meeting was called to order at 11 a.m.

Immunity of State officials from foreign criminal jurisdiction (agenda item 3) (*continued*) (A/CN.4/739)

Mr. Grossman Guiloff, speaking via video link, said that he wished to thank the Special Rapporteur for her diligent and careful work on the topic "Immunity of State officials from foreign criminal jurisdiction" and for her eighth report (A/CN.4/739). Fighting impunity and ensuring responsibility for international crimes was an essential interest for the international community as a whole; he therefore welcomed the Special Rapporteur's proposal to include a draft article on the relationship between immunity of State officials from foreign criminal jurisdiction and international criminal tribunals. It was crucial to ensure that the draft articles reflected, and did not undermine, the substantive strides made in the area of international criminal law.

The Commission must bear in mind that the *erga omnes* nature of the duty to combat crimes such as torture and genocide created a positive obligation on all States to ensure the effective prosecution of individual perpetrators. It was important to stress that the proposed draft articles did not affect obligations that States had freely undertaken, including those related to international criminal tribunals and other treaty regimes, and to strike a balance between the prohibition of impunity for the gravest international crimes and the avoidance of politically motivated prosecutions. However, as he and other Commission members had previously noted, no such balance existed in practice; the prevailing situation in international relations was one of impunity, which necessitated the intervention of international criminal tribunals and treaty bodies to ensure international accountability.

With that universal goal in mind, he found it difficult to understand the concerns raised by Mr. Rajput at the Commission's 3521st meeting with regard to the principle of accountability, specifically as to whether that principle meant that rules of law could be ignored in favour of a subjective preference. Such a question implied that accountability was not a principle of law on the same footing as other principles of law and that accountability for the most serious international crimes was not a goal shared by the entire international community. Both of those insinuations were wrong and unsupported by law.

Turning to the two draft articles proposed in the eighth report, he said that he was in favour of referring draft article 18 to the Drafting Committee. Mr. Rajput had argued against the inclusion of draft article 18 on the grounds that national criminal prosecution of foreign officials and international criminal prosecution were unrelated, while at the same time claiming that the inclusion of a "without prejudice" clause in the draft articles could be prejudicial to domestic prosecutions. Mr. Rajput had also denied that there was any overlap between the jurisdiction of national courts and that of international criminal tribunals, yet had acknowledged the principle of complementarity, which underpinned the jurisdiction of the International Criminal Court and required that preference must be given to national prosecution when national authorities were willing and able to provide an adequate forum. The need for complementarity arose only when two forums had concurrent jurisdiction; it was that very balance that draft article 18 endeavoured to preserve.

Another argument that had been advanced for not including draft article 18 was that doing so would represent an attempt to pre-empt the opinion of the International Court of Justice on the duty to cooperate with the International Criminal Court. However, in fact, draft article 18 rightly left space for the International Court of Justice to pronounce itself on that issue and did not prejudge what its pronouncement might be. If the logic of such an argument were followed to its conclusion, the Commission would be unable to expound any rules of international law for fear of a possible future conflict with a case or advisory proceeding before the International Court of Justice.

A further argument offered against draft article 18 was that a similar "without prejudice" clause did not feature in either the draft convention on crimes against humanity or the International Convention for the Protection of All Persons from Enforced Disappearance. However, in the draft convention on crimes against humanity, the Commission had established safeguard provisions precisely with regard to obligations under the International Convention for the Protection of All Persons from Enforced Disappearance. In addition, those instruments sought to impose obligations on States parties that were higher than the

obligations to which such States would otherwise be subject. By contrast, the draft articles on immunity of State officials were not necessarily intended to form the basis of a convention. Rather, in their current form, they were an attempt to codify customary rules regarding the immunity of State officials and to provide guidance to States in their efforts to determine which actions for the national criminal prosecution of a foreign official were in compliance with international law. The rules set out in the draft articles were a floor, not a ceiling.

Accordingly, he interpreted the draft articles as applying primarily to States that were not parties to the Rome Statute of the International Criminal Court, at least with regard to officials charged with any of the crimes listed in draft article 7. The rules set out in the draft articles would not apply to States that were parties to the Rome Statute or to other instruments through which they had agreed to limit the immunity enjoyed by their officials. To avoid any possible confusion in that regard, it was fundamental for the "without prejudice" clause to remain. The decisions of international criminal tribunals whose jurisdiction did not emanate from a Security Council resolution did not affect third States.

He did not agree that the objective of draft article 18 was to establish a position of neutrality in relation to the functioning of the International Criminal Court, as suggested by Mr. Murphy, or to force the jurisdiction of the Court onto States that were not parties to the Rome Statute, as suggested by Mr. Rajput. Rather, its objective was to recognize explicitly that the exclusion of the rules related to international criminal tribunals from the scope of the draft articles must be understood to mean that none of the rules governing immunity before such tribunals were affected by the content of the draft articles, as noted in the commentary to draft article 1. In his view, the Special Rapporteur had made that objective abundantly clear in her report. However, the debate over draft article 18 suggested that there could indeed be some confusion as to which rules might apply. Inserting the words "or to any pre-existing obligations under international law that States may have" at the end of draft article 18 could prevent any such confusion.

As noted by other Commission members, draft article 18 referred only to "international criminal tribunals" and did not make reference to mixed or internationalized criminal tribunals, as anticipated in the commentary to draft article 1. Such an omission could be problematic. Although the former Special Rapporteur had determined, at the Commission's sixty-fifth session, that it had not been possible at that stage to definitively address the question of mixed or internationalized criminal tribunals, it had become clear over time that leaving the question unresolved could lead to confusion, as exemplified by the case of the prosecution of the former President of Chad, Hissène Habré, in Senegal. Mr. Jalloh's suggestion, made at the Commission's 3520th meeting, to replace the word "international" with "internationalized" should therefore be seriously considered. He also supported Mr. Jalloh's suggestion to insert the words "and practices" after "the rules". The formulation "rules and practices governing the functioning of internationalized criminal tribunals" better reflected the spirit and status of international law in that regard. Moreover, he was sensitive to the concerns raised by Mr. Forteau at the Commission's 3521st meeting regarding the suitability of the term "functioning"; the Drafting Committee should find a more comprehensive term.

At the 3521st meeting, Mr. Murphy had raised the concern that draft article 18 appeared to assert that the rules governing the functioning of the International Criminal Court could alter the rules relating to immunity in national law as set forth in the draft articles. As far as States parties to the Rome Statute were concerned, that assertion was entirely true, since States parties were bound by the obligations they had freely undertaken under the Statute and could not evade them by pointing to a conflicting customary obligation. However, the rules governing the functioning of the International Criminal Court, or any other treaty-based authority, could not alter the rights or obligations of third States. According to the complementarity principle, a case could be referred to an international criminal tribunal in order to ensure respect for the immunity of State officials from foreign criminal jurisdiction. Draft article 18 established that such supranational prosecution was not affected by the content of the draft articles. Draft article 18 thus did not create a back-door means by which international tribunals could alter rules relating to immunity in national laws; rather, it ensured that the immunity of State officials from foreign criminal jurisdiction would not be

misinterpreted at the stage at which complementary supranational prosecutions were instituted by international criminal tribunals for the purpose of ensuring accountability.

Mr. Murphy had also expressed the concern that draft article 18 appeared to suggest that the rules governing the International Criminal Court prevailed over the immunity enjoyed by foreign State officials from the criminal jurisdiction of States that were not parties to the Rome Statute. However, draft article 18 did not impose any obligation or alter any rules concerning the immunity enjoyed by foreign State officials from the criminal jurisdiction of non-parties. On the contrary, if draft article 18 was not included, the draft articles could be misinterpreted as altering the rules governing international criminal tribunals in respect of complementary proceedings. The "without prejudice" clause in draft article 18 was intended simply to recognize that international criminal tribunals operated under a separate legal regime and to avoid interference with the rules governing the functioning of such tribunals.

Accordingly, he did not share the concern that draft article 18, or the reasoning in paragraph 27 of the Special Rapporteur's eighth report, could be interpreted as contravening article 34 of the 1969 Vienna Convention on the Law of Treaties. According to the rules of general international law, a treaty did not create obligations or rights for third States without their consent, but that rule did not relieve States parties of obligations to which they had agreed. For example, the compliance of a State party to the Rome Statute with a request from the International Criminal Court regarding an official of a third State did not create any obligations for the third State. He therefore disagreed with the view expressed by some Commission members that States that were not parties to the Rome Statute could not *per se* be affected by the rules and practices governing the functioning of the International Criminal Court. As recognized by the Appeals Chamber of the International Criminal Court in the case of *The Prosecutor v. Omar Hassan Ahmad Al-Bashir*, when the Court had jurisdiction over a case pursuant to article 13 of the Rome Statute, States parties had an obligation to cooperate fully and could not, even on behalf of a non-party, avoid that obligation by raising the defence of immunity. In cases where the Security Council referred a situation in a third State to the International Criminal Court, it was the resolution of the Security Council, acting under Chapter VII of the Charter of the United Nations, that served as the source of any obligation or effect on the rights of the third State, not the Rome Statute itself. As Mr. Saboia had noted at the Commission's 3521st meeting, the Security Council resolutions establishing the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda also established an obligation to cooperate with those tribunals that was binding on all States Members of the United Nations. He was not opposed to making the source of such an obligation more explicit, as suggested by Mr. Murphy.

Although it had been the focus of much attention in the Commission's debate so far, the decision in the *Al-Bashir* case was not the only precedent that was relevant to the duty to cooperate with international criminal tribunals and other treaty regimes. State practice also provided for such a duty. Some States, such as Germany, Poland and Spain, had codified exceptions to the immunity of State officials and the duty to extradite in their domestic law. Organic Act No. 16/2015 of Spain included an article on international crimes, which provided that the provisions of the Act did not affect the international obligations assumed by Spain regarding the prosecution of international crimes or its commitments to the International Criminal Court. It therefore appeared, in the case of Spain, that the immunity from jurisdiction and extradition enjoyed by former Heads of State, former Heads of Government and former Ministers for Foreign Affairs did not apply in cases of cooperation with the International Criminal Court or in cases where Spain had undertaken other international obligations regarding the prosecution of international crimes.

It was important to recall that being a party to the constituent instrument of an international criminal court was not the only source of the obligation to prosecute the perpetrators of the worst international crimes. Article 26 of the 1969 Vienna Convention set out the principle of *pacta sunt servanda*, according to which every treaty in force was binding upon the parties to it and must be performed by them in good faith. The vast majority of States were parties to treaties that obligated them to prevent and prosecute the worst international crimes, such as the Convention on the Prevention and Punishment of the Crime of Genocide, the International Convention on the Suppression and Punishment of the Crime

of Apartheid, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the International Convention for the Protection of All Persons from Enforced Disappearance. He hoped that the draft articles on prevention and punishment of crimes against humanity would also one day form the basis for international obligations to prosecute such crimes. His suggestion that draft article 18 should state that the draft articles on immunity of State officials from foreign criminal jurisdiction did not affect any other obligations by which States had previously agreed to be bound would help to clarify that point.

With regard to draft article 17, as the Special Rapporteur rightly noted in her report, the Commission had been discussing the idea of including a mechanism for the peaceful settlement of disputes from the outset of its consideration of the topic. The process of determining whether immunity applied could be contentious, as both States arguably had legitimate interests to protect: on the one hand, the effective and speedy resolution of national criminal prosecutions, and, on the other hand, foreign officials' long-standing right to immunity, which was necessary to protect their dignity and to ensure that they were not targeted or penalized for actions taken in their official capacity. Draft article 17 followed logically from the draft articles on notification, exchange of information and consultations. Therefore, while he shared the concerns voiced by Mr. Forteau and Mr. Tladi at the Commission's 3520th and 3521st meetings, he felt strongly that draft article 17 should be referred to the Drafting Committee.

Both Mr. Forteau and Mr. Tladi had argued that a dispute settlement clause was appropriate only if the draft articles were intended to form the basis for a convention. However, he agreed with the Special Rapporteur that including draft article 17 in the set of draft articles adopted on first reading would allow the Commission to gain insight from States that would be beneficial if the draft articles did ultimately form the basis for a convention. Of course, if that were to happen, draft article 7 would have to be revised. It had been noted that the dispute settlement guidelines should apply only in the absence of other applicable law. Mr. Forteau had pointed out that in cases involving accusations of torture, the dispute settlement guidelines would be inapplicable in respect of States parties to the Convention against Torture, since that instrument required effective prosecution or extradition. While he appreciated Mr. Forteau's concern, he did not believe that retaining draft article 17 could lead to conflicting obligations, especially if the "without prejudice" clause contained in draft article 18 was also retained.

A separate issue raised by Mr. Forteau was more problematic. As currently formulated, draft article 17 (3) on the suspension of national proceedings was extremely deferential to the State of the official and the preservation of immunity, at the expense of effective national criminal prosecutions, and might even allow officials to evade accountability by delaying national prosecutions for years, even in justified cases, on procedural grounds. Additionally, as noted by Mr. Forteau, the suspension of national proceedings was not automatic in practice; it was determined on a case-by-case basis. Accordingly, any obligation on the forum State to suspend judicial proceedings would derive from a court order. Nonetheless, he was confident that those concerns could be addressed in the Drafting Committee.

In conclusion, while he fully supported the referral of draft articles 17 and 18 to the Drafting Committee, he also hoped that, during the current session, the Commission would make progress on the provisional adoption of the draft articles that remained outstanding from the previous session. By doing so, the Commission would make an important contribution to the fight against impunity for the perpetrators of the most serious crimes of concern to the international community as a whole.

Mr. Park, speaking via video link, said that he was grateful for the Special Rapporteur's considerable contribution to the important and sensitive topic of immunity of State officials from foreign criminal jurisdiction. Her eighth report was relatively concise compared to the previous reports, but it contained essential information on pending issues.

With regard to the relationship between immunity of State officials from foreign criminal jurisdiction and international criminal tribunals, during the Commission's consideration of the Special Rapporteur's fifth report (A/CN.4/701), he had underlined the need to reflect on the evolution of international criminal law through the International

Criminal Court and international tribunals when examining the scope of immunity from foreign criminal jurisdiction. However, as pointed out by the Special Rapporteur in her eighth report, immunity from foreign criminal jurisdiction and immunity from international criminal tribunals were technically two different and independent systems. The Commission should limit the scope of its work to the system of immunity that applied to the horizontal relations between States, in line with draft article 1.

In that connection, he did not consider it necessary to include a "without prejudice" clause in the form of a new draft article 18. Draft article 1 (1) clearly limited the scope of the draft articles to "the immunity of State officials from the criminal jurisdiction of another State". Furthermore, the scope of the draft articles was adequately clarified in paragraph (6) of the commentary to draft article 1, which stated that "the immunities enjoyed before international criminal tribunals, which are subject to their own legal regime, will remain outside the scope of the draft articles. This exclusion must be understood to mean that none of the rules that govern immunity before such tribunals are to be affected by the content of the present draft articles." Some Commission members had suggested that the content of draft article 18 should be moved to draft article 1, in the form of a new paragraph 3. However, such an addition could raise complex questions about the relationship between the topic of immunity of State officials from foreign criminal jurisdiction and the rules governing the functioning of international criminal tribunals. Moreover, as he had already mentioned, the commentary to draft article 1 was quite clear on that point.

Various opinions on the question of the settlement of disputes had been expressed within the Commission, as indicated in paragraph 34 of the eighth report. In his view, the Commission should examine the question in the light of two conflicting interests: the protection of State sovereignty and the pursuit of values of the international community such as the effort to end impunity. Given the importance of criminal jurisdiction in each domestic legal system, it was questionable whether States would agree without hesitation that the draft articles should include a dispute settlement clause. Even if they did agree to such a provision, they might be reluctant to invoke it in practice, since it could be seen as a restriction on the exercise of their own criminal jurisdiction.

Draft article 17 (3) was also problematic. In his view, the applicability of paragraph 3 was closely linked to an argument advanced by other Commission members that had not yet been specifically addressed, namely that a precondition for the forum State's exercise of criminal jurisdiction was the physical presence of the foreign official in its territory. If that precondition was accepted as reasonable, draft article 17 (3), as currently worded, would put foreign officials in the territory of the forum State in an unstable situation until the International Court of Justice or international arbitral body made a final decision on the dispute, since that process normally took a considerable amount of time. He therefore did not consider it appropriate to include a dispute settlement clause in the draft articles.

Nonetheless, if the Commission decided to include draft article 17 in the draft articles to be adopted on first reading, the Special Rapporteur should clarify the difference between the terms "consultations" and "negotiations" in draft article 17 (1). With regard to draft article 17 (2), the Commission would have to determine whether the consent of the States concerned was required before the dispute could be referred to an international judicial institution. Moreover, the phrase "may suggest" was unclear. In that connection, he recalled the two-step approach taken in article 27 (2) of the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property, which provided that:

> Any dispute … which cannot be settled through negotiation within six months shall, at the request of any of those States Parties, be submitted to arbitration. If, six months after the date of the request for arbitration, those States Parties are unable to agree on the organization of the arbitration, any of those States Parties may refer the dispute to the International Court of Justice …

Draft article 17 (3) should be deleted in view of the uncertainty surrounding its applicability.

He had made comments on recommended good practices at the 2019 session, stating in particular that it seemed unnecessary to include State practices in the draft articles because they did not fit into the form of the text. In addition, it might not be appropriate for the draft articles to include a good practice guide or manual of the kind mentioned in the Special

Rapporteur's report. If the Commission wished to respond to the two points raised by the Special Rapporteur in paragraph 55 of the report, it could refer to those points in the relevant commentaries or request the United Nations General Assembly to include them in a resolution. As the Special Rapporteur pointed out in paragraph 60, it should be for each State to ensure that it had such a guide or manual; the Commission's main mandate on the topic should be to provide assistance to those States that wished to develop the relevant manuals or guides. Furthermore, as mentioned in paragraph 58 of the report, draft articles 8 to 16, as currently proposed by the Special Rapporteur, could serve as a kind of practical guide.

Lastly, reiterating his thanks for the Special Rapporteur's tireless efforts, he said he hoped that the Drafting Committee would come up with good solutions for the draft articles pending agreement at the current session.

Sir Michael Wood, thanking the Special Rapporteur for her eighth report and her introductory statement, said that the report did not address central issues that the Commission needed to resolve before it completed the first reading, including, in particular, the stark differences of opinion on draft article 7, which a divided Commission had only been able to adopt by vote. The Sixth Committee was, if anything, even more divided on the article, although it was united in calling for the Commission to find a way forward. Another important issue that the Commission would need to revisit before a set of draft articles could be adopted was the inviolability of the person of foreign State officials. As inviolability of the person was of great practical importance when questions of immunity from criminal jurisdiction arose, the Commission's position on inviolability, and the distinction between inviolability and immunity, should be clear; earlier texts based on the Commission's work dealt with inviolability of the person expressly and separately. The Commission also needed to consider further definitions for inclusion in the proposed draft article 2 (3).

Turning to the eighth report, he said that he found the title of chapter I vague. It gave no real indication as to which aspects of the relationship between immunity of State officials from foreign criminal jurisdiction and international criminal tribunals were being addressed. The subsequent analysis was not particularly helpful in that regard either. In any event, he disagreed with much of the chapter's content and did not wish to see it included in the commentaries. All that needed to be said had already been said in paragraph (6) of the commentary to draft article 1, adopted in 2013. There was no need for a "without prejudice" clause; it was perhaps no more than an excuse for a lengthy disquisition on international criminal courts and tribunals in the commentary, which he would strongly oppose. Like some of the other Commission members, he was not in favour of referring the proposed draft article 18 to the Drafting Committee. There were also practical reasons for that view: if the Commission were to consider a "without prejudice" clause, both the article and the commentary would require very careful drafting and were likely to prove highly controversial. The end result would therefore be yet further delay in the completion of the first reading.

As he had stated at the 2019 session, he agreed that there was no reason for the Commission to debate the judgment issued by the Appeals Chamber of the International Criminal Court on 6 May 2019 in the *Jordan Referral re Al-Bashir* appeal, in which he had acted as counsel. He took that view not because he thought the Commission should generally shy away from assessing judicial decisions, as paragraph 23 of the report seemed to suggest, but because such an assessment was simply not relevant to the topic at hand. The Special Rapporteur had rightly noted that assessments of the Chamber's decision had "not been kind". The Chamber's "findings", which were not entirely accurately described in the report, were indeed badly reasoned, if not simply wrong, as Mr. Tladi had eloquently explained at the Commission's 3520th meeting. Those "findings" had been rejected by States and international organizations and could not be considered law. The Rome Statute was far from universal, and no treaty could affect the rights of non-parties.

The Special Rapporteur's arguments for proposing the inclusion of a "without prejudice" clause, even though the matter was already addressed in the commentary to draft article 1, were unconvincing and hard to follow. She asserted that such a clause would allow two elements to be accommodated. The first element seemed to be the need to clarify that immunity before international criminal tribunals did not fall within the ambit of the topic, but there was no such need. The Special Rapporteur asserted that, without a "without prejudice" clause, international criminal tribunals could only be excluded from the scope of the draft

articles following an *a contrario* interpretation of draft article 1 (1). However, it was abundantly clear – from the title of the topic, the text of the draft articles and the draft commentaries – that the draft articles applied only to immunity before national courts. The draft "without prejudice" clause referred to "the rules governing the functioning of international criminal tribunals", yet, whatever rules that language was intended to cover, which was far from clear, what was clear was that the topic did not deal with international criminal tribunals. The rationale for incorporating the second element invoked by the Special Rapporteur was even harder to grasp; he simply did not see how the "relevance of international criminal tribunals in the fight against impunity" required the Commission to include a "without prejudice" clause.

With regard to chapter II, on the settlement of disputes, he wished to draw attention to two points on which the report was a little misleading. First, it was not the case, as stated in paragraph 36, that the Commission's practice until very recently had largely been to avoid including provisions on means of dispute settlement in its texts; the Commission's work on dispute settlement clauses in 2010 and 2011 had made that clear. Second, the International Court of Justice had not ruled on questions relating to the immunity of State officials in all of the cases cited in footnote 50: for example, it had not done so in the *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France)* case.

He agreed that the draft articles should include a dispute settlement clause, but any such clause must be at least potentially effective. The proposed draft article 17 was very weak, providing merely that a State might "suggest" to the other party that the dispute should be referred to arbitration or the International Court of Justice. Such a provision might even detract from States' existing obligations to accept dispute settlement. As the Special Rapporteur pointed out, the question of dispute settlement was related to some of the safeguard provisions that had been proposed in her seventh report (A/CN.4/729) and should be considered in tandem with them. It was also closely related to the question of the form of the final outcome; the nature of the dispute settlement clause would depend on whether the Commission was aiming for a convention, as in the case of the topic "Crimes against humanity", or something in the nature of conclusions, as in the case of the topic "Peremptory norms of general international law (*jus cogens*)".

Assuming, as he had done from the outset of the work on the topic, that the ultimate aim was a convention, the Commission could recommend the inclusion of what was becoming a standard, but not unduly ambitious, provision for the settlement of inter-State disputes concerning the interpretation or application of the future convention, using as a model article 15 of the 2019 draft articles on prevention and punishment of crimes against humanity, in particular paragraphs 1 and 2 of that article. Such a provision could be optional, in the sense that a State could "opt out" at the appropriate time if it so wished. It was not contrary to the free choice of means for States to agree to the jurisdiction of the International Court of Justice or to arbitration; in fact, such a provision was an example of a free choice of means, and was frequently accepted by States that supported dispute settlement. If such a clause was recommended, he saw no need for any further dispute settlement provision. The Special Rapporteur rightly had not proposed the formation of a permanent *ad hoc* international body, although the possibility appeared to have been left open for the future. He saw no merit in such a proposal, not least because States were unlikely to act upon it.

With regard to chapter III of the report, on recommended good practices, he agreed with the Special Rapporteur's conclusion that there was no need to formulate any specific proposals.

Returning to the central issue of the Commission's work on the topic, namely draft article 7, he said that, unless the Commission acknowledged that the draft article remained just as much an obstacle to agreement within the Commission and among States as it had been at the time of its adoption by vote in 2018, there was little hope of constructive progress on the topic. The eighth report made no reference to the controversy surrounding the draft article or the strongly held differences of opinion that had been expressed at all stages. Instead it gave the impression that all was well, even going so far as to suggest that the Special Rapporteur's preliminary report of 2012 had been "approved" by the Commission and the Sixth Committee, which was far from the case. In fact, the Special Rapporteur's general approach and methodology had been questioned from the outset.

At the 2019 session, he had set out his views in six points. First, draft article 7 in its current form was not acceptable to States generally, nor was there agreement on it within the Commission, and it was thus not a basis for the successful conclusion of the Commission's work on the topic. Second, as the Special Rapporteur now seemed to accept, draft article 7 did not reflect *lex lata*; if it was retained, the Commission should make clear, at least in the commentary, that it was not a statement of existing customary international law. Third, draft article 7 did not reflect a "trend" in the way the law was developing. Fourth, given the position of many States in various regions and with various legal traditions, there was no realistic prospect that draft article 7 would come to be seen as reflecting customary international law. Fifth, if the applicable rules of international law were to be changed in the sense of draft article 7, the change would apply only between States that were willing to become parties to a duly ratified convention. Sixth, if anything like the current draft article 7 was retained, effective procedural safeguards would need to be included to prevent abuse of the proposed exceptions to immunity *ratione materiae* through politically motivated or otherwise abusive prosecutions. That seemed to be the general view within the Commission and among States, and was reflected in draft article 8 *ante*, which had been provisionally adopted by the Drafting Committee in 2019.

He very much hoped that the Commission could complete a first reading in 2021, or at least during the current quinquennium, but proceeding to a first reading without having reached agreement on the outstanding issues, in particular those associated with the highly controversial draft article 7, would be damaging to the Commission's work. The adoption of commentaries would be a major task, as those adopted thus far were too wordy, entered into theoretical matters that were of no practical or other interest, and tended to be quite confusing. He trusted that draft commentaries and, where appropriate, updates and revisions of existing draft commentaries would be made available in good time, so that members would be able to study them carefully before their adoption on first reading.

In conclusion, thanking the Special Rapporteur again for the eighth report, he said that he would be happy to see draft article 17 referred to the Drafting Committee, but did not wish to refer draft article 18, for the reasons he had explained.

Mr. Nguyen, speaking via video link**,** said that he was grateful to the Special Rapporteur for her extensive work on the eighth report, the informal consultations organized during the first week of the session and her introductory statement, which had provided a solid foundation for discussion. Due to time constraints, he would not make general comments but would focus on the three procedural questions dealt with in the report.

Turning first to the proposed draft article 18, he said, with regard to the relationship between immunity of State officials from foreign criminal jurisdiction and international criminal tribunals, that he agreed that the two jurisdictions were distinct and should be treated separately. Draft articles on immunity from "foreign" criminal jurisdiction were understood to regulate only immunity invoked before national courts, not before international criminal tribunals; the obligation to cooperate with international criminal bodies in international criminal cases was regulated by other specific conventions, rules and arrangements. For example, the obligation to cooperate with the International Criminal Court differed depending on whether or not the State concerned was a party to the Rome Statute. The Court had the authority to make requests for cooperation to the 123 States parties, but could only invite States that were not parties to provide assistance.

The obligation to cooperate with international criminal bodies must be applied in a manner respectful of States' independence and sovereign rights and of any agreements they might have concluded. States were responsible for punishing persons who committed the most serious crimes of international concern, with international criminal courts and tribunals serving as alternative means of ensuring that impunity was avoided. Such matters involved a balance between laws and politics, and the practice of States was far from uniform. Since the Commission's main objective was to codify that practice, the draft articles should focus on the general regime applicable to immunity of State officials from foreign criminal jurisdiction in all cases, regardless of the status of States relative to the Rome Statute. The draft articles should not interfere with relevant political debates and negotiations on the obligation to cooperate with international criminal tribunals, especially bearing in mind that, since 2014, no comments on the topic had been received from Asian or African States. In general, States

were cautious in their approach to the question of the immunity of State officials from foreign criminal jurisdiction, including the relationship between the jurisdiction of national courts and that of international criminal courts. The balance of rights and responsibilities in the text should reflect the positions of all States, including Asian and African States. From that point of view, he fully supported the Special Rapporteur's conclusion that the Commission did not need to take a position on the issue in the context of the current work.

The inclusion of draft article 18 in the set of draft articles therefore required careful consideration. He fully agreed with Mr. Forteau, Mr. Jalloh, Mr. Murphy, Mr. Rajput and Mr. Tladi that the "without prejudice" clause should be placed in draft article 1 as a new paragraph 3 addressing the relationship between the draft articles and the rules governing the functioning of international criminal tribunals and State practice, with commentary touching upon the scope of all the draft articles. The "without prejudice" clause did not encourage States to refer cases to international criminal courts or tribunals instead of allowing their national courts to exercise jurisdiction in prosecuting international crimes.

Turning to the proposed draft article 17, on the settlement of disputes, he said that the consideration, determination and application of immunity for foreign State officials by national courts were procedural matters. The relevant procedures – namely, notification (draft article 12), exchange of information (draft article 13) and exercise of jurisdiction (draft articles 14 and 15) – had the aim of settling any possible dispute at an early stage. In almost all cases, any discrepancy between the two States' legal positions on the nature of the breach, the severity of measures and the application of immunity became evident from the moment that notification was received and immunity invoked. On the one hand, because criminal matters were more likely than other matters to affect States' national sovereignty, security, public order (*ordre public*) and other essential interests, no foreign State or court had a right to determine how the forum State should organize its procedures. On the other hand, States were responsible for safeguarding their officials from foreign criminal jurisdiction.

The dispute settlement clause included in the project should therefore reflect State practice and the balance of obligations. It should not in any way affect or interfere with the contemporary dispute settlement model that was well established in international law. The peaceful means of dispute settlement mentioned in Article 33 of the Charter of the United Nations could be applied in any dispute, including disputes regarding immunity. States were obliged to seek to settle such disputes bilaterally, whether through the procedures established in international cooperation and mutual legal assistance agreements, through other procedures agreed upon by the States concerned or through the diplomatic channel, before referring the dispute to a third party. They were then free to select the means of third-party settlement, including judicial settlement.

Draft article 17 focused on negotiation and the possibility of arbitration or judicial settlement. It neglected to mention other peaceful means, such as mediation or the role of the Secretary-General of the United Nations as effective means of dispute settlement in State practice. In the *Rainbow Warrior* affair, for instance, the Secretary-General of the United Nations had successfully mediated a settlement of the dispute between New Zealand and France regarding the involvement of State officials in harm caused to a national of another State.

Any deadline for the bilateral settlement of a dispute over immunity was dependent on the steps taken by States and on their consent. The period of 12 months referred to in draft conclusion 21 of the draft conclusions on peremptory norms of general international law (*jus cogens*) had its origins in article 66 of the Vienna Convention on the Law of Treaties. However, draft conclusion 21 emphasized that States should seek a solution through the means indicated in Article 33 of the Charter of the United Nations before referring the dispute to the International Court of Justice and that its content was without prejudice to the procedural requirements set forth in the Vienna Convention, the relevant rules concerning the jurisdiction of the International Court of Justice or other applicable dispute settlement provisions agreed by the States concerned.

The final outcome of the Commission's work on the topic "Crimes against humanity" had been proposed as a possible future convention. Draft article 15 (3) of that text reserved the right of States to declare that they did not wish to be bound by the obligation to submit

disputes to the International Court of Justice. For disputes regarding immunity, there was neither a conventional nor a customary basis for the inclusion of a deadline for negotiation and the obligation to refer the dispute to arbitration or to the International Court of Justice. When there were doubts as to whether the outcome of the Commission's work on a topic would become an international treaty, it was prudent to ensure that no treaty rule was imposed on States without their consent. He therefore preferred a cautious formulation for draft article 17 that drew on the language used in draft conclusion 21 (3)–(5) of the draft conclusions on peremptory norms of general international law (*jus cogens*) and draft article 15 (3) of the draft articles on prevention and punishment of crimes against humanity. In addition, the title "Procedural requirements" would be preferable to "Settlement of disputes", in his view; the former title had been used for draft conclusion 21 of the draft conclusions on *jus cogens* and would mitigate the impression that a binding obligation was being placed on States.

He supported the Special Rapporteur's proposal not to include a guide on recommended good practices. Such a guide would have marked a departure from the nature of the Commission's work on the topic as described in paragraph 7 (b) of the second report (A/CN.4/661), in which the Special Rapporteur stated that, owing to the difficult and sensitive nature of the topic, it seemed more appropriate to begin with *lex lata* considerations. Recommended good practices would need to be accompanied by commentaries clarifying their content and scope, and should be flexible enough not to prejudge the will of either the forum State or the State of the officials involved. They should reflect the most clearly established practices of States and exclude elements that were not reflected in practice or that were unclear or legally imprecise. Their preparation would generate additional time requirements for a topic that had already been under consideration for 14 years and the subject of 11 reports by two Special Rapporteurs.

Before concluding his statement, he wished to again pay tribute to the Special Rapporteur, whose guidance, cooperation and expertise had greatly facilitated the Commission's work. He was in favour of referring draft articles 17 and 18 to the Drafting Committee and hoped that the Commission would be in a position to adopt the draft articles on first reading at the current session.

The meeting rose at 12.20 p.m.